

The Constitutional Court's complaint against Judge President Hlophe

On 30 May 2008, the judges of the Constitutional Court issued a statement advising that they had referred a complaint about Judge President of the Cape High Court, Judge John Hlophe, to the Judicial Service Commission (JSC). In the complaint it was alleged that Judge Hlophe had approached some of the judges of the Constitutional Court 'in an improper attempt to influence (the) Court's pending judgment in one or more cases.' The cases referred to are those concerning the lawfulness or otherwise of searches and seizures conducted in connection with the investigation and prosecution of ANC President Jacob Zuma and Thint (Pty) Ltd.

The legal professions' initial response:

The release of the statement elicited immediate and varied responses from the various organisations that represent the legal profession. The media statements published below were issued in the days immediately following the release of the Constitutional Court statement. Though only part of the story, they reveal the respective organisations' stance on various issues, such as whether Judge Hlophe should continue to hold office pending the determination of the complaint, calls for the JSC to act transparently and expeditiously and the profession's handling of the complaint.

Although events are unfolding quickly and much will have happened at the time of going to press, the editorial committee of *Advocate* is publishing the statements in full as part of the historical record of what seems set to be a crucial test of South Africa's constitutional democracy.

Cape Bar Council: 30 May 2008

The Cape Bar Council has noted with grave concern, the complaint, referred to Judicial Service Commission by the judges of the Constitutional Court, that the Judge President of the Cape High Court, Judge John Hlophe, has approached some judges of the Constitutional Court and tried to influence that Court's judgment in one or more cases. Conduct of this nature – the very antithesis of upholding the Constitution, the rule of law and the administration of justice without favour or prejudice – violates the dignity of the high office of a judge.

As sad a day it is for the judiciary when one of its members behaves in a reprehensible way, it is heartening that the judges of the Constitutional Court have spoken out swiftly and unequivocally in condemning behaviour which is tantamount to an attempt to defeat the ends of justice.

Given the seriousness of the complaint by the Constitutional Court judges, the Cape Bar Council considers that it would be untenable for Judge President Hlophe to continue in office pending the determination of the complaint by the Judicial Service Commission.

Cape Bar Council: 2 June 2008

The Cape Bar Council is encouraged by the statement made on behalf of the Judicial Service Commission, reported in the press, to the effect that the complaint laid against Judge President Hlophe by the judges of the Constitutional Court will be dealt with as a matter of urgency.

Given the seriousness of the complaint by the Constitutional Court judges against the Judge President, the Cape Bar Council as stated publicly, considers that it would be untenable for Judge Hlophe to continue in office pending the determination of the complaint by the Judicial Service Commission.

In the circumstances, and in order to safeguard public confidence in the independence and impartiality of the judiciary, the Cape Bar Council today requested the JSC to facilitate Judge Hlophe's absence from office pending the final determination of the complaint.

Advocates for Transformation: 2 June 2008

The Executive of Advocates for Transformation (AFT (WLD)) has learnt with shock, allegations that the Judge President of the Cape High Court was involved in conduct which, if the allegations are supported by evidence, would amount to an attempt to influence the Constitutional Court on pending matters. AFT (WLD) views these allegations as very serious. AFT (WLD) considers the conduct complained of, if proven, to be detrimental

to the proper functioning, integrity and credibility of our judicial system.

The allegations are contained in a media statement issued by the Judges of the Constitutional Court on Friday, 30 May 2008.

AFT (WLD) therefore calls on the Judicial Services Commission to act immediately on the complaint referred by the Constitutional Court and address the issue expeditiously and decisively to bring this matter to finality.

We particularly call on the profession to exercise restraint and allow the JSC to discharge its constitutional mandate in terms of section 177 of the Constitution. We urge all to avoid speculation and/or anticipating what the JSC will or must decide. What we have, at this juncture, are allegations and the Judge President must be afforded the opportunity to defend himself against these allegations. That is a basic tenet of our Constitution. We live in a Constitutional State and the respect for our Constitution is the supreme duty of all of us.

Section 177 of the Constitution empowers the President to suspend a Judge when the JSC finds him or her guilty of gross misconduct. The JSC may recommend to the President to suspend a Judge who is the subject of an inquiry in terms of section 177 of the Constitution. There is no provision in the Constitution for a suspension of a Judge without a recommendation of the JSC.

The Judge President of the Cape may however request to be placed on leave pending a JSC inquiry and finding on the matter. In our view, this is a matter for the JP to decide. Allegations of interference with the judiciary are serious and go to the heart of our democracy. Because these allegations involve the most senior Judge of the Cape bench, they may have a long-lasting impact on the integrity of our judiciary. It is in the interest of our society that any such impact be minimised. The matter deserves therefore to be dealt with expeditiously.

Black Lawyers Association: 3 June 2008

The BLA has learnt with great concern the allegations made against Judge President Hlophe (the JP). Our position on the issue is that we do not know the facts, and in any event we are aware that judges do discuss cases with other judges, even with other judges in other divisions, and therefore because there is no evidence as to what exactly happened, the profession must wait to hear what the JSC will decide. The BLA would only urge that the JSC must be expeditious in dealing with the issue.

The BLA will not join the chorus of those who say the JP must step down pending the outcome of the JSC inquiry. This is because the JP is entitled to a fair process and to a presumption of innocence till his guilt or otherwise has been proved.

If the JP, of his own free will decides to take leave, that should be his choice, and it should not be the expectation of anyone that he will not return from leave until his case has been decided by the JSC. If he decided to return from leave before the JSC has finished its investigation, it should be his prerogative to do so.

He is guilty of no crime, and he should be entitled to be treated as such.

General Council of the Bar: 3 June 2008

The serious allegations against Judge President Hlophe strike at the heart of the legal profession and what the judiciary is and should be.

The General Council of the Bar of South Africa welcomes the indications that the Judicial Service Commission will expeditiously deal with the complaint. We call upon the Judicial Service Commission to ensure

that the process is also transparent so that there is no room for uninformed speculation. It is untenable that, pending the investigation of the complaint, the Judge President stays on active duty. The seriousness and source of the complaint, as well as its ramifications, demand that he goes on special leave. If he does not do so voluntarily, the Minister of Justice and Constitutional Affairs and/or the Judicial Service Commission must see how that can be facilitated as a matter of urgency.

Accordingly, we fully support the stance of the Cape Bar Council in the complaint against Judge President Hlophe.

We believe that when serious allegations, which are not frivolous or vexatious, are made against any person in public office, he or she should always stand down until the allegations have been tested. That has nothing to do with a presumption of innocence, which is a concept closely related to the criminal law, but everything with the trust reposed in such persons. This applies even more to judges.

The Law Society of South Africa: 3 June 2008

The Law Society of South Africa (LSSA) has expressed its grave concern at the complaint lodged by the Constitutional Court judges against Judge President Hlophe. The LSSA has urged the Judicial Service Commission to deal with the complaint expeditiously.

NADEL: 3 June 2008

The National Association of Democratic Layers (NADEL) having considered the statement of the judges of the Constitutional Court issued by Chief Justice Pius Langa in connection with the remarks allegedly made by Judge John Hlophe to certain judges, supports the numerous calls for the speedy resolution of this complaint by the Judicial Service Commission (JSC). The due process that follows any complaint must be respected by all sectors of the public and the media. The independence of and respect for the Judiciary must be observed during this process. The JSC should regard this matter of grave importance to warrant an early sitting to bring finality to an issue that has gripped the attention of the public. Further speculation and gratuitous remarks about the allegations and the person of Judge Hlophe places unfair pressure on the JSC and only serve to undermine the rights of all parties to be fully heard before a finding can be made.

Cape Bar Council: 18 June 2008

The Cape Bar Council is concerned about the inaccurate statements, reported in the media during the past few days, to the effect that the Cape Bar Council, together with others, has called for Judge President Hlophe to resign. These statements are devoid of any truth.

After the public statement by the Constitutional Court judges on 30 May 2008, the Cape Bar Council has on a number of occasions stated in public that it could not comment on the merits of the complaint, that it was undesirable to speculate about the merits pending the determination of the Judicial Service Commission and has stressed Judge Hlophe's right to a fair hearing.

The Cape Bar Council's stance was that, in order to safeguard public confidence in the independence and impartiality of the judiciary, Judge Hlophe should take leave pending the determination of the complaint by the JSC. Judge Hlophe subsequently applied for leave, which the Minister of Justice granted.

The Cape Bar Council implores all members of the legal profession to exercise restraint and to conduct themselves with dignity while allowing the JSC to deal with the merits of the complaint against Judge President Hlophe. 