

**SUBMISSIONS TO THE JUDICIAL SERVICE COMMISSION ON PRINT MEDIA
ACCESS TO THE HEARING INTO COMPLAINTS SUBMITTED BY THE
HONOURABLE JUDGES OF THE CONSTITUTIONAL COURT AND THE
HONOURABLE JUDGE PRESIDENT HLOPHE**

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1. Introduction

- 1.1 These submissions are made on behalf of the following parties:
- 1.1.1 Avusa Limited ("**Avusa**"), who is the publisher of, amongst other titles, the *Sunday Times*, *The Times*, *Sowetan*, *Sunday World*, *Business Day*, *Financial Mail*, *The Herald*, *Weekend Post*, *Daily Dispatch*, *Saturday Dispatch* and *I-Net Bridge*;
- 1.1.2 Independent Newspapers (Proprietary) Limited ("**Independent**"), who is the publisher of, amongst other titles, *The Star*, *The Saturday Star*, *The Pretoria News*, *The Cape Argus*, *The Cape Times*, *The Saturday Argus*, *The Sunday Argus*, *The Daily News*, *The Post*, *Isolezwe*, *The Independent on Saturday*, *The Sunday Tribune* and *The Sunday Independent*; and
- 1.1.3 Mail & Guardian Limited ("**Mail & Guardian**"), who publishes the *Mail & Guardian* newspaper.
- 1.2 These submissions are made in response to a notification by the Judicial Service Commission ("**the JSC**") dated 14 July 2008 offering interested parties an opportunity to make written submissions to the JSC in regard to public and media access to the pending hearing of the JSC into the complaint ("**the complaint**") by the Honourable judges of the Constitutional Court against the Honourable Judge President of the Cape High Court, Mandlakayise John Hlophe ("**Hlophe JP**"), and Hlophe JP's complaint against the judges of the Constitutional Court ("**the counter-complaint**").
- 1.3 The JSC resolved on 5 July 2008, in view of the conflict of fact on the papers, to conduct an oral hearing ("**the JSC hearing**") into the complaint and the counter-complaint, to determine whether the complaints have merit.
- 1.4 The broad submission of Avusa, Independent and the Mail & Guardian is that the JSC hearing should be conducted in public; there should be no restrictions on public and media access to and reportage of the hearing. We submit that this result is compelled by the constitutional obligations which

are binding on the JSC as a public body. Moreover, we submit that the fact that the details of the complaint, the counter-complaint, and the responses by the judges of the Constitutional Court and Hlophe JP thereto (“**the responses**”) are in the public domain, makes the case for access irrefutable.

1.5 At bedrock, our clients submit that hearings into judicial gross misconduct, incapacity or gross incompetence,¹ are matters of clear public interest, involving the consideration by the JSC, a public body, of the conduct and possibly the fitness for office of judges, senior public officials who wield substantial power in our democracy. JSC hearings into judicial conduct may result in the National Assembly deliberating on and ultimately impeaching a judge in terms of section 177(1) of the Constitution.² These are all moments of great import in our democratic life. The manner in which the JSC deals with a judicial conduct complaint is itself a matter of significant public interest. These propositions apply with even greater force to the complaint and the counter-complaint, as will be illustrated below.

1.6 These submissions are structured as follows:

1.6.1 first, we consider the relevant factual background to the JSC hearing, and more especially the respects in which the complaint, the counter-complaint and the responses are in the public domain and have received extensive publicity and commentary;

1.6.2 secondly, we submit that the matters complained about by the respective parties are of manifest public interest and that the proper administration of justice justifies openness in respect of the JSC hearing;

1.6.3 thirdly, we examine the Rules that the JSC has itself adopted for the hearings of judicial conduct enquiries. The default position in respect of formal hearings of the JSC into judicial conduct is that such hearings must take place in public unless exceptional circumstances apply. We

¹ For the sake of convenience, we refer to these grounds for impeachment of judges, which are set out in section 177(1) of the Constitution, collectively as “judicial conduct” hereafter.

² Section 177(1) of the Constitution provides that a judge may be removed from office only if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, and the National Assembly calls for that judge to be removed by a resolution adopted by at least two-thirds of its members.



submit that the JSC hearing bears all the hallmarks of a formal hearing and should be so treated for purposes of the JSC Rules;

1.6.4 finally, we examine other specific legal bases for the JSC hearing to take place in public:

1.6.4.1 we first discuss the legal status of the JSC as an organ of state, and then the constitutional values of openness, transparency and accountability ("**the openness principle**"), which require that the JSC, as an organ of state, should conduct the JSC hearing in public;

1.6.4.2 we next consider how the principle of openness is buttressed by the principle of open justice, which requires that, unless exceptional circumstances apply, members of the public (including the media) ought to be allowed to attend the JSC hearings;

1.6.4.3 finally, we discuss the constitutional right to freedom of expression and of the media enshrined in section 16 of the Constitution of the Republic of South Africa Act, 1996 ("**the Constitution**"), and the correlative right of the public to receive information on matters of public interest, which require that the media and the public have access to the JSC hearing.

2. **Factual background and publicity in regard to the complaint and the counter-complaint**

2.1 On Friday 30 May 2008, the judges of the Constitutional Court released a media statement recording that certain Constitutional Court judges had been approached by Hlophe JP "*in an improper attempt to influence the Court's pending judgment*" in certain cases ("**the media statement**"). The media statement further noted that the Constitutional Court had referred its complaint to the JSC.

2.2 The media statement recorded that the complaint relates to the matters before the Constitutional Court of *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* (CCT 89/07), *JG Zuma and Another v National Director of Public Prosecutions and Others* (CCT 91/07), *Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public*



Prosecutions (CCT 90/07) and *JG Zuma v National Director of Public Prosecutions* (CCT 92/07) (“**the Zuma appeals**”). These are matters where the applicants – Jacob Zuma (“**Zuma**”), the President of the African National Congress (the ruling party) and the probable future President of South Africa, and two companies, Thint (Pty) Ltd and Thint Holdings (South Africa) (Pty) Ltd (collectively, “**Thint**”), argued inter alia that certain evidence obtained by the National Prosecuting Authority (“**the NPA**”) in the course of executing search warrants, and which the NPA wishes to use in the pending corruption trial of Zuma and Thint, is inadmissible in those proceedings. The Zuma appeals also concern the lawfulness of a letter of request by the NPA to the authorities in Mauritius.

- 2.3 Argument in the Zuma appeals was heard by the Constitutional Court in March 2008. Judgment in these matters has been reserved.
- 2.4 According to the media statement, the judges of the Constitutional Court viewed Hlophe JP’s conduct “*in a very serious light*” and were of the view that “[a]ny attempt to influence this or any other Court outside proper court proceedings ... not only violates the ... Constitution ... but also threatens the administration of justice in our country and indeed the democratic nature of the state”.³
- 2.5 The media statement was extensively reported and commented upon in the media.⁴
- 2.6 On 6 June 2008, the JSC met and set a timetable for the presentation of written statements of the facts by both parties.
- 2.7 Hlophe JP then submitted the counter-complaint on 10 June 2008. In the counter-complaint, Hlophe JP alleges, inter alia, that the Constitutional Court

³ Paras 4 and 8 of the media statement.

⁴ In respect of print media publicity, see e.g. “Hlophe accused of influencing Zuma judgment”, *The Times*, 30 May 2008; “Call for John Hlophe’s judicial head”, *SAPA*, 2 June 2008; “Skop Hlophe uit! – Balie”, *Beeld*, 3 June 2008; “Hlophe saga puts judicial ethics to the test”, *Business Day*, 5 June 2008; “There’s no sign of Hlophe”, *The Star*, 5 June 2008; “Without fear or favour”, *Mail & Guardian*, 6 June 2008; “The people must stand up for the judiciary”, *Mail & Guardian*, 6 June 2008; “High noon for Hlophe”, *Mail & Guardian*, 6 June 2008; “It’s not about race”, *Mail & Guardian*, 6 June 2008; “Hlophe could lose R2m”, *The Sunday Independent*, 8 June 2008; “Politics could tip the scales for Hlophe”, *The Sunday Independent*, 8 June 2008; “Judges also innocent until proven guilty”, *The Sunday Independent*, 8 June 2008; “Lawyers demand evidence for Hlophe complaint”, *Sunday Times*, 8 June 2008; “Why go public on Hlophe?”, *The Times*, 8 June 2008; “Secure your future, rule for Zuma”, *The Citizen*, 9 June 2008; “Top judge may take fall in Hlophe affair”, *Cape Argus*, 15 June 2008.



judges have undermined his rights to dignity, privacy, procedural fairness, equality, and access to courts; violated international jurisprudence and the Constitution; and undermined the integrity of the judiciary, in publicising their untested allegations against him in the media statement.⁵ Hlophe JP also contends in the counter-complaint that the conduct of the Constitutional Court justices “*was designed to tarnish my reputation as a judge in the most vile and malicious manner*”,⁶ and that the media statement “*carried a rare vindictiveness*”.⁷ Hlophe JP further contends that “*it can not [sic] but be concluded that the motives in issuing the [public] statement were motivated by un-desirable political consideration [sic]*”.⁸

2.8 The contents of the counter-complaint are in the public domain and have been extensively reported and commented upon by the media.⁹

2.9 The Honourable Justice Bess Nkabinde (“**Nkabinde J**”) and the Honourable Acting Justice Chris Jafta (“**Jafta AJ**”) of the Constitutional Court, whom the media had at that point identified as the judges whom Hlophe JP had allegedly approached in relation to the Zuma appeals,¹⁰ submitted a joint statement to the JSC on 12 June 2008 (“**the joint statement**”). In the joint statement, Nkabinde J and Jafta AJ stated that on a number of occasions, the Honourable Chief Justice Pius Langa (“**Langa CJ**”) and the Honourable Deputy Chief Justice Dikgang Moseneke (“**Moseneke DCJ**”) had been informed that Nkabinde J and Jafta AJ did not intend lodging a complaint and were not willing to make statements about the matter.¹¹

⁵ Paras 2, 4, 5, 7, 8 and 17 of the counter-complaint.

⁶ Para 7 of the counter-complaint.

⁷ Para 9 of the counter-complaint.

⁸ Para 13 of the counter-complaint.

⁹ For examples of print media publicity, see “ConCourt judges abusing authority”, *The Star*, 12 June 2006; “Hlophe vs Full bench”, *The Star*, 12 June 2008; “Hlophe slams his accusers”, *The Citizen*, 13 June 2008; “Don’t let them lynch Hlophe”, *Mail & Guardian*, 13 June 2008; “Hlope strikes” *The Saturday Star*, 14 June 2008; “Hlophe savages constitutional court judges”, *The Sunday Independent*, 15 June 2008; “Transparent justice”, *Business Day*, 19 June 2008.

¹⁰ See e.g. “Judges’ accusations are ‘utter rubbish’”, *The Star*, 31 May 2008; “Judiciary plunged into crisis”, *The Sunday Independent*, 1 June 2008; “Hlophe approached 2 judges”, *SAPA*, 8 June 2008; “Secure your future, rule for Zuma”, *The Citizen*, 9 June 2008; “Who will succeed Mbeki?”, *Cape Times*, 12 June 2008.

¹¹ Para 3 of the joint statement.



- 2.10 The contents of the joint statement are in the public domain and were extensively reported and commented upon by the media.¹²
- 2.11 The judges of the Constitutional Court – including Nkabinde J and Jafta AJ – submitted the complaint to the JSC on 17 June 2008. On the same date, the justices of the Constitutional Court submitted a response (“**the Constitutional Court’s response**”) to Hlophe JP’s counter-complaint.
- 2.12 The contents of the complaint and the Constitutional Court’s response are in the public domain and have been extensively reported and commented upon.¹³
- 2.13 The complaint alleges, inter alia, that Hlophe JP:
- 2.13.1 without invitation visited Jafta AJ in his chambers; also without invitation discussed the Zuma appeals; and told Jafta AJ that the case against Zuma should be looked at properly and that Jafta AJ was “*our last hope*” (“*Sesithembele kinina*”). Hlophe JP also told Jafta AJ that Zuma was being persecuted just as he had been persecuted;¹⁴
- 2.13.2 visited Nkabinde J in her chambers; without invitation discussed the Zuma appeals; told Nkabinde J that he had a “*mandate*” and that the privilege issues in the Zuma appeals (in respect of which Nkabinde J was writing a post-hearing note) had to be decided “*properly*”; and informed Nkabinde J that he had connections with national intelligence, and was politically well-connected. Hlophe JP also told Nkabinde J that

¹² For examples of print media publicity, see e.g. “We didn’t lodge a complaint with the JSC”, *SAPA*, 12 June 2008; “We didn’t complain”, *The Weekender*, 14 June 2008; “Judiciary must regain trust of the people”, *The Sunday Independent*, 15 June 2008; “Lawyers want top judges to step down”, *Sunday Times*, 15 June 2008; “JSC will adjudge judicial complaint”, *The Times*, 16 June 2008; “Judge Hlophe saga on hold”, *The Sowetan*, 18 June 2008; “South Africa’s rule of law lies in jeopardy”, *Cape Argus*, 21 June 2008.

¹³ In respect of print media publicity, see e.g. “Constitutional Court to pursue Hlophe complaints”, *Business Day*, 18 June 2008; “Hlophe: judges reply to commission”, *Daily News*, 18 June 2008; “Chief justice files response to Hlophe’s claims”, *The Star*, 18 June 2008; “Charges revealed”, *The Star*, 19 June 2008; “11 judges unite against Hlophe”, *The Times*, 18 June 2008; “Transparent justice”, *Business Day*, 19 June 2008; “Top court’s bombshell in Hlophe case disclosed”, *Business Day*, 19 June 2008; “Constitutional Court’s Hlophe bombshell”, *The Times*, 19 June 2008; “Mandate, what mandate?”, *Cape Argus*, 19 June 2008; “Accused-The charges against Judge John Hlophe”, *Cape Argus*, 19 June 2008; “Concourt judges do the right thing”, *The Citizen*, 20 June 2008; “Judges at war”, *The Sowetan*, 20 June 2008; “Just give us the truth”, *The Sowetan*, 20 June 2008; “Hlophe had no ANC mandate – Mantashe”, *Business Day*, 20 June 2008; “Which of the judges must we believe?”, *Business Day*, 20 June 2008; “Judge Jafta may have to tell all”, *Sunday Times*, 22 June 2008; “Hlophe a fine and intelligent judge”, *Sunday Times*, 22 June 2008.

¹⁴ Paras 29 and 30 of the complaint.



some people would lose their positions after the elections, and that Hlophe JP would make himself available for appointment at the Constitutional Court.¹⁵ He further informed Nkabinde J that there was no real case against Zuma, that it was therefore important to hold in Zuma's favour, and that Zuma was being persecuted just as he (Hlophe JP) had been persecuted.¹⁶

- 2.14 The Constitutional Court judges further allege in the complaint that the attempt to influence Nkabinde J and Jafta AJ by Hlophe JP was calculated to have an impact not only on the individual decisions of the judges but on the capacity of the Constitutional Court as a whole to adjudicate in a manner that ensures its independence, impartiality, dignity, accessibility and effectiveness, and constituted interference with the functioning of the Court.¹⁷ It was also stressed that the conduct of Hlophe JP was viewed by the judges of the Constitutional Court in "*the most serious possible light*" as it constituted a threat to the institution of the judiciary and to the Constitution.¹⁸
- 2.15 The Constitutional Court also responded to the counter-complaint, arguing that it was necessary to issue a media statement on 30 May 2008 because, inter alia, the integrity of the adjudicative process had been threatened by Hlophe JP and, with a view to the constitutional values of openness and accountability, "*it was considered that the independence of the Constitutional Court and its deliberative processes would be best protected by a public disclosure of what occurred*".¹⁹ The Court further stated that it was especially important that the litigants in the Zuma appeals and the public were informed of the attempt to influence the Court, and that the Court had not succumbed to it.²⁰

¹⁵ Paras 13-15, 24 – 25 of the complaint.

¹⁶ Para 25 of the complaint.

¹⁷ Para 54 of the complaint.

¹⁸ Para 58 of the complaint.

¹⁹ Para 5.5 of the Constitutional Court's response.

²⁰ Para 5.7 of the Constitutional Court's response.



- 2.16 Hlophe JP submitted a detailed response to the complaint on 30 June 2008 ("**Hlophe JP's response**"), the contents of which are also in the public domain and have been extensively reported and commented upon.²¹
- 2.17 In Hlophe JP's response, he alleges *inter alia* that:
- 2.17.1 Langa CJ's and Moseneke DCJ's total disrespect for Hlophe JP's constitutional rights to privacy and dignity show a "*single-mindedness that can only be attributed to people who were acting with an ulterior motive*";²²
- 2.17.2 the voices of Nkabinde J and Jafta AJ were suppressed in the media statement and their position was not disclosed to other judges of the Constitutional Court by Langa CJ and Moseneke DCJ; indeed, these two judges "*manipulated the facts and ... abuse[d] ... the office entrusted to [them]*";²³ and "*were hell-bent to maintain a veneer of judicial solidarity even if it meant they had to conceal complete and true facts*";²⁴
- 2.17.3 the Constitutional Court appears to have lied to the public and perpetrated a fraud by misrepresenting the media statement as a unanimous statement of the Court when they knew it to be false;²⁵
- 2.17.4 the Constitutional Court's version of his meetings with Jafta AJ and Nkabinde J by the Constitutional Court is inaccurate in material respects and, in particular, no attempt was made to influence the judges in the Zuma appeals.²⁶

²¹ See e.g. "Politieke bymotiewe laat Langa, adjunk kla, se Hlophe", *Beeld*, 2 July 2008; "Hlophe hits back at country's top justices", *Cape Argus*, 2 July 2008; "Hlophe accuses accusers", *SAPA*, 2 July 2008; "Top judges lied, says Hlophe", *Cape Times*, 2 July 2008; "Hlophe: The chats were confidential", *Cape Argus*, 2 July 2008; "Hlophe: Judges lied to Concourt", *Independent Online*, 2 July 2008; "JSC will not discuss facts on Hlophe complaint", *City Press*, 3 July 2008; "Hlophe divides to rule", *Mail & Guardian*, 4 July 2008; "Hlophe's bid for recusal denied as impeachment looms", *Cape Argus*, 6 July 2008; "ANC's war on the judiciary", *Sunday Times*, 6 July 2008; "Attack on the judiciary", *The Witness*, 8 July 2008.

²² Para 1 of Hlophe JP's response.

²³ Paras 7.1 and 7.3 of Hlophe JP's response.

²⁴ Para 7.8 of Hlophe JP's response.

²⁵ Para 21 of Hlophe JP's response.

²⁶ Paras 23 – 32 of Hlophe JP's response. To complete the chronology, it is worth mentioning that the Constitutional Court judges had an opportunity to reply to Judge Hlophe's response; this reply is, as far as we are aware, not in the public domain.



3. The public interest in the complaint and the counter-complaint and the interests of the administration of justice

- 3.1 The complaint, the counter-complaint, the joint statement, and the responses concern allegations and counter-allegations by judges of South Africa's highest Court and a Judge President of a provincial division of the High Court. At stake is the integrity of the judges of the Constitutional Court, including the Chief Justice and the Deputy Chief Justice, and the integrity of a Judge President. The consequences of an adverse finding against either the Constitutional Court judges or Hlophe JP by the JSC, which include the possibility of one or more senior judges facing impeachment by the National Assembly, are stark. Moreover, the political ramifications of a possible finding that Hlophe JP indeed sought to improperly influence the Constitutional Court, potentially acting on the mandate of supporters of Zuma (who is widely expected to become the next President of South Africa) are of obvious significance.
- 3.2 We submit that against this background, there can be no doubt that the interrogation by the JSC in the JSC hearing of factual disputes, to determine whether the complaint and the counter-complaint have any substance, and the manner in which the JSC resolves these factual disputes, are of manifest public interest in our democracy.
- 3.3 A useful parallel in this context is provided by the decision of the High Court in **Moldenhauer v Du Plessis and others**.²⁷ The Court permitted a review by the magistrate concerned of a decision of the Magistrates' Commission to hold his disciplinary enquiry *in camera*.²⁸ The Court accepted that the open justice principle enjoyed application and that the hearing should take place in public.²⁹ The Court also stated that "*this matter has evoked such public interest that the public is looking forward to it being resolved in the open in a reasoned and rational manner*".³⁰ We submit that the same observation applies with greater force to the complaint and the counter-complaint.

²⁷ 2002 (5) SA 781 (T).

²⁸ At 788.

²⁹ At 795; see further 5.3 below.

³⁰ At 795.



- 3.4 The administration of justice will be enhanced rather than undermined by the transparency and openness of the JSC hearing. The interests of justice require full disclosure of the true facts that attended the meetings between Hlophe JP and Nkabinde J, and Hlophe JP and Jafta AJ, and of the process for determining such facts, so that false speculation and rumour in regard to the complaints is minimised. As Yacoob J stated in **Shinga v The State**:³¹ "[s]ee[ing] justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process". We submit that the same rationales apply to the JSC hearing.
- 3.5 Reportage and commentary on the JSC hearing, far from harming the administration of justice and the independence of the judiciary, will foster and reinforce the proper administration of justice. In **Richmond Newspapers Inc v Virginia**,³² the US Supreme Court noted, in relation to the importance of public trials that:

A result considered untoward may undermine public confidence and where the trial has been concealed from public view, an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted...

People in an open society do not demand infallibility from their institutions but it is difficult for them to accept what they are prohibited from observing ...

Closed trials breed suspicion of prejudice and arbitrariness which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.³³

- 3.6 The comments of Lord Salmon in the *Report of the Royal Commission on Tribunals of Inquiry*, which was submitted in 1966 following the Profumo affair in the United Kingdom, are equally apposite:

Hearings before a tribunal of inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth. When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted always tend to promote the suspicion, however unjustified,

³¹ 2007 (4) SA 611 (CC) at para 25.

³² 448 US 555 (1980).

³³ At 571-2, 595; our emphasis.



that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up. Publicity enables the public to see for itself how the investigation is being carried out and accordingly dispels suspicion. Unless these inquiries are held in public, they are unlikely to achieve their main purpose, of restoring the confidence of the public in the integrity of public life. And without this confidence no democracy can survive.³⁴

3.7 Members of the public know what the factual disputes between the Constitutional Court judges and Hlophe JP are. It makes little sense to deprive the public of access to the process for resolving those disputes. We submit that preventing the public and the media from accessing the JSC hearing will foster distrust of any findings made by the JSC and lead to continued speculation about the veracity of the allegations.³⁵ By contrast, allowing the JSC hearing to take place in full view of the public, so that it can observe the manner in which the hearings are carried out and be privy to the testimony and arguments put forward by the parties, will foster confidence in the administration of justice. As the judges of the Constitutional Court urged in its covering letter to the JSC dated 17 June 2008, in the context of making the complaint public, this was necessary "*so as to inform the public of the basis of the complaint to avoid further harm being caused to the institution of the judiciary.*" We submit that these sentiments are equally applicable to the JSC hearing.

3.8 It might be contended that complaints against judges ought not to be publicised until such time as a formal charge has been laid, because publications of baseless complaints would damage the integrity and standing of the judiciary unnecessarily. Whatever the desirability for the administration of justice of delaying publicity in judicial conduct hearings to

³⁴ Paras 115-6 of the Report of the Royal Commission on Tribunals of Inquiry; our emphasis.

³⁵ It is not inapposite in this regard to refer to the handling by the JSC of the complaint, in 2007, that Hlophe JP acted improperly by allegedly receiving a retainer from a company and granting the company permission to sue the Honourable Judge Siraj Desai without disclosing Hlophe JP's relationship with the company. The JSC hearings into this complaint were closed to the public. Ultimately the JSC decided not to sanction Hlophe JP despite finding that his explanation had been "unsatisfactory" and his conduct "inappropriate". There has been widespread criticism and public debate about the JSC's handling of the complaint. The shroud of secrecy that surrounded the JSC's handling of the complaint fuelled the controversy. See e.g. "Hlophe 'not fit to be a judge': Kriegler", *Cape Times*, 8 October 2007; "An abuse", *Business Day*, 21 July 2008; "Hlophe should resign", *News 24*, 9 October 2007; "Hlophe has no place on Bench, say legal gurus", *Pretoria News*, 9 October 2007; "Urgent action needed to mitigate damage done by Hlophe decision", *Mail & Guardian*, 10 October 2007; "Hlophe in opposition's crosshairs", *Mail & Guardian*, 12 October 2007; "Stellenbosch law profs join Hlophe outcry", *Cape Times*, 16 October 2007; "Hlophe detractors misleading", *Cape Times*, 17 October 2007; "Joburg Bar split in bitter row over Hlophe", *The Times*, 28 October 2007; "Hlophe; A little weed that grew into a monstrous bush", *The Times*, 2 June 2008; "High noon for judge Hlophe", *Mail & Guardian*, 6 June 2008.



later stages of proceedings as a general proposition,³⁶ we submit that in circumstances where the allegations contained in the complaint and the counter-complaint and the responses are already in the public domain, no further purpose can be served by closing the JSC hearing; doing so would amount to closing the stable door after the proverbial horse has bolted.

- 3.9 Moreover, the complaints made in this matter cannot be compared with scurrilous or trivial allegations made, for instance, by disgruntled members of the public; the complaints emanate from the highest judicial officers in the country, on the one hand, and a Judge President, on the other. In these circumstances, it would clearly harm the administration of justice to hold the JSC hearing in secret, even though it may not technically constitute a formal hearing of the JSC into judicial conduct.³⁷ The public and the media must act as a watchdog on the functioning of the JSC in the JSC hearing and are, as a corollary, entitled to ensure that Hlophe JP and the judges of the Constitutional Court are accountable for their conduct.

4. The JSC Rules

- 4.1 Rule 5.6 of the *Rules Governing Complaints and Enquiries in terms of Section 177(1)(a) of the Constitution* (“**the JSC Rules**”) adopted by the JSC in October 2006, provides that in respect of formal enquiries into judicial conduct, the JSC is “*entitled to permit the media and public, subject to such restrictions as may be considered appropriate, to attend any enquiry unless good cause is shown for their exclusion*”.³⁸
- 4.2 Although the JSC hearing appears not to be specifically contemplated by the JSC Rules, we submit that the default position that the JSC Rules articulates – that formal hearings into judicial conduct should take place in public – should apply with equal force to the JSC hearing, which we submit is for all

³⁶ Although confidentiality relating to both the name of the judge accused of misconduct, and the nature of the complaint, is arguably in general justifiable until it is determined that the complaint has merit (see e.g. the JSC Rules discussed below), this assumes confidentiality in the first instance. In the case of the complaint and the counter-complaint, no confidentiality has attended the process. The Constitutional Court, for reasons expressed in the Constitutional Court’s response, took the view that it served the integrity of the judiciary for the complaint against Hlophe JP to be made public in the media statement, and all the material documents that have emerged thereafter are in the public domain. In these circumstances, it cannot be contended that secrecy should now be introduced into the process.

³⁷ See 4 below.

³⁸ Rule 5.6; emphasis added.



intents and purposes akin to the formal hearing that the JSC Rules envisages.

- 4.3 In this regard, the JSC Rules provide in the first instance that on receipt of a complaint against a judge, the judge's response, and the complainant's reply, the JSC must consider the relevant documentation and "*decide whether, prima facie, the conduct complained of would, if established, amount to such incapacity, incompetence or misconduct as may justify removal of the Judge in terms of Section 177(1) of the Constitution.*"³⁹ A sub-committee may then be appointed by the JSC to deal with the complaint if it determines that the complaint may justify removal from office, after which the JSC may proceed with a formal enquiry.⁴⁰ Alternatively, the JSC may decide to proceed with a formal enquiry on its own accord.⁴¹
- 4.4 It is unclear what precise procedure the JSC has adopted with respect to the complaint and the counter-complaint, and, as stated, the JSC hearing appears not to be contemplated in the JSC Rules. However, what is clear, we submit, is that the JSC hearing bears all the hallmarks of the formal hearing that is envisaged in the JSC Rules.
- 4.5 According to media reports, the spokesperson for the JSC, Advocate Marumo Moerane SC, stated on 7 July 2008 that at the oral hearings, oral evidence would be led, under oath, in respect of both the complaint and the counter-complaint, and this evidence would be subject to cross-examination by the legal representatives of both parties, and questioning by the JSC.⁴² This approximates in material respects the procedure that is envisaged in the formal hearings contemplated in rule 5 of the JSC Rules. Thus rule 5.7 of the JSC Rules provides that the judge who is the subject of the complaint is entitled to legal representation and has the right to call evidence, cross-examine witnesses and prepare argument. Rule 5.9 states that witnesses testifying before the formal enquiry will be required to take the oath or affirm the truth of their testimony. Further, rule 5.12 provides that any member of

³⁹ Rule 3.1 of the JSC Rules.

⁴⁰ Rule 4.3 of the JSC Rules.

⁴¹ Rule 4.4 of the JSC Rules.

⁴² See e.g. "Big questions on future of judges inquiry", *Business Day*, 8 July 2008.



the JSC is entitled to ask questions of witnesses and Counsel with the JSC chair's consent. All these procedures will apply to the JSC hearing.

- 4.6 We therefore submit that the JSC hearing is in substance if not in form a formal hearing into judicial conduct, such that the rationale for rule 5.6 of the JSC Rules applies. The evidence led at the JSC hearing will determine whether the complaint and the counter-complaint are dismissed or whether impeachment proceedings are commenced with respect to either of the complaints. The public has the details of what the disputes between the parties are, who the complainant judges are, and who the judges are about whom the complaint and the counter-complaint have been made. A decision to exclude the public at this stage will undermine the rationale for rule 5.6 of the JSC Rules.
- 4.7 Next, we consider three additional legal bases that require that the JSC hearing not be held in secret.

5. Legal obligations that require that the JSC open the JSC hearing

5.1 The legal status of the JSC

- 5.1.1 Section 178(1) of the Constitution establishes the JSC, and provides that its members include the Chief Justice of the Constitutional Court, the President of the Supreme Court of Appeal, a Judge President designated by the Judges President, the Minister of Justice, two practising advocates and two practising attorneys, a teacher of law, six members of the National Assembly, four permanent delegates to the National Council of Provinces, and four persons nominated by the President of South Africa.
- 5.1.2 Section 178(4) of the Constitution provides that the JSC "*has the powers and functions assigned to it in the Constitution and national legislation*". The national legislation that presently regulates the functions of the JSC is the Judicial Service Commission Act ("**JSC Act**").⁴³

⁴³ Act 9 of 1994.



- 5.1.3 Section 178(6) of the Constitution provides that the JSC "*may determine its own procedure, but decisions of the JSC must be supported by a majority of its members*".
- 5.1.4 We submit that the JSC is clearly an organ of state that exercises public functions in terms of the Constitution and the JSC Act. "*Organ of State*" is defined in section 239 of the Constitution as "*any other functionary or institution ... exercising a power or performing a function in terms of the Constitution ... or ... exercising a public power or performing a public function in terms of any legislation*". The JSC clearly so qualifies, as is recognised in analogous jurisprudence.⁴⁴
- 5.1.5 The significance of the categorisation of the JSC as an "*organ of State*" or a public body for these purposes is that constitutional obligations bind the JSC. In particular, the general presumption should, in our submission, be that hearings by the JSC into judicial misconduct should be open to the public.
- 5.1.6 In the next section, we consider the specific constitutional obligations and rights upon which Avusa, Independent and Mail & Guardian rely in support of their contention that the public – and specifically members of the media – should be granted access to the JSC hearing. In particular, it is argued that the openness principle, the open justice principle and the constitutional right to freedom of expression, require that the JSC hearing not take place in secret.

5.2 The values of openness, accountability and transparency

- 5.2.1 Openness is an underlying value of the Constitution. Thus section 1(d) provides that the Republic of South Africa is one democratic state founded upon a number of values, including "*a multi-party system of democratic government, to ensure accountability, responsiveness and openness*".

⁴⁴ See e.g. **Inkatha Freedom Party & Another v Truth and Reconciliation Commission and others** 2000 (3) SA 119 (C) at 131, where Davis J held that the Truth and Reconciliation Commission clearly formed part of the "*State*". Cf also **Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo** 2007 (1) SA 66 (SCA) at para 11 (Mittalsteel on facts performing a public function in terms of legislation; therefore an organ of state); **Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting, and Others** 1996 (3) SA 800 (T) at 808 (Telkom SA an organ of state).



- 5.2.2 The openness principle permeates the provisions of the Constitution. For instance:
- 5.2.2.1 section 34 provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum";
- 5.2.2.2 section 41(1)(c) provides that all organs of State must "provide effective, transparent, accountable and coherent government for the Republic as a whole";
- 5.2.2.3 section 59(1)(b) states that the National Assembly "must conduct its business in an open manner, and hold its sittings, and those of its committees, in public";⁴⁵
- 5.2.2.4 section 59(2) provides that the National Assembly "may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open an democratic society";⁴⁶
- 5.2.2.5 section 182(5) states that any report issued by the Public Protector must be open to the public unless exceptional circumstances require that it be kept confidential;
- 5.2.2.6 section 188(3) states that the Auditor-General's reports must be made public; and
- 5.2.2.7 section 195(1)(g) requires that the public administration of the Republic must foster transparency by providing the public with "timely, accessible and accurate information".⁴⁷
- 5.2.3 The openness principle is also reflected in important legislation enacted pursuant to the Constitution. For example, the Promotion of Administrative Justice Act⁴⁸ provides in its preamble that the legislation

⁴⁵ See also section 188(1) of the Constitution in relation to provincial legislatures.

⁴⁶ See also section 188(2) of the Constitution regarding provincial legislatures.

⁴⁷ This obligation applies to all organs of state: section 195(2) of the Constitution.

⁴⁸ Act 3 of 2000.



is necessary in order to "create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function".⁴⁹ Further, the Promotion of Access to Information Act⁵⁰ provides in its preamble that the apartheid state "resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations".

5.2.4 Our courts have considered these values in the context of information that should be made available to the public. For instance, the Supreme Court of Appeal (per Howie P) in **Transnet Ltd v SA Metal Machinery Co (Pty) Ltd**⁵¹ held:

[Transnet Ltd] being an organ of State, is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue ... the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails.⁵²

5.2.5 The openness principle results, we submit, in a general presumption that the proceedings of public bodies should be open, transparent and accountable to the public. The proceedings of public bodies should not take place in private unless there are exceptional reasons to justify this departure from the general rule.

5.2.6 We submit that the JSC itself recognises that as a public body, it must adhere to the constitutional values of openness and transparency, in at least the following respects:

5.2.6.1 the *Procedure of the JSC* gazetted in 1996,⁵³ provides in sections 2(i) and 3(i) that interviews for candidates for judges of the Constitutional Court and the Supreme Court of Appeal "shall be open to the public and the media subject to the same rules as

⁴⁹ See also section 4(1) of the Promotion of Administrative Justice Act 3 of 2000, which states that where administrative action materially adversely affects the rights of the public, an administrator must decide whether to hold a public inquiry.

⁵⁰ Act 2 of 2000.

⁵¹ 2006 (6) SA 285 (SCA).

⁵² Para 55; our emphasis.

⁵³ Published under GN R114 in *Government Gazette* 16952 of 2 February 1996.



those ordinarily applicable in courts of law". Robust and searching interviews of candidates for such posts continue to be conducted under the glare of publicity. Thus, for instance, the transcripts of the interviews by the JSC for six justices of the Constitutional Court in 1994 remain accessible on the Internet,⁵⁴ and interviews by the JSC continue to receive much media attention;⁵⁵

5.2.6.2 the JSC Rules, which we have discussed above, recognise the importance of public access to formal judicial conduct enquiries.⁵⁶

5.2.7 In summary, we submit that the openness principle has the result that access by the public and the media be granted in respect of the JSC hearing.

5.3 The open justice principle

5.3.1 The rationale for the open justice principle was articulated in the seminal House of Lords decision in **Scott v Scott**⁵⁷ (quoting the rationale of Jeremy Bentham):

Publicity is the very soul of justice. It is the keenest spur to exertion and the surety of all guards against improbity. It keeps the judge himself, while judging, under trial.

5.3.2 The open justice principle was recognised in the South African common law even before the enactment of the Constitution.⁵⁸ It was first discussed by the Constitutional Court in **S v Mamabolo**.⁵⁹

Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so

⁵⁴ See <http://concourt.law.wits.ac.za/interviews/index.html> (visited 19 July 2008).

⁵⁵ See e.g. "Lesbian judge quizzed over her lifestyle", *The Mercury*, 19 October 2005; "Judge awes judicial panel during interview", *The Mercury*, 18 October 2005; "Sexism in the Judiciary", *Sunday Times* 23 October 2005.

⁵⁶ Rule 5.6 of the JSC Rules.

⁵⁷ [1913] AC 417 at 447.

⁵⁸ See e.g. **Botha v Minister van Wet en Order en Andere** 1990 (3) SA 937 (W); **S v Leepile and others** (4) 1986 (3) SA 661 (W).

⁵⁹ **S v Mamabolo** 2001 (3) SA 409 (CC) at paras 28-9; our emphasis.



that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts and, ultimately such free and frank debate about judicial proceedings serve more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the more important aspirational attributes prescribed for the judiciary by the Constitution

However, such vocal public scrutiny performs another important constitutional function. It constitutes a democratic check on the judiciary. The judiciary exercises public power and it is right that there be an appropriate check on such power.

- 5.3.3 The inherent danger to constitutional democracy of closed judicial proceedings received potent recognition by the Constitutional Court in the case of **Shinga v The State**.⁶⁰

Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based

Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal [matters] to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy.⁶¹

- 5.3.4 In **Edmonton Journal v Attorney General for Alberta, Attorney General of Canada and Attorney General of Ontario**⁶² the Supreme Court of Canada pointed out a further relevant reason for the open justice principle:

It is also worth noting that there is an important educational aspect to an open court process. It provides an opportunity for the members of the community to acquire an understanding of how the courts work and how what goes on there affects them.⁶³

- 5.3.5 And the Canadian Supreme Court has again recently emphasised the open justice principle in **Named Person v Vancouver Sun**.⁶⁴

⁶⁰ 2007 (4) SA 611 (CC) at para 25; our emphasis.

⁶¹ See also **South African Broadcasting Corporation v National Director of Public Prosecutions** 2007 (1) SA 523 (CC) at paras 31 and 32; **S v Geiges** 2007 (2) SACR 507 (T).

⁶² [1989] 2 SCR 1326, 64 DLR (4th) at 577; our emphasis.

⁶³ Ar para 21.

⁶⁴ 2007 SCC 43.



Information is at the heart of any legal system In any truly democratic society, courts are expected to be open and information is expected to be available to the public...

For justice to be seen to be done is necessary to preserve public confidence in the administration of justice.⁶⁵

5.3.6 The most recent pronouncement of the Constitutional Court in regard to the open justice principle is **Independent Newspapers (Pty) Ltd v Minister for Intelligence Services**,⁶⁶ where the Court reaffirmed the rule that courts must be open. As Moseneke DCJ acknowledged in terms accepted by the full Court:

The constitutional imperative of dispensing justice in the open is captured in several provisions of the Bill of Rights ...

This systemic requirement of openness in our society flows from the very founding values of our Constitution, which enjoin our society to establish democratic government under the sway of constitutional supremacy and the rule of law in order, amongst other things, to ensure transparency, accountability and responsiveness in the way courts and all organs of state function ...

From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice.⁶⁷

5.3.7 The most obvious application of the open justice principle is to courts. However, we submit that having regard to the underlying reasons for the principle, as a matter of principle and logic it also has broader application to other adjudicative bodies, such as the JSC where it adjudicates upon a complaint against a judge.⁶⁸ Indeed, the open justice principle already receives recognition in regard to enquiries concerning magistrates' conduct, where it is provided that formal

⁶⁵ At paras 1 and 84.

⁶⁶ [2008] ZACC 6.

⁶⁷ At paras 39-41. See also **South African Broadcasting Corporation** (above) at paras 31-2.

⁶⁸ The open justice principle has been recognised in other domestic contexts as applying to adjudicative or similar public bodies. Thus commissions of enquiry established under the Commissions Act 8 of 1947 must be open to the public, unless the presiding officer determines otherwise (section 4). Section 50(4) of the Auditing Professions Act 26 of 2005 provides that disciplinary enquiries conducted against auditors are held in public, unless the chairperson determines that any part of the hearing be held *in camera*. And section 33(3) of the Military Discipline Supplementary Measures Act 16 of 1999 provides for open court martial hearings. The extension of the open justice principle beyond court hearings has also been recognised in England. For example in **R v Secretary of State for Health** [2001] 1 WLR 292 (DC), which concerned an independent inquiry instituted under the National Health Act 1977, the Divisional Court held that as a basic principle such an enquiry should be open to the public unless there are persuasive reasons for the public to be excluded, and that closing the enquiry without sufficient reason to do so had interfered with the rights to receive and impart information under Article 10 of the European Convention on Human Rights. See also **R (Wagstaff) v Secretary of State for Health** [2001] 1 WLR 292 (DC).



disciplinary hearings of magistrates generally take place in public.⁶⁹ The principle is also implicitly recognised in the JSC Rules discussed above, which provide that the default position for formal hearings into judicial conduct is that of openness.⁷⁰

5.3.8 We submit that the underlying reasons for the open justice principle are applicable to the JSC hearing. Closing the JSC hearing to the public would undermine the salutary principle that adjudicators should be accountable and that members of the public should be informed of how the adjudicative process works. Moreover, members of the public cannot engage in participative democracy by discussing and debating the allegations that have been made by the complainants in an informed manner, if access to the JSC hearing is denied.

5.3.9 Insofar as it may be asserted that the judges' privacy and dignity may be impacted upon if access to the JSC hearing is permitted, we submit that this cannot constitute a legitimate basis for restricting the openness of the proceedings. In this regard, the decision in **Prinsloo v RCP Media Ltd t/a Rapport**⁷¹ is instructive. The applicants argued that the hearing of their application should take place in camera because of the salacious nature of the facts of the case, and their right to privacy. Van der Westhuizen J held:

Intimate personal details are often disclosed in court rooms in front of members of the public and the media. This is unfortunate for the individuals involved, but their privacy is in such cases outweighed by values such that courts in a democratic country function with transparency, so that any member of the public can see that justice is being done.⁷²

5.3.10 In summary, the principle of open justice, we submit, applies to the JSC hearing. The rationales for the rule are classically applicable to the JSC hearing. To exclude the media and the public from the JSC hearing would therefore undermine the credibility of the process, would limit the right of citizens to debate and discuss the complaint and the

⁶⁹ Regulation 26(25) of the 1994 Regulations for Judicial Officers in Lower Court under the Magistrates Act 90 of 1993.

⁷⁰ Rule 5.6 of the JSC Rules; see 4 above.

⁷¹ 2003 (4) SA 456 (T).

⁷² At 462.



counter-complaint in an informed fashion, and would also not allow the public to check the conduct of the JSC in administering justice in the circumstances.

5.4 **The right to freedom of expression and of the media**

5.4.1 Freedom of expression is protected by section 16(1) of the Constitution:

- (1) Everyone has the right to freedom of expression which includes –
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas ...

5.4.2 The importance of freedom of expression to an open and democratic society has been reiterated by our courts on numerous occasions. It suffices to mention a few of the leading pronouncements of the Constitutional Court:

5.4.2.1 in **South African National Defence Union v Minister of Defence & Another**,⁷³ the Constitutional Court stated:

Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally,⁷⁴

5.4.2.2 O'Regan J's pronouncements in **NM v Smith**⁷⁵ also bear repeating:

Freedom of expression is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible, but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy. Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the

⁷³ 1999 (4) SA 469 (CC).

⁷⁴ At para 7.

⁷⁵ 2007 (5) SA 250 (CC).



possibility of morally autonomous human beings independently able to form opinions and act on them.⁷⁶

5.4.3 Freedom of the media – expressly protected by section 16(1)(a) of the Constitution – is inextricably connected with the right of the public to receive information and ideas (protected in section 16(1)(b) of the Constitution). It is an aspect of the right to freedom of expression that has received specific emphasis in the judgments of our highest courts:

5.4.3.1 in **Khumalo v Holomisa**,⁷⁷ the Constitutional Court stated as follows:

The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected;⁷⁸

5.4.3.2 the Supreme Court of Appeal has also eulogised the importance of media freedom in our democracy. In **National Media Ltd and others v Bogoshi**, the Court held that:

[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens ...⁷⁹

5.4.4 The significance of media freedom in a democracy has also been recognised in foreign jurisdictions. One prominent decision is the ruling of the House of Lords in **McCartan Turkington Breen (A Firm) v Times Newspapers Ltd**⁸⁰ where the House held as follows:

In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society ... The majority cannot participate in the public life of their society ... if they are not alerted to and

⁷⁶ At para 145. The Supreme Court of Appeal has similarly attached great prominence to the right to freedom of expression. See e.g. **National Media Ltd v Bogoshi** 1998 (4) SA 1195 (SCA) at 1206.

⁷⁷ 2002 (5) SA 401 (CC).

⁷⁸ Para 22; our emphasis.

⁷⁹ 1998 (4) SA 1196 (SCA) at para 1209; our emphasis.

⁸⁰ [2000] 2 All ER 913 (HL) at 922; our emphasis.



informed about matters which call or may call for consideration in action. It is very largely through the media ... that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring.

- 5.4.5 The guarantee of media freedom is designed to serve the interest that all citizens have in the free flow of information "*which is possible only if there is a free press*".⁸¹ As the Constitutional Court stated in **South African Broadcasting Corporation v Director of Public Prosecutions**:⁸²

A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.⁸³

- 5.4.6 In the specific context of the JSC hearing, it bears emphasis that reporting on the conduct of judicial officers constitutes political speech that lies at the core of any freedom of expression guarantee, and that hence ought to receive heightened protection in our law. Restrictions on this type of speech – unlike, for instance, commercial speech or private information – impact directly on the nature of our democracy and such restrictions must be compelling to pass constitutional scrutiny.⁸⁴

- 5.4.7 Judges are public officials who are ultimately accountable to the public for their actions. As Lewis JA stated (with Howie P concurring) in **Mthembi-Mahanyele v Mail & Guardian Ltd**⁸⁵ in the context of the accountability of a cabinet minister:

The State, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has

⁸¹ **Midi –Television (Pty) Ltd t/a e-TV v Director of Public Prosecutions (Western Cape)** 2007 (5) SA 540 (SCA) at para 6.

⁸² 2007 (1) SA 523 (CC) at para 28; our emphasis.

⁸³ See also Yacoob J in **Indepenedent Newspapers v Minister for Intelligence** (above) at para 87.

⁸⁴ Eric Barendt *Freedom of Speech* (2nd edn, 2006) at 193.

⁸⁵ 2004 (6) SA 329 (SCA) at para 66; our emphasis.



the right to know what the officials of the State do in discharge of their duties. And the public is entitled to call on such officials, or members of Government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts.⁸⁶

5.4.8 Even before the enactment of the Constitution, our courts emphasised that judicial officers are accountable to the public. As Corbett CJ stated in **Argus Printing and Publishing Co Ltd and others v Esselen's Estate**:⁸⁷

I also agree that Judges, because of their position in society and because of the work which they do, inevitably on occasion attract public criticism and that it is right and proper that they should be publicly accountable in this way.⁸⁸

5.4.9 The JSC hearing will have serious consequences for our democracy. As we have stated, the JSC hearing may ultimately result in the impeachment by the National Assembly of a Judge President of our country, or of certain judges of the Constitutional Court. Even if the JSC rejects the complaint or the counter-complaint after the JSC hearing, the implications for the credibility of the judges of the Constitutional Court and Judge Hlophe are significant. Access to the JSC hearing and full and fair reporting on the JSC hearing go to the heart of freedom of expression and the right to information in a democracy. To restrict access to the hearings and hence the publication of political speech would be tantamount to undermining democracy itself.

5.4.10 We submit that the US Supreme Court decision in **Landmark Communications Inc v Virginia**⁸⁹ reinforces the submissions that we make in this context. A Virginia statute made it a crime to divulge information regarding closed proceedings before a state judicial review commission that is authorized to hear complaints about judges' disability or misconduct. The newspaper printed an article accurately reporting on a pending inquiry by the commission and identifying the

⁸⁶ See also **Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape** 2007 (6) SA 442 (C) at para 4.

⁸⁷ 1994 (2) SA 1 (A).

⁸⁸ At 24-5; our emphasis.

⁸⁹ 435 US 829 (1978).



judge whose conduct was being investigated. The Supreme Court held that the First Amendment does not permit the criminal punishment of third persons who are strangers to proceedings before such a commission for divulging or publishing truthful information regarding confidential proceedings of the commission.

- 5.4.11 More significantly for our purposes, the Supreme Court (per Burger CJ) emphasised the importance of the public receiving information concerning serious complaints against judges. The Court stated that speech about judicial conduct “*lies at the core of the First Amendment*” and judicial conduct is a matter “*of utmost public concern*”.⁹⁰ In words that are applicable to the general position in regard to closed proceedings, the Court held:⁹¹

The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest The article published ... provided accurate factual information about a legislatively authorised inquiry pending before the Judicial Inquiry and Review Commission, and in so doing, clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect. ...

Admittedly, the [government] has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free' ... The remaining interest sought to be protected, the institutional reputation of the court, is entitled to no greater weight in the constitutional scales. (our emphasis)

- 5.4.12 We submit that these sentiments enjoy application to the JSC hearing. The case for access to the JSC hearing is, we submit, compelling.
- 5.4.13 We point out, parenthetically, that our submission is that the right to media freedom has the result that journalists must be afforded a right of physical access to the JSC hearing and must be entitled to report freely on the proceedings. We do not address in this submission the right of the electronic media to broadcast the JSC hearing live via television or radio. Special circumstances may apply in such circumstances. Our clients request physical access to the JSC hearing.

⁹⁰ At 838.

⁹¹ At 832; our emphasis.



6. Conclusion

- 6.1 We submit that our clients and the public should be granted access to the oral hearings on the following bases:
- 6.1.1 the details of the complaint, the counter-complaint and the responses are firmly in the public domain and have been the subject of intense scrutiny and commentary by the media and the public. They disclose matters of great moment to our democracy, and are of immense and manifest public interest. To legitimise secrecy at this stage of proceedings would, we submit, be absurd and would undermine the administration of justice;
- 6.1.2 the application of the values of openness, responsiveness and accountability that are articulated in section 1(d) of the Constitution and that permeate the Constitution, require that the JSC hearing be conducted in public;
- 6.1.3 the principle of open justice requires that proceedings of courts and, we submit, quasi-judicial proceedings on matters of public interest, must in general take place in public; and
- 6.1.4 access to the JSC hearing will vindicate the freedom of the media to impart political speech concerning a public body's treatment of complaints against public officials, and the right of the public to receive such information.

Dr Dario Milo/ Ms Pamela Stein/ Ms Okyerebea Ampofo-Anti

22 July 2008

Webber Wentzel on behalf of Avusa Ltd, Independent Newspapers (Pty) Ltd, and Mail & Guardian Ltd

