

**IN THE HIGH COURT OF SOUTH AFRICA  
(WITWATERSRAND LOCAL DIVISION)**

**CASE NO**

In the matter between:

**MANDLAKAYISE JOHN HLOPHE**

Applicant

and

**CONSTITUTIONAL COURT OF SOUTH AFRICA**

First Respondent

**LANGA CJ**

Second Respondent

**MOSENEKE DCJ**

Third Respondent

**MADALA J**

Fourth Respondent

**MOKGORO J**

Fifth Respondent

**O'REGAN J**

Sixth Respondent

**SACHS J**

Seventh Respondent

**NGCOBO J**

Eighth Respondent

**SKWEYIYA J**

Ninth Respondent

**VAN DER WESTHUIZEN, J**

Tenth Respondent

**YACOOB J**

Eleventh Respondent

**NKABINDE J**

Twelfth Respondent

**JAFTA AJ**

Thirteenth Respondent

**KROON AJ**

Fourteen Respondent

**JUDICIAL SERVICE COMMISSION**

Fifteenth Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned

**MANDLAKAYISE JOHN HLOPHE**

do make oath and state that;

- 1 I am the Judge President of the Cape High Court in the Republic of South Africa. I am the Applicant in this application. I am also the respondent in a complaint lodged by the Judges of the Constitutional Court with the Judicial Service Commission.
  
- 2 In that complaint I am accused of attempting improperly to influence the decision of the Constitutional Court in cases involving the President of the African National Congress, Jacob G. Zuma, which were argued before the Constitutional Court in March 2008 and in respect of which judgement was reserved. In this regard, a copy of a document submitted, on the face of it, by the Judges of the Constitutional Court and titled "**Complaint to the by the Judges of the Constitutional Court**" is annexed hereto as "**MJH1**". The document is dated 30 May 2008. I also annex as "**MJH2**" a copy of another document dated 17 June 2008 and titled "**Statement in Support of Complaint to the by the Judges of the Constitutional Court Made on 30 May 2008**". This latter document is intended to supplement the document dated 30 May 2008.
  
- 3 Save where otherwise stated or where the converse appears from the context, the facts contained in this affidavit are within my personal knowledge and are true and correct.

- 4 The first respondent is the Constitutional Court of South Africa, constituted in terms of section 166 of the Constitution and established as the highest Court on all constitutional matters.
  
- 5 The second to fourteen respondents are all judges appointed in terms of the Constitution of the Republic of South Africa to serve as such at the Constitutional Court. The judges acting as a Court took the unanimous decision or as a Court unanimously decided to support the decision of the Chief Justice or Deputy Chief Justice to lodge against me a complaint of gross misconduct on the basis of ex parte representations made to them by two judges of the Constitutional Court. I state upfront that the decision taken by the Court was taken without affording me an opportunity to reply to the allegations of the judges concerned. As such the Court acted unlawfully. I deal with this aspect later in this affidavit.
  
- 6 The fifteenth respondent is the, body constituted in terms of section 178 of the Constitution of the Republic of South Africa. The has the powers and functions assigned to it in the Constitution and Act 9 of 1994.

## **INTRODUCTION**

- 7 Let me state from the outset the decision to bring this application against the judges of the Constitutional Court has been and will be one of the most difficult decisions I have had to make in my life. I am fond of many of them and at a personal level enjoy a fair amount of respect. I have a high regard for the judicial work that the judges have done and continue to do in this country and believe

that they have managed the transition in a manner that has entrenched into our legal life respect for fundamental rights. When I became a Judge of the High Court in 1995, I knew then that the responsibilities would require a rare commitment to the values and principles of the Constitution. I found a place to serve my country in its transition from a past riddled with racial animosity, institutional distortions and distrust to a future where the fundamental rights of everyone in this country is a valuable asset and mean something. I decided then that I would serve my country with integrity and loyalty to the Constitution which embodies the national values of the modern constitutional dispensation.

- 8 My background is not an unusual one for most Africans in South Africa. I grew up in an environment of repression and watched my parents struggle from day to day because they had been denied in law the access to the opportunities of life by the racist apartheid government. I have experienced the difficulties of being treated as the oddity of the human race in apartheid South Africa and in the democratic South Africa have endured many unpleasant experiences as a judge of the Cape of Good Hope Provincial Division. I have in my lifetime lived in an informal settlement, struggled to make ends meet as a gardener and lived my life fearing that unless I succeed in my education, I may never be available to serve my country as I currently do. So when I was appointed as a judge of the High Court in 1995, it was one of the most memorable and fondest moments for me and in that appointment I started to live my dream, which is to serve my country in the development of a new legal culture that is based on the recognition and protection of fundamental rights of all people irrespective of the circumstances of their birth and background.

9 The Constitutional Court embodies for me the most sacred values of our Constitution. When it was constituted I knew that the South African legal culture would never again be used as a tool to justify repression and the relegation of fundamental rights to a privilege or to deny anybody the opportunities to live in peace and safety.

10 I have provided this very short background in order to emphasise that it is not easy for me to make the allegations that I have made about judges of this august judicial institution, the Constitutional Court. For many ordinary South Africans and the world that has come to admire the judicial work of the Constitutional Court, it will be difficult to associate the allegations that are made in this affidavit with the Court. The Constitutional Court has made some very profound constitutional decisions that have impacted the international thinking on the protection and advancement of human rights. The quality of judicial officers that have served and are serving in the Constitutional Court does not permit easily of the association with allegations of the nature that I make against them. But even Judges of the Constitutional Court, as human beings, err. I submit, with respect, that they have erred in the manner that they have dealt with the allegations against me.

11 I have over the few years of being a judge of the High Court realised that the protection of our human rights is still vulnerable and cannot be achieved when people keep quiet about even what some may consider mild violations of the bill of rights. At least I am comforted in that remark by the pronouncements of the Constitutional Court itself in numerous decisions that have set an uncompromising pace for the protection of fundamental rights. The Court has

been robust and activist in its decisions and rulings against any violations of the constitutional rights of every person who has come under its judicial authority. It has demonstrated that the only way to a culture of protecting the bill of rights is when the Courts become alert, sensitive and robust in their exercise of judicial authority.

12 I have therefore come to this Honourable Court for relief against what I consider to be serious violations of my constitutional rights as enshrined in the bill of rights chapter of the Constitution. I do so appreciating the very delicate institutional ramifications. I am aware the relief that I seek is against the judges of the highest Court of the land, the Constitutional Court, and that in terms of Court hierarchy I may be treading on unchartered territory. I am aware that the relief that I seek in this application, if granted, would have serious consequences for the Constitutional Court. It may suffer institutional harm – a result for which I do not wish but one that is unavoidable. I have considered that this matter may simply be reduced and limited only to a single inquiry which is whether or not my conduct as alleged by the judges of the Constitutional Court amounts to gross misconduct.

13 Such a limitation will be simplistic in my submission if the legal implications of the decision of the Constitutional Court judges to file a complaint as a Court against me, in circumstances where I was not afforded my right to hearing, is to be considered. First I believe that it is important that our judicial institutions are used for the purposes for which they were created. Second I believe that it is important to resolve the question whether judges of the Constitutional Court sitting as a Court could decide unanimously or support a decision to unanimously

file a complaint of judicial misconduct without affording me my right to a hearing. This I submit is the jurisdictional requirement for the Judicial Service Commission to assume its authority to deal with the complaint. If the Court acted unlawfully in lodging a complaint as a Court, then the Judicial Service Commission has no jurisdiction to inquire into a complaint that is unlawfully filed with it. If conversely the Court acted lawfully in lodging a complaint as a Court of law, then the Judicial Service Commission has jurisdiction to entertain the complaint. Whatever the correct position, this is an issue which only a court of law can decide and not the Judicial Service Commission.

14 I have considered that while the legal issues of this matter may require that I approach the Constitutional Court on a direct access basis, such a step would deny me a Court to adjudicate my complaints. The judges of the Constitutional Court are all respondents and would in deference to the ethical obligations of every judicial officer, be obliged to refuse to sit in judgement over their cause. The judges of the Constitutional Court acting as a Court are complainants against me. That much is made plain by the Second Respondent in a statement submitted to the Judicial Service Commission on 4 July 2008 and annexed hereto as “**MJH3**”.

15 I have considered whether the legal issues that I raise in this application can best be decided by the Judicial Service Commission in the process that is already underway. I remain convinced that the Judicial Service Commission is not a judicial institution and cannot make judicial findings of the nature that I am asking for in this application. The powers of the Judicial Service Commission are restricted to findings of facts and recommendations to the appropriate authority.

The President of the Republic of South Africa is not bound by their recommendation and Parliament may vote against their recommendation. An order or decision issued by a Court binds all persons to whom and organs of state to which it applies.

- 16 If this Honourable Court should consider that it would be undesirable of it to enquire into the constitutional conduct of judges of the Constitutional Court acting as a Court in respect of the relief that I seek, I would ask that a referral be made to the Constitutional Court, differently constituted to consider its conduct in light of the submissions that I make. A position in which the judges of the Constitutional Court reconsider their decision to lodge a complaint against me as a Court would be unprecedented but would be justifiable in the public interest. Such a position would provide the Court with an opportunity to review its own decisions in light of the legal submissions that I make without creating a constitutional crisis of the nature that would result if another Court would make adverse findings against it. I make these submissions without giving up my right to a fair hearing and due regard to my constitutional rights.

### **URGENCY**

- 17 This matter has already enjoyed the attention of the Judicial Service Commission, and a decision by it has been made to refer the alleged complaint against me to oral evidence. My legal team has been approached for appropriate dates for the submission of oral evidence. There is also a public call by the Democratic Alliance leader Helen Zille that the oral evidence is held in

public for political reasons. I state that I do not consider public hearings to be desirable but will be bound by the decisions of the Judicial Service Commission in that regard if the matter is persisted with. A date for the hearings is imminent pending my application and other ancillary issues relevant to a fair process. I attach that letter dated 7 July 2008 from the Judicial Service Commission as “MJH4”. It is thus desirable that these legal issues are determined before the reconvenes for the hearing of oral evidence.

18 I considered direct access to the Constitutional Court but I advised against such a step because it would precipitate a situation that I have no Court to deal with my complaint. There are exceptional circumstances in this case that require that my application is dealt with as a matter of urgency. I do not believe that the judges of the Constitutional Court would be unduly prejudiced if this matter is dealt with on an urgent basis.

19 I respectfully submit that the determination of legal issues that is required in this application is not complicated since they do not require the resolution of a dispute of facts. The question that arises is of a purely legal nature and has to do with whether or not it was lawful for the judges of the Constitutional Court, acting as Court, to cause untested allegations suggestive of gross misconduct against me to be published in the media only on the basis of ex parte representations made to them by some of the judges of the Court, who had already indicated that they did not wish to complain against me. Related to that question is whether or not the judges of the Constitutional Court were entitled as a Court to take any decision without giving due regard to its functions as Court, without due regard to my constitutional rights and without due regard to the

implications of the decision for it as a Court. I do not believe that the Constitutional Court could act in a manner that results in it being unable to exercise judicial authority when called upon to do so.

20 While I believe under normal circumstances that a lower Court should not be placed in a position where it has to decide the constitutionality of actions by the judges of the Constitutional Court, the circumstances of this case are novel. The circumstances created by the decision of the Constitutional Court are unprecedented. They affect the entire judiciary and do not permit of a rigid approach. I request this Honourable Court, as part of the judiciary, to consider the implications of denying me the right to raise these issues in a Court. While it may be a serious matter and an uncomfortable exercise to inquire into the legality of conduct by the judges of the Constitutional Court, including the conduct of the Chief Justice and the Deputy Chief Justice, I do not believe that it is unlawful to do so. Section 8(1) of the Constitution provides that the bill of rights is binding on the legislature, executive and the judiciary. This means that every Court has the responsibility of ensuring that it does not act in a manner that unjustifiably restricts the determination of the bill of rights where a call is made.

21 The implications of a decision from the Honourable Court has exercised my mind, and while it is very difficult to ask a lower court to determine the legality of a decision of a higher Court, I have no prospect of obtaining relief in the Constitutional Court itself. The Constitutional Court is at the apex of judicial authority on the issues that arise in this case. The importance of the legal issues that arise in this case, and the desirability of an immediate decision on them,

cannot be disputed. The possibility of the unprecedented outcome that I may face impeachment proceedings is a real one.

22 It has come to my attention that a day before the Judicial Service Commission , the Chief Justice called a meeting of Heads of Courts in which he briefed them on this matter. While the Chief Justice was entitled to inform the Heads of Courts about this matter, I do believe that it is important that my side of the story should have also been told. I believe that it is important that the Chief Justice treats this matter with real sensitivity that it deserves and not present a one-sided version every time that he has an opportunity to do so. I fear that such a situation might poison colleagues in a prejudicial matter and cause them to lose the independence to determine this matter in a fair and impartial manner. I attach a copy of the minutes of the meeting as **"MJH5"**

23 I further indicate that having referred this matter to the Judicial Service Commission, the Chief Justice on behalf of the Court issues directions to the litigants in that matter inviting them to make submissions on the allegations. I raised my objections to the Judicial Service Commission that are contained in the letter attached as **MJH6.**

### **RECUSAL OF ALL CONSTITUTIONAL COURT JUDGES IS INEVITABLE**

24 It is plain, with respect, that the current Judges of the Constitutional Court cannot be expected to determine the issues I raise in this application without partiality and prejudice as required of them by the Constitution. It is my respectful

submission that the recusal of all Constitutional Court judges would be unprecedented. I would have no Court to hear my application unless it is constitutionally and legislatively possible. I have found no comparable precedence.

### **THE BACKGROUND FACTS**

25 On 29 May 2008, while in Cape Town and conducting my normal judicial functions, I received a call from the Chief Justice at approximately 11h58 the purpose of which was to inform me that the judges of the Constitutional Court had decided to lodge a complaint of gross misconduct against me. When I asked the details of the gross misconduct that was the subject of the alleged complaint, the Chief Justice requested my private fax number to which he faxed a copy of the complaint at 11h59. The faxed copy of the alleged complaint dated 30 May 2008 is annexed as “**MJH7**”.

26 My heart sank when I received this fax from the Chief Justice but soon after receiving this alleged complaint, I started receiving telephone calls from journalists. I was told by them that the Constitutional Court had issued a press statement on the alleged complaint. This was most disturbing and for a while unbelievable until I got hold of the media statement myself. I realised that the media statement was in exactly the same terms as the alleged complaint. I annex hereto as “**MJH8**”.

27 I must point out that I was never consulted by any of the judges of the Constitutional Court before a decision was taken by the Court to accuse me of gross misconduct in public and before the Judicial Service Commission. The alleged complaint and media statement clearly stated that the decision to accuse me of gross misconduct in public had been that of the Court, supported by all the judges of the Constitutional Court. I have now been informed how that decision was arrived at by the judges of the Constitutional Court.

28 The genesis of the decision of the Court to lodge a complaint with the Judicial Service Commission and to publicly accuse me of gross misconduct arose in the following manner:

26.1 Sometime in May 2008, Justice Nkabinde approached Justice Mokgoro for advice on certain discussions that had allegedly taken place between Justice Nkabinde and I in April 2008. In that meeting, Justice Mokgoro appears to have advised Justice Nkabinde to report these alleged discussions with me to the Chief Justice.

26.2 Justice Mokgoro, without further consulting Justice Nkabinde about this matter, reported what had been conveyed by Justice Nkabinde to her about me to Justice O'Regan who was Acting Deputy Chief Justice at the time in the absence of Deputy Chief Justice Moseneke. Justice O'Regan and Justice Mokgoro appear to have decided to encourage Justice Nkabinde to report the matter to the Chief Justice or Deputy Chief Justice.

26.3 Before Justice Nkabinde could accept their advice, Justice O'Regan decided to inform Deputy Chief Justice Moseneke of what had been

conveyed to her by Justice Mokgoro. Justice Nkabinde appears to have approached the Chief Justice about the alleged discussions in which I am alleged to have attempted to influence her improperly.

- 26.4 It appears that two meetings were held with Justice Nkabinde in which the Chief Justice advised her to make a written statement. It is alleged that at those meetings and subsequently during a telephone conversation with the Chief Justice, Justice Nkabinde expressed her unwillingness to lodge a complaint against me and furnish a written statement regarding the matter that she had reported to him.
- 26.5 It appears then that the Deputy Chief Justice Moseneke telephoned Justice Nkabinde and Acting Justice Jafta to set up a meeting in the office of the Chief Justice at the Constitutional Court. I point out that the Deputy Chief Justice was reported to have been on official leave when he assumed the responsibility to set up a meeting with these judges. The meeting was held on 28 May 2008 at 11h00 and present were Justice Nkabinde and Acting Justice Jafta, Deputy Chief Justice Moseneke and the Chief Justice. The meeting was convened by the Chief Justice and Deputy Chief Justice in their capacity as leaders of the judiciary.
- 26.6 After the meeting of 28 May 2008, the Chief Justice and Deputy Chief Justice then convened a meeting of judges of the Constitutional Court. At that meeting, the Chief Justice and Deputy Chief Justice informed other judges what had been conveyed to them by Justice Nkabinde and Acting Justice Jafta.

- 26.7 The meeting was called on 29 May 2008 where the following judges were in attendance: Langa CJ, Moseneke DCJ, O'Regan J, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J. At that meeting, the Chief Justice and Deputy Chief Justice asked the judges not to put any questions to Justice Nkabinde and Acting Justice Jafta given the "distressing circumstances" in which they found themselves. It was at that meeting that the Chief Justice and Deputy Chief Justice decided that my "conduct" as reported to them by Justice Nkabinde and Acting Justice Jafta constituted a serious attempt to influence the decision of the Court in the Zuma/Thint cases.
- 26.8 The Judges of the Constitutional Court were apparently "shocked and distressed" by this report and a full discussion ensued. Various courses of action were debated but neither I nor the Judicial Service Commission has been informed what those other courses of action were and why they were not considered appropriate in the circumstances. It was decided unanimously by all the judges present that the appropriate course of action was to lay a complaint with the Judicial Service Commission against me. In reaching this decision it was specifically stated that the judges who had been approached by me would have to give oral evidence in the event that I "resisted the complaint". It was also decided that "all judges should be party to the complaint." It was further decided that a brief press statement should be prepared. A draft statement was allegedly circulated to colleagues for discussion. A further meeting of judges was allegedly requested by Justice Ngcobo and was held on 30 May 2008.

- 26.9 At that meeting of 30 May 2008, not all judges appear to have been present, but the Chief Justice, the Deputy Chief Justice, O'Regan J, Jafta AJ, Nkabinde J, Madala J, Mokogoro J, Kroon AJ, Ngcobo J, Skweyiya J and Van der Westhuizen J were present. After a discussion, the judges decided that the press statement would be issued in the same terms as the complaint. All judges apparently concurred in the decision. It was further agreed that I would be telephoned by the Chief Justice, who did telephone and inform me of the complaint.
- 29 It follows from the facts above that the judges of the Constitutional Court decided as a Court not only to publish a media statement based on ex parte representations by Justice Nkabinde and Acting Justice Jafta but also to lodge a complaint against me with the Judicial Service Commission, thereby triggering impeachment proceedings against me, without first hearing my version of what had transpired. That much has now been made plain by statements submitted on behalf of the Court by the Chief Justice Langa to the Judicial Service Commission on 17 June 2008 (“**MJH2**”) and on 4 July 2008 (“**MJH3**”).
- 30 Thus, the Second to Thirteenth Respondents decided to lodge a complaint of alleged gross misconduct against me:
- 28.1 as a Court of law;
- 28.2 on the basis of a one-sided version of allegations conveyed to them either by Acting Justice Jafta and Justice Nkabinde or on the basis of hearsay account by the Chief Justice and Deputy Chief Justice;

28.3 without affording me an opportunity to respond to the allegations in circumstances where they knew these untested allegations could possibly result in my impeachment, something that has never happened in the history of South Africa's judicial system.

31 In the circumstances, the Constitutional Court denied me the right to have the dispute between Justice Nkabinde and Acting Justice Jafta, on the one hand, and I on the other decided in a fair hearing by application of law. Since it is customary for judges to discuss and even debate legal issues that arise in cases on which they preside, the Second to Thirteenth Respondents should at the very least have explored the possibility that this may well have been what happened and sought my version of what precisely was conveyed by me to the two judges. For my part, I never imagined that robust discussion of legal principles between judicial colleagues could ever constitute gross misconduct. That is certainly what I was doing – debating legal principles with colleagues.

32 The Constitutional Court further decided to publish the allegations of gross misconduct without:

30.1 due regard to its functions as a Court of law;

30.2 due regard to my constitutional right to privacy;

30.3 due regard to my constitutional right to be presumed innocent;

30.4 due regard to my constitutional right to human dignity;

30.5 due regard to my constitutional right to fair procedure;

30.6 due regard to my constitutional right to privacy;

30.7 due regard to the office that I hold as Judge President of the High Court;  
and

30.8 due regard to my constitutional right to access court.

33 I deal with each of these violations.

#### *Functions of a Court*

34 The judicial authority of the Republic of South Africa is vested in the Court in terms of section 165(1) of the Constitution. The functions of the judiciary are fundamental to constitutional democratic governance. The Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. An order or decision issued by a Court binds all persons to whom and organs of state to which it applies.

35 The decision of the Second to Thirteenth Respondents to lodge a complaint as an institution in the form of the First Respondent (the Constitutional Court) was unlawful in that it undermined and violated:

33.1 the judicial authority conferred on it by section 165(1) of the Constitution  
in that it cannot fulfil its judicial functions as a complainant in the case

against me served before the . The Constitutional Court cannot lawfully decide a course that strips it of its judicial authority;

33.2 its independence in terms of section 165(2) of the Constitution in that it decided unanimously to file a complaint of gross misconduct against me on the basis of a one-sided version of allegations conveyed on it by colleagues. As a Court, the Judges of the Constitutional Court were obliged to hear me before condemning me of gross judicial misconduct in public. They were not exempted from hearing my side of the facts before making a unanimous decision on my fate. By morphing itself into a litigant, the Constitutional Court as currently constituted has lost all independence as an arbiter of disputes;

33.3 the decision to lodge a complaint was based clearly on *ex parte* representations reluctantly made by two of the judges while I was not given any notice and an opportunity to respond to the “Court” before serious allegations of judicial misconduct were published about me. The principles of fairness and natural justice encompass the requirement that a party to a dispute is not allowed to give evidence to the decision maker in the absence of the other party;

33.4 the Chief Justice, with respect, misses the point entirely when he says the Constitutional Court was under no obligation to give me a hearing before publishing scurrilous allegations against me. The fact is that the Judges of the Constitutional Court made that publication as the Court and not merely as an assortment of individual judges. As a Court, they sat in judgement of me and condemned me on the basis of allegations by two of

their own. The interests of justice dictate that it was imperative in these circumstances, particularly in light of the serious implications that these allegations have for me, that I should have been heard before the decision to publish untested allegations was made;

33.5 it is inconsistent with the appearance of independence and impartiality of a judge for that judge to have ex parte communication with one party and to make decisions on material not disclosed to the other party for a response. The Constitutional Court has not even pretended to put up an appearance of independence in the matter of the complaint it has lodged against me. This, of course, is impossible since it is the Court that is the complainant and defends its decision to publish scurrilous and untested allegations against me as fact.

*Violation of my right to equality*

36 In publishing as fact untested allegations of gross misconduct against me, the Constitutional Court as currently constituted has unreasonably and unjustifiably violated my right to equality, including equal protection and benefit of the law. Before the unanimous decision of the Court was taken, and allegations that had the potential to bring the judiciary into serious disrepute were published, I was entitled to the protection of the law and should have been afforded a hearing. The Constitutional Court was not even-handed in affording a hearing only to my accusers and denying me the same opportunity. The situation was made worse by the Chief Justice and Deputy Chief Justice instructing the other judges not to question my accusers on their untested allegations against me, and then

proceeding to adopt those untested allegations as the official complaint of the entire Court. This is, with respect, wrong and demonstrates clear inequality of treatment.

*Violation of my right to be presumed innocent*

37 The Constitutional Court judges violated my right to a presumption of innocence. In publishing a media statement in which they convey *ex parte* allegations by two of their own as fact, they abused their judicial authority and pre-empted a complaint process that is carefully laid out in the Constitution and is known to the Chief Justice who presides as the Chairperson of the .

38 The presumption of innocence is not a principle that applies only in criminal cases. Even in disciplinary proceedings in employment law the principle has application. In any event, in light of the serious and far-reaching consequences on me of the publication of untested allegations about me and the decision to lodge a complaint of gross misconduct against me without affording me a prior hearing, the principle is particularly applicable in the circumstances of the complaint against me and the events leading up to it. If this Honourable Court should find that I was not afforded a constitutionally adequate procedure leading up to the lodging of the complaint against me, then the entire process before the is tainted. The only remedy must be a dismissal of the complaint.

39 The judges implicated in the case against me should have been advised to lodge individual complaints with the Judicial Service Commission and if they were not interested in doing so they should have been left alone. In that instance, I believe that it would be competent for other judges (who are uncomfortable sitting with these judges) to question their suitability to complete their work on the pending judgement given that a perception existed that they had allegedly been infected with undue external and undesirable influence. In fact, the two judges indicated "for the record" in a joint statement they submitted to the Judicial Service Commission on 12 June 2008 that they did not wish to lodge a complaint against me, are not "complainant Judges" and do not wish to make any statement on the matter. This joint statement was submitted two weeks after submission of the alleged complaint of the Court on 30 May 2008 and barely five days before submission of the supplementary complaint on 17 June 2008. This, when viewed in light of the facts set out above as regards how the complaint came to be made, is an indication of an unhealthy zealotry on the part of the Chief Justice and his Deputy and other senior judges to trigger impeachment proceedings against me where the two judges allegedly improperly approached by me did not consider my discussion improper enough to warrant filing a complaint of gross misconduct. It is conduct that is demonstrative of a presumption of guilt.

40 My right to the presumption of innocence is a very serious right and my entire credibility to perform any duties as a judge depended on that right being given effect to by the judges of the Constitutional Court acting as a Court. I have, as a result of this disregard for the presumption of my innocence endured very disparaging commentary from the public. I annex the articles written to the

media about this matter as “**MJH6**”. One must also have regard to the condemnation that I have endured from the organised profession, the most vicious being the Cape Bar. I annex as “**MJH7**” their statement of 30 May 2008 in which they call on the Judicial Service Commission to “facilitate Judge Hlophe's absence from office pending the final determination of the complaint”. The only manner in which the Judicial Service Commission can achieve that is by recommending my suspension under section 177(3) of the Constitution. Thus, effectively the Cape Bar Council has publicly called for my head based only on the media statement issued by the Constitutional Court on 30 May 2008 in which it accuses me of gross misconduct without having heard my version and without interrogating my accusers as regards why my discussion with them should have been considered as being outside the realms of normal judicial debate of legal principles. It appears the Cape Bar Council – and the General Council of the Bar which in its media statement of 30 June 2008 expresses its full support for the Cape Bar Council's stand (“**MJH8**”) – has also presumed me guilty.

41 The presumption of innocence in my instance is particularly crucial for another reason. As Constitutional Court judges, they enjoy credibility and are more likely to be believed by the public than I. I say this because I have had to endure serious allegations of misconduct in the past that resulted in a very rare form of activism by a retired judge of the Constitutional Court, professors of law in Universities of Cape Town, the Western Cape and Stellenbosch, and senior members of the Bar. My innocence is difficult to establish when the judges of the Constitutional Court in a rare show of judicial solidarity decide that I am guilty of gross misconduct. One must just read the statements that have been placed before the Judicial Service Commission to appreciate the conviction and resolve

with which the judges seek to carry out their decision to lodge a complaint of alleged gross misconduct against me.

- 42 I must be protected from the presumption of guilt by the judges of the Constitutional Court. That obligation does not apply because judges feel affronted by my alleged conduct. The allegations remain untested and that should have exercised their mind to give me the benefit of the right to be presumed innocent.

*Violation of my Constitutional Right to Human Dignity*

- 43 There can be no doubt that the right to dignity is the cornerstone of the Constitution. It is inherent and cannot be violated whatsoever. I shall refer the Constitutional Court to its own decisions on the meaning of dignity for purposes of arguing that my rights were violated beyond measure by a unanimous decision of the Constitutional Court to file a complaint on the basis of ex parte representation of allegations and without regard to my right to the presumption of innocence published to all and sundry in the media of the world.

- 44 To demonstrate how deep the wound is on my right to dignity, I refer again to the public commentary ("**MJH6**") that followed the publication of the media statement. Since the Constitutional Court judges decided that I had conducted myself in a manner unfit of a judge and in many instances alleged that I was not fit to be a judge my dignity as a person has suffered irreparably. As a judicial officer I have suffered the indignity of being accused in public by judges of the Constitutional Court – the guardians of our constitutional rights – without a prior

hearing. The Constitutional Court judges decided that I was too bad to deserve the minimum protection afforded to all persons under the Constitution – human dignity. In so far as they are concerned, I deserved to be surrendered in public as a spectacle of ridicule and public outrage. I am a human being and no matter how the judges felt about my alleged conduct I was entitled to be treated with dignity and the decorum associated with the Constitutional Court.

45 I am appointed under the Constitution of my country as a Judge President and no matter how the judges of the Constitutional Court felt about my alleged conduct on the ex parte version of their colleagues, I was entitled to a Court that is independent and that applies the law impartially and without fear, favour or prejudice. I do not accept that my conduct was so egregious as to justify the withdrawal of my constitutional rights. Even if it were, the Constitutional Court had no right to trample on my right to human dignity. The Constitutional Court was not acting lawfully in making the decision to submit a complaint to the without hearing me, and publishing damning allegations of gross misconduct on the basis of untested facts. I have been a judge of the High Court for 14 years. During that time I have never come across a situation where a person is found guilty in his absence on the basis of untested allegations of his accusers. Even in apartheid South Africa there was at least a show of a hearing.

46 Where I presided in matters of professional discipline, I have referred practitioners to their respective disciplinary bodies but have never done so without giving them the right to be heard. Most of my colleagues have referred practitioners appearing before them to disciplinary bodies but I have never ever heard that such a step is taken without the practitioner being afforded a right to

be heard. Even contempt of court cases that I have dealt with have always been preceded by the person concerned being asked to address the Court on the issues. This practice is very critical to the proper administration of justice and gives effect to the right of a person to be presumed innocent, thereby affirming the dignity of that individual.

*Violation of my Constitutional Right to Fair Procedure*

47 I should have been afforded my right to hearing before the decision of the Court was taken unanimously to file a complaint of gross misconduct and publication of untested and ruinous allegations about me to all and sundry. My complaint in this regard has met with cynicism and disregard by the judges of the Constitutional Court. They state that I am not entitled to a hearing from them, but that this right applies at the proceedings before the Judicial Service Commission. In particular the Constitutional Court judges unanimously agree that:

47.1. without hearing me, I should be reported for gross misconduct to the ; and

47.2. without hearing me, the untested and ruinous allegations of gross misconduct should be published in the media as part of attempts allegedly to protect the administration of justice against me;

48 In justifying the denial of my rights, the Constitutional Court submits that they did so

- 48.1. with “a view to the constitutional values of openness and accountability”;
  - 48.2. “in defence of the integrity and independence of the Constitutional Court and the administration of justice in South Africa as a whole”;
  - 48.3. because they were “entitled to and did accept what had been told to them by their colleagues”;
  - 48.4. because my “procedural right to fairness will be respected and protected by the Judicial Service Commission.”
- 49 I submit that such a position is inconsistent with the obligations that are placed on a Court and the judges of that Court in terms of the Constitution. Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, executive, the judiciary and all organs of state. The Constitutional Court was not entitled to exempt itself from the binding provisions of the Constitution for purposes of deciding to lodge a complaint and publishing untested ruinous allegations about me without giving effect to my rights as enshrined by the bill of rights chapter of the Constitution. The fact that the will give effect to my rights did not exempt the Constitutional Court judges from giving effect to them before deciding as a Court to make allegations of gross misconduct about me and putting those out in the public media. At the hearing of this matter, Counsel will make submissions on this very critical issue and refer the Court to relevant international jurisprudence on judicial misconduct.

50 The publication of untested allegations in the media by the Constitutional Court judges violated my right to privacy. I shall refer this Court to its decisions in which it has held that the right to privacy is an important constitutional right and includes the right to live in peace without the fear of any unjustified intrusions into one's life. The decision of the Constitutional Court judges to lodge a complaint as a Court on the basis of a one-sided version of their colleagues was one thing; but publishing those allegations to the world as fact went beyond legitimate publication and trumped my right to privacy. In this respect, my name and photograph appears many times on television and the print media, something other people may enjoy but something I find quite invasive. I am associated with scandals and despite being innocent, the coverage given to these allegations have encroached upon my protected space of life and liberty. Counsel will make further submissions on this issue at the hearing of this application.

*The Infringement on the Judicial Office*

51 The conduct of the Constitutional Court judges violates the institution of the judiciary and undermines the judicial office. By relegating the Constitutional Court to being a complainant against me, the judges have violated the judicial authority conferred on the Court so that it will be unable to sit in judgement of this case in the inevitable event of this matter ending up before that Court since they will all be respondents in that matter.

52 I know of no provision in the Constitution that permits the appointment of at least eight acting judges that may be appointed to hear my complaint against the Constitutional Court in the circumstances of this case. The Constitution seems to permit of the appointment of Acting Judges in two instances, namely, where there is a vacancy and in the absence of a judge (presumably on leave or on duty elsewhere). The position in which the Constitutional Court judges have placed the Court is that by virtue of their conduct, they are unable to exercise the judicial authority in respect of a matter involving my rights. The Court as currently constituted cannot do so independently, impartially and without prejudice against me and that is a travesty.

53 In these unprecedented circumstances, however, it is my respectful submission that my bill of rights cannot be sacrificed by reason of the identity of the persons that have, or institution that has, violated them. After all, the bill of rights binds even the Constitutional Court and its judges. The special circumstances of this case, when it eventually reaches the Constitutional Court, will require that at least eight Acting Justices be appointed. This is the predicament in which the judges of that Court have placed that institution by their conduct.

54 Ideally, Acting Justices would have had to be appointed from the ranks of Justices of equivalent Courts in other comparable jurisdictions because appointment of Acting Justices from the ranks of serving South African judges or academics would in my submission be unlikely to result in an impartial and independent Court that has no prejudice against me. This is because of the institutional (South African judiciary) bias caused by the unfair and ruinous media reports that have inevitably arisen from the course of action adopted by the

current judges of the Constitutional Court. But because the Constitution does not allow the appointment of a non-citizen to sit on the Constitutional Court, this route is not open to the State President.

### **INTERDICTION ON THE JSC PROCEEDINGS**

55 I submit that it is in the interests of justice that, while this application is pending, before this Court, the proceedings before the Judicial Service Commission must be halted. This is so because if this Honourable Court should find that the Constitutional Court has by its conduct unreasonably and unjustifiably violated my bill of rights and/or abandoned the functions vested in all Courts by section 165 of the Constitution, then that will be the end of the complaint against me.

56 In the circumstances of this case as articulated above, there can be no doubt that

54.1 I have a prima facie right to the relief I seek against the ;

54.2 the balance of convenience favours the halting of the proceedings before the pending the determination of the issues in these proceedings; and

54.3 there is no other reasonably satisfactory remedy.

## **CONCLUSION**

- 57 I believe that I have demonstrated that an interim interdict as against the Judicial Service Commission is appropriate pending the finalisation of this application. If this Honourable Court upholds my application, the proceedings before the Judicial Service Commission will become moot, since it could never sit to consider a complaint that is unlawfully filed with it.
- 58 I have not brought this application to stall the finalization of the complaint against me but have sought to ensure that it is done fairly with regard to the constitutional difficulties that I address in this affidavit. I am ready and willing to have the Judicial Service Commission deal with the alleged complaint by the judges of the Constitutional Court if their conduct acting as a Court is permissible under the Constitution. I contend that the Court cannot at once be a Court and a complainant without compromising the functions vested in it by the Constitution. The conduct of the Judges of the Constitutional Court has incapacitated the Court from being able to exercise its judicial authority in this matter.
- 59 The process followed by the Constitutional Court in lodging a complaint against me falls foul of numerous constitutional prescripts. Such a finding by this Honourable Court must render the complaint currently pending against me before the Judicial Service Commission a nullity.

60 In the circumstances of the above I pray for the orders sought in terms of the Notice of Motion.

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**MANDLAKAYISE JOHN HLOPHE**

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit, which affidavit was signed and sworn to at Cape Town on this      day of      July 2008 in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.

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**COMMISSIONER OF OATHS**