

Report of the Portfolio Committee on Justice and Correctional Services on the letter from the Acting Deputy Chief Justice of the Republic of South Africa and Acting Chairperson of the Judicial Service Commission, Justice SSV Khampepe, on the Judicial Service Commission’s decision relating to a complaint brought by Justices of the Constitutional Court Against Judge President M J Hlophe, the Majority and the Minority decisions of the Commission, as well as the Report of the Judicial Conduct Tribunal, Submitted in terms of Section 177 of the Constitution, 1996, Dated 30 November 2023

The Portfolio Committee on Justice and Correctional Services, having considered the referral from the Acting Deputy Chief Justice of the Republic of South Africa and Acting Chairperson of the Judicial Service Commission, Justice SSV Khampepe, of the Judicial Service Commission’s finding of gross misconduct relating to a complaint brought by Justices of the Constitutional Court against Judge President MJ Hlophe, in terms of section 20(4) of the Judicial Service Commission Act, 1994 (Act No 9 of 1994), read with section 177(1) of the Constitution of the Republic of South Africa, referred to it, reports as follows:

1. Introduction

1.1. In a letter to the Speaker of the National Assembly, dated 25 August 2021, Acting Deputy Chief Justice of the Republic of South Africa and Acting Chairperson of the Judicial Service Commission, Justice SSV Khampepe referred a finding of the Judicial Service Commission (“JSC”) that Judge President MJ Hlophe (“Hlophe JP”) is guilty of gross misconduct to the National Assembly in terms of section 20(4) of the Judicial Service Commission Act, 1994 (Act No 9 of 1994) (“the JSC Act”), read with section 177(1) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The Acting Deputy Chief Justice highlighted the following:

1.1.1. On 30 May 2008, 11 Justices of the Constitutional Court lodged a complaint with the JSC against Hlophe JP alleging that during discussions with Justices B E Nkabinde and C N Jafta, both of the Constitutional Court, he improperly attempted to influence the Constitutional Court’s pending judgments in *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/Thint matters”).

1.1.2. After several years of delays occasioned by various litigation, a Judicial Conduct Tribunal (“JCT”), appointed by the Chief Justice in terms of section 21 of the Judicial Service Commission Act, 1994 (“JSC Act”) to investigate and report on the complaint, found Hlophe JP’s conduct breached the provisions of section 165 of the Constitution in that he improperly attempted to influence the two Justices of the Constitutional Court to violate their oaths of office. Additionally, the JCT found that Hlophe JP’s conduct threatened and interfered with the independence, impartiality, dignity, and effectiveness of the Constitutional Court, and that it threatened public confidence in the judicial system.

1.1.3. The JSC, having considered the JCT’s report, the record, and submissions from the parties, by a majority decision, decided to uphold the JCT’s decision that Hlophe JP is guilty of gross misconduct as envisaged in section 177 of the Constitution.

2. Removal process

2.1. Section 177 of the Constitution

2.1.1. Section 177 of the Constitution provides for the removal of a judge, setting out a three-stage process, as follows:

- “177. (1) A judge may be removed from office only if—
- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
 - (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) ...”.

2.2. Judicial Services Commission Act 9 of 1994

- 2.2.1. The JSC Act provides for oversight of judicial conduct and the accountability of judicial officers and sets out the process that must be followed when a complaint is laid against a judicial officer. The Act distinguishes between impeachable offences, serious non-impeachable offences, and lesser offences. An impeachable offence being one that involves incapacity, gross incompetence, or gross misconduct on the part of a judicial officer, as envisaged in section 177(1) of the Constitution.
- 2.2.2. Section 20(4) of the JSC Act provides that if the JSC (having followed its own internal inquiry processes as mandated by the Constitution and regulated by the Act) finds that a judicial officer is guilty of gross misconduct, the JSC must submit that finding, together with the reasons and a copy of the JCT’s report, including any relevant material, to the Speaker of the National Assembly.

3. Role of the National Assembly

- 3.1. Section 177 of the Constitution clearly distinguishes between the powers and functions of the JSC and the National Assembly in the process regarding the removal of a judge from Office:
- 3.1.1. In terms of section 177(1)(a), the JSC is responsible for making the finding as to whether a judge is guilty of gross misconduct.
 - 3.1.2. In terms of section 177(1)(b), the National Assembly is tasked with determining whether a judge who has been found guilty of gross misconduct should be removed from office.
- 3.2. That section 177(1) of the Constitution does not allocate the task of making a finding as to whether a judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct to the National Assembly implies that it is not constitutionally mandated to perform this task.
- 3.3. In the matter of *Hlophe v JSC and Others* [2022] ZAGPJHC 276 at paras 152 to 155 (“the *Hlophe* judgement”), the South Gauteng High Court, Johannesburg, clarified the distinctive roles set out in section 177 of the Constitution and the proper parameters of those roles:
- 3.3.1. *“The structure of section 177 (1)(a) plainly provides that a judge can be removed if the JSC finds that the judge is guilty of gross misconduct. That finding is a jurisdictional precondition to the National Assembly contemplating a resolution to remove a judge. The decision as to whether misconduct occurred is that of the JSC alone”.*
 - 3.3.2. *“There is no provision in section 177 for a re-hearing of the complaint by the National Assembly”.*

- 3.3.3. *“...[T]he Constitution ... assigns different roles to the JSC and to the National Assembly, not overlapping roles. Also, neither the National Assembly nor the JSC are subordinate to one another. The JSC is vested with the power to make a decision based on the norms of judicial ethics. The National Assembly makes a political decision.*
- 3.3.4. *“The inescapable consequence of the two institutions having different decisions to make is that there is no scope for the National Assembly to enquire into whether the judge referred to it has committed gross misconduct... the National Assembly receives that finding as a fact and deliberates thereupon, not to reconsider it, but to decide what to do based on it”.*
- 3.3.5. *“... [W]hen Parliament passes a resolution on the matter, it does not have to re-hear the matter. It would have sufficient documentation before it to make a decision”.*

3.4. Guided by the High Court’s interpretation of section 177 of the Constitution, the Committee developed steps (set out below at paragraph 4.6) to allow for sufficient engagement with the affected judge and deliberations to empower its members to make an informed political decision about the remedy determination as a consequence of the JSC’s finding.

4. **Committee process**

- 4.1. The matter was referred to the Committee for consideration and report on 2 September 2021.
- 4.2. Shortly after the matter was referred to the Committee, Hlophe JP took the JSC’s decision of 25 August 2021, in which its majority resolved that he had committed gross misconduct, on review. The Speaker to National Assembly was cited as Fourth Respondent in the review application. Accordingly, the Committee stayed further consideration of the matter, pending the outcome of the review application, in deference to the process and as it required certainty as to the legal decision before it for consideration.
- 4.3. On 5 May 2022, a Full Bench (Ledwaba AJP, Sutherland DJP and Victor J) of the Johannesburg Division of the High Court in the *Hlophe* judgment dismissed the application, stating that Hlophe JP had failed to raise proper grounds for review. Subsequently, Hlophe JP sought leave to appeal, and, on 22 June 2022, the Full Bench granted leave to the Supreme Court of Appeal (“SCA”), on the basis that the case raised significant matters of public interest, while highlighting that the granting of leave to appeal was not because the Court thought there was any chance of the appeal succeeding on the merits.
- 4.4. On 14 September 2023, the National Assembly Programme Committee, at its meeting, resolved that the Committee should proceed to consider the JSC’s finding of gross misconduct for recommendation to the National Assembly as to whether removal should follow as a consequence. At this stage, legal certainty was provided in the *Hlophe* judgment about the National Assembly’s section 177 constitutional mandate and confirmation provided of the legitimacy of the JSC’s finding as referred to the National Assembly; while Hlophe JP’s appeal process had also stalled due to his failure to file the required record with the SCA.
- 4.5. Concerning the procedure to be followed, the Committee notes the clarity provided by the *Hlophe* judgement on the specific roles assigned to the JSC and the National Assembly (and by extension the Committee) in giving effect to section 177 of the Constitution, neither of which is subordinate to the other:
- 4.5.1. There are different tasks to be performed by the JSC and the National Assembly respectively. The finding as to whether a judge is guilty of gross misconduct is a responsibility assigned to the JSC in accordance with section 177(1)(a) of the Constitution. The remedy determination, however, falls to the National Assembly,

as it is tasked with determining whether a judge, who has been found guilty of gross misconduct, should be removed in accordance with section 177(1)(b) of the Constitution.

- 4.5.2. The National Assembly's role is not to re-hear the matter (that is a question of merit already settled at the JSC finding stage).
- 4.5.3. In making its determination, the National Assembly makes a political decision.
- 4.6. To give expression to this section 177 interpretation, the Committee agreed to the following steps when applying its mind to the required political decision regarding the remedy determination:
 - 4.6.1. The Committee must note the finding by the JSC of gross misconduct (referred to the National Assembly in terms of section 20(4) of the JSC Act) as a legal fact.
 - 4.6.2. The Committee may call for a presentation by (an official of) the JSC to provide an overview of the JSC's process. However, this step is merely informative to provide contextual understanding of the process that unfolded and is not an absolute requirement for purposes of the section 177(1)(b) responsibility that falls to the National Assembly.
 - 4.6.3. The Committee must invite written representations from the affected judge addressing any extenuating circumstances they wish to place before the National Assembly that they regard as relevant to the still required remedy decision only.
 - 4.6.4. The Committee must deliberate on whether it wants to recommend, as a political decision, to support the removal of the affected judge.
 - 4.6.5. The Committee must report on its political decision as to the recommendation of remedy for resolution by the National Assembly.
- 4.7. In giving expression to paragraph 4.6.2, the Committee wrote to the Chief Justice to invite the JSC to provide it with an overview of the procedural aspects relating to the removal process. The Committee noted the Chief Justice's reply, dated 12 October 2023, in which he suggested that the Committee should make a written request for any information it needs and the JSC would then provide the information in writing.
- 4.8. The Committee wrote to Hlophe JP, in a letter, dated 4 October 2023, inviting him to place any extenuating circumstances that he considered relevant to the Committee's deliberations as to whether his removal from office is the appropriate response to the already proven gross misconduct. The representations should be in writing only and should reach the Committee no later than 15 November 2023.
- 4.9. In response, the Committee received a letter from Hlophe JP, dated 17 October 2023.
- 4.10. The Committee considered the contents of the letter at a meeting on 24 October 2023, and replied to him on 25 October 2023, inviting him once again to make representations on any extenuating circumstances that he considered relevant to whether his removal from office is the appropriate response to the already proven gross misconduct. The Committee requested that he refrain from addressing merit issues already settled in terms of the JSC process.
- 4.11. The Committee received further correspondence from Hlophe JP, dated 15 November 2023, which it considered on 22 November 2023.

5. **Deliberations**

- 5.1. The Committee met on 22 November 2023 to consider the representations placed before it and deliberate thereon:
- 5.1.1. Regarding Hlophe JP's claim that the merit issues have not yet been settled, the Committee submits that the JSC's finding of gross misconduct against Hlophe JP was confirmed in the *Hlophe* judgment. Absent an interdict preventing the National Assembly from continuing with its section 177 process, the Committee takes as a legal fact the High Court's finding that the JSC's decision of 25 August 2021 was rational and reasonable for purposes of reporting on the way forward (namely his possible removal) to the National Assembly. That Hlophe JP has been granted leave to appeal to the SCA does not present a legal impediment to the Committee's process, as Parliament is under a legal obligation in terms of section 237 of the Constitution to meet the constitutional obligation set out in section 177 diligently and without delay.
- 5.1.2. Regarding the financial obstacles Hlophe JP faces in mounting his appeal of the review application to the SCA, the Committee submits that litigation management considerations, such as costs, are not an issue that concerns it in exercising its section 177 assigned functions for purposes of the National Assembly's mandate. This is an issue for Hlophe JP to take up with the State Attorney.
- 5.1.3. Regarding the argument that Parliament should 'consider' the JSC's finding, the Committee notes that, in the *Hlophe* judgment, the High Court rejected this position. The Court clearly explained that, in terms of section 177 of the Constitution, it is not for the National Assembly to revisit the finding of the JSC. What is required of the National Assembly is to make a political decision as to whether removal should follow because of the JSC's finding of gross misconduct against Hlophe JP.
- 5.1.4. Regarding the argument that there was improper influence exerted on the JSC process, the Committee notes that Hlophe JP continues to allude to political motives at play that resulted in the complaint against him being lodged with and processed by the JSC. However, this argument was not given any credence by the High Court in the *Hlophe* judgement as a relevant factor for the purpose of the JSC exercising its mandate. A similar view is accepted by the Committee in terms of its processes.
- 5.1.5. Regarding similar concerns raised by Hlophe JP about political views already made public and potential conflicts of interest, the Committee submits that as jurisprudence has already described this as the political decision phase of the section 177 process, this is not an impediment to proceeding. It again also took note of the fact that similar conflict of interest arguments failed to succeed in the High Court too.
- 5.1.6. Concerning the argument that the Committee did not afford Hlophe JP an opportunity to make oral representations, the Committee submits that he was granted two opportunities to make extensive written representations. The Committee believes that this is sufficient in the context of its process as it is not facilitating an inquiry process.
- 5.1.7. Hlophe JP called on the Committee to have regard to his public service record, highlighting that:
- a.) He holds B Iuris, LLB, LLM, PhD qualifications.
 - b.) Prior to taking the bench, he lectured at the University of Zululand, University of Natal, and University of Transkei.
 - c.) He is currently the most senior judge, serving for 28 years until he was suspended in December 2022, and he has 23 years of service as a Judge President.

- d.) He is a well-respected academic, having published and presented numerous papers and chapters in books nationally and internationally.
- e.) He has served as a member of the South African Law Reform Commission.
- f.) He has delivered many reported judgments, some which were referred to with authority in judgements of the SCA and Constitutional Court.
- g.) He has diligently performed his duties as a Judge President up until his suspension in December 2022.
- h.) He is still held in high esteem by many African jurists and scholars.

6. Findings

- 6.1. The Committee notes as a legal fact the JSC's finding of gross misconduct against Hlophe JP referred to the National Assembly in terms of section 20(4) of the JSC Act, read with section 177(1) of the Constitution.
- 6.2. Having considered the documentation before it, including the written representations from Hlophe JP, and having applied its mind through deliberations, the Committee, by majority, notes the arguments placed before it, and finds no extenuating circumstances that would support a decision on its part not to recommend that the National Assembly resolve to call for the removal of Hlophe JP from office.

7. Recommendation

- 7.1. The Portfolio Committee on Justice and Correctional Services, having considered the referral from the Acting Deputy Chief Justice of the Republic of South Africa and Acting Chairperson of the Judicial Service Commission, Justice SSV Khampepe, of the Judicial Service Commission's finding of gross misconduct relating to a complaint brought by Justices of the Constitutional Court against Judge President MJ Hlophe, submitted in terms of section 20(4) of the Judicial Service Commission Act, 1994 (Act No 9 of 1994), read with section 177(1) of the Constitution of the Republic of South Africa, 1996, referred to it, recommends that the National Assembly resolve to call for the removal of Judge President M J Hlophe from office.

Report to be considered.