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THE HEARING INTO THE COMPLAINTS BY JUDGE PRESIDENT HLOPHE AND THE CONSTITUTIONAL COURT MUST NOT BE PUBLIC AND ONLY LIMITED MEDIA COVERAGE MUST BE PERMITTED

A. INTRODUCTION

Your recent request for public comments on whether the Judicial Services Commission's investigation into the Hlophe cases should be held in public has nothing to do with judicial independence or the so-called transparency and openness that various academics and members of the Cape Bar pay lip service to. It has everything to do with dereliction of duty and naked political gamesmanship on the part of the JSC. As made pellucid below, the rules regarding confidentiality of investigations of judicial misconduct at the preliminary stage are well-established throughout the civilized world and should not be subject to second-guessing. There is absolutely no need for the JSC to pretend that it is writing on a pristine page or reinventing the wheel insofar as the principles and procedures governing investigation of judicial misconduct complaints are concerned. Let me preface my remarks with the following pertinent observations questioning the JSC's ability to conduct the inquiry into the respective complaints of judge president Hlophe and the Constitutional Court:

First, Judge Hlophe's complaint raised quintessential legal questions which may be characterized as jurisdictional and which must necessarily be resolved by the JSC before it canvasses public opinion on these legal issues. Most obvious is the legal status of the so-called complaint of "Court" by the eleven judges of the Constitutional Court which should have been clarified as a threshold matter. It is claimed that these judges purported to be acting in their judicial capacity as a duly constituted court when they issued their jeremiad against Judge President Hlophe – at least Judge Langa's admission coupled with the fact that the initial press statement in the name of the "Judges of the Constitutional Court" was issued on that court's letterhead or stationery suggest that much. As you all know, the two classic principles, ***nemo iudex*** (which means entitlement to an impartial court) and ***audi alteram partem*** (the right to a fair hearing) are fundamental to the visible and uncontroversial justness of any trial or judicial decision. It would be incumbent upon the JSC to determine, as a threshold matter, whether the rule of automatic disqualification would apply so as to invalidate the so-called action of "Court" in the first place. In order for any "court" to make pronouncement on or adjudicate the interests of the parties, all interested persons must be afforded constitutionally adequate due process. That opportunity was never afforded to Judge President Hlophe. As demonstrated here, no other civilized country would permit judges to have their colleague tarred and feathered in the press even before he has been notified of the allegations which are the subject of a JSC complaint. As discussed below, Judge President Hlophe is entitled to a dismissal of the so-called complaint of "Court" as there was no duly constituted court and the decision was clearly infected with bias. The rule of automatic disqualification as clarified by the House of Lords in Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No: 2), (2000) 1A.C. 119 renders any decision rendered

by the "Court" consisting of all 11 judges (including the two complainants) null and void. The JSC is not allowed to evade a decision on that fundamental issue by simply resorting to solicitation of public comments. To do otherwise is to simply increase public pressure on the accused judge while at the same time denying him a ruling that may very well be dispositive of the issues at hand.

The other two related legal issues that must be resolved by the JSC (as opposed to politicians and the public) are judicial privilege and the nature of a judge's right to freedom of expression. As you all know, the principle of freedom of expression for members of judiciary is guaranteed by the Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly in 1985. Principle 8 states:

> "8. ***In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary .***"

As shown below, the JSC has adroitly attempted to side-step a resolution of the foregoing issues by simply throwing into the public debate the question of whether the hearing should be public or not. An objective reasonable person is left with the disturbing impression that the JSC's decision to require an evidentiary hearing even on these mundane legal issues clearly capable of resolution on the papers submitted was inspired by calls from the Democratic Alliance, some law professors and other lunatic fringe groups who seek to pervert the truth-finding purpose of the inquiry. The JSC runs the risk of being perceived to be capitulating to pressure from these groups instead of conscientiously performing its constitutionally mandated duties. Even worse, the JSC, through its choice of procedure including its announcement that it would hold an evidentiary hearing, has already telegraphed a message to Judge President Hlophe and the generality of the public that it considers the Constitutional "court" complaint to be validly filed and that it would give short-shrift to Judge President Hlophe's complaint about procedural violations including breach of confidentiality. Simply put, no tribunal resolves legal questions or for that matter issues of proper procedure to be followed in judicial misconduct inquiry on the basis of plebiscites, public opinion polls, internet chat-room discussions or political debates.

Second, the JSC has been forced to resort to ad hoc procedures precisely because it has shirked its duties imposed by our constitution. As shown below, it would not be an exaggeration to state that the JSC is operating in an unconstitutional manner and exercising its powers in the absence of established standards. In the absence of rules, however, due process requires the agency to demonstrate that its internal and written standards for disciplinary inquiries are objective and ascertainable and that they are applied consistently and uniformly. A member of the public must not be put in the unenviable position of speculating about whether the JSC reserves the spectacle of public hearings even before a prima facie case

is established for certain disfavoured judges such as Judge President Hlophe. I am compelled to make this assertion by the following clear provisions of our constitution. Pursuant to Section 178 of the Constitution, the "***Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation***" and the Commission "*may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.*" In addition, Section 33 of the Constitution entitled "Just administrative action" states that "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." That is mandatory and applies equally to Judge President Hlophe.

It is a truism that the JSC was afforded more than 12 years after our constitutional democracy to adopt, develop and promulgate rules specifying comprehensive and complete standards governing the handling of judicial misconduct complaints. At all relevant times, the minimum criteria of judicial independence (which is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law) were: judges' security of tenure, financial security and institutional independence. You were duty-bound to know that constitutional protection of judicial independence requires the existence in fact of security of tenure, and maintenance of the perception that it exists. Accordingly, it was expected of you that you would have developed standard operating procedures instead of waiting until now to be canvassing public opinion on how such job duties are to be performed. The fact that you believe that plebiscites or public opinion should matter on how the issue is ultimately dealt with is not only puzzling but is emblematic of the chaotic and ineffective nature of our governmental institutions under Thabo Mbeki. You were supposed to know that judicial independence is an extremely important constitutional principle and norm that goes beyond and lies outside the Bill of Rights and thus is not subject to the limitations of Section 36 in our constitution. Such matter requires established, predictable written procedures and cannot be left to chance. Instead of performing your collective duty, you dilly-dallied, lollygagged and simply frittered the time away and have now been caught with your pants down. In short, you are completely unprepared for the very important constitutional duty that lies ahead and are now forced to resort to ad hoc unwritten procedures which are the very anti-thesis of safeguarding judicial independence and rule of law in the first place. At a minimum, the principles of judicial independence, due process and equal protection concerns require that an administrative agency charged with safeguarding such important institution as our judiciary must demonstrate that any unwritten standards which have not been made explicit in the constitution or applicable statutes are applied consistently and uniformly. You have failed to adopt clear guidelines and rules governing confidentiality in the filing of judicial misconduct complaints which would have prevented the constitutional court judges from pre-empting the very process you now seek to manage. You have failed to develop written criteria and definitions of what constitutes

"gross misconduct" required for impeachment of judges and are now forced to develop ad hoc definitions of requisite gross misconduct and appear to be at a loss as to when a robust debate amongst judges is allowed and when a debate would constitute "improper influence." As demonstrated later, you have through your own indolence failed to ensure that principles observed in international jurisprudence are recognized and applied in our country as required by Section 39 of the Constitution. The JSC's failure to promulgate regulations specifying comprehensive and complete standards coupled with an application of informal standards on a case-by-case basis, will lead to the agency's action being stricken as arbitrary, capricious, and otherwise not in accordance with law should Judge President Hlophe choose to litigate this matter.

Third, my view of the JSC's dereliction of duty if further reinforced by the explicit instruction in section 39(1)(a) of the constitution which reads: "***When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.***" Contrary to the muddle-headed and confused ramblings of some law professors including De Vos of the UWC, some UCT law professors and members of the Cape Bar, the JSC's reference to international law in constitutional decision-making in the Hlophe matter is not only recommended, it is textually required. Accordingly, it is disingenuous for the JSC to decide as an initial matter to hold an "evidentiary hearing" on whether there was a legal duty on the part of the Constitutional Court to observe confidentiality in the first place and then as an afterthought to ask members of the public to decide whether the matter should be aired in public. To be perfectly clear, the JSC is duty-bound to consider international jurisprudence, foreign case-law, UN international instruments and international "good practices' in interpreting our constitutional provisions regarding judicial independence and in resolving specifically the question of whether confidentiality must be maintained at this preliminary stage of the inquiry. Resorting to plebiscites and soliciting public comments from self-interested politicians and members of the news media is not a proper substitute for performing your collective duties as mandated by the constitution.

And finally, it is shown here that eeveryone would agree in principle that important public decisions be open and public. But experience has taught many in mature democracies and the civilized world that public airing of judicial dirty laundry carries more risk than benefit. Without exception, it has been proven that premature publication of allegations of judicial misconduct and an open process will tend to politicize the judiciary, put undue public pressure on the JSC, publicly embarrass the persons who are subject of the complaint and even intimidate witnesses who may be want to file complaints against errant judges in the future. In this era of cult of celebrity judges, the JSC should not be overly ambitious or be tempted to view the Hlophe matter as an opportunity to show that conventional wisdom prevailing in all major democracies

is fallacious. South Africa is a virtual "Mafikizolo" as far as democratic institutions are concerned and the JSC must have both the humility and modesty to admit that the Hlophe matter should not the opportunity to experiment or to demonstrate that the hitherto non-existent South African virtues of civility and moderation can make an open and public process work, especially where others who are more experienced have voted in the negative. The fact of the matter is that none of the Constitutional Court judges would survive cross-examination by advocates Thabani Masusku and Dumisa Ntsebeza unscathed.

But that is not all there is to a public hearing in the Hlophe matter. The JSC has itself been irredeemably compromised by the actions of the Constitutional Court judges: The JSC accepted an obviously flawed "press statement" masquerading as a complaint of the highest court in the land. The JSC proved overly indulgent of Judge Langa's actions and it is not even clear why the constitutional court judges, including the Chief Justice who is a chairperson of the JSC needed to be reminded by the JSC to file a proper complaint or affidavits supporting their allegations against Judge Hlophe in the first place. It is not clear why Justice O'Regan asked for extra time and opportunity to "consult with counsel" when asked to provide such simple information under oath - was she and the other judges (most of whom were at best relying on double hearsay) afraid of committing perjury? Unlike ordinary complainants or litigants these judges, who have a concomitant constitutional duty to promote judicial independence were bound to observe confidentiality prior to the JSC assuming jurisdiction and its determination of probable cause, an indispensable step to preserve the integrity of our judicial system and the morale of our judges. It is above all else required to protect the integrity of the JSC process itself. Instead of a searching inquiry about best practices and observance of strict confidentiality required by international jurisprudence, the judges and their apologists have reduced the matter to whether they "**carefully**" considered the matter before going public and whether a hypothetical "complainant" has the right to publicize his or her complaint. That is all red-herring and irrelevant - these judges were and supposedly still are complainants against Judge Hlophe. But they are not just ordinary complainants – they had a constitutional duty to uphold judicial independence and integrity. They had no right to prejudice and to pre-empt the JSC process by issuing press statements which were clearly intended to provoke public condemnation of Judge Hlophe and calculated to make the publication of the complaint a done deal even for the JSC. Indeed the frenzied calls by lunatic fringe groups for Judge President Hlophe to resign were the reasonably foreseeable results of a carefully calibrated decision by these judges to ignore the mandates of the constitution and international jurisprudence.

By adopting their self-imposed short-cuts, these judges abused their judicial authority by hastily constituting a kangaroo court and issuing damning statements suggesting that a sitting Judge President is guilty of not only judicial misconduct but also obstruction of justice (a criminal offence) without even the

courtesy of a constitutionally required due process hearing. Simply put, they have prejudiced a tribunal (JSC) and have created undue pressure and an **inevitable conflict of interest** situation for the JSC. By publicly accusing Hlophe, they have painted him in a corner where he essentially has to publicly defend his reputation and prove his innocence. They have pre-empted the process by removing confidentiality under the guise of announcing the filing of a complaint and have thus increased the pressure on both Hlophe and the JSC to have the proceedings in public despite international practice and UN rules to the contrary. The JSC, which should have denied the judges' complaint as procedurally flawed and invalid simply gave the accusers another opportunity to meet with their counsel and to submit a better and improved complaint – a step that will raise suspicion in the minds of the public about the credibility of the justices in our highest court and the JSC's forgiving attitude towards them. The JSC, by insisting by even suggesting a public hearing on the matter notwithstanding the glaring constitutional errors and procedural missteps by the 11 judges, now runs the risk of eroding the integrity of our judiciary in that it unfairly suggests that the JSC countenances or overlooks constitutional violations by our judges if a majority of judges get together and issue prejudicial press releases to the detriment of a sitting judge, and then hand that victim to the JSC after having him pilloried in the press.

In fact, the JSC has given the impression that its decision on the merits of Judge Hlophe's complaint against the Constitutional Court judges is already predetermined. How can the JSC which is supposed to rule on the merits of a complaint alleging breach of confidentiality purport to resolve that very issue by suggesting a further breach of that very principle? How can it consider a public hearing at this stage without appearing to trivialize Judge Hlophe's complaint? If it was wrong for the Constitutional Court judges to publicize the matter before a prima facie case has been established why would it be permissible now to hold a public evidentiary hearing on the same complaint when the JSC has not even made a determination as to whether Hlophe or any of the judges against whom he complains have a case to answer?

Although a public hearing would, under certain circumstances serve a salutary purpose and clearly expose many of the political machinations involved in the Hlophe matter, it is downright wrong to contemplate such a hearing under the present circumstances. To be blunt, Chief Justice Langa's cross-examination on the circumstances of the "Order of the Baobab" from Thabo Mbeki shortly before he went public with the incendiary allegations against Judge President Hlophe would make an interesting and valuable lesson in civics. A cross-examination about his decision to specifically identify name, docket number etc. (as opposed to simply stating that Judge Hlophe interfered with respect to a ***pending*** matter) in the cases involving Mr. Zuma and other political loyalties, if any, of the remaining justices will be the ugliest spectacle ever witnessed in judicial circles in the entire civilized world. The implications or even

appearance that he or other judges under his supervision instigated the complaints for partisan political reasons would be fair impeachment or cross-examination material - but all of us will be disgraced by these sordid details which would have very little to do with the "truth." The only persons likely to be thrilled by such an obscene orgy are likely to be racist white politicians, lawyers and academics who have their own axe to grind with Judge Hlophe. After all these same elements have joined in not only as odious cheerleaders of the constitutional court's violation of the constitution but as a lynch-mob baying for Hlophe's blood and hell-bent on destroying the very constitution they are paying lip-service to. It's no secret why the writers of the phony "openness and transparency" get so defensive when it is pointed out that other weightier considerations involving judicial independence mandate confidentiality: their opinions helped lead to the chorus of condemnation of the JSC in 2007 when it found no gross misconduct warranting impeachment on Hlophe's part, so any time their agenda to drive Hlophe off the bench by public condemnation is threatened, they rise up in its defense. It is not surprising that one eminent so-called "expert" has accused me personally of "inventing" the confidentiality rules observed universally.[1]

B. DISCUSSION

I. The Judicial Services Commission's Inexcusable Failure To Promulgate Rules of Procedure Renders Any Ad Hoc Decision To Conduct Public Hearing Unlawful, Unreasonable and Procedurally Unfair

The JSC is a constitutional body (Section 178 of our Constitution) vested with the ultimate power to recommend to parliament and the president the removal, impeachment or retirement of a sitting judge. Section 177 of the Constitution states that a judge may be removed from office **only if the** following standard is met: 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. The evidentiary standard for removal was set deliberately high to ensure that judges are protected from harassment and unwarranted calls for removal every time some interest group is dissatisfied with them. To give effect to the foregoing measures aimed at securing judicial independence, Section 178 of the Constitution, states that the "***Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation***" and that the Commission "*may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.*" Furthermore, Section 33 of the Constitution entitled "Just administrative action" states that "***everyone has the right to administrative action that is lawful, reasonable and procedurally fair."*** Although the

[1] http://www.mg.co.za/article/2008-07-21-judiciary-judged

Constitution gives the JSC the power to make rules for the investigation of judges, it does not state that the said rules must provide for the confidentiality of complaints to and investigations by the commission. Does this mean that the JSC is then free to haphazardly make up ad hoc rules specifically relating to confidentiality as it deems fit? ***Emphatically and a**bsolutely not!*

The answer to this is straightforward and lies plainly in Section 39(1) of our constitution which reads: "***When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.***" Settled international practices and comparative foreign law provides clear guidance to the JSC as to how confidentiality issues are to be handled. All major democracies are unanimous that the confidentiality of the Commission's investigations is based on sound public policy and is not merely to serve the narrow self-interest or sensibilities of the accused judge. Confidentiality encourages the filing of complaints and the willing participation of citizens and witnesses by providing protection against possible retaliation or recrimination. It also protects judges from premature injury to their reputation, dignity and privacy which might result from the publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys, or by political adversaries, and preserves confidence in the judiciary as an institution by avoiding premature announcement of groundless claims of judicial misconduct or disability. Confidentiality is essential to protecting the judge's constitutional right to a private admonishment if the circumstances so warrant, and when removal or retirement is justified by the charges, judges are more likely to resign or retire voluntarily without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided. Leading writers have recognized that confidentiality of investigations and hearings by the Commission is essential to its success. (Mosk v. Superior Court (1979) 25 Cal.3d 474, 491-492; and see Adams v.Commission on Judicial Performance (1994) 8 Cal.4th 630, 646-648.). The JSC was supposed to take the foregoing precepts into account and to develop consistent, fair and predictable written rules of procedure as is customary in a democracy.

In the absence of rules, however, due process requires the agency to demonstrate that its internal and written standards of procedure are objective and ascertainable and that they are applied consistently and uniformly. See White v. Roughton, 530 F.2d 750, 753-54 (7th Cir. 1976); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968). Some courts have held that an agency's failure to promulgate regulations specifying comprehensive and complete standards coupled with an application of informal standards on a case-by-case basis, may lead to the agency action being stricken as arbitrary, capricious, and otherwise not in accordance with law. See, e.g., Ethyl Corp. v. E.P.A., 306 F.3d 1144, 1149-50 (D.C. Cir. 2002). Accordingly, we believe that both due process and equal protection concerns

require that an administrative or regulatory agency charged with performing such an important role as deciding the security of tenure for judges must demonstrate that any unwritten standards which have not been made explicit in the statute or regulations are applied consistently and uniformly. That the JSC is unable to do.

Here the JSC has failed to promulgate regulations or procedures required to carry out its constitutionally mandated duty under Section 178 of the constitution. Under these circumstances, I conclude the JSC's failure to promulgate regulations and written appropriate procedures is a failure to carry out its constitutional mandate and that the JSC's solicitation of advise from the public on such highly sensitive matters involving security of tenure for judges and protection of the accused judges' constitutional rights is arbitrary, capricious, and unreasonable. By its own implicit admission, the JSC lacks ascertainable standards which are well stated, accessible to the public and followed in deciding when public hearings should be held. Basing a decision on unwritten rules, or even worse misguided comments from the public which has not been educated about international practices and the JSC's own constitutional duties, is arbitrary and capricious. Two reasons counsel against permitting agency actions based on unwritten rules: first, parties are entitled to fair notice of the procedures to be followed and the criteria by which their cases will be judged by an agency, and second, judicial review is hindered when agencies operate in the absence of established guidelines." It is puzzling how the JSC expects an aggrieved judge (who wishes to challenge a decision to violate confidentiality that was inspired by public clamour for a public hearing) to litigate such matter in our courts. The reason why due process requires written, predictable principles and forbids agencies from having unwritten, changeable-at-will rules is precisely to avoid a scenario similar to the Judge Hlophe matter where the JSC seems to be cow-towing to the demands of political opposition parties and other bigots such as the Democratic Alliance. If the procedure followed by the JSC is left unchallenged, confidentiality for accused judges will be granted or denied on a case by case basis without any standards or criteria to guide either the accused judges or the JSC. Such a regulatory scheme would clearly not comport with constitutional standards and would leave judges vulnerable to political manipulations and intimidation. To allow a government agency charged with the sacred duty of protecting judicial independence to operate in this fashion would open the door to unjust favouritism and discrimination. I am not suggesting that any favouritism or discrimination has been (or needs be) proven to anyone's satisfaction in the Judge Hlophe case. However, it is the opportunity for the exercise of arbitrary discrimination by JSC between judges who appear as accused before the JSC, and not only the fact itself, which renders the use of unwritten ad hoc criteria objectionable. I accordingly urge you to abandon your proposed course of action.

Aside from any constitutional considerations, fundamental fairness would seem to require nothing less. The JSC must appreciate an apparent paradox which is a common thread in these types of judicial misconduct investigations. Judicial independence encompasses both individual and institutional elements. It means an individual judge must hear and decide cases without interference from outsiders, including the government, the ***Judicial Services Commission (JSC), other judges or parties to the litigation***. And the court or the judiciary (***which includes even the accused judge***), as the protector of the Constitution, must be institutionally independent from the other branches of government. In both cases, the objective is that justice should not only be done but should manifestly and undoubtedly be seen to be done. This principle was elucidated In R. v. Lippé, [1991] 2 S.C.R. 114, where the Canadian Court affirmed its two-pronged approach to judicial independence and also ***considered from whom the judiciary should be independent***. In the view of Lamer C.J., with whom Sopinka J. concurred, the judiciary should be independent of "***the government***", which includes not only the executive and legislative branches, ***but also other regulatory or supervisory bodies such as the JSC***. The Chief Justice states, at page 138 (emphasis in the original):

> By "***government***", in this context, I am ***referring to any person or body, which can exert pressure on the judiciary through authority under the state . This expansive definition encompasses, for example, the Canadian Judicial Council or any Bar Society. I would also include any person or body within the judiciary which has been granted some authority over other judges; for example, members of the court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice.***

Gonthier J., with whom La Forest and L'Heureux-Dubé JJ. concurred, would have adopted a more expansive appreciation of judicial independence to include independence not only from "***the government***" as defined by the Chief Justice of the Supreme Court, but also ***from parties to the litigation***. The decision in Lippé also affirmed the principle, first set out in Valente, that the test for assessing independence was the same as that for impartiality.[2] Viewed with this prism, the JSC as "***the government***" from whom the judiciary should be independent may not itself adopt procedures and other devices which put undue pressure on accused judges all under the guise of serving the need for openness and transparency in a democratic society. In a similar vein, the JSC cannot capitulate to tactics used by complainants judges or "*parties to the litigation" or appear to endorse their self-serving tactics of* prematurely publication of complaints of judicial misconduct and then using the same adverse publicity as a basis on which to conclude that public hearings would be "in the public interest." The JSC's failure to require the

[2] The decision in Lippé was followed by four other Supreme Court decisions: R. v. Bain, [1992] 1 S.C.R. 91; R. v. Généreux, [1992] 1 S.C.R. 259; Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3; and Ruffo v. Conseil de la magistrature, [1995] 4 S.C.R. 267.

constitutional court judges to comply with the law, to respect confidentiality and to accord Judge President Hlophe due process is likely to seriously damage our constitutional democracy and to erode whatever vestiges of public confidence in the JSC remains.

The egregious failure to hold the judges accountable even where unauthorized leaks continued unabated after the filing of the complaint and despite the JSC's admonition clearly shows that the appearance of neutrality or impartiality for the JSC has been eroded. An ad hoc rule allowing public hearings in this case simply because the constitutional court judges had the temerity to violate confidentiality and to orchestrate unauthorized leaks in such a brazen fashion would encourage mischief without a concomitant benefit to an accused judge, the public or even complainants. No prescience is needed to foresee the flood of unfounded complaints that would follow the JSC's endorsement of the despicable course charted by the constitutional court judges. Any litigant or irresponsible politician or racist member of the Cape Bar could orchestrate a press conference in which he makes outlandish allegations or scurrilous attacks on a judge and then submit a real or imagined complaint to the JSC, after which he could demand that the JSC's inquiry about the complaint should be held in public since the "cat is already out of the bag"-- thereby making a mockery of the rationale for any putative JSC's confidentiality rules (to encourage willing participation by witnesses, candour by judges, and to protect judges from the injury that might result from the publication of unexamined and unwarranted complaints by disgruntled litigants or their attorneys, all of which are essential to the JSC's success). (Mosk v. Superior Court, supra, 25 Cal.3d at pp. 491-492.). The fact of the matter is that in a race-obsessed South Africa, Judge Hlophe is still the target of many of the vitriolic attacks because of his stance on racism and transformation. In the not-too-distant future, the JSC would need to deal with other judges who may be subject of complaints emanating from their own colleagues, court personnel etc. It would be irresponsible to establish a blanket rule in favor of disclosure simply because we live in an "open and democratic society"; some judicial employees or other witnesses might be unwilling to assist investigators if they knew their statements would automatically be made public. The so-called public interest in disclosure has to be balanced against the need to guarantee confidentiality to some witnesses in cases where essential evidence might be impossible to obtain without it. I don't claim to have the expertise needed to determine exactly where the line should be drawn but I do know that countries such as the US where unrestrained press freedom is the norm have found it prudent to draw a strict line on confidentiality in matters involving judicial security of tenure. This is because the alternatives would not adequately protect one of the pillars of a democracy- the independence of the judiciary!

II. Both the JSC and the Constitutional Court Judges Have Shown Complete Disregard for the Principle of Presumption of Innocence and Judge President Hlophe's Constitutional Rights.

First, it is necessary to reject the unfounded statements by Chief Justice Langa that the seriousness of the allegations against Judge President Hlophe justified the breach of confidentiality and the violation of the principle of presumption of innocence. In fact, the Constitutional Court itself has rejected similar nonsensical claims in the case of State v Coetzee [1997] 2 LRC 593. It is worth setting out the eloquent explanation by Sachs J of the significance of the presumption of innocence in full [para 220 at 677]:

> "There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book… ***Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases***".

The logic of this reasoning is inescapable and exposes the hypocrisy and unprincipled decision-making by the Concourt judges in the Hlophe matter. Having rejected the "ubiquity and ugliness argument" in all other cases, these judges conveniently cast aside these same principles and issued their self-serving statements in which they claim that the seriousness of the allegations against Judge President Hlophe justify wholesale breach of confidentiality and violation of the presumption of innocence. If the presumption of innocence is flagrantly violated the "public confidence in the enduring integrity of the legal system" as a whole evaporates - pure and simple. Members of the public are entitled to point out to the violation of this very principle, the breach of confidentiality and the undue publicity as a reason for their concern that Judge President Hlophe would not get a fair trial or hearing. After all, the JSC has further reinforced this perception by its apparent lack of concern about these same issues. The fulcrum of the dispute between Judge Hlophe and the Concourt judges is after all his complaint about the violations of his constitutional right and the accompanying wholesale breach

of confidentiality and violation of the presumption of innocence. The JSC has trivialized Judge President Hlophe's complaint by simply asking for the public to participate in a plebiscite meant to determine whether a public hearing is warranted at this stage. Predictably, the JSC can point to no precedent, domestic or international, statute, or plausible legal principle in support of the notion that such important issues and safeguards for judicial independence can be resolved on the basis of public opinion polls.

In this context it is the effect of what the constitutional court judges have done that has to be examined. It is significant that they accused Judge President Hlophe of heinous criminal conduct albeit in a complaint to the JSC. They have essentially alleged that he attempted to willfully pervert, impede or obstruct or otherwise interfere with the due course of justice, or to bring the administration of justice into contempt - all criminal acts. It is also significant that the same judges sent a copy of their press statement or "complaint" to the National Prosecuting Authority. Accordingly, the misguided claims by the Cape Bar and some law professors that Judge President Hlophe is not entitled to a presumption of innocence applicable to those accused of criminal offences has no merit. The court looks behind the appearances and investigates the realities of the procedure: Deweer v Belgium (1980) 2 EHRR 439, 458, para 44.

International jurisprudence makes it pellucid that the presumption of innocence may be infringed not only by a judge or court but also by other prosecuting authorities' actions, including press releases, judicial grandstanding, etc. The ECtHR deemed the presumption of innocence so important that it ruled that this presumption should be respected not only by the judges, but by all public officials. In that regard, the ECtHR has noted: "The Court recalls that the presumption of innocence […] will be violated if ***a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. In this regard the Court emphasizes the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence."*** (emphasis added) ***Allenet De Ribemont v. France***, ECtHR judgment of 23 January 2005, para 35 and ***Daktaras v. Lithuania***, ECtHR judgment of 10 October 2000, para 41. See also, *General Comment on Article 14 of the ICCPR*, 13/21,& 7; the Committee stressed the duty on all public authorities to refrain from prejudging the outcome of a trial. It suffices, as in the Judge President Hlophe's case, in the absence of a formal finding, that the "Court" consisting of the 11 judges made comments suggesting that the accused is guilty of criminal interference with and perversion of justice. Such a premature expression by the "Court" itself of such an opinion will inevitably run afoul of the said presumption

(see, among other authorities, Deweer v. Belgium, judgment of 27 February 1980, Series A no. 35, p. 30, § 56, Minelli v. Switzerland, judgment of 25 March 1983, Series A no. 62, §§ 27, 30 and 37, Allenet de Ribemont v. France, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36 and Karakaş and Yeşilırmak v. Turkey, no. 43925/985, § 49, 28 June 2005).

The ECtHR has in fact deemed the presumption of innocence so important that it has ruled it inappropriate even for the police to make statements implying that an individual is guilty of a crime before the guilt had been established in a due process. The case of Daktaras v. Lithuania involved a complaint by an applicant who had been "portrayed in the Lithuanian media as a Mafia leader." He was found guilty on two counts of obtaining property by threats of force and inducing another to pervert the course of justice, sentenced to seven years and six months' imprisonment and his property was confiscated. The applicant further complained under Section 6 § 2 of the Convention that the prosecutor had commented that his guilt had been proved before the trial had started, thereby breaching the presumption of innocence. The Court reiterated its case-law that ***impartiality within the meaning of this provision meant an absence of bias and outside influence on the judges deciding the case. It further recalled that, under the objective test of impartiality under Article 6 §1, appearances were of importance***. The court concluded the applicant's ***doubts as to the impartiality of the Supreme Court could be said to be objectively justified***. Consequently, there had been a breach of Article 6 §1. In another case, ***Allenet De Ribemont v. France***, ECtHR judgment of 23 January 2005, para 35, the European Court of Human Right made it clear that the principle of presumption of innocence must be scrupulously observed even by the executive branch of the government. Allenet de Ribemont v France, concerned statements at a press conference. There the French Interior Minister (FIM) mentioned that Ribemont had jointly taken out a bank loan with a person who was being investigated for the murder of a French MP. In the FIM's presence, the director of criminal investigation then said: "Mr. de Varga-Hirsh and his acolyte Mr. Allenet de Ribemont were the instigators of the murder..." Ribemont was later arrested and charged with aiding and abetting the murder of the MP. Upon acquittal, he sued the French Government for violating his right to be presumed innocent until proven guilty under art.6(2) of the European Convention on Human Rights (ECHR). The European Commission found that, in the circumstances, Ribemont "***could legitimately have believed that he had been held up in public, by the highest authorities of the State, as a person guilty of complicity in murder***".

As a general rule, the presumption of innocence will be violated if, without the accused's having previously been proven guilty according to law and, notably, without his having had the opportunity of exercising his rights of defense, **a judicial decision** concerning him reflects an opinion that he is guilty.

This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty. The decision of the European Court of Human Rights in Minelli v. Switzerland (1983) 5 EHRR 554 makes this concept perfectly clear. Minelli, a Swiss journalist, wrote an article in a Basel newspaper alleging fraud against a company and a director of that company. The company and that director brought a private prosecution against Minelli. But it was terminated before trial by reason of the expiry of a statutory limitation period. The domestic court decision reflected an opinion that he was guilty: "*the incidence of costs and expenses should depend on the judgment that would have been delivered*", the newspaper article complained of would "*very probably have led to conviction*". The appeal court judgment did not alter the meaning or scope of the first-instance court's reasoning. On their view of the probable outcome of the prosecution if it had proceeded to trial, the Swiss courts ordered Minelli to pay part of the court costs and part of the private prosecutors' costs. All this came to a total of 1,574.65 Sfrs. Minelli took Switzerland to the European Court of Human Rights, and succeeded there. After examining the evidence, the European Court of Human Rights concluded:

> "37. ***In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defense, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty***.
>
> 38. … In this way the Chamber of the Assize Court showed that it was satisfied of the guilt of Mr. Minelli, an accused who, as the Government acknowledged, had not had the benefit of the guarantees contained in paragraphs 1 and 3 of Article 6. *Notwithstanding the absence of a formal finding and despite the use of certain cautious phraseology* ('***in all probability'***, '***very probably***'), the Chamber proceeded to ***make appraisals that were incompatible with respect for the presumption of innocence***."

Accordingly, the court held that there had been a violation of the presumption of innocence conferred by art. 6(2) of the European Convention on Human Rights. This reasoning applies with equal force to Judge President Hlophe's case and shows clearly that the constitutional court's statements about Judge Hlophe's alleged "conduct" of interfering "with the functioning of the courts," his alleged "attempt to influence this or any other Court outside proper court proceedings" which "not only violates the specific provisions of the Constitution regarding the role and function of courts, but also threatens the administration of justice in our country and indeed the democratic nature of the state" as well as statements to the effect that the Court "will not yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality" all directed at Judge President

Hlophe clearly violated the presumption of innocence principle. A member of the public would be left with a clear impression that Judge President Hlophe has been pronounced guilty by a duly constituted "court." In Judge Hlophe's case, the "trial" before the JSC and eventually parliament if need be will commence with the public having the full knowledge Judge President Hlophe was deemed by all the judges of the nation's highest court to have engaged in attempts to willfully pervert, impede or obstruct or otherwise interfere with the due course of justice, or to bring the administration of justice into contempt.

The actions of the constitutional court judges are, however, of particular importance since, in addition to their obligation to observe the presumption of innocence, they are also under an obligation to preserve the appearance of impartiality and judicial independence. To maintain public confidence in the farness of a trial, judges must avoid even the appearance of bias against a defendant. In Kyprianou v. Cyprus, (ECtHR judgement of 15 December 2005, para 120), the ECtHR summarized its practice: "The Court has held ***for instance that the judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges.*** […] Thus, where a court president publicly ***used expressions which implied that he had already formed an unfavourable view of the applicant's case before presiding over the court that had to decide it, his statements were such as to justify objectively the accused's fears as to his impartiality*** (see Buscemi v. Italy, 29569/95 [1999] ECHR 70 (16 September 1999) Para. 68, the court must not make statements to the press before the case is decided that casts doubts upon its impartiality). In an ironic sense, these judges' obligation to maintain the independence of the judiciary extends to Judge Hlophe's security of tenure and independence as well. If these judges' actions of engaging in public accusations against another sitting judge had occurred in the US, sanctions against these constitutional court judges would be following hard and fast.

III. The Question of Confidentiality Which Must Be Maintained At this Preliminary Stage And the Natural Justice To Which An Accused Judge Is Entitled Are Legal Issues Which Must Be Resolved By The JSC itself Without Resort to Plebiscites

Contrary to the muddle-headed and confused ramblings of some law professors including De Vos of the UWC[3], some UCT law professors and members of the Cape Bar, our judges are given explicit

[3] Equally absurd has been the misguided argument raised by some ill-informed law professors, De Vos and Unterhalter, that violations of Hlophe's procedural due process rights must not be considered at this stage since it is about mere "technicalities." Such ludicrous argument has been rejected in every civilized country and was rubbished by the US Supreme Court in a case involving an alleged Al Qaeda terrorist, Hamdi v.Rumsfeld 03-6696, U.S. Supreme Court, June 28,2004. There the court explained that "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); see also id., at 266 (noting "the importance to organized society that procedural due process be observed," and emphasizing that ***''the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions***"). It is no answer to

instruction in section 39(1)(a) of the constitution which reads: "***When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.***" Accordingly, I have taken the measures necessary to provide the JSC with substantive analysis of the position taken in foreign jurisdictions with respect to confidentiality issues and due process for accused judges. Extensive reference will be made to the jurisprudence of Canada, Australia, Commonwealth countries and the United States of America, which has notably contributed to the development of South Africa's jurisprudence on equality and human rights in general. As stated earlier notable key differences between the South African Constitution and the U.S. Constitution exist in that the former has a specific provision (Section 39) stipulating that "[w]hen interpreting the Bill of Rights, a court ... must consider international law." Thus, reference to international law in constitutional decision-making in South Africa is not only recommended, it is textually required. The JSC does not have the luxury of deciding otherwise.

In fact in Makwanyane, the Constitutional Court relied extensively on international and comparative experiences to inform whether the death penalty was constitutionally suspect even though the constitution did not express outlaw the death penalty. The Court there argued that "***The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention.***" (para. 34). Furthermore, the Constitution enjoins our courts and tribunals to have regard to international law including comparative international case-law in interpreting the provisions of our own constitution.

As a point of departure, it is absolutely clear that the JSC's approach in asking for public opinion on these matters and the arguments by the so-called legal experts in favour of public hearings are not supportable by any creditable citation to legal authority. In fact, overwhelming precedent is strictly against public hearings at the preliminary stage. Closer to home, the issue of confidentiality was considered by a South African court in Moldenhauer v Du Plessis & Others 2002 (5) SA 781 (TPD). There the applicant, the chief magistrate for the district of Pretoria, challenged the provisions of Regulation 26(20) (governing misconduct investigations for magistrates) requiring that "t**he investigation …take place in camera."** He contended that the disciplinary hearings against him should **not be held in camera but in public since the administrative charges against him had**

Hlophe's complaint about the Court's violations to state that he must just proceed to the merits on the substantive charge against him. The JSC's approach gives the appearance trivializing the violations of the "absolute" procedural rights by calling for public evidentiary hearings on matters that should be decided on the papers and as a matter of law.

commanded a considerable amount of press coverage. It was the applicant's **case that public hearing of the inquiry would enable him to clear his name and to set the records straight.** Counsel for the applicant contended that the investigation was not merely a fact-finding mission but the future and career of the applicant and therefore his rights might be adversely affected as contemplated by section 33 of the Constitution. Although it was conceded that the applicant was not an accused person in terms of section 35 for the purposes of invoking the right to a fair trial, and that the rights in section 34 could not be transported into disciplinary proceedings, it was nonetheless contended that the principles enshrined in the Constitution were applicable. Extolling the public essence of judicial proceedings as adumbrated by Kriegler J in S v Mamabolo (ETV & Others Intervening) 2001 (3) SA 409 (CC) paragraphs 18, 30 & 31, Motala J held that in view of the public interest evoked by the 'chaotic' situation in the Pretoria magistracy, the public must be eager to see it resolved in the open in a reasoned and rational manner. However, the learned judge made the following observations which make clear the egregious nature of the Concourt judges' violations. He stated (at 795B-E):

> '***The Judiciary and the magistracy in my view can only prosecute their functions where there exists respect, honesty, self-discipline and to some extent restraint when colleagues deal with each other. When a debate is thrown into the public eye and not discussed (sic) amongst themselves, it exhibits a high degree of indiscipline. It is a well-known convention of our courts that judicial officers speak in court and as such only in court. They are not there to defend their liberty or even go to the extent of debating their decisions or misunderstandings in public. The impression I gathered from the pleadings before me as well as the newspaper cuttings attached to the pleadings only illustrate the 'chaotic' situation which exists in the magistrate's office in Pretoria.***'

Sadly, the learned judge could never have predicted that his observations about the "chaotic" situation in the Pretoria Magistracy would later be replicated in the nation's highest court, the constitutional court! He could never have imagined that his lamentations about the lack of "***respect, honesty, self-discipline and to some extent restraint when colleagues deal with each other"*** would be an indictment of the despicable manner in which his colleagues on the constitutional court dealt with Judge President John Mandlakayise Hlophe. He could never in his wildest imagination have fathomed that his observations that "w***hen a debate[about judicial misconduct] is thrown into the public eye and not discussed (sic) amongst themselves, it exhibits a high degree of indiscipline"*** would apply with equal force to the 11 judges of the constitutional court in the entire Hlophe saga**.** He could never have known that the judges on our highest would flagrantly violate the "***well-known convention of our courts that judicial officers speak in court and as such only in court"*** and that the said judges would choose to unleash a lynch-mob on a supposedly valued colleague. He certainly had no clue that the cult of celebrity would assert itself in the constitutional court and that the guardians of our human rights enshrined in our constitution would issue misleading and prejudicial press statements "***or even go to the***

extent of debating their decisions or misunderstandings in public" all in a calculated effort to increase public condemnation and pressure on Judge President Hlophe. He could not in a million years have guessed that the judges of our nation's highest court would exhibit "a high degree of indiscipline" and unprincipled judicial decision-making by extolling the virtues of foreign jurisprudence or case-law when it suited them and then flagrantly ignoring the very hallowed principles such as confidentiality observed in these foreign nations when dealing with Judge Hlophe's case.

The mere fact that Langa, his predecessors and the JSC itself have all failed to develop and promulgate rules requiring that investigation of judges (as opposed to magistrates) shall take place "in camera" is not dispositive of the claims asserted by Judge President Hlophe regarding the breach of confidentiality and threats to judicial independence by these judges. It would be nothing short of perverse for this JSC to recognize that a magistrate being investigated for "judicial misconduct" enjoys more rights than a Judge President who is similarly being investigated for alleged misconduct. Such a magistrate is entitled under Regulation 26(20) to have "t**he investigation …take place in camera"** while a Judge President of one of the busiest courts in the land enjoys no similar constitutional protections against possible premature injury to his reputation or malicious publicity**.** It would be a complete travesty for the JSC to rule that the need for "openness and transparency" is sufficient to trump judicial independence and Judge President Hlophe's right to human dignity contained in the Bill of Rights (Chapter 2 of the Constitution, 1996) which includes both the value of the intrinsic worth of a person and his/her individual reputation built upon his or her own individual achievements.

A cursory survey of practices in all major democracies and most Commonwealth countries reveals that no country allows breach of confidentiality during the preliminary stages of investigation of judicial misconduct complaints. Most important, it makes clear why the rules of natural justice must be rigorously applied in the interest of maintaining judicial independence and ensuring fairness for the accused judge. The following discussing of the practices in several countries (major democracies and commonwealth) clearly exposes the fallacy of Langa's reasoning and makes it clear that there is no excuse for the egregious constitutional violations and the well-established rule of confidentiality in the investigations of judicial misconduct. The seriousness of the allegations against Judge President Hlophe required caution and increased confidentiality to protect public confidence in our judiciary and Judge President Hlophe's constitutional rights. The JSC threatens to compound the violations further by holding the preliminary stage of the investigation in public.

(a) Confidentiality and Due Process Rights of Accused Judges in the United States of America.

In the United States, the initial investigation stage of judicial misconduct complaints is ***absolutely confidential***. Just four months ago, on March 11, 2008, the Judicial Conference of the United States approved the first-ever binding, nationwide set of rules for handling conduct and disability complaints against federal judges, bringing consistency and rigor to the process.[4] The new rules codified a long-established tradition that judicial conduct and disability ***complaint process remain confidential***, ***as required by federal law***. Under the rules, even a final order dismissing a complaint will not identify a complainant or the judge who is the subject of the complaint. In most cases, only a final order sanctioning a judge will identify the judge. It is thus inconceivable that a public hearing would be countenanced under these rules under circumstances where there has been no determination as to whether a prima facie case exists for the accused judge to answer.

The principles in the rules are nothing new and have nothing to do with Americans' lack of comprehension of the principles governing "an open and democratic society." The US Supreme Court ruled more than 30 years ago in Landmark Communications v. Virginia, 435 U.S. 829; 835 (1978) that confidential investigations of judicial misconduct serve salutary purposes in protecting judicial independence. The appealing defendant, Landmark Communications owned a newspaper which had been convicted of publishing details of a judicial misconduct inquiry in violation of Virginia's statute. A Judge H. Warrington Sharp, who sat on the Juvenile and Domestic Relations Court, was under an investigation by a judicial fitness panel. The panelists were deciding whether or not to begin disciplinary proceedings against Sharp. Under Virginia statute, each complaint against a judge was confidential and would be publicly disclosed only if deemed serious enough (after investigation) to require a public hearing. All states in that country (US) had, (and still have) confidentiality requirements to avoid use of the disciplinary inquiry as retribution against a judge; however, only Virginia and Hawaii provided for criminal penalties for disclosure.

The Landmark Court listed four state interests served by confidentiality in the early period of the investigation: (1) encouraging the filing of complaints; (2) protecting judges from unwarranted complaints; (3) maintaining confidence in the judiciary by avoiding premature announcement of groundless complaints; and (4) facilitating the work of the commission by giving it flexibility to accomplish its mission through voluntary retirement or resignation of offending judges. Id. at 835-37, 98 S.Ct. at 1539-41. The Court assumed that these interests were legitimate. Id. at 841, 98 S.Ct. at 1542-43. In a concurring opinion, moreover, Justice Stewart described these interests more generally as the state's interest in the "**quality of its judiciary**," and stated that there could "**hardly be a higher**

[4] http://www.uscourts.gov/Press_Releases/2008/judicial_conf.cfm

governmental interest." Id. at 848, 98 S.Ct. at 1546. The court noted that "***much of the risk [from disclosure of sensitive information regarding judicial disciplinary proceedings] can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings***" supra, at 845. This is in stark contrast to the JSC's abject failure to develop any procedures to protect confidentiality of its proceedings. The US Supreme Court also acknowledged that the confidentiality can facilitate the work of a commission by giving it flexibility to accomplish its mission through voluntary retirement or resignation of offending judges. Obviously, the latter cannot be accomplished when judges find out through the tabloid press or internet chat rooms what accusations are being leveled at them by their colleagues and are thus forced to fight back in a public forum to defend their honour.

Events in South Africa have already borne out the US Supreme Court's admonition cited above. The Moldenhauer v Du Plessis & Others 2002 (5) SA 781 (TPD) case perfectly illustrates the point. There the applicant's most stentorian argument was that the disciplinary hearings against him should *not be held in camera but in public since the administrative charges against him had commanded a considerable amount of press coverage.* He insisted that only a *public hearing of the inquiry would enable him to clear his name and to set the records straight.* An astute judge Motala recognized that the very act of airing the judicial officers' dirty laundry in public was symptomatic of lack of discipline and as such deplorable. The public's interest in attracting qualified judges, increasing assistance with investigations, procuring complete and truthful testimony, insuring the independence of the our judiciary, and increasing outsiders' ability to monitor the judiciary are all weighty interests that can only be vindicated by due observance of confidentiality. Holding preliminary investigations in public simply to satisfy the curiosity of the public or the newspaper publishing companies' needs to sell newspapers would clearly not serve the weighty interests of insuring an independent judiciary and safeguarding the human rights of our judges accused of misconduct.

The foregoing principles underlying the confidentiality rationale were further interpreted and applied by the federal Third Circuit Court of Appeals in The First Amendment Coalition v. Judicial Inquiry And Review Board, 784 F.2d 467 (3rd Circ. 1986). The court acknowledged that the "**trauma of public accusation**," one which is "**greater for an official who, due to the special constraints of the bench, is largely disabled from seeking public support**" is a relevant consideration. It gave considerable weight to the reasons for the US Senate's belief "**that the establishment of a confidentiality provision will avoid possible premature injury to the reputation of a judge**," and that specified measures ought to be taken in "**protecting the judge from malicious publicity.**" The court noted that: "**In practice, it has been demonstrated that one of the most effective methods of**

meeting the problem of the unfit judge is to remove him from the bench by voluntary retirement or resignation. Experience has shown that some judges would prefer to resign rather than undergo complete formal hearings. .. if the confidentiality provisions were not in effect, the accused judge might feel compelled to seek vindication by requiring a hearing." [5] Furthermore, it is instructive that US Congress has concluded that confidentiality of inquiries into federal judicial misconduct is of great value. See 28 U.S.C. Sec. 372(c)(14) (**all papers, documents and records of investigations into judicial misconduct are confidential**). In addition, confidentiality may encourage judges who have engaged in misconduct or have a disability to resign or retire "quietly" before the complaint becomes public with the commencement of formal proceedings. Kamosinsfci v. Judicial Review Council, 797 F. Supp. 1083 (D. Conn. 1991). Finally, confidential investigations allow commissions to respond privately or informally to minor misconduct that should be called to the judge's attention but may not necessarily qualify as "gross misconduct" or serious misbehaviour to justify formal proceedings. A country's interest in the quality of its judiciary is indeed an interest of the highest order and that lofty goal cannot be sacrificed through "a high degree of indiscipline" or reckless disrespect for confidentiality condemned by the court in Moldenhauer v Du Plessis & Others. Unfortunately, the JSC under pressure from Zille's Democratic Alliance appears to be on the verge of elevating the "high degree of indiscipline" or reckless disrespect for confidentiality condemned into universal legal principles.

It is noteworthy that at the state level, all states in the US which operate under judicial disciplinary rules similar to the federal system, have without exception stressed the importance of confidentiality in judicial disciplinary proceedings, especially before formal charges are filed against the judge. See, e.g., First Amendment Coalition v.Judicial Inquiry & Review Bd., 784 F.2d 467 (3rd Cir. 1986) (state constitutional provision permitting public access to records of the judicial inquiry and review board only if board recommends that state supreme court discipline a judge is not unconstitutional); Bradbury v.Idaho Judicial Council, 28 P.3d 1006 (Idaho 2001) (confidentiality in judicial disciplinary proceedings does not infringe upon a fundamental right and is rationally related to the state's legitimate interests); In re Inquiry Concerning Stigler, 607 N.W.2d 699 (Iowa 2000) (judge failed to establish how statute providing that all hearings of the judicial disciplinary commission be confidential denied him due process of law); In re Deming, 736 P.2d 639(Wash. 1987) (confidentiality is mandated during investigatory stage of proceeding; once probable cause is determined and formal complaint is filed, judicial discipline commission has discretion in disclosing information and holding

[5] http://bulk.resource.org/courts.gov/c/F2/784/784.F2d.467.84-1164.84-1153.html

public hearings); State ex rel. Lynch v.Dancey, 238 N.W.2d 81 (Wis. 1976) (statute requiring governmental bodies to hold open meetings did not apply to judicial commission; judicial commission rules of procedure that required public hearings after formal charges had been filed pre-empted the application of the open meetings statute); McCartney v. Comm'n on Judicial Qualifications, 526 P.2d 268 (Cal.1974), overruled on other grounds by Spruance v. Comm'n on Judicial Qualifications, 532P.2d 1209 (Cal. 1975) (because judicial commission's proceedings were neither criminal nor before a "court of justice," there was no impropriety in commission's refusal to hold public hearings).

The Arkansas Supreme Court underscored the policy reasons for requiring confidentiality of Judicial Commission meetings held prior to the filing of formal charges in In re Rules 7and 9 of the Rules of Procedure of the Arkansas Judicial Discipline & Disability Comm'n,302 Ark. Appx. 633, 790 S.W.2d 143 (1990) (per curiam). In that order, the Court said: "When adopting and implementing laws and rules that provide for a judicial discipline system, we are confronted with the issue as to when in the process or proceedings does the right to constitutional access attach. ***Every state in the Union recognizes that some confidentiality is necessary, and from our research, we have found that all states, …. provide for disclosure in all judicial discipline cases only after probable cause has been determined and some type of formal hearing or charge has been completed or filed***. See **J. Shaman and Y. Beque, Silence Isn't Always Golden**, 58 Temp.L.Q. 755, 756 (1985)."

The rush to hold so-called public hearings before a prima facie case or probable cause has been established appears to be motivated by the need to use public condemnation and hostile media propaganda to drive Judge President Hlophe off the bench. There is no way the JSC, the Constitutional court judges and the so-called legal experts would all be ignorant of the principles which are so clearly established in all major democracies. It bears repeating that most states in the US have even included in their constitutions a provision that all investigations of complaints against judges remain confidential unless charges are actually filed by the responsible investigating agency.[6] These principles are strictly enforced as evidenced by the fact that courts in other states have rejected attempted encroachments into their confidentiality rules. (E.g., Garner v.Cherberg (Wash. 1988) 765 P.2d 1284, 1288 [quashing state legislature's subpoena duces tecum issued to the Commission on Judicial Conduct, finding that confidentiality of the commission's process was "essential to the preservation of fundamental judicial independence"]; Stern v. Morgenthau (N.Y. 1984) 465 N.E.2d 349, 353 [quashing grand jury's

[6] In Florida's constitution for instance, the Judicial Qualifications Commission can investigate complaints made by individuals, and it can investigate judges on its own initiative. **During the initial investigation, the Constitution provides that all JQC complaints, investigations, and proceedings are confidential**.
http://www.floridasupremecourt.org/pub_info/jqc.shtml

subpoena to New York's Commission on Judicial Conduct, notwithstanding that discovery was in furtherance of a criminal investigation involving two judges because the "responsibilities of the Commission . . . transcend the criminal prosecution of individuals"].)

The foregoing should dispose of Chief Justice Langa's self-serving argument that the need for openness and transparency in a democratic society should be deemed sufficient to override other weighty interests such as protecting judicial independence and judges' reputations through observance of confidentiality. Americans clearly have a sophisticated understanding of press freedom and have recognized that open judicial proceedings are fundamental to their legal system and their liberty. As a matter of constitutional, statutory and common law, their courts have consistently held that judicial proceedings must be conducted in public. For instance, in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the U.S. Supreme Court established beyond a doubt that the public and the press have a First Amendment right to open criminal trials. The Court stated that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." Id. at 573. Through open judicial proceedings the press is able to provide public education and scrutiny of the judicial process. "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." Nebraska Press, 427 U.S. at 559-60 (1976) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)). They have proven that they are not insensitive to the public's interest in knowing about the judicial system. "It is important for the public to receive information about the operation of the administration of justice, including information about the people who do render justice in the truest sense of the word." United States v. Doherty, 675 F.Supp. 719, 723 (D. Mass. 1987) (holding that under the First Amendment, jurors' names and address must be made public). As the US Supreme Court in Landmark has recognized, "[t]he operation of the . . . judicial system itself . . . is a matter of public interest, necessarily engaging the attention of the news media." Landmark Communications v. Virginia, 435 U.S. 829, 839 (1978). They readily accept that in order for the judicial system to keep the public's trust and maintain "confidence that standards of fairness are being observed," it is imperative that the public be able to obtain information about the handling of judicial misconduct complaints and scrutinize its processes. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 509 (1984). And yet, Americans who are almost obsessive about press freedom and openness have recognized the need to draw a very strict line on the issues involved here. They have recognized a long time ago that the protection of their judiciary, specifically judicial independence requires that the

constitutional rights of the judges be respected and that confidentiality is crucial for ensuring judicial accountability through the disciplinary system. That is a point about which the constitutional court judges appear to have showed very little understanding.

At the risk of carting coals to Newcastle, the lofty goal of informing the public is not served by the irresponsible and flagrant manner in which the 11 constitutional court judges violated the confidentiality principle in Judge President Hlophe's case. They brought the administration of justice into disrepute in that the JSC was left in an untenable and embarrassing situation where its concerns about "widespread violations of confidentiality" seemed like a farcical attempt at closing the stable door after the horse has bolted. The generality of the public knew that the nation's highest court set the lowest moral tone of the process by leaking a skeletal complaint to the press long before the JSC had any opportunity to express its "misgivings" about the widespread disrespect for confidentiality. If the public is to have any faith in the administration of justice during the JSC handling of the Hlophe investigation, it needs clear, demonstrable, swift and decisive action by the JSC. Instead of a clear and unequivocal condemnation of the irresponsible action of the 11 judges by the JSC, the JSC has now chosen to wallow in the mud created by the errant judges. The JSC cannot side-step these issues by simply calling for "public comments" or some ill-conceived plebiscite and emphasizing the need to proceed to the merits of the allegations. In fact, only the JSC's ability to speak and to distance itself from unconstitutional acts by any judge or group of judges will fully restore public confidence in our judiciary. Accordingly, the JSC has already tipped its hand and evinced bias against Judge President Hlophe by trivializing his complaint and ignoring comparative case-law and good practices standards from the US.

b. Confidentiality and Natural Justice for Accused Judges in Canada.

In Canada the independence of the federally appointed judiciary is guaranteed by the Canadian Constitution (namely sections 96 to 100 of the Constitution Act, 1867) which provides for the appointment, security of tenure and financial security of superior court judges.[7] Section 99 of the Constitution Act states: "Subject to subsection 2 of this section the judges of Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and the House of Commons." This provision aims to ensure judicial independence by making it extremely difficult to remove judges from office for political or other reasons. The 1971 amendments to

[7] Judicial Independence in also guaranteed by the Canadian Charter of Rights and Freedoms, Schedule B to the Constitution Act, 1982

the Judges Act created the Canadian Judicial Council and gave it statutory authority to investigate complaints against federally appointed judges.

As demonstrated above, South African courts have borrowed liberally from and quoted Canadian courts decisions on judicial independence. Accordingly it is appropriate here to place the discussion of the violations of the principles of judicial independence and impartiality by the 11 judges in the broader context. The independence of the judiciary is a fundamental foundational principle in the Canadian justice system and in the criminal justice system in particular. Judicial independence requires not only that the judiciary be independent of the legislative and executive branches of government, but that *the public perceive that the judiciary is independent and free from interference by the other branches of government*. The importance of protecting the perception of independence was recognized by the Canadian Supreme Court in Mackin v. New Brunswick:

> … not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly "communicated" to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement. Mackin v. New Brunswick (2002), 209 D.L.R. (4th) 564 (S.C.C.) at at 585.

Security of tenure has been recognized as the first of the essential conditions of judicial independence. Valente v. The Queen, [1985] 2 S.C.R. 673 at 694. There the Supreme Court clearly states that the rule of security of tenure means: " . . . ***that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard***." Constitutional protection of judicial independence requires the existence in fact of security of tenure, and maintenance of the perception that it exists. Mackin v. New Brunswick, supra, at 586. In this case, the appearances of security of tenure have been irreparably damaged. In addition, where it is obvious that dismissal is a possible ultimate punishment for the actions charged against a judge, he has the benefit of the presumption of innocence at the time the complaints are laid. Bourbonnais v. Canada (Attorney General) (F.C.A.), 2006 FCA 62, [2006] 4 F.C.R. 170. The duty to comply with the rules of natural justice and to follow rules of procedural fairness extends to all administrative bodies acting under statutory authority. Therrien, supra, at para. 81. Within those rules exists the duty to act fairly, which includes affording to the parties the right to be

heard, or the audi alteram partem rule. In addition, Canadian courts have recognized the doctrine of reasonable expectations which operates as a component of procedural fairness, and finds application when a party affected by an administrative decision can establish a legitimate expectation that a certain procedure would be followed. The doctrine can give rise to a right to make representations, a right to be consulted or perhaps, if circumstances require, more extensive procedural rights. Moreau-Bérubé v. New Brunswick, supra at para.77.

As a result of the Constitutional Court's public complaint against Judge President Hlophe and the vitriolic attacks against him by members of the Cape Bar, law professors, politicians and members of other lunatic fringe groups, Judge President Hlophe has been effectively removed from his position on an interim basis. He has been forced by the unprecedented vicious public attacks to seek a temporary leave of absence. Judge President Hlophe respectfully submits that security of tenure is violated not just when a permanent removal takes place, but equally by a temporary or limited removal, or a day-to-day removal of indefinite duration which follows irresponsible public disclosure of complaints against a sitting judge. In other words, the consequential effect of temporarily removing a judge from judicial duties is as invidious and must be precluded equally with a permanent threat. If left unchecked, the unprecedented action of the 11 constitutional court judges will lead to all kinds of evils that will destroy our entire judicial system or constitutional order. It sends a clear message to all disgruntled litigants and anti-transformation elements that the easiest way to evict a judge from the judicial scene is to create a firestorm of controversy by publicly announcing the filing a complaint alleging the most serious albeit unsubstantiated claims as the 11 judges have done. The consequential effect of temporarily removing a judge from judicial duties through a circus-like lynch-mob atmosphere can come in handy for those litigants and advocates who wish to avoid a particular judge in a case.[8]

Any ability by any party to unilaterally orchestrate a media frenzy and adverse publicity calculated to remove a judge from judicial duties (even through consequential effect), either permanently or temporarily, runs afoul of the basic constitutional principle of judicial independence. This is even worse when the culprit is the nation's highest court. How can the appearance of independence possibly be maintained when litigants, facing the uncertainties of the outcome of their lawsuits and protected only by the Constitution and the rule of law, are faced with the fact that the

[8] In R. v. Regan, conduct of the Crown and police seeking to avoid bringing matters before a particular judge was strongly criticized: The judge shopping in this case was equally offensive. It illustrated another inequality between the Crown and defence, in that only the Crown has the power to influence which judge will hear its case by manipulating the timing of the laying of the charge. Even if this advantage was not ultimately exploited, it must be reasserted that judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system. R. v. Regan, [2002] 1 S.C.R. 297 at 330-331

interpreter of the law and guardian of the Constitution – the trial judge – may be publicly accused through press release by the nation's highest court judges and subjected to an inquiry for removal from office even without a due process hearing? Why should a litigant who has a constitutional due process complaint appear before the constitutional court when that same court shows itself to be either insensitive to or ignorant of the applicable legal principles?

The facts of this case demonstrate the danger. In this case, the initial exiguous complaint of the eleven constitutional court judges which was released to the media was long on condemnation but woefully short on specifics. It is no answer to the constitutional arguments raised by Judge Hlophe to argue that the 11 judges were merely complainants and had no power to "investigate" the complaints or definitively pronounce on its merits. In fact, to argue otherwise is to ignore the harm caused by the public announcement that a complaint about Judge Hlophe has been referred to the JSC – all this emanating form a self-styled "court." The statement went beyond simply announcing a procedural step – it announced that "***the judges of this Court view conduct of this nature in a very serious light***" which implies they believe he has engaged in the said "conduct" even though he was never afforded a fact-finding hearing. They pontificated about section 165 of the Constitution guaranteeing that the courts are independent and "subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts. Organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts." They went on to state that: "any attempt to influence this or any other Court outside proper court proceedings therefore not only violates the specific provisions of the Constitution regarding the role and function of courts, *but also threatens the administration of justice in our country and indeed the democratic nature of the state.* Public confidence in the integrity of the courts is of crucial importance for our constitutional democracy and may not be jeopardised." They concluded by saying that "***this Court*** – and indeed all courts in our country – ***will not yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality. Judges and other judicial officers will continue – to the very best of their ability – to adjudicate all matters before them in accordance with the oath or solemn affirmation they took, guided only by the Constitution and the law.***" This makes it clear that, in their view, a duly constituted "**Court**" held a trial in absentia for Judge President Hlophe and then proceeded to make statements implicating him in high crimes including being a threat to the "***democratic nature of the state."*** As a result of the actions of that "court" and the subsequent media campaign, the constitutional court has been able to unilaterally "remove" Judge President Hlophe as a

judge. The fact that this "removal" is not automatically permanent is irrelevant to the constitutional violation.

The approach of the Canadian courts[9] clearly exposes the reckless and unlawful nature of the actions of our constitutional court here. In Canada, the Canadian Judicial Council which like our JSC has the authority under the Judges Act to handle complaints and allegations of judicial misconduct about federally appointed judges has this to say on its website: "The Council is committed to reviewing complaints about the conduct of judges ***in a way that is sensitive to the person making the complaint, fair to the judge who the complaint was about***, and ***credible to the judiciary and the public.*** While the public must have a way to voice its concerns about members of the judiciary, ***the judges must be given an opportunity to respond to the allegation of misconduct.***" These statements preclude the possibility that a judge like Judge President Hlophe would be informed for the first time about allegations of misconduct made against him through newspapers as was done by the 11 judges of the constitutional court. Moreover, the clear procedures of the Canadian Council are carefully designed to avoid the circus atmosphere experienced in the constitutional court's handling of the complaint against Judge President Hlophe. The Canadian Judicial Council consists of the Chief and Associate Chief Justices of all the courts. According to the Canadian Judicial Council, "*when someone believes that a judge's behaviour is of serious concern, or a judge is not fit to sit on the bench, a complaint may be made to the Canadian Judicial Council.*" Id. Under section 63(2) of the Judges Act, any member of the public (including a provincial attorney general or the federal Minister of Justice) may make a complaint about a federally appointed judge by writing to the Canadian Judicial Council. Id. The Council's jurisdiction arises only upon a complaint being made about inappropriate conduct on the part of a judge, and not about a judge's decision. As provided in the Council's Complaints Procedures, complaints are first screened by the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee of the Council. Most importantly, ***the accused judge's constitutional rights to due process are fully protected- comments are often sought from the judge and his or her Chief Justice***. If serious enough to merit further consideration, the matter is referred to a Panel of up to five chief justices and puisne judges, often following a fact-finding investigation by independent counsel. The Panel can close the file with or without an expression of concern about the conduct which led to the complaint, or it can recommend to the full Council that there be a formal investigation under section 63(2) of the Act to determine whether to recommend the judge's removal from office. In special circumstances, a file

[9] In Valente v The Queen [1985] 2 SCR 673 at 695, the Supreme Court of Canada had no doubt that, under s 99(1) of the Constitution Act 1867, the only method by which judges of the superior courts of Canada may be removed is by the parliamentary process. This view was endorsed by the Federal Court in Gratton v Judicial Council of Canada, [1994] 2 FC 769 (Trial Div).

may be closed when a judge agrees to receive counselling or undertake other remedial measures. If the Council decides to undertake a formal investigation, an Inquiry Committee is appointed. The Committee generally consists of two Council members together with a lawyer appointed by the Minister of Justice of Canada. An Inquiry Committee may summon witnesses, take evidence and require the production of documents in the same was as a superior court. ***A judge whose conduct is being investigated is entitled to be heard and to be represented by counsel.*** Upon completion of its investigation, the Inquiry Committee makes a report to the Canadian Judicial Council. This report may include a recommendation that the judge in question be removed from judicial office because he/she has become, in the words of the Act, "incapacitated or disabled from the due execution of the office of judge" for one or more of the reasons set out in the Act. If the Canadian Judicial Council feels that the conduct in question does not merit removal, it can still express disapproval of such conduct. Upon receipt of such report, the full Council, with or without receiving further submissions from the judge, must formulate a recommendation that the judge be removed, or not be removed, from judicial office.

Although there has never been a Parliamentary removal, a number of judges have resigned at various stages of the process triggered by complaints of misconduct. It is noteworthy that Canadians have never relied on orchestrated adverse publicity or media frenzy to put pressure on accused judges or to drive them into resignation. In fact, they have not only conscientiously protected the due process rights of accused judges throughout the multi-layered process but they have also scrupulously observed strict confidentiality. Professor ***Martin L. Friedland***, in his book ***A Place Apart*** (1995), a comprehensive study of the Canadian federal and provincial judiciary, specifically points out the vital importance of confidentiality in the judicial discipline process:

> "***The visibility of the process is also a matter that requires careful consideration. At the early stages of the process, there has to be a large measure of confidentiality. An allegation of impropriety against a judge can have serious consequences in terms of the credibility of the judge. Thus, it would be very unfair for the Council itself to publicize unfounded complaints that have not gone on to a hearing…There are, of course, cases where the issue is already public and it is in the judge's interest to make the result known. No jurisdiction that I am aware of gives the public access to the investigation stage or routinely reveals the judge's identity at that stage. The new American Bar Association procedures maintain confidentiality at the investigation stage. The same seems to be true in Canada for complaints against lawyers. And in the criminal process generally, police investigations are also normally kept confidential until a charge is laid or some other action is taken.***(emphasis added)" **Friedland,** ***A Place Apart***, supra, p. 134.

The foregoing is clear and unequivocal repudiation of the position adopted by Langa and the other constitutional judges here. Judicial grandstanding and media churning of allegations are not values that we can tolerate in a self-respecting democracy. In this case, public confidence in the judiciary would

more severely be impaired by the JSC's failure to criticize inappropriate conduct by the constitutional court judges and its failure to acknowledge it. For reasons stated herein it is obvious that that JSC's proposal to hold a public hearing at the preliminary stages of an investigation into judicial misconduct is both unsupportable by precedence and inimical to the very idea of judicial independence.

(c) Other Commonwealth Countries And Rules of Confidentiality and Natural Justice

The pivotal question here is: has there been any breach of natural justice in the Constitutional court's handling of the complaint against Judge President Hlophe? The judges have not given any satisfactory explanation as to why they did not notify the Judge President of the complaint against him or afford him an opportunity for a response before they went public. They seem to be arguing that natural justice did not apply to decisions taken at the preliminary stage pending an inquiry by the JSC. Further, they invoke the "public interest" as a justification for the irresponsible manner in which they published the allegations against Judge President Hlophe. Their argument is fundamentally flawed and misplaced as shown by a plethora of case-law from around other Commonwealth countries with similar or comparable legal systems.

A seminal case in this regard is the decision of the Privy Council in ***Rees v. Crane*** (1994) 2 A. C. 173. The Privy Council quashed the suspension of a judge and the decision of the Judicial and Legal Services Commission to represent that the judge's removal from office ought to be investigated. The case concerned a High Court judge in Trinidad and Tobago unlawfully excluded from the roster of sittings for the following term. The procedure laid down by the Constitution of the Republic of Trinidad and Tobago has three stages. First, the Judicial and Legal Services Commission (JLSC) has to decide whether "the question of removing a Judge under this section ought to be investigated." Secondly, where the JLSC represents to the President that an investigation is necessary, the President appoints a Tribunal to investigate the matter. Thirdly, on the basis of the Tribunal's recommendations, the Privy Council decides to remove (or not to remove) the judge from office. In Rees v. Crane,the JLSC found (at the first stage) that an investigation was required and the President set up a tribunal ***without informing the judge of the complaints made against him and giving him a chance to reply to them***. That was eerily similar to the treatment Judge President John Hlophe received in this matter. Indeed, Barron J. stated "***The first that the respondent knew of these happenings was through a television report on the day upon which the President had acted***." The judge brought a successful constitutional challenge on the ground that his fundamental right to the protection of the law under paragraph 4(b) of the Constitution (the right to the protection of the law) had been violated. The state appealed to the Privy Council.

The Privy Council dismissed the State's appeal against the Trinidad and Tobago Court of Appeal's order upholding the judge's constitutional challenge on the ground that his fundamental right to the protection of the law under paragraph 4(b) of the Constitution (the right to the protection of the law) had been violated. The decision to suspend him was contrary to section 137(1) of the Constitution which provided that: "A judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause), or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section." That contravention, it was held, could not be corrected retrospectively by a later suspension order. Several significant observations of the Privy Council are directly relevant to Judge President Hlophe's case.

The Privy Council held that the rules of natural justice had to be implied at the preliminary (representation) stage of the three-stage process outlined in the Constitution. It did not matter that the first two stages of the procedures did not involve the actual investigation itself but dealt with preliminary matters such as whether "the question of removing a Judge under this section ought to be investigated." Natural justice was implied ***because of the seriousness of the allegations and the potential damage to the judge's reputation if he was not given an opportunity to be heard at the representation stage.*** The Judicial Committee held, inter alia, that: "***Although natural justice would not normally require that a person be told of the complaints against him and given an opportunity to answer them if the investigation into the complaints was purely a preliminary inquiry and the person affected was entitled to be heard at a later stage of the inquiry or investigation, there was no universal rule to that effect. Nor did it follow that because the rules of natural justice applied to the procedure as a whole they did not have to be applied at every stage. The courts were not bound by rigid rules as to when the audi alteram partem rule applied and would have regard to all the circumstances of the case.***" In that particular case the Judicial Committee decided that having regard to the serious nature of the charges against the respondent, the publicity surrounding his suspension and the damage to his reputation and position as a judge, he ought to have been given the opportunity to reply to the charges before representation was made to the President.

Contrary to Langa's assertions in this case, the fact that the matter involves a judge and the fact that the so-called complaint reflect a decision by a "court" constituted by all eleven judges provide a compelling reason to accord due process and to comply with the rules of natural justice and the provisions of the constitution. The reasoning of the Privy Council was very clear. While the judges on appeal acknowledged that sometimes it would be necessary to move with speed in cases of allegations of misconduct, they pointed out that an individual judge was in "**a particularly vulnerable position both for the present and for the future if suspicion of the kind referred to is raised without**

foundation." The judge whose duty was to accord fairness was also entitled to have fairness accorded to him in such a circumstance. Hence the essential duty of maintaining a principle of equity in such circumstances.

The reasoning of the Rees case highlights the confusion of the Langa court in the instant case. It is true that the Constitutional Court itself is not the investigating body but the preliminary step taken by the court including the order of administrative referral of the complaint to the JSC is of paramount importance. The Rees case focuses attention on the kinds of decision which attract natural justice. The Privy Council held that the failure to notify the judge of the complaints made against him and that the Commission ***was considering referring the matter to the President was a breach of fair procedures.*** Lord Slynn acknowledged that a three tier procedure had to be exhausted before the judge could be removed from office. However the Privy Council held:

> ***"[i] t is not a priori sufficient to say, as the Appellants in effect do, that it is accepted the rules of natural justice apply to the procedure as a whole but they do not have to be followed at any individual stage***. The question remains whether fairness requires that the audi alteram partem rule be applied at the commission [initial] stage . . . ***their Lordships are satisfied that in all circumstances the respondent was not treated fairly. He ought to have been told about the allegations made to the Commission and given a chance to deal with them – not necessarily by oral hearing, but in whatever way was necessary for him reasonably to make his reply***."

What is important here is to recognize the detrimental effects of a decision to hold an inquiry into the fitness to hold judicial office or to practice of a professional person on the professional's reputation. It is pointed out by the Privy Council in Rees v. Crane that ***knowledge of the fact of a complaint may damage the subject of it, and specifically confidence in him or her as a professional person, in a way which may not be entirely repaired even by a successful out-come to the full hearing***. Just like Judge President Hlophe, the applicant in that case was a Judge, obliged to sit in public, and the opinion of Lord Slynn makes it quite clear that such damage can be incurred by other professionals as well. In Rees v Crane Lord Slynn emphasised the importance of this aspect when the enquiry is into the conduct of a judge. He said at 847:

> "***But a judge, though by no means uniquely, is in a particularly vulnerable position, both for the present and for the future, if suspicion of the kind referred to is raised without foundation. Fairness, if it can be achieved without interference with the due administration of the Courts, requires that the person complained of should know at an early stage what is alleged so that, if he has an answer, he can give it.***"

What is abundantly clear is that natural justice will apply even to decisions taken at the preliminary stage pending an inquiry if a person's livelihood or reputation is likely to be damaged. The decision of the Court of Appeal in Lewis v. Heffer [1978] 1 WLR 1061 at 1078 in Geoffrey Lane L. J.

stated: "In most types of cases there is in the early stages a point at which action of some sort must be taken firmly in order to set the wheels of investigation in motion. Natural justice will seldom if ever at that stage demand that the investigator should act judicially in the sense of having to hear both sides. ***No one's livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone's reputation or to inflicting financial loss on someone the more necessary it becomes to act judicially and the greater the importance of observing the maxim audi alteram partem***". The proper inquiry is whether at each stage of the procedure the accused was treated fairly.

The Court of Appeal of Guyana found the procedure followed in removing the judge in Barnwell v Attorney General 1994 (3) LRC 30 defective. The Chancellor of the Judiciary of the Republic had invited the judge to an interview after receiving a complaint from a Chief Magistrate about the attempt by the judge to influence the outcome of the case before the Chief Magistrate. Without giving the judge the details of the allegations or letting him see a copy of the petition against him, the Chancellor, acting also in his capacity as the chairman of the Judicial Service Commission, demanded the resignation of the Judge failing which he would face an inquiry leading to his removal in accordance with article 197 of the Constitution of Guyana 1980. The Commission subsequently met and considered the allegations along with the Chancellor's recollections of the interview with the Judge but did not hear the Judge. The Commission represented to the President that removal of the judge from office be investigated. Although the judge wrote an explanation to the Commission, the latter did not recall its representation to the President who, pursuant to article 197(5), suspended the judge pending investigation by a tribunal as to the judge's removal. The Court was unanimous in holding that there was a breach of the principles of fairness and natural justice in that the Commission made representations to the President without having given the judge a hearing. According to Bishop CJ, given that the Constitution did not exclude the rules of natural justice and gave judges a protected status, on general principles of fairness it ***was not proper that a judge suffered loss of status, reputation, position, prestige, power and property (which exoneration would not necessarily undo) without a hearing before the Commission's representation to or suspension by the President***. Fairness had not been extended by observing the rules of natural justice or acting under a duty to be fair since the judge had no prior intimation of the agenda for his meeting with the Chancellor and had no ample opportunity to respond in that meeting (at 66-68, 78, 79 & 82). In his judgment, Kennard JA held that the rules of natural justice and fairness applied to a representation by the Commission to the President as to the removal of a judge since the Commission was a body having legal authority to determine a question affecting the judge's rights and there was no contrary intention in the Constitution. Natural

justice also applied to suspension of a judge from office since it was a drastic measure with a devastating effect causing prejudice that might never be assuaged (at 95, 97-8, 99 & 103). Per Churaman JA: given the constitutional importance of removal of a judge from office, the Commission ***had a duty to act reasonably in deciding whether to make a representation to the President which included hearing the judge first***. Further, ***a decision-maker deciding a question affecting the rights of an office-holder (particularly given the constitutional office of judge and the fact that the Commission's decision not to make a representation would be an end to the matter), had a duty to hear the office-holder before a decision in the absence of clear statutory words to the contrary***. Moreover, there was a right to be heard as to suspension since the consequences could be untold financially, emotionally and socially and no legislation denied such a right (at 128-9, 130-31, 134 & 136).

At the appellate level in Barnwell v AG of Guyana, [1994] 3 LRC 30 at 39-40 and 97, Guyana's Court of Appeal recognized something that Langa and his colleagues have wilfully turned a blind eye to – that is once removal proceedings are instituted they are likely to attract considerable publicity, especially when the judge is of a superior court. As recognised in Barnwell the very fact that a judge's fitness to remain in office has become the subject of investigation may, when made public, sully the judge's reputation forever, notwithstanding that he or she is eventually cleared of the allegations against him or her. It may be untenable for that judge to continue serving on the bench even if he is exonerated. Accordingly, the Court of Appeal held that a judge was entitled to a hearing before the JSC's representation to or suspension by the President. The seriousness of the allegations or strength of the evidence does not excuse failure to provide a due process hearing. For example, in the controversial Barnwell case, the judge partially admitted the allegation made against him by the Chief Magistrate to the effect that he went to her office and spoke to her in connection with drug charges that were brought against his two relatives and was seeking to have her impose a monetary penalty on them instead of imprisonment. Because he was not given a hearing by the Judicial Service Commission before that body made a representation to the President or by the President before suspension, his suspension was held to be null and void, although he was given a hearing at a later stage where the Tribunal found the allegations made against him to be true.

Another issue decided by the court in Barnwell v. Attorney General was the legitimate expectation that a judge who has a constitutionally guaranteed security of tenure would receive natural justice. On two occasions the judge was invited to appear before the Judicial and Legal Services Commission in relation to allegations which had been made about his conduct. On each occasion after the appellant had explained his conduct to the Commission, the matters were treated as closed and the

Commission took no further action. In September 1989 the appellant was summoned to the Chambers of the Chancellor who was also Chairman of the Commission. He was told that a magistrate had made allegations against him in a letter sent to the Chancellor. The Chancellor did not show the letter to the appellant but merely read it to him. The Chancellor thereafter reported his discussions with the appellant to the Commission and showed the members of the Commission the letter. Some days later, without giving the appellant an opportunity to appear before it or comment in any way, the Commission represented to the President of the Republic that the question of removing the appellant from office be investigated and the appellant was in fact soon suspended from office. He sought judicial review of the decision of the Commission. The court stressed the need to take account of the doctrine of legitimate expectation which "lends itself readily for application to written constitutional provisions which embody the fundamental and organic law". Aubrey Bishop CJ and Cecil Kennard JA held that the appellant had been deprived of his legitimate expectation (as a matter of constitutional security of tenure and based on his previous experience before the Commission in relation to allegations) that he would have been afforded an opportunity to be heard before the Commission reached a decision. The Court cited with approval a dictum of Kenneth George C in Kent Garment Factory (1991) 46 WIR 177 at p.187 on the doctrine of legitimate expectation: "*It is a concept that is based on the desirability of and indeed the necessity for, propriety and good faith on the part of a public official or authority towards a citizen, not to depart from a course of action which the latter has been led to believe or expect would be pursued or adopted and which departure would adversely affect his property or liberty, without due and adequate notice and, if appropriate, providing for an opportunity to be heard*."

Another case demonstrating the clearly incompetent and unlawful manner in which in which our constitutional court judges acted is George Meerabux v. The Attorney General of Belize [2005] UKPC 12. The best description of the procedural posture and constitutional issues raised in that case is found in the judgment of Abdulai Conteh, Chief Justice of the Supreme Court of Belize (given before the case went to the Privy Council).

See. http://www.belizelaw.org/judgements/no_65_of_2001.html. Unlike our 11 constitutional court judges, Justice Conteh properly understood that adverse publicity given to untested allegations of judicial misconduct against a sitting judge can have far-reaching and devastating consequences and result in violation of the constitutional rights of the accused. His eloquent observations are worth quoting at length:

> "***News that a judge of the Supreme Court is to appear before any body for the purposes of investigation is certainly of general public interest***. This must be so because of the position of a judge in nearly every society. It has been said and rightly so; in my view, that ***society attributes honour, if not veneration, learning if not wisdom, together with detachment,***

probity, prestige and power to the office of a judge. Therefore, ***news of any probe concerning a judge would elicit public attention, whether of the concerned or the plainly curious. This may be for the public good.***
But ***the public weal itself will be damaged if the news is not handled with care and circumspection; for it may inevitably result in the corrosion of public confidence in the judiciary itself, with deleterious effects on the administration of justice as a whole.***
The ***public right to know and be informed is one which the courts ought always to protect, but this must be balanced with the way that knowledge or information is purveyed. Anything tending to convey unsubstantiated rumours, idle gossip or the salacious must be restrained, particularly in a society*** **such as we have in Belize**, ***which is a veritable fish bowl for almost every public office holder*****. Otherwise**, ***the right to know becomes corrupted with the zeal to feed frenzy on unsubstantiated rumours and stories. This will be a positive disservice to all Belizeans, for when facts and fiction collide, faction is the result.***
This is why I regret the way in which some sections of the media covered the developments concerning the applicant that have culminated in this application before me. And the Applicant has, not without reason, complained. **But** ***I am satisfied that none of the parties to this application is in any way responsible for the less than satisfactory manner in which some sections of the press tried to portray the applicant. It is therefore reassuring to note the fact that the President of the second Respondent, the Belize Bar Association, has filed an Affidavit in these proceedings distancing the Association from the publication of their allegations contained in their complaint to the Governor-General, and has affirmed that the Association bears or harbours no malice towards the Applicant.***
It is possible that ***but for the unfortunate disclosure in the press, the applicant might not have felt the need to apprehend that he has been denied, as he contends in this application, the protection of the law, and he therefore harbours perhaps an understandable feeling of being railroaded.*** Hence his present application. And to this I must now turn." Id. (emphasis added).

Sadly, the learned judge's observations that "none of the parties to this application is in any way responsible for the less than satisfactory manner in which some sections of the press tried to portray the [accused judge]" cannot apply to our constitutional court judges. These eleven judges were solely responsible for issuing the press statements impugned here and without factual details. This fueled speculation and unprecedented amount of condemnation for Judge President Hlophe in the press. The continued leaks and "widespread disrespect for confidentiality" which continue unabated despite the "misgivings" of the JSC speak volumes about the 11 judges' complete failure to ensure that the news about Judge President Hlophe was "handled with care and circumspection" and their insensitivity to the fact that media churning of these unsubstantiated allegations "may inevitably result in the corrosion of public confidence in the judiciary itself, with deleterious effects on the administration of justice as a whole." They failed to appreciate that the "public right to know and be informed is one which the courts ought always to protect, but this must be balanced with the way that knowledge or information is purveyed." They were wilfully blind to the reality that irresponsible action on their part would result in the present morass where "the right to know becomes corrupted with the zeal to feed frenzy on

unsubstantiated rumours and stories." Unlike the Meerabux case where "***the President of the … Belize Bar Association, … filed an Affidavit in … distancing the Association from the publication of their allegations contained in their complaint to the Governor-General***" our 11 constitutional court judges have unclean hands- they were responsible for the initial decision to publicize these charges and appear to be even guilty of the leaks of sensitive documents addressed only to the Deputy Chief Justice and the Chief Justice. The JSC must act firmly and affirmatively in this matter to restore public confidence in our judicial system – it needs commonsense measures and respect for the constitution recognized even in small countries such as Belize! The call for public comments on whether the investigation ought to be conducted in public is nothing but a red herring having no connection with truth-0finding.

Chief Justice Conteh continued with his incisive analysis and delivered the most memorable and eloquent decision on the issues of natural justice and procedural fairness in judicial misconduct investigations:

> "At the heart of this complaint is ***that there has been a denial of natural justice by the breach of procedural fairness, the Audi alteram partem rule***: that there has been a determination or decision by the Governor-General to refer the complaints against him to the Belize Advisory Council and to suspend him even before his own side of the story was heard or told.
> It has been rightly said that "***That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, proclaimed in Seneca's Medea, enshrined in the Scriptures - ("Doth our law judge any man, before it hear him and knoweth what he doeth***? (John, VII, 51), mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Book to the law of nature, asserted by Coke to be ***a principle of divine justice, and traced by an eighteen-century judge to the events in the Garden of Eden***" - see De Smith, Woolf and Jowell, Judicial Review of Administration Action (5th ed. 1995) at pp. 378-379.
> ***Natural justice is a principle therefore that is as old as the hills, if not before. It is reflected in all the religions of the Abrahimic tradition that even at the moment of the descent of humankind from the Divine presence, it was not a decision reached in the absence of natural justice***: ". . .even ***God himself did not pass sentence upon Adam, before he was called upon to make his defence. 'Adam', says God; where at thou? Hast thou not eaten of the tree, whereof I commanded thee thou shouldst not eat?***' - R v Chancellor of the University of Cambridge (1723) 1 Str. 557 at 567 per Forfescue J."

Chief Justice Conteh cited with approval both Rees v Crane, and the Barnwell cases, and ruled that "the decisions to make representation to the President regarding the question of the removal of the judges in those cases and to have the relevant Commissions sit to enquire into their removal were quashed because it was found that they had not been given an opportunity to be heard before the decisions were arrived at." He summed up his analysis of these cases as follows:

In the Rees case, Lord Slynn of Hadley delivering the opinion of the Board of the Judicial Committee of the Privy Council, quoted with approval the following from Sir William Wade in his Administrative Law (6th Edn.) at pages 496 and 497 :

> ***"As the authorities will show, the courts took their stand several centuries ago on the broad principle that bodies entrusted with legal power could not validly exercise it without first hearing the person who was going to suffer. This principle was applied very widely to administrative as well as to judicial acts, and to the acts of individual Ministers and officials as well as to the acts of collective bodies, such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing was just as much a canon of good administration as of good legal procedure. Even where an order or determination is unchallengeable as regards its substance, the Courts can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration."***

Again at page 570, the learned author continues:

> ***"Natural justice is concerned with the exercise of power, that is to say, with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected" (emphasis added).***

I respectfully adopt this exposition of the law. Looking therefore at the relevant constitutional provisions on the removal of a judge of the Supreme Court (the statutory procedure if you will), I hold that a judge who is the subject of those provisions, as the applicant in the instant case, is entitled, ex debito justitiae, to he heard at every stage of the procedure. This is so, even though the relevant Constitutional provisions are silent on the right of the affected judge to be heard. Justice requires it and if the independence of the judiciary means anything, this must be so. For without the right to be heard at each stage of the procedure, a judge would be condemned unheard. This will be a terrible day for the independence of the judiciary, the due administration of justice, and the rights and freedoms of Belizeans the protection and enforcement of which are entrusted to judges of the Supreme Court. If a judge of the Supreme Court does not have the right to procedural fairness, natural justice, fundamental justice, fair play in action, rational justice, substantial justice, or call it by whatever name or simply justice without any epithet, in a critical area as his tenure of office or the question of his removal therefrom, then it simply boggles the imagination to fathom how he can truly, with independence and integrity, dispense justice let alone protect the rights and freedoms of all Belizeans.

The learned judge continued:

> Surely, the framers of the Constitution could not have intended this. I am therefore prepared to hold and I do hold that notwithstanding the silence of subsections (3), (4) and (5) of section 98 of the Constitution, ***a judge of the Supreme Court of Belize, such as the applicant, is entitled to natural justice, in particular the principle of audi alteram partem, procedural fairness, in relation to the question of his removal from office whether it be inability to perform the functions of his office for whatever cause or misbehaviour. The applicant therefore has a right to be heard before a decision concerning the question of his removal is arrived at. This***

right I also hold is applicable to all the stages of the process, viz, at the consideration stage by the Governor-General of the question of his removal from office whether for inability or misbehaviour ought to be investigated, at the stage where if the matter is referred to the Belize Advisory Council, (the referral stage).

What is important here is to appreciate the wise approach of the Supreme Court of Belize and the Privy Council in this matter. The press in Belize saw the sacking of Justice George Meerabux as part of a clean-up of an intolerably slow and corrupt judiciary. The allegations against Justice Meerabux were far more serious than those levelled against Judge President Hlophe. The Bar Association successfully led evidence in support of its complaints and proved the following:

> "(i) an allegation that Meerabuxx had colluded with Mr Gian Gandhi, then the Solicitor General of Belize, in preparing his judgment in a case in which Mr Gandhi had appeared on behalf of the Attorney General;
> (ii) an allegation that Meerabux was willing to interfere improperly with the functions of the justice system, in that he met Mr Orlando de la Fuente, who was a party to a child custody case before another judge, and informed him that if he had known about the matter he would have transferred the case into his own court and awarded him custody of the child;
> (iii) an allegation that the appellant entered into an intimate sexual relationship with Miss Ruth Guerra while she was a defendant in criminal proceedings, in the course of which he varied her bail conditions on at least two occasions without there having been any formal applications to that effect; and
> (iv) an allegation that on two occasions he had received gifts or money from litigants appearing before him and that he had held himself out as willing to use his office for improper gains." George Meerabux v. The Attorney General of Belize [2005] UKPC 12.

And yet, the courts did not allow themselves to be blinded by the heinous nature of the offences alleged. They affirmed that even a judge like Meerabux against whom there existed overwhelming credible evidence was entitled to full procedural due process protections. The judge was eventually removed by the Governor General after an investigation and a due process hearing. He later challenged the decision again on the basis of bias but was unsuccessful. Mr Meerabux sought declarations on various points amounting to a declaration that he had been deprived of a fair hearing. He objected that the chair of tribunal which made findings against him, and recommended his dismissal to the Governor General, was a member of the same Bar Association which had initiated the complaint against him. He also objected that the tribunal sat in camera. On the facts of the case, Meerabux did not succeed in his claim. One of his two brothers on the Supreme Court bench declined to makes the declarations he sought (judgment). Then he sought a stay of the Governor General's action against him from another justice of the Supreme Court (which was refused). Then the Governor General removed him from

office. Then he applied again for declarations that he been treated unfairly, and a third judge dismissed that application. That matter went to the Court of Appeal (judgment), and up to the Privy Council. Mr. Meerabux failed in every court. But the overwhelming nature of the evidence against him was not deemed a valid reason to violate his constitutional rights.

Other courts from other commonwealth countries have had no difficulty applying the principles enunciated in Rees v. Crane above to other cases of professional misconduct involving health-care and legal professionals. Suffice it to mention only two other cases, one from Ireland and one Australian. The Irish Supreme Court decision in O'Ceallaigh v An Bord Altranais [2000] 4 IR 54, Sup. Crt. concerned complaints made against Ms. O'Ceallaigh, a domiciliary midwife, and the subsequent disciplinary procedure under the Nurses Act 1985 to which she was made subject. The complaints were dealt with under the provisions of section 38 of the Nurses Act 1985 which has four stages. First, the Fitness to Practice Committee considers the complaint and decides whether there is a prima facie case for the holding of an inquiry. Second, if it decides that there is a prima facie case the Committee holds the inquiry and makes a report. Third, on the basis of the report the Board takes a decision. Fourth, the decision has no legal effect unless and until it is confirmed by the High Court. Four complaints were made against Ms. O'Ceallaigh. When the first complaint was made Ms. O'Ceallaigh was notified of it and given an opportunity to respond. The Fitness to Practice committee did not decide that there was a prima facie case for the holding of an inquiry until they had heard what Ms. O'Ceallaigh had to say. This was not the case with the subsequent three complaints. The Committee decided that these complaints were genuine and serious and that a full inquiry was necessary without informing Ms. O'Ceallaigh of the complaints and hearing her side. Ms. O'Ceallaigh challenged the procedures adopted in relation to the last three complaints made against her. She argued that the decisions to hold an inquiry into her fitness to practice ought not to have been taken without hearing what she had to say. As a result, there was a breach of fair procedures in relation to the three complaints. The Board's reply was that the right to be informed and to reply at a later stage – the full inquiry – dispensed with the obligation or duty to inform at the initial or a preliminary stage. The decision to hold the inquiry was merely a preliminary matter and consequently, the principle of ***audi alteram partem*** did not apply.

The three main judgments in the Supreme Court, including Murphy J.'s dissent, occupied themselves in the main with a discussion of the decision of the Privy Council in Rees v. Crane above. The court reiterated the principles in Rees v. Crane which concerned the fairness of the procedures adopted in the removal from office of a judge. The court stressed that in Rees v. Crane the JLSC found that an investigation was required and the President set up a tribunal without in-forming the judge of the

complaints made against him and giving him a chance to reply to them. Indeed, Barron J. stated "*The first that the respondent knew of these happenings was through a television report on the day upon which the President had acted*." According to Lord Slynn the proper inquiry is whether at each stage of the procedure the accused was treated fairly. Hardiman J., Barron J. and Murphy J. dissenting broadly endorsed this statement of principle. However, while the members of the Supreme Court agreed with the statement of the law they disagreed on what constituted fair and proper. The minority view Murphy J. dissenting held that Ms. O'Ceallaigh had been treated fairly at all stages of the procedure. He argued that the initial decision whether or not to hold a full inquiry into the fitness to practice of a nurse was not a decision to which the principles of natural justice applied because the decision was merely a preliminary decision and did not affect the nurse. He distinguished Rees v. Crane on the basis that under the relevant procedure in Rees v. Crane the accused could be suspended on the basis of the report made at the initial stage. Under the Nurses Act the Committee had no such power at the initial stage. It could only decide that a full inquiry was warranted. Nurse O'Ceallaigh's livelihood or reputation was not at stake. The decision was merely a procedural formality and not a determination of the substantive merits of the allegations. Murphy J. stated that the Committee "was not called upon to predict with a particular degree of confidence, or at all, the manner in which the issue might be resolved ultimately." He continued: "I am satisfied that the decision of the Committee was merely the first step in a sequence of measures which might culminate in a decision detrimental to the interests of Nurse O'Ceallaigh and that this is the type of decision which does not, in general, attract the right for the person who may be affected to be heard at that stage." Murphy J. further argued that the prima facie stage provided a useful filtering mechanism and that this function would be stultified if a hearing was necessary at this initial stage. Indeed it would make the first stage otiose; the first stage and the second inquiry stage would now be identical.

The majority of the Court took a different view. Hardiman, Barron and Geoghegan JJ. took the view that it was not fair that Ms. O'Ceallaigh was only made aware of the complaint after the decision to hold an inquiry had been taken. They held that a decision to hold an inquiry into the fitness to practice of a nurse is a very serious matter which can affect the person against whom the complaint is made and as a result the principles of natural justice apply. Hardiman J. stated "***A decision to hold an inquiry into the alleged misconduct of a professional person in the position of the Applicant is itself a grave matter.*** . . " He reasoned, firstly, that the decision to hold the inquiry had serious financial consequences for Ms. O'Ceallaigh. He observed that defending one's conduct at an inquiry can be a costly matter and in this case Nurse O'Ceallaigh "would have to defend herself at her own expense since apparently the Irish Nurses Organisation Professional Insurance Policy does not extend the costs of

defending allegations of professional misconduct." The inquiry into the first allegation against Ms. O'Ceallaigh lasted seventeen days. Hardiman J. continued "Quite clearly both legal representation and medical midwifery expertise would have to be deployed." The decision to hold the inquiry exposed Ms. O'Ceallaigh to financial strains. Secondly, Hardiman J. observed that while the section 44 procedure may be activated in isolation, in this case the suspension order under section 44 had only been sought pending the outcome of the inquiry. Therefore, the decision to hold the inquiry under section 38 had the effect of triggering the suspension of Nurse O'Ceallaigh under section 44. This restriction on Ms. O'Ceallaigh's ability to practice was damaging. He stated that "[a] ny restriction on her practice would also bear more heavily on a self employed professional such as Nurse Kelly than on a public official who would presumably be paid while under suspension." The detrimental suspension of Ms. O'Ceallaigh under section 44 was connected to and indeed dependent on the decision to hold the inquiry under section 38. Thirdly, Hardiman J. considered the detrimental effects of a decision to hold an inquiry into the fitness to practice of a professional person on the professional's reputation. He stated: "***It is pointed out by the Privy Council in Rees v. Crane that knowledge of the fact of a complaint may damage the subject of it, and specifically confidence in him or her as a professional person, in a way which may not be entirely repaired even by a successful out-come to the full hearing. Though the Applicant in that case was a Judge, obliged to sit in public, the opinion of Lord Slynn makes it quite clear that such damage can be incurred by other professionals as well.***" Fourthly, Hardiman J. rejected claims that the complaints procedure under section 38 would not be stultified if the Fitness to Practice Committee was under an obligation to notify persons against whom complaints had been made. This problem, the judge stated, could easily be avoided by simply requiring the accused to give an answer within a reasonable time. He pointed out that in the O' Ceallaigh case one of the complaints made related to a birth where Ms. O'Ceallaigh was not the midwife in charge of the birth and was not responsible for the plan to have a home delivery. This complaint could have been exploded at the very initial stage if Ms. O'Ceallaigh had been given the opportunity of giving her side of the story. The filtering function would be enhanced and not hindered if the accused was given an opportunity to respond to the complaint at the initial stage. The Irish Supreme Court's O' Ceallaigh case makes one thing abundantly clear: When dealing with accused persons in a profession founded on trust and confidence, the courts need to be sensitive to procedural fairness requirements. The reputation of say a nurse who becomes embroiled in an inquiry into her fitness to practice is bound to be damaged. The relationship of trust and confidence will be infected. ***People assume that where there is smoke, there is fire. At the full inquiry the person's conduct may be fully vindicated. But her reputation may be permanently and irreparably damaged.***

Lord Slynn's observations in Rees were quoted with approval by Sheller JA (with whom Priestley and Stein JJA agreed) in the Australian case, Murray v Legal Services Commissioner (1999) 46 NSWLR 224 where the court emphasized that, not infrequently, the first step in a sequence of measures may itself be sufficiently detrimental to a person's interests and legitimate expectations that an opportunity to be heard before the first step is taken will be required. In Murray's case the Commissioner conducted an investigation into a complaint against a legal practitioner. There the question was whether the Commissioner was required to give the legal practitioner an opportunity to be heard, and consequently access to a copy of the complaint, before making a decision under s 155 of the Legal Profession Act 1987 (NSW) to institute proceedings or take some other steps. The Court gave an affirmative answer. Section 155 required the Commissioner to be 'satisfied' of certain matters, and Sheller JA said (at 247) he found it hard to imagine that the Commissioner could reach the required level of satisfaction without taking into account the legal practitioner's response to the complaint made against him or her. He also drew attention to the serious consequences to the legal practitioner of an adverse decision. He concluded that these considerations gave the legal practitioner a legitimate expectation that he would be heard before the Commissioner made a decision under s155.

The irresponsible actions of the 11 constitutional court judges who paraded allegations against a sitting Judge President are deserving of condemnation by the JSC. It would be wrong for the JSC to further compound the constitutional violations by violating confidentiality even before there has been a determination that a prima facie case exists.

d. Confidentiality and Natural Justice for Accused Judges - International Standards and UN Basic Principles on the Independence of the Judiciary

The United Nations has endorsed the essential importance of an independent judiciary by its adoption of the Basic Principles on the Independence of the Judiciary at its Seventh Congress in 1985.[10] As a consequence of the adoption of the Basic Principles by the UN General Assembly, each member state is expected to guarantee the independence of its judiciary in its constitution or the laws of the country.[11] In addition several international standards concentrate on securing judicial independence by insulating judicial processes from external influence. For example, Commonwealth (Latimer House) Principles for the Commonwealth (CLHP), 2003- Latimer House Guidelines on the "Independence of the Judiciary"; and the Bangalore Principles of Judicial Conduct (2002)[12] set forth the standards for

[10] See General Assembly resolution 40/146, 1985.
[11] See Basic Principles on the Independence of the Judiciary, Art. 1
[12] The Bangalore Principles were developed by the Judicial Group on Strengthening Judicial Integrity, a group of senior judges from eight African and Asian common law countries. This group was formed in 2000 under the auspices of the Global Programme Against Corruption of the UN Office of Drug Control and Crime Prevention in Vienna. The principles

safeguarding judicial independence and should have been considered by the 11 judges before they acted rashly. In the U.N. Basic Principles on the Independence of the Judiciary it is provided in paragraph 12 that "***judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists***". In Zand v. Austria 1978 15 D.R. 70 it was said that "***The irremoveability of judges during their term of office, whether it be for a limited period of time or for life time, is a necessary corollary of their independence***". As the Canadian case of Valente stated: "The essence of security of tenure is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner".

Judge Langa's false dichotomy between openness and transparency on the one hand and respect for confidentiality on the other is misplaced. The UN "Basic Principles on the Independence of the Judiciary"[13], encourage countries to adopt appropriate, transparent and objective procedures for disciplining judges, and suggest that legislative and executive bodies should have limited involvement in this process. And yet, the same Basic Principles explicitly recognize that respect for confidentiality is crucial in protecting judicial independence and the human rights of the accused judge. Article 17 of the Basic Principles on the Independence of the Judiciary specifically states that the examination of a complaint "…***at its initial stage shall be kept confidential, unless otherwise requested by the judge***".

The Bangalore Principles of Judicial Conduct (2002) (which were ironically developed by judges including Langa) recognize that judiciaries are not passive players in terms of maintaining the independence, impartiality and effectiveness of a judicial system, and therefore its integrity, but must be active in maintaining appropriate standards of judicial conduct and performance. In addition, the necessity of judicial independence is amply articulated by the Latimer House Principles, endorsed by

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were subsequently adopted by a roundtable of chief justices from all major legal traditions in November 2002. A group of judges preparing recommendations for action for other judges was perceived to have a legitimacy that more traditional, state-centred processes would not. The question of legitimacy is crucial to their effectiveness and future impact, and has been reflected in their quick adoption and acceptance by countries around the world. The Bangalore Principles are primarily directed at judiciaries for implementation and enforcement, rather than the state.
The Bangalore Principles set out six core values that should guide the exercise of judicial office, namely: independence, impartiality, integrity, equality, propriety, and competence and diligence. Under each value the principles describe specific considerations and situations of which judges should be aware in order to ensure the maintenance of, and public confidence in, judicial integrity. In the case of propriety, for example, the principles highlight the fact that the position of judge is one that carries significant responsibility and weight, and so a judge must accept restrictions that would otherwise be considered burdensome. These restrictions include not fraternising with members of the legal profession who regularly appear before the judge in court, or not allowing family members to appear before the judge's court as parties or lawyers since both give rise to the perception of favouritism and lack of impartiality, and undermine confidence in the administration of justice. The focus on practical guidance and specificity, compared to other international standards, makes them of direct utility to members of the judiciary.

[13] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

Commonwealth Heads of Government at their summit in Abuja, Nigeria, December 2003. Article IV provides:

> An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, ***consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country***. (emphasis added)

These same principles discourage public admonishment and limit grounds for removal of judges to serious misconduct and inability to perform judicial duties. Further, the CLHP state that judicial officers "***must have the right to be fully informed of the charges, to be represented at the hearing, to make a full defence, and to be judged by an independent and impartial tribunal.***'" Id. In the interest of judicial independence, the person investigated must be able to represent themselves at no cost, common law rights should apply, and removal should only be pursued if the tribunal believes that the misconduct occurred beyond reasonable doubt. It also stands to reason that judge who is in the process of being investigated should enjoy procedural due process protections during the investigation. Also, in the interest of judicial independence, most importantly security of tenure and freedom from undue outside influence, breach of confidentiality must be condemned in the strongest terms possible. It is also obvious that impartiality has to be maintained at all costs in accordance with the CLHP, which state that "*Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness*." Furthermore, the Universal Declaration of Human Rights[14] enshrines the principles of: (1) equality before the law, (2) the presumption of innocence, and (3) the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

In fact, the guidelines on "Judicial Ethics in South Africa" issued by the Chief Justice, the President of the Constitutional Court and the judges president of the different High Courts and the Labour Appeal and the President of the Land Claims Court state "***in the preparation of these guidelines regard was had to the Constitution, our common law, case law, and international standards***." Why should "case law and international standards now be abandoned simply because the case involves allegations against Judge Hlophe? In fact, Guideline number 5 of these guidelines (South African) states that "***in conducting judicial proceedings, a judge should give special attention to the right of equality before the law and the right of equal protection and benefit of the law. A judge***

[14] Adopted by the United Nations in December, 1948. Article 10 reads: "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*." See also article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), UN General Assembly Resolution 2200 A (XXI) of 16 December 1996,entered into force on 23 March 1976 in accordance with Article 49.

should not in the performance of judicial duties manifest any bias or prejudice." Guideline number 19 also states that a judge should respect the "***confidences of colleagues***" and expressly recognizes that "***private consultations and debate are inherent in the functioning of a judge; and often a mere sounding board is helpful. It goes without saying that confidentiality is also essential for this benefit of collegiality to function***." Apparently the 11 judges and now the JSC do not believe that Judge Hlophe counts as a "colleague" whose confidences must be respected by anyone. The freedom of speech recognized for all judges apparently does not apply to him!

The Guidelines also recognize the obligation of a judge to "inform the relevant professional body or a Director of Public Prosecutions of any conduct on the part of a legal practitioner or public prosecutor which may be unprofessional." (Guideline number 20). It states that the judge "***ought to have clear and reliable evidence of serious misconduct or gross incompetence***…A judge should not assume the role of prosecutor and is not a policeman. ***When a judge decides to take action in response to perceived misconduct , the reference to the appropriate authority should be made in a neutral fashion.***" Most important, the same guideline states: "***Before commenting in a judgement or in public*** on the conduct of a particular practitioner or prosecutor, ***the judge should give that person the opportunity to deal with the allegation***." The latter statement should dispose of the absurd argument of the constitutional court judges that they did not have to observe natural justice and ***audi alteram partem*** rule before commenting in public (through press releases) on Judge President Hlophe's alleged misconduct. Once again, it is simply ridiculous to insist on the one hand that confidentiality can be observed with respect to accused magistrates and that lawyers accused by judges of unprofessional conduct and that such persons are entitled to an opportunity to make a response before the accusations are released to the public while insisting on the other hand that a judge president of our high court has no similar procedural protections. The fact that the Concourt judges, for whom ignorance of the law can never be an excuse, have used the press and other news media to inflict damage on a sitting judge president is not sufficient reason for the JSC to wallow in the mud by entertaining the issue of public hearings at this stage.

VI. As A Matter of Law, the So-Called Complaint of "Court" Has No Legal Status And Fails to State A Prima Facie Case of Judicial Misconduct.

As a point of departure, where misconduct is the ground being considered under Section 177 of the Constitution, the JSC must find "gross misconduct" not simply "misconduct". "Gross" is a word of emphasis. It means that the misconduct must be really serious and grave before that ground can be said to have been established. In England, the ground for removal is misbehaviour. ***Halsbury's Laws of England*** 4th ed. 1107 states :

> "'***Behaviour***' means ***behaviour in matters concerning the office, except in the case of conviction upon an indictment for any infamous offence of such a nature as to render the person unfit to exercise the office, which amount legally to misbehaviour, though not committed in connection with the office***. ***'Misbehaviour' as to the office itself means improper exercise of the functions appertaining to the office or non attendance or neglect of or refusal to perform the duties of the office."***

In my view, gross misconduct in Section 177 has much the same meaning. The grave nature of the conduct required to justify the removal of a Judge is illustrated by the fact that in all the centuries of the judiciary in England, only one Judge has ever been removed for misbehaviour: Sir Jonah Barrington, an Irish Judge in 1830: *Barrington's* case (1830) 85 Commons Journals 196 (18th March 1830). Gross misconduct, incapacity or professional incompetence ***must almost always relate to the manner in which the Judge is performing or failing to perform the duties of the office of a Judge.*** There may be, in what we would regard as most exceptional circumstances, cases where conduct unrelated directly to the carrying out the judicial office may be taken into account. But that will only be where such conduct has some bearing on the Judge's fitness for office. If he is guilty of gross misconduct that has no bearing at all on the carrying out of or fitness for judicial office, such misconduct will not be a ground for a determination by the JSC.

In this case, the JSC must consider the alleged misconduct here and the public hearing against a myriad of critically important factors: First, the principle of freedom of expression for members of judiciary is guaranteed by the Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly in 1985. Principle 8 states: "***'8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary .***" How much of this freedom of speech are our judges allowed to have and when does their expression of strongly held views in private conversations with their colleagues become "improper influence"? Furthermore, the UN principles governing "professional secrecy and immunity" state in Principle 15 as follows: "***The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters."*** When does a judge lose the "professional secrecy and immunity" right and under what circumstances can he/she be compelled to testify about "confidential information" acquired in private debates with colleagues?

At best, what the JSC is confronted with in the Hlophe matter is the following: The statements allegedly made were made by Judge Hlophe in various comparatively-private conversations and bantering sessions he engaged in with Jafta, a colleague of long standing. The alleged statements were said by Judge Hlophe during the course of what he perceived as give-and-take discussions or debates in which he was merely intent on expressing his philosophical, political, and social views. A judge is not wholly stripped of his or her free speech rights just by virtue of taking judicial office. Judge Hlophe is not properly subject to judicial discipline for making statements regarding his thoughts, perceptions, and personal opinions in conversations with another judge when the statements were not made from the bench in the Judge's official capacity, did not adversely affect the orderly workings of the court, and did not suggest he was allowing his personal perceptions to interfere with his judicial duty to afford every person fair and impartial treatment to litigants in his own court. No elaborate public hearing is required to determine whether the majority of his alleged statements fall within the protection of the freedom of speech clause of our own constitution.

The JSC must also determine as a threshold legal issue whether subjecting the judge to discipline for his alleged extra-judicial statements violate his free speech rights under the South African constitution. It needs also to determine whether "***judicial privilege***" recognized in all major democracies is recognized under South African law. Guideline number 19 of the "Judicial Ethics" for South African judges also states that a judge should respect the "confidences of colleagues" and expressly recognizes that "***private consultations and debate are inherent in the functioning of a judge; and often a mere sounding board is helpful. It goes without saying that confidentiality is also essential for this benefit of collegiality to function***." These Guidelines developed by the Chief Justice of the Constitutional Court itself are meant to give meaning to the concept of collegiality among judges. It recognizes that judges are not a bunch of bloodless automatons belonging to a homogeneous or conformist group, which would make for a decidedly unhealthy judiciary. It recognizes that judges have a common interest, as members of the judiciary, in getting the law right, and that, as a result, they must be willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered. Specifically, collegiality plays an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive and law-abiding ways. The Constitutional court itself recognized that judges may well have well-defined political beliefs or other strongly held views about particular legal subjects and this, in and of itself, is not a bad thing. Collegiality helps ensure that results are not preordained. The more collegial the court, the more likely

it is that the cases that come before it will be determined solely on their legal merits. Collegiality may come into play either where the same group of judges are decided a particular case or where a judge consults another judge to "pick his brains" on an issue that the former has to decided. In a collegial environment involving a group of judges deciding a case, divergent views are more likely to gain a full airing in the deliberative process--judges go back and forth in their deliberations over disputed and difficult issues until agreement is reached. This is not a matter of one judge "compromising" his or her views to a prevailing majority. Rather, until a final judgment is reached, judges participate as equals in the deliberative process--each judicial voice carries weight, because each judge is willing to hear and respond to differing positions. The mutual aim of the judges is to apply the law and find the right answer. In a debate involving two or more judges about a case pending only before one of the participants (such as the Jafta-Hlophe debate), it is ridiculous to denigrate collegiality or to ignore the fact that Jafta used Judge Hlophe as a "sounding board" by simply claiming that Judge Hlophe gave the "impression that he wanted a particular outcome." After all, the dictionary defines "debate" as "to engage in argument by discussing opposing points." Collegiality allows judges to disagree freely and to use their disagreements to improve and refine the opinions of the court or to deepen their own understanding of the law. Strong collegial relationships are respectful of each judge's independence of mind while acknowledging that appellate judging is an inherently interdependent enterprise. It is irresponsible to use the labels such as "improper influence" to ambush judges who may freely engage in discussions or debate with their colleagues solely on the grounds that their opinions reflected preference for certain outcomes in cases. The public airing of the accusations against Judge Hlophe and his complaint against the constitutional court judges are likely to destroy any semblance of collegiality within our judiciary for the longest time to come. There will be pressure to conform along ideological lines as there is likely to be a mushrooming of ideological "camps" on the court. The judges are likely to develop absence of a genuine sense of being involved in an institutional enterprise; they are likely to believe that one is not really free to disagree except along the predictable party lines. When a court is bereft of collegiality, judges become distrustful of one another's motivations; they are less receptive to ideas about pending cases and to comments on circulating opinions; and they stubbornly cling to their first impressions of an issue, often readily dismissing suggestions that would produce a stronger opinion or a more correct result. Judges Langa and Moseneke's coercive tactics applied on their junior colleagues Jafta and Nkabinde to "tow the line" in filing a complaint against Judge Hlophe are far more destructive of judicial independence that anything that Judge Hlophe could ever have accomplished through his debates with Jafta and Nkabinde. That being said, it is despicable for a judge like Jafta to engage Judge Hlophe in a debate or conversation and to use him as a "sounding board" and then twist

the conversation around by claiming that Judge Hlophe gave the "impression" that he wanted a particular result in favour of Zuma. It is also disingenuous for Jafta to reveal only a part of the conversation while claiming "confidentiality" as to the remainder of the conversation. How is Judge Hlophe supposed to defend himself against charges involving a debate where one part of the conversation (presumably Jafta's contribution) remains shrouded in mystery and is deemed "confidential"? On the face of it, Jafta has assiduously obfuscated the full context of the alleged discussion in a manner that enable the other judges to falsely portray Judge Hlophe's discussion as anything other than permissible "debate" or that he was being used as Jafta's "mere sounding board". In a similar vein, the so-called discussion with Nkabinde has every appearance of being a set-up. Assuming both Jafta and Nkabinde honestly believed that Judge Hlophe was acting improperly and was exerting influence on them, they were duty-bound to take affirmative steps to immediately terminate further contact or communication with him. Judge Jafta allegedly "warned" Judge Nkabinde about Judge Hlophe's attempts to influence her and yet Jafta took no other efforts to report the matter to anyone else or even to ask Judge Hlophe to desist from his alleged improper actions. Likewise Judge Nkabinde who was duty-bound to cease and desist from any further contacts with Judge Hlophe upon hearing the supposedly alarming report from Judge Jafta actually welcomed Judge Hlophe and allegedly continued to engage him in conversations about the pending cases. That was gross recklessness and irresponsibility of the highest order: She was admittedly acting with full knowledge of the fact that Judge Hlophe would discuss the said matters and she welcomed him even though she had been warned ahead of time about such allegedly improper approaches.

The JSC must be cognizant of the fact that judges in other major democracies have a judicial privilege to freely discuss matters with colleagues with the reasonable expectation that such discussions are confidential and are not to be divulged to anyone except under exceptional circumstances. The leading case on the judicial privilege is In re Certain Complaints Under Investigation by an Investigating Comm., 783 F.2d 1488 (1 1 th Cir. 1986), which arose from an investigation of alleged impropriety by Judge (now congressman) Alcee L. Hastings and some members of his judicial staff. There members of the staff of then Judge Alcee J. Hastings commenced the action to enjoin the enforcement of subpoenas commanding their appearance before a committee of the Eleventh Circuit investigating charges that Judge Hastings had, inter alia, conspired to obtain a bribe in return for performing a judicial act. On appeal, the Williams Court analyzed those cases which had found the existence of an executive privilege and concluded that the reasoning in those cases supported the existence of a judicial deliberation privilege. The privilege recognized in that case encompasses "***confidential communications among judges and their staffs in the performance of their judicial***

duties." Williams, 783 F.2d at 1520. The Williams court held that the privilege was necessary because "[***j]udges *** depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties.***" Williams, 783 F.2d at 1519-20. The court further explained that "[***c]onfidentiality helps protect judges' independent reasoning from improper outside influences *** [and] safeguards legitimate privacy interests of both judges and litigants.***" Williams, 783 F.2d at 1520. The JSC must agree with the foregoing unassailable rationale.

Confidential communications between judges and between judges and the court's staff certainly "originate in a confidence that they will not be disclosed." Judges frequently rely upon the advice of their colleagues and staffs in resolving cases before them and have a need to confer freely and frankly without fear of disclosure. "Judges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties." In re Certain Complaints Under Investigation by an Investigating Comm., 783 F.2d 1488, 1519 (11th Cir. 1986) ("Hastings"), quoted in In re Grand Jury, 821 F.2d 946, 957 (3rd Cir. 1987). If the rule were otherwise, the advice that judges receive and their exchange of views may not be as open and honest as the public good requires. See Soucie v. David, 448 F.2d 1067, 1080-81 (D.C. Cir. 1971) (Wilkey, J., concurring). In order to protect the effectiveness of the judicial decision-making process, judges cannot be burdened with a suspicion that their deliberations and communications might be made public at a later date. As the United States Supreme Court has observed, "***those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process."*** United States v. Nixon, 418 U.S. 683, 705, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974). The purpose of protecting the confidentiality of such communications is designed to benefit the public, not the individual judges and their staffs. See Commonwealth v. Vartan, 733 A.2d 1258, 1264 (Pa. 1999). If the confidentiality of these intra-court communications were not protected, judges and their staffs would be subject to the pressures of public opinion and might well refrain from speaking frankly during deliberations. Because it is the public who benefits from the impartial and independent resolution of matters which come before a court, the communications between judges and their colleagues and staffs are among those which ought to be protected for the public good. A judge should not be worried about whether someone would probe into or disclose the fact that he used another judge as a "sounding board" or engaged him in a debate before deciding a case. For these same reasons, the damage that the judicial decision-making process would suffer from the disclosure of such communications would, in almost every instance, be far greater than the benefit which might be gained by those seeking disclosure. The UN Basic Principles regarding professional secrecy and confidentiality give recognition to the foregoing - there exists a judicial deliberation privilege protecting

confidential communications between judges and between judges and the court's staff made in the course of the performance of their judicial duties and relating to official court business. No further analysis in necessary to support the conclusion that communications between judges and between judges and their law clerks which fall within the scope of the privilege are protected from disclosure. The very rationale underlying a recognition of the privilege supports our conclusion in this regard. Courts have even extended the rule and allowed the same protection to be afforded to communications between a judge and another judge's law clerk, or between law clerks serving different judges. Although law clerks are engaged by a specific judge and serve at his or her direction, the fact remains that they are members of the court's staff. Albeit not an everyday occurrence, judges have been known to confer with another judge's clerk and, when they do, those communications are entitled to no less protection than when the judge is conferring with his or her own clerk. If the judicial deliberation privilege did not extend to communications between a judge and another judge's clerk, judges would certainly be reluctant to seek out the ideas and insights of another judge's clerk in formulating their decisions and, as a result, judges would not avail themselves of the full resources of the court's staff. These courts have reasoned that the benefits which inure to the judicial decision-making process through the interchange of ideas between a judge and all of the members of the court's staff would be diminished unless these communications remained confidential, including even communications between a judge and another judge's clerk. The JSC may not in this case simply opt for the so-called public hearing without carefully evaluating how these matters involving judicial privilege are likely to damage the judiciary, the very institution it purports to protect.

The truth of the matter is that discussions amongst judges are allowable and it must generally be assumed that these judges who were selected for service on the basis of their character and intellect have the internal fortitude to make independent decisions without being influenced by anyone. Ironically, it is that knowledge of their Solomonic unique independent quality that can give another judge the assurance that a mere debate, however robust or spirited, would not 'improperly influence" any judge worth his salt. If the person initiating a conversation is another judge, the context including the seniority of the judge, their prior relationship, their involvement in the case being discussed etc. are very important. The political litmus test must never enter into the equation. In a speech to the International Bar Association Human Rights Institute Conference, Hong Kong, 12-14 June 1998, The Hon. Justice Michael Kirby AC CMG (President of the International Commission of Jurists; Formerly Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. Justice of the High Court of Australia.) stated as follows: "***One aspect of judicial independence which is often overlooked is that judges must also be independent from each other***. ***A proper system of***

judicial administration will provide for presiding judges and court officials to organise the business of the members of courts and tribunals efficiently, economically and justly as between different members. But in the performance of the central role of decision-making, a member of a court or tribunal will not be independent if he or she can be directed by a superior colleague on how to decide a matter." He commented specifically on the principles in the Rees v. Crane case and stated that:

> "***The case involving Justice Crane is a strong decision and one which reminds readers of the lonely individuality of each judicial decision-maker. In collegiate courts, it is necessary and efficient to share the workload and to exchange ideas and opinions. But even there, respect must always be paid to the right of each judge to decide matters according to that judge's conscience and understanding of the facts and law. Court officials and presiding justices cannot invade that space which is essential to true judicial independence. This is often misunderstood by the media, by government officials used to directions from superiors and by the public. When I was President of a Court of Appeal, I was often amused by the assumption of my power to direct my colleagues and to "pull them into line". Lawyers know that it does not happen like that. Judges know that it never should.***"
>
> See, http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_abahk.htm

The JSC must be equally concerned with the ludicrous so-called "confirming" statements by the other judges who rely entirely on hearsay statements by Langa, Nkabinde and Jafta to lodge a complaint. Of all these judges, Albie Sachs has no business joining in the so-called complaint of "court" – he was in New York the entire time, he was absent from the meeting in which Langa briefed the other judges and just like the other judges he was never afforded an opportunity to ask questions because Langa and Moseneke prohibited it. The majority of these judges were admittedly prohibited from asking Jafta and Nkabinde probing questions about the context of the entire discussion. This was admittedly after Langa falsely told the majority of these judges that Jafta and Nkabinde were "distressed". But that was not all - the judges orchestrated a phony display of judicial solidarity by claiming that all constitutional court judges were "complainants" against Judge Hlophe. To maintain this façade of unity, they assiduously concealed evidence of dissension within their ranks – both judge Jafta and Nkabinde adamantly insist they told their senior colleagues including Kate O'Regan that they were not lodging a complaint and were not intending to lodge a complaint against Hlophe. And yet, their dissenting voices were drowned out and suppressed in the process while the other judges were trying to figure out their next move. There can only be one inescapable conclusion from this- either the majority justices were fibbing in their statements that all judges were united in solidarity against Judge Hlophe or justices Jafta and Nkabinde were lying when they stated in their jointly issued statement filed with this JSC that that they had "on a number of occasions informed judges Langa and Moseneke that they did not intend to lodge a complaint or make a statement about the matter." Significantly, when the

two judges attended a meeting with justices Langa and Moseneke on May 28 to discuss the basis of a complaint against Judge Hlophe, they again stressed they were not intending to lay a complaint. They were blatantly ignored. The evidence is clear that Judge Langa and the rest of his colleagues committed impeachable gross misconduct - they misled the public and perpetrated a fraud upon us all by parading their press statement of May 30, 2007 as a statement of the full bench of the court when they knew that to be false. It gets even worse. Through their prejudicial press statements and sheer judicial grand-standing, these judges have pre-empted and polluted a JSC process that was supposed to be conducted with dignity and without the glare of media publicity. By removing the veil of confidentiality from the onset, they have increased pressure on both Hlophe and the JSC to have the proceedings in public. Clearly, decision making in the glare of publicity is difficult but in Hlophe's case there is increased risk that any JSC decision might be viewed by the public as the consequence of inappropriate, premature and dramatic publicity by the media. Complicating this scenario is the lack of appearance of JSC's impartiality at two levels. First, instead of dismissing the improperly filed press statement of these judges, the JSC simply ignored the procedural flaws and gave Hlophe's accusers another opportunity to meet with their counsel and to submit a better and improved complaint. When these judges failed to meet the deadline and were faced with the dissenting statements of Nkabinde and Jafta, they were simply given another extension which enabled them to keep pressure on their junior colleagues who eventually capitulated. We now have a new complaint – a step that will raise suspicion in the minds of the public about the credibility of the justices in our highest court and the JSC's forgiving attitude towards them. If the JSC finds a "prima facie" case and overlooks the glaring constitutional errors and procedural missteps by the 11 judges, an appearance is created that the JSC countenances such violations so long as a majority of judges picks on a colleague, issues prejudicial press releases against him, orchestrates a lynch-mob atmosphere, and then hands that victim to the JSC after having him pilloried in the press.

In this case, even accepting the dubious claim that Judge President Hlophe's alleged one-time conversation with justices Jafta and Nkabinde was bent on securing support for Zuma, it stretches credulity that he would only discuss the case with two relatively junior judges of the Concourt. Even more puzzling, why would Hlophe, a seasoned judge who should be aware of the concept of security of tenure for judges make an absurd and vacuous promise of job security to these learned judges? These judges already have security of tenure which is a constitutional or legal guarantee that a judge cannot be removed from office except in exceptional circumstances and for proven gross misconduct or incompetence. Security of tenure offers protection, by ensuring that a judge cannot be victimized for exercising their powers, functions and duties. It enables the democratic or constitutional process

through which a judge is appointed not to be overturned except in the most extreme and strict cases. Understood from this vantage point, the two judges' statements that they adequately dealt with the matter explains Jafta and Nkabinde's initial refusal to file a complaint - they are already serving on the Concourt and Judge Hlophe is not even there yet. On the other hand, the picture on the undue influence issue does not look pretty for the rest of the Concourt judges. It appears they improperly exerted undue influence upon their junior colleagues by ignoring their wishes and portraying them as joint complainants in a process from which they clearly disassociated themselves. That is the analytical equivalent of high treason in judicial decision-making and is very destructive of the principal quality a judiciary must possess which is "impartiality." Lord Devlin said of "judicial impartiality" that it exists in two senses-the reality of impartiality and the appearance of impartiality. He emphasized that the appearance of impartiality was the more important of the two. Impartiality also means that judges are not only free from influence of external forces, but also of one another.

No judge however senior can dictate to his brethren as to how a decision should be arrived at or what their verdict must be. That was the point made in the Canadian case, Canada v. Tobiass. (Tobiass v. Canada [1997] 3 S.C.R. 391). The facts were: The Minister of Citizenship and Immigration had made application for the revocation of the citizenship of each of the three applicants for having obtained citizenship by concealing material circumstances: that they had committed war crimes or crimes against humanity. Notices of intention to revoke the citizenship of the respondents were sent out in January 1995 and various interlocutory motions were still being argued in May 1996. Crown counsel expressed to the presiding judge, the Associate Chief Justice, concern over the long delay and the urgency of getting on with the matter. Counsel's fear was that aging Crown witnesses might die or become unable to testify and that the cases might never be heard on the merits. The Associate Chief Justice nevertheless continued to set dates in the usual manner. An Assistant Deputy Attorney General then, without notice to the parties, met with the Chief Justice of the Federal Court and admonished him that it was in the public interest to accelerate matters as "the potential for embarrassment" was "very high should it be seen that the Justice system is unable to respond to these urgent cases in a timely way" and adding that the Attorney General of Canada was being asked to consider taking a reference to the Supreme Court of Canada to determine certain preliminary points of law primarily because the Federal Court Trial Division was unable or unwilling to proceed with these cases expeditiously. The Chief Justice then discussed these concerns with the Associate Chief Justice, who stated that he would take all reasonable steps to avoid a reference to the Supreme Court and henceforth assign the highest priority to cases of this nature. The discussions and understandings arrived at were confirmed in an exchange of correspondence which was disclosed to counsel for the respondents about a week later by counsel for

the Minister. The Associate Chief Justice decided that in light of the circumstances, carriage of the cases should be turned over to another judge.

These were motions for stays of proceedings on the basis that judicial independence had been compromised. The Trial Court allowed the motions. It stated at length:

> The issue was whether the correspondence between and conduct of the Chief Justice of the Federal Court and the Assistant Deputy Attorney General was such as to compromise judicial independence.
> Judicial independence encompasses both individual and institutional elements. An individual judge must hear and decide cases without interference from outsiders, including the government, the Canadian Judicial Council, a provincial law society, other judges or parties to the litigation. And the court, as the protector of the Constitution, must be institutionally independent from the other branches of government. In both cases, the objective is that justice should not only be done but should manifestly and undoubtedly be seen to be done.
> This appeared to be the first case in which an issue involving individual judicial independence had come before a Canadian court. This case was about the liberty of an individual judge to hear and decide the cases, free of interference by the Chief Justice of his Court or a senior law officer of the Crown.
> ***The question was not whether the Associate Chief Justice was actually influenced or would have acted unfairly in any way, but whether a reasonable person, having read the correspondence between the Chief Justice and the Assistant Deputy Attorney General, would conclude that a judge of this Court could act independently in adjudicating the respondents' cases. The conclusion was that a reasonable person would believe that there indeed had been judicial interference and that the respondents would not be coming before an independent court.***
> ***The Chief Justice and the Assistant Deputy Attorney General were well aware that the respondents' cases were actively being considered by the Associate Chief Justice. Given this context, and the admonitions set out in the case law concerning judicial independence and non-interference by government, it could not reasonably be asserted that the Chief Justice and the Assistant Deputy Attorney General were unaware that their meeting and discussions were patently wrong.***
> A reasonable person would conclude, following the discussion between the Chief Justice and the Associate Chief Justice, that now that the latter ***"appreciated"*** the ***"urgency of dealing with these matters as expeditiously as the Government would like***", he would feel obliged to hurry the respondents' cases along, perhaps to their detriment.
> The ***influence or pressure that was brought to bear on the Associate Chief Justice was especially egregious, given that the statements were conveyed by the Chief Justice of the Federal Court, on the urging of a senior government official who also acted for one of the parties. A reasonable person would conclude that even if the Associate Chief Justice removed himself from these three cases, another judge could be perceived as responding to the pressure that had been brought to bear by the Chief Justice and the Assistant Deputy Attorney General.***
> The importance of the cases did not justify overlooking the transgressions. The fact that the accusations are so serious demands that the judge who hears these matters be convinced by the evidence alone, not by pressure brought to bear by any outsider.
> As to whether a stay of proceedings is the appropriate remedy, the Supreme Court of Canada has held that a stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair

> play and decency", or where the proceedings are "oppressive or vexatious". A stay should, however, be ordered only the "clearest of cases".
> A ***complaint to or even disciplinary proceedings before the Canadian Judicial Council or the Law Society of Upper Canada would not meet the requirements of justice herein***. Such institutions are independent of this Court, and the Court cannot, and should not, seek to influence or burden parallel proceedings that may be commenced. Most importantly, this Court must itself safeguard its own independence. The public must be assured that anyone coming before the Federal Court of Canada will be treated fairly and that the government or another powerful party will not enjoy a special advantage.
> The clandestine meeting and the subsequent intervention with the Associate Chief Justice was a serious breach of judicial independence. This affront to judicial independence was the "clearest of cases" and a stay of proceedings, in each of the respondents' cases, had to be granted.

On appeal, the Supreme Court of Canada held that the contact caused damage to the appearance of judicial independence and directed that the two judges have nothing more to do with the case. The test for judicial independence, was succinctly stated by the Supreme Court of Canada in Canada(Minister of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391 at para. 72: "***whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges***."

Given the South African court Guidelines allowing collegiality, debate amongst judges and using other judges as "mere sounding boards" it is ludicrous to assert that a junior judge who expresses his views of a pending case and desire to be "acting" on the constitutional court to other judges who already have the job is an affront to the judicial independence of those judges. The Supreme Court of Canada has stated that "[j]udicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law.": Mackin v. New Brunswick (Minister of Finance), 2002 SCC 13, [2002] 1 S.C.R.405 at para. 34. The principle of judicial independence requires that a judge, as adjudicator of disputes, be completely independent of any other entity in the performance of his or her judicial functions. In Mackin, at para. 35, Gonthier J. adopted the following statement from article 2.02 of the Universal Declaration on the Independence of Justice: "Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." This includes freedom not only from the influence of the state, as represented by the executive branch of the government, but from other judges as well, as was made clear in R. v. Lippé,[1991] 2 S.C.R. 114 at para. 45:

> "I do not intend, however, to limit this concept of "government" to simply the executive or legislative branches. By "government", in this context, I am referring ***to any person or body,***

> ***which can exert pressure on the judiciary through authority under the state***. This expansive definition encompasses, for example, the Canadian Judicial Council or any Bar Society. I would also include ***any person or body within the judiciary which has been granted some authority over other judges; for example, members of the Court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice***."

The person alleged to be interfering or exerting influence must necessarily have authority or influence over the judges targeted for influence. The assessment of judicial independence requires the application of an objective test: "whether a reasonable person who is fully informed of all the circumstances would perceive that the court was able to conduct its business free from the interference of the government or other judges. Not only must a court be truly independent, but it must also be reasonably seen to be independent: see Mackin at para. 38; Tobiass at para. 72; R. v. Campbell, [1997] 3 S.C.R. 3 ("Provincial Court Judges Reference") at para. 113. Unfortunately, the only judges likely to be seriously damaged in the whole saga are judge Jafta and Nkabinde who went against their better judgment to file a complaint they never believed in.

Both individual independence and institutional independence are required; both the court as an institution and the individual judges on the court must be free from outside interference: R. v.Valente, [1985] 2 S.C.R. 673at para. 20. The Canadian Supreme Court explained the distinction between these two dimensions of judicial independence at para. 39 of Mackin:

> Individual independence relates to the purely adjudicative functions of judges – the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable - whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers. Nevertheless, in each of its dimensions, independence is designed to ***prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice."***

The Constitutional court judges seem not to appreciate the distinction between institutional independence and individual independence of the judiciary. A reasonable person can be presumed to know that our judges do not become bloodless automatons upon ascending to the bench. They retain their intellectual acumen and are encouraged to exchange ideas with their colleagues at all levels so long as they remain true to their sworn duty to be independent. It would be ludicrous to assert as the 11 judges do that debating an issue with judges of equal (or even superior) rank and stating one's opinion in strong terms indicating preference for an outcome is, without more, improper influence or interference. It is inconceivable that these judges are encouraged to use others as "mere sounding board" but the other judges being used in that manner are not allowed to hold and to express strongly

held views during such debates! It is abundantly clear that Judge President John Mandlakayise Hlophe has no case to answer!

And finally, the JSC must seriously consider the practicalities of how in a public hearing the same judges could be cross-examined about their views concerning the pending Zuma cases even before the Constitutional court issued its judgment in that matter. Judge Hlophe who is accused of attempting to "improperly influence" some judges is certainly entitled to delve into what views these judges hold about the entire Zuma prosecution or "persecution", what those views were before Judge Hlophe had discussions with them and whether they underwent any dramatic in their milieu after those conversations. Certainly, one cannot be accused of "improperly" influencing a person who already shares or welcomes the same views. Equally interesting would be the robust cross-examination of Langa about his understanding of "threat" to judicial independence. It is important that the judiciary should be perceived as independent, and that the test for independence should include that perception. It is a perception of whether a particular tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees. The test for this purpose is the same as the test for determining whether a decision-maker is biased. The question is whether a reasonable observer would (or in some jurisdictions "might") perceive the tribunal as independent. The Bangalore Principles Langa was instrumental in drafting would certainly prohibit him from receiving the "Order of the Baobab" from President Mbeki while he is presiding over a case involving a political rival who had just unseated the president. The Commentary to the Bangalore principles provides some examples of 'inappropriate connections with and influence by' the executive and legislative branches of government, as determined by courts or judicial ethics advisory committees. It cites as inappropriate the following: "***A practice whereby the Minister of Justice awards, or recommends the award, of an honour to a judge for his or her judicial activity, violates the principle of judicial independence. The discretional recognition of a judge's judicial work by the executive without the substantial participation of the judiciary, at a time when he or she is still functioning as a judge, jeopardizes the independence of the judiciary***." *Decision of the Constitutional Court of Hungary, 18 October, 1994, Case No.45/1994, (1994) 3Bulletin on Constitutional Case-Law, 240.* Was there a connection between Langa's receipt of the "Order of the Baobab" and the gadarene rush to lynch Judge Hlophe and Mr. Zuma a mere three weeks after that pomp and ceremony of presidential awards? In short, public airing of this judicial dirty laundry would not serve the interests of our democracy at all. I hope that the JSC applies its mind to the matter and lets common sense prevail before the matter evolves into or assumes the implacability of a real

constitutional quandary. It would be very foolish to hold a public hearing before a determination has been made as to whether there is a case to answer and if so what the charges would be.

Respectfully Submitted
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