



CONSTITUTIONAL COURT

17 June 2008

The Hon Deputy Chairperson of the Judicial Service Commission: Justice CT Howie
Judicial Service Commission
Private Bag X1
Constitution Hill
Braamfontein
2017

Fax: 086 649 2425

Dear Judge Howie

COMPLAINT AGAINST HLOPHE JP

In response to your letter of 12 June 2008, I can now inform you as follows. On 16 June the judges of the Constitutional Court (including Nkabinde J and Jafta AJ) met. Their response is:

1. The judges do pursue their complaint against Hlophe JP that was lodged on 30 May 2008.
2. We attach a set of statements in support of the complaint. The main consolidated statement on behalf of the judges is made by me. Statements confirming the correctness of my statement insofar as it relates to them are furnished by Moseneke DCJ, Jafta AJ, Mokgoro J, Nkabinde J and O'Regan J. If the Commission requires, confirming statements by other judges will be furnished.
3. I also attach a response to the complaint by Hlophe JP signed by me on behalf of all the judges.

Given the obvious public interest in this matter, the judges have no objection to the Commission releasing those statements to the media. While respecting the Commission's call for confidentiality, the judges feel that it would not be inappropriate for the statements to be released in the current circumstances so as to inform the public of the basis of the complaint to avoid further harm being caused to the institution of the judiciary.

Yours sincerely

P N Langa
Chief Justice
Encl.


**STATEMENT IN RESPONSE TO COMPLAINT TO THE
JUDICIAL SERVICE COMMISSION BY HLOPHE JP MADE ON
10 JUNE 2008**

I, the undersigned,

PIUS NKONZO LANGA

make the following statement:

1. I am the Chief Justice of South Africa. This statement is made in my capacity as the head of the Constitutional Court and on behalf of all my colleagues at the Constitutional Court. The statement is a response to the complaint laid by Hlophe JP on 11 June 2008.
2. On 10 June 2006, Hlophe JP lodged a complaint against the judges of the Constitutional Court. The JSC forwarded this complaint to the Acting Deputy Chief Justice on 11 June 2008 and requested a response.
3. The complaint by Hlophe JP is set out at some length. In essence, it turns on the media statement issued by the judges of the Constitutional Court on 30 May 2008 ("the media statement") which publicly announced that a complaint by the judges of the Constitutional Court against Hlophe JP had been referred to the JSC. The media statement recorded, *inter alia*, that the basis of the complaint was that Hlophe JP had approached some of the judges of the Constitutional Court in an improper attempt to influence the Constitutional Court's pending judgment in one or more cases.

4. The essence of the complaint by Hlophe JP is that the judges of the Constitutional Court acted in a procedurally unfair manner by issuing the media statement. It is contended that in so acting, the judges of the Constitutional Court violated Hlophe JP's constitutional rights. There appears to be a related issue, namely, that the complaint against Hlophe JP ought to have been confined to the judges who were improperly approached and that the remaining judges should not have “prejudged the issue or associated themselves in 'solidarity' with the complaints of the individual judges”. I have dealt with the reasons why the complaint emanated from all the judges of the Constitutional Court in my statement providing details of the complaint made by the judges of the Constitutional Court against Hlophe JP. The relevant paragraphs of that statement are paragraphs 53 – 57. I do not repeat them here but they should be considered as if they had been incorporated here.
5. The decision to issue a media statement at the time of referring the complaint to the JSC was necessitated by the following factors: 
- 5.1. The *integrity of the adjudication process* and the very independence of the Constitutional Court had been threatened by Hlophe JP's improper approach to Nkabinde J and Jafta AJ.
- 5.2. Nkabinde J and Jafta AJ properly discharged their duty by disclosing what had occurred to Langa CJ and Moseneke DCJ. Nkabinde J also disclosed to Mokgoro J what had happened as appears from my statement containing the details of the complaint against Hlophe JP.

- 5.3. The other judges were shocked and distressed by the reports. None of the judges had experienced such a serious affront to the integrity of the judicial process in their careers as judges and the matter was accordingly viewed in the gravest possible light. In the absence of any possible reason to suggest that our colleagues would manufacture reports of such a serious nature, we accepted the accuracy and veracity of what they had been told and continue to do so.
- 5.4. The judges felt that it was imperative that the matter be referred to the JSC which is the constitutionally appointed body to deal with complaints of this nature.
- 5.5. With a view to the constitutional values of openness and accountability, it was considered that the independence of the Constitutional Court and its deliberative processes would be best protected by a public disclosure of what occurred. It was felt that it was particularly important to re-assure the public that the judges of the Court are committed to protecting the integrity of the judicial process and will not, even when circumstances may be difficult or hostile, shrink from that commitment.
- 5.6. The measures taken by the judges of the Constitutional Court were regarded as being in defence of the integrity and independence of the Constitutional Court and the administration of justice in South Africa as a whole. The purpose was not to fortify a complaint against Hlophe JP. The judges of the Court consider that the proper constitutional

body to adjudicate the complaint is the JSC and that is why they have referred the matter to the JSC. It should be added that the judges are committed to assisting the JSC to carry out this task.

5.7. In circumstances where the independence of the Constitutional Court had been threatened and the integrity of the administration of justice in South Africa generally, it was considered imperative and appropriate that this be publicly disclosed. Should the facts have emerged at a later stage there would have been a serious risk that the litigants involved in the relevant cases and the general public would have entertained misgivings about the outcome and the manner in which the decisions were reached. It was especially important that the litigants and the general public were informed of the attempt and that the Constitutional Court had not succumbed to it.

5.8. As mentioned above, Hlophe JP was informed of the complaint to be lodged against him on Friday 30 May 2008, and a copy of the complaint was thereafter on the same day faxed to him at an address furnished by him. Thereafter and again on the same day, the complaint was lodged with the JSC. The media statement in question was issued shortly after the complaint was sent to the JSC.

6. The media statement was issued in the same way as all statements emanating from the Constitutional Court are issued. This is done electronically by the Registrar of the Constitutional Court. Since its inception, the Constitutional Court has made use of the internet in conveying information about the Court, its judgments, directions and media releases. The addressees to whom the

media statement was sent subscribe to this service and automatically received the media statement.

7. In asserting that the judges of the Court were not permitted to disclose the fact of the complaint to the press, Hlophe JP appears first to underestimate the gravity of the complaint the judges of the Court make. An attempt to influence judges of the highest court to determine a case in a particular manner is a threat to the institution of the judiciary, one of the pillars of our constitutional democracy. Moreover, his complaint appears to confuse the functions of a complainant (in this case, the judges of the Constitutional Court) with the functions of the JSC. It is the latter's task to determine whether or not the complaint is well founded. The judges of the Constitutional Court were entitled to and did accept what had been told to them by their colleagues, Nkabinde J and Jafta AJ. This is not a pre-judgment of the complaint, nor could it be because that is a function reserved for the JSC.
8. Hlophe JP's procedural right to fairness will be respected and protected by the JSC. We do not understand it to be suggested by Hlophe JP that the JSC will be improperly influenced by the issue of the media statement.
9. The contention that the issue of the media statement is in conflict with "established international jurisprudence" is not borne out by the complaint. The various principles and international instruments referred to by Hlophe JP do not address a situation such as the present where there has been an improper attempt to influence the highest court in pending matters.

10. The circumstances giving rise to the complaint against Hlophe JP were unprecedented and exceptional. There are no pre-ordained procedural requirements in such circumstances.

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LANGA CJ

Johannesburg

17 June 2008

**STATEMENT IN SUPPORT OF COMPLAINT TO THE JUDICIAL
SERVICE COMMISSION BY THE JUDGES OF THE
CONSTITUTIONAL COURT MADE ON
30 MAY 2008**

I, the undersigned

PIUS NKONZO LANGA

make the following statement:

1. I am the Chief Justice of South Africa. This statement is made in my capacity as Chief Justice and as the head of the Constitutional Court. This is a consolidated statement made on behalf of all the judges of the Court containing the key information relevant to the complaint. My colleagues Moseneke DCJ, Jafta AJ, Mokgoro J, Nkabinde J and O'Regan J have made confirming statements insofar as the contents of this statement relate to them. The other judges of the Court are willing to make confirmatory statements as well, should the Commission so require.
2. On 30 May 2008, the judges of the Constitutional Court made a complaint to the Judicial Service Commission (the "JSC") concerning the conduct of Hlophe JP. On 2 June 2008, the JSC requested further particulars of that

complaint. It did not prove possible to furnish the particulars by 6 June as requested; and an extension was sought to 13 June 2008. On 6 June 2008, the JSC requested that details in the form of statements by each of the two judges concerned be furnished to it. On 12 June 2008, two of the judges, Jafta AJ and Nkabinde J, lodged a statement to the JSC placing on record, among other things, that they were not willing to make any statement to the JSC, were not at liberty to discuss the contents of their discussion with the Chief Justice and Deputy Chief Justice but that they would not object to their disclosing the contents of those discussions to the JSC. The other judges of the Court had no knowledge that Jafta AJ and Nkabinde J had taken this position. The result was that the lodging of this statement was once again delayed.

3. At the outset, I confirm that the complaint having been collectively lodged by the judges of the Court is being pursued by them. Those judges are myself, Moseneke DCJ, Jafta AJ, Kroon AJ (Jafta AJ and Kroon AJ were appointed to act as judges of the Constitutional Court for the period 15 February 2008 till 31 May 2008), Madala J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J (O'Regan J acted as ADCJ for the period 15 February to 31 May 2008 and is sometimes referred to as O'Regan ADCJ in this statement), Skweyiya J, Van der Westhuizen J and Yacoob J. The basis of that complaint is set out in this statement, and confirmed in the attached statements by Moseneke DCJ, Jafta AJ, Mokgoro J, Nkabinde J and O'Regan J. The judges do not presume to advise the JSC as to the manner in which the complaint should be

investigated, including the manner in which it should receive evidence. Should the JSC so require, judges who have not made confirmatory statements are willing to furnish them.

4. On 10 June 2008, Hlophe JP laid a complaint against the judges of this Court. The response of the judges to that complaint is made separately.

5. During March 2008 the Constitutional Court heard argument in the following matters:

5.1. Thint (Pty) Limited v National Director of Public Prosecutions and others (CCT89/07);

5.2. J. G. Zuma and another v National Director of Public Prosecutions and others (CCT91/07);

5.3. Thint Holdings (South Africa) (Pty) Limited and another v National Director of Public Prosecutions (CCT90/07); and

5.4. J. G. Zuma v National Director of Public Prosecutions (CCT92/07).

These cases are referred to in this statement as the Zuma/Thint cases.

6. Nkabinde J and Jafta AJ sat in the Zuma/Thint cases. The other members of the court were Langa CJ; O'Regan ADCJ; Kroon AJ; Ngcobo J; Madala J; Mokgoro J; Skweyiya J; Van der Westhuizen J and Yacoob J.
7. Both Moseneke DCJ and Sachs J were on long leave and were thus replaced by Jafta AJ and Kroon AJ respectively.
8. The Zuma/Thint cases concerned, *inter alia*, the lawfulness of certain searches and seizures undertaken in terms of section 29 of the National Prosecuting Authority Act 32 of 1998 and the lawfulness of the issue of a letter of request to the authorities in Mauritius in terms of the International Co-operation in Criminal Matters Act 75 of 1996. Both the searches and seizures and the issue of the letter of request related to the criminal investigation concerning, amongst others, Mr J. G. Zuma, Thint Holdings (Southern Africa)(Pty) Ltd and Thint (Pty) Ltd. Judgment in the Zuma/Thint cases has been reserved.
9. Towards the end of March 2008, and after argument in the Zuma/Thint cases had been heard --
 - (a) without invitation, Hlophe JP visited the chambers of Jafta AJ;
 - (b) again without invitation, Hlophe JP raised the matter of the Zuma/Thint cases that had been heard by the Court; and

- (c) in the course of that conversation, Hlophe JP sought improperly to persuade Jafta AJ to decide the Zuma/Thint cases in a manner favourable to Mr J. G. Zuma.
10. On 23 April 2008, Hlophe JP contacted Nkabinde J telephonically and requested to meet her on Friday 25 April 2008. On that day –
- (a) Hlophe JP visited the chambers of Nkabinde J at the Constitutional Court as agreed;
 - (b) without invitation, Hlophe JP initiated a conversation with Nkabinde about the Zuma/Thint cases that had been heard by the Court; and
 - (c) in the course of that conversation, Hlophe JP sought improperly to persuade Nkabinde J to decide the Zuma/Thint cases in a manner favourable to Mr J. G. Zuma.
11. The approach by Hlophe JP to both Jafta AJ and Nkabinde J was then made known to Mokgoro J by Nkabinde J when the court term commenced in May 2008. Nkabinde J invited Mokgoro J to her chambers saying that she needed some advice on a certain matter.
12. Nkabinde J told Mokgoro J in confidence that both she and Jafta AJ had been approached by Hlophe JP. She said that she had been informed by Jafta AJ of the improper approach by Hlophe JP to him prior to her being approached by

Hlophe JP and she said that Jafta AJ had warned her of what Hlophe JP might say.

13. Nkabinde J then said that she had been approached by Hlophe JP in her chambers towards the end of April. She told Mokgoro J that Hlophe JP had commenced the conversation enquiring from her “which Nkabinde are you?” Nkabinde J told him where she originated from whereupon Hlophe JP then said that he had always thought she was from one of the Zulu-speaking Nkabinde families. She told him that she had been married to a “Nkabinde” and that after their divorce she had retained the surname.
14. Nkabinde J then said that Hlophe JP had told her “he had a mandate”. He then told her that the privilege issues in the Zuma/Thint cases had to be decided “properly”. Nkabinde J was concerned because she had been writing a post-hearing note on the aspect of privilege. Both Mokgoro J and Nkabinde J wondered how Hlophe JP had become aware of the fact that Nkabinde J had been writing on that aspect.
15. Hlophe JP told Nkabinde J that he had connections with the national intelligence. He also said that some people were going to lose their positions after the elections. Hlophe JP also said that he had outgrown the Cape High Court and that he was going to make himself available for appointment at the Constitutional Court and that Jafta AJ should also make himself available for appointment to the Constitutional Court.

16. Mokgoro J advised Nkabinde J to report the matter to Langa CJ and or Moseneke DCJ. She advised Nkabinde J that the matter would affect the integrity of the judiciary and that, if not attended to, it would place it in peril.
17. Mokgoro J observed that it was deeply worrying that Hlophe JP could approach Nkabinde J in that manner; and wondered if a Judge President could approach a colleague in this manner at the Constitutional Court, what it meant for how he performed his duties as a leader in his own Court. Mokgoro J was of the view that Nkabinde J was under an obligation to make disclosure to Langa CJ or Moseneke DCJ. Mokgoro J was concerned that this is not how we do justice in this country.
18. After reflecting on the matter, Mokgoro J without reverting to Nkabinde J informed O'Regan ADCJ of what she had learnt from Nkabinde J. Mokgoro J and O'Regan ADCJ agreed that Nkabinde J should be encouraged to report the matter to either Langa CJ or Moseneke DCJ.
19. In the meantime, O'Regan ADCJ informed Moseneke DCJ of what she had been told by Mokgoro J.
20. Thereafter, Nkabinde J informed Langa CJ of what had happened. Two meetings were then held between Langa CJ and Nkabinde J at the instance of Langa CJ during which he advised her to make a written statement. At those meetings and subsequently during a telephone discussion with Langa CJ, she

expressed her unwillingness to furnish a written statement regarding the matter.

21. Moseneke DCJ then telephoned Jafta AJ and Nkabinde J personally to set up a meeting in the chambers of Langa CJ at the Constitutional Court. Present were Langa CJ, Moseneke DCJ, Jafta AJ and Nkabinde J. It was held at 11h00 on Wednesday 28 May 2008. Langa CJ and Moseneke DCJ convened the meeting as leaders of the judiciary because of the gravity with which the events were considered. The meeting lasted approximately two hours.
22. At the start of the meeting, Langa CJ introduced the reason for the meeting, namely, for Nkabinde J and Jafta AJ to recount what had happened in their chambers during the visits by Hlophe JP. Langa CJ acknowledged that it was a difficult and sensitive matter; but affirmed that it was one that he and Moseneke DCJ viewed seriously and one which had importance beyond the judges concerned.
23. Nkabinde J provided the first account. She recounted that Hlophe JP visited her chambers on Friday 25 April. Hlophe JP commenced the conversation by inquiring from her “which Nkabinde are you?” This was a traditional opening remark aimed at identifying the clan of which she forms part. She explained where she originated from, that she had been married to a “Nkabinde” from KwaZulu-Natal, and that she retained that name even after their divorce.

24. Hlophe JP then turned to discuss the Zuma/Thint cases; and said they were important cases for the future of Mr Zuma. He said that the issue of privilege was an important aspect of the case for the prosecution. If the point raised by Mr Zuma's counsel were to be sustained there would be no case against Mr Zuma. Nkabinde J expressed concern to Langa CJ and Moseneke DCJ that she had composed a post-hearing note on the specific issue of privilege and proposed a preliminary conclusion on it. (Post-hearing notes are circulated amongst judges as a precursor to deliberations amongst judges). She was also puzzled as to why Hlophe JP had selected the issue of privilege for discussion and wondered how he could have known that she had written on this issue. She was concerned as to how Hlophe JP had obtained this information about the Zuma/Thint cases.
25. Nkabinde J continued by saying that Hlophe JP had told her that he had a mandate to act as he was doing. He stated that he was politically well-connected; and connected to members of national intelligence. The implication was that he was well informed about what was happening at the Court. Hlophe JP added that there was no real case against Mr Zuma and that it was therefore important to hold in his favour. Upon being asked by Nkabinde J what "besigheid" it was of his to discuss the case, Hlophe JP said that Mr Zuma was being "persecuted" as he (Hlophe JP) had been persecuted. Beyond that Nkabinde J reported that Hlophe JP had made other claims that she referred to as "hogwash". Nkabinde J made it clear that she had told

Hlophe JP that he is not a member of the Court to talk about the case and that even if he were a member, he would still not be entitled to discuss the case unless he had sat in the case.

26. Nkabinde J stated to Langa CJ and Moseneke DCJ that she had told Hlophe JP that he should not interfere with the workings of the Court; and that Hlophe JP's approach did not influence her.
27. Nkabinde J also told Langa CJ and Moseneke DCJ that after the visit by Hlophe JP she had wrestled with what she should do about the visit for some time. She then decided to speak to Mokgoro J to seek advice which she did in early May just after the court term commenced.
28. After Nkabinde J had provided her account to Langa CJ and Moseneke DCJ, it was the turn of Jafta AJ. He began by asking whether the meeting was an official or unofficial one. Moseneke DCJ responded that it may have both official and unofficial consequences. He confirmed that Langa CJ and he were acting in their capacity as Chief Justice and Deputy Chief Justice. Jafta AJ then went on to say that he had known Hlophe JP for many years; that they had been colleagues and friends. He said that he did not want to breach a confidence but that he could confirm in general terms what Nkabinde J had said.
29. He stated that in March 2008, after the Zuma/Thint cases had been heard, Hlophe JP had come to his chambers and held a conversation with him. He

divided his account of his conversation with Hlophe JP into two parts. The first part he was willing to relate; the second he said he had been told in confidence and refused to relate it. He related the first part of the meeting by saying that Hlophe JP had said that the case against Mr Zuma should be looked at properly or words to similar effect and added words to the effect that you are our last hope (“Sesithembele kinina”).

30. In response to a question, Jafta AJ stated that he gained the impression that Hlophe JP wished for a particular result in the matter. Jafta AJ explained that he gained this impression because Hlophe JP mentioned that Mr Zuma was being “persecuted” just as he (Hlophe JP) had been persecuted. Jafta AJ told Langa CJ and Moseneke DCJ that, particularly after he had heard of the approach to Nkabinde J, he considered the approach to be serious and that it was part of an attempt by Hlophe JP aimed at interfering with the independent exercise of judicial discretion by judges at the Court.
31. Jafta AJ also told Langa CJ and Moseneke DCJ that he had told Hlophe JP in no uncertain terms that the Zuma/Thint cases would be properly decided on its facts and on the application of the law to them.
32. Jafta AJ then stated that when he heard that Hlophe JP planned to visit Nkabinde J, he warned Nkabinde J that Hlophe JP had discussed the Zuma/Thint cases with him.

33. Jafta AJ also told Langa CJ and Moseneke DCJ that he had not planned to lodge a formal complaint about the conduct of Hlophe JP even though he considered it to have been an improper attempt to influence him. His view was that he had decisively dealt with the matter by rejecting the approach of Hlophe JP.
34. Both Nkabinde J and Jafta AJ made it clear that in their view the approach by Hlophe JP had been improper. They also made it clear that after they had dealt with the matter by rejecting the approach of Hlophe JP, they did not consider it necessary to lodge a complaint or make a statement.
35. Langa CJ and Moseneke DCJ then raised the question of how the matter should be taken further. Langa CJ and Moseneke DCJ indicated that in the light of the seriousness of the matter it was their view that a meeting of judges of the Court should be held to discuss what steps should be taken. Langa CJ and Moseneke DCJ then enquired from Jafta AJ and Nkabinde J whether they would object to the matter being taken to conference. Jafta AJ and Nkabinde J said they had no objection. Jafta AJ then requested that Langa CJ and Moseneke DCJ recount to colleagues what had happened at his meeting with Hlophe JP rather than tell the story himself. Nkabinde J agreed that her story should also be told by Langa CJ and Moseneke DCJ. Langa CJ was approached before the conference and was requested by Nkabinde J (expressing the sentiments of Jafta AJ as well) that conference should be notified of their position on the matter.

36. A meeting was called of judges on Thursday 29 May. The following judges were present: Langa CJ, Moseneke DCJ, O'Regan ADCJ, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J. Ngcobo J did not attend, nor did Sachs J who was in New York. At that meeting, Langa CJ and Moseneke DCJ recounted the essence of what they had been told at the meeting on 28 May. They asked judges at the meeting not to subject Jafta AJ and Nkabinde J to questioning given the distressing circumstances in which they were. Langa CJ and Moseneke DCJ reported that in their view the conduct of Hlophe JP as reported to them by Jafta AJ and Nkabinde J constituted a serious attempt to influence the decision of the Court in the Zuma/Thint cases.
37. The judges of the court were shocked and distressed at the disclosure by Langa CJ and Moseneke DCJ. A full discussion followed. Various courses of action were debated. It was decided unanimously by all judges present that the appropriate course of action, given the gravity of the matter, was to lay a complaint with the JSC against Hlophe JP. In reaching this decision, it was specifically stated that the judges who had been approached by Hlophe JP, if Hlophe JP resisted the complaint, would have to give oral evidence to the JSC in due course. The judges agreed that the JSC would be the appropriate body to determine any dispute of fact that might arise, but decided that it was appropriate given the perceived attack on the integrity of the Court that all judges should be party to the complaint. It was also agreed that a clear and

brief press statement should be prepared. The reasons for the issue of the press statement are dealt with separately in my statement in response to the complaint of Hlophe JP.

38. A draft statement was then circulated to colleagues for discussion. During this process, Ngcobo J, who had not attended the meeting, requested that a further meeting be held to discuss whether a press statement should be issued.
39. A meeting was then held on Friday 30 May. Not all judges could be present, but the following judges were present: Langa CJ, O'Regan ADCJ, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Ngcobo J, Skweyiya J and Van der Westhuizen J. After discussion it was agreed that the terms of the press statement should largely be in the same terms as the complaint to be lodged with the JSC. All judges concurred in the decision, though Langa CJ did note that as chairperson of the JSC, it would not be appropriate for him to issue a media statement. It was also agreed that Langa CJ would call Hlophe JP and inform him of the complaint; that the complaint would be sent to Hlophe JP and thereafter would be lodged with the JSC> It was agreed that thereafter the media statement would be released.
40. On the same day, at approximately noon, Langa CJ then called Hlophe JP to inform him of the complaint and to obtain a secure fax number to which the complaint could be sent. The complaint was then sent to Hlophe JP. Shortly thereafter it was lodged with the JSC. And again, shortly thereafter, a media

statement was sent to the media list used by the Court. This list is described more fully in para 6 of my statement in response to the complaint of Hlophe JP. I do not repeat that paragraph here.

41. On 2 June 2008, a letter was sent to the Court by the JSC asking for fuller detail concerning the complaint to be forward to the JSC by not later than 6 June 2008. Langa CJ was out of the country. O'Regan ADCJ drew the letter to the attention of Nkabinde J and Jafta AJ. They agreed that they would seek to meet the deadline of 6 June, but indicated that they would like counsel to be appointed to act for them. They indicated that they would like Madlanga SC and Tokota SC to be briefed.
42. O'Regan ADCJ arranged with the State Attorney for Madlanga SC and Tokota SC to be briefed. However, as Madlanga SC was not in Johannesburg, it proved impossible for Jafta AJ and Nkabinde J to prepare a response by 6 June 2008. After discussion with their counsel, however, they indicated that their response would be prepared by Friday 13 June.
43. Accordingly, O'Regan ADCJ wrote to the JSC to inform them that the statements requested could not be lodged by Friday 6 June and indicated that the statements would be furnished by Friday 13 June 2008.
44. Langa CJ returned to South Africa on Sunday 8 June 2008. The events were reported to the judges at their weekly conference on Monday 9 June 2008. At conference, it was suggested that counsel should also be appointed for the

Court. Langa CJ then arranged for Adv Marcus SC and Adv M Sikhakhane to be briefed on behalf of the Constitutional Court. In discussion with counsel, it was agreed that a statement should be prepared on behalf of the Court to augment the statements being prepared by Madlanga SC on behalf of Jafta AJ and Nkabinde J.

45. It was agreed that Madlanga SC and Tokota SC as well as Marcus SC and Adv M Sikhakhane should work together to ensure that the statements would be ready by 13 June 2008.
46. By 11 June 2008, a draft statement had been prepared by counsel for the Court. It was forwarded to Madlanga SC and Tokota SC for its contents to be confirmed.
47. On 11 and 12 June 2008, Moseneke DCJ held a series of conversations with both Jafta AJ and Nkabinde J to finalise the portions of the statement that referred to them. There were repeated delays during the day, but finally, late in the afternoon, the following two proposed paragraphs were forwarded to Marcus SC by Tokota SC for inclusion in the court's statement.
48. The first paragraph referred to the meeting between Hlophe JP and Jafta AJ. It was proposed by counsel for Nkabinde J and Jafta AJ that the following detail be included in the statement:

“In the course of that conversation, Hlophe JP said that the case against Mr JG Zuma should be looked at properly (or words of similar effect) and

added, “Sesithembele kinina”, a rough translation which is: “you are our last hope”.”

49. The second paragraph referred to the meeting between Hlophe JP and Nkabinde J. It was proposed by counsel for Nkabinde J and Jafta AJ that the following detail be included in the statement:

“In the course of that conversation, Hlophe JP said he wanted to talk about the question of “privilege”, which in his words formed the gravamen of the National Prosecution Authority’s case against Mr JG Zuma. He further said the manner in which the case was to be decided was very important as there was no case against Mr Zuma without the “privileged” information and that Mr Zuma was being persecuted, just like he (Hlophe JP) had also been.”

50. On 12 June at approximately 17h00 a document was delivered by hand to Moseneke DCJ and O’Regan ADCJ which indicated that Jafta AJ and Nkabinde J did not intend to make any statement to the JSC. The other judges of the Court had no prior knowledge that the two judges intended to lodge a separate statement of this sort. The statement was circulated to all judges on Thursday evening.

51. A meeting of judges had been convened for 09h30 on Friday 13 June to discuss and settle the statement to be issued to the JSC. Present at that meeting were Langa CJ, Moseneke DCJ, O’Regan ADCJ, Kroon AJ,

Mokgoro J, Ngcobo J, Van der Westhuizen J and Yacoob J. Neither Jafta AJ nor Nkabinde J was present, nor were Madala J, Skweyiya J or Sachs J. It was agreed that a full meeting should be held as soon as possible and that Jafta AJ and Nkabinde J should be asked to attend. The purpose of the meeting was to finalise the formulation of a response to the chairperson of the JSC. After telephonic conversations, the meeting was set for Monday 16 June 2008 at 12h00.

52. This statement and those annexed to it are a product of that meeting and a subsequent meeting held at the Court on 17 June.

The reason for the complaint by all judges

53. In terms of Section 167(2) of the Constitution, a matter before the Constitutional Court must be heard by at least eight judges. The Constitutional Court has recognised that there is an obligation upon members of the Court to sit in matters unless disqualified or unable to do so for a material reason (*President of the Republic of South Africa and Others v SA Rugby Football Union and Others* 1999 (7) BCLR 725 (CC); 1999 (4) SA 147 (CC) at para 46).

54. The attempt to influence Nkabinde J and Jafta AJ in the manner described above –

- (a) was calculated to have an impact not only on the individual decisions of the judges concerned but on the capacity of the Constitutional Court as a whole to adjudicate in a manner that ensures its independence, impartiality, dignity, accessibility and effectiveness as required by Section 165(5) of the Constitution;
- (b) constituted a breach of Section 165(3) of the Constitution which prohibits any person or organ of state from interfering with the functioning of the courts.

55. In *President of the Republic of South Africa and Others v SA Rugby Football Union and Others* 1999 (7) BCLR 725 (CC); 1999 (4) SA 147 (CC), the Constitutional Court had to consider an application for recusal against five members of the Court. The Court noted that if one member of the Court is disqualified from sitting in a case, the Court is “under a duty to say so, and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case”. (at para 31) The Court noted that if one disqualified judge decides to sit in a matter, that “could fatally contaminate the ultimate decision of the Court, and the other members may well have a duty to refuse to sit with that judge”. (at para 32)
56. It follows that every member of the Constitutional Court not only has a direct and substantial interest in any improper attempts to influence the decision-making process required of any member of the Constitutional Court, but a

duty to ensure that all judges who sit in a matter are qualified to do so. It is in the light of these obligations and the seriousness with which the judges of the Court viewed the conduct of Hlophe JP that the judges of the Court (including Moseneke DCJ and Sachs J) unanimously made the complaint to the JSC.

57. Pursuant to the information conveyed by Nkabinde J and Jafta AJ, the Constitutional Court made the complaint on 30 May 2008. Prior to its being lodged, Hlophe JP was telephonically informed of the intention to lodge the complaint with the JSC by Langa CJ and a copy of the complaint was furnished to him.

Conclusion

58. In conclusion, it should be noted that this complaint is based on conduct which the judges of the Court view in the most serious possible light. It constitutes a grave threat to the institution of the judiciary, and accordingly to our Constitution. The speedy resolution of the complaint is imperative. Should the JSC wish to have any further information or clarification of the above particulars, I will assist to the best of my ability.
-

LANGA CJ

Johannesburg

17 June 2008

CONFIRMATORY STATEMENT

I, the undersigned,

JENNIFER YVONNE MOKGORO

do hereby make the following statement:

1. I am a judge of the Constitutional Court.
2. I have read the statement prepared by the Chief Justice, Pius Nkonzo Langa.
3. I confirm its contents insofar as they relate to me as being true and correct.

MOKGORO J

Johannesburg

17 June 2008

CONFIRMATORY STATEMENT

I, the undersigned,

BAAITSE ELIZABETH NKABINDE

do hereby make the following statement:

1. I am a judge of the Constitutional Court.
2. I have read the statement prepared by the Chief Justice, Pius Nkonzo Langa.
3. I confirm its contents insofar as they relate to me as being true and correct.

NKABINDE J

Johannesburg

17 June 2008

CONFIRMATORY STATEMENT

I, the undersigned,

CATHERINE MARY ELIZABETH O'REGAN

do hereby make the following statement:

1. I am a judge of the Constitutional Court.
2. I have read the statement prepared by the Chief Justice, Pius Nkondo Langa.
3. I confirm its contents insofar as they relate to me as being true and correct.

O'REGAN J

Johannesburg

17 June 2008

CONFIRMATORY STATEMENT

I, the undersigned,

CHRISTOPHER NYAOLE JAFTA

do hereby make the following statement:

1. I am a judge of the Supreme Court of Appeal; and served as an acting judge at the Constitutional Court for all times relevant in this matter.
2. I have read the statement prepared by the Chief Justice, Pius Nkonzo Langa.
3. I confirm its contents insofar as they relate to me as being true and correct.

JAFTA JA

Johannesburg

17 June 2008

CONFIRMATORY STATEMENT

I, the undersigned,

DIKGANG MOSENEKE

do hereby make the following statement:

1. I am the Deputy Chief Justice of South Africa and a judge of the Constitutional Court.
2. I have read the statement prepared by the Chief Justice, Pius Nkondo Langa.
3. I confirm its contents insofar as they relate to me as being true and correct.

MOSENEKE DCJ

Johannesburg

17 June 2008