LAW MATTERS

by **Franny Rabkin**

Octoptimist

As I write this column, results are coming in from voting stations across South Africa in the sixth national election in our 30th year of democracy. Our democracy has been tested and is maturing.

One test – which needs to marked – is that this year we also saw our first judicial impeachments. On 21 February, Western Cape Judge President John Hlophe and Gauteng High Court Judge Nkola Motata were removed by overwhelming majorities in Parliament in terms of section 177 of the Constitution.

It is no small thing to impeach a judge. By constitutional design, the removal of a judge is not easy, nor should it be – lest we imperil judicial independence. Here, the vote itself happened quickly and with little fanfare. But getting there was a long-running, and frankly excruciating, saga – in which the Constitution, the law and our constitutional institutions were stretched and tested.

The complaint against the former JP, by all the then-justices of the Constitutional Court, was made at the end of May 2008. Much of the detail of what happened has been lost through the attrition of time. There were many twists and turns, and much intervening litigation.

The short version is that, on two separate meetings in 2008 at the Constitutional Court – one with Justice Chris Jafta (then acting) and one with Justice Bess Nkabinde – Hlophe raised the matters of Zuma / Thint, in which judgment was still pending. The cases concerned search and seizure warrants connected to corruption allegations for which Zuma is still – to this day – on trial.

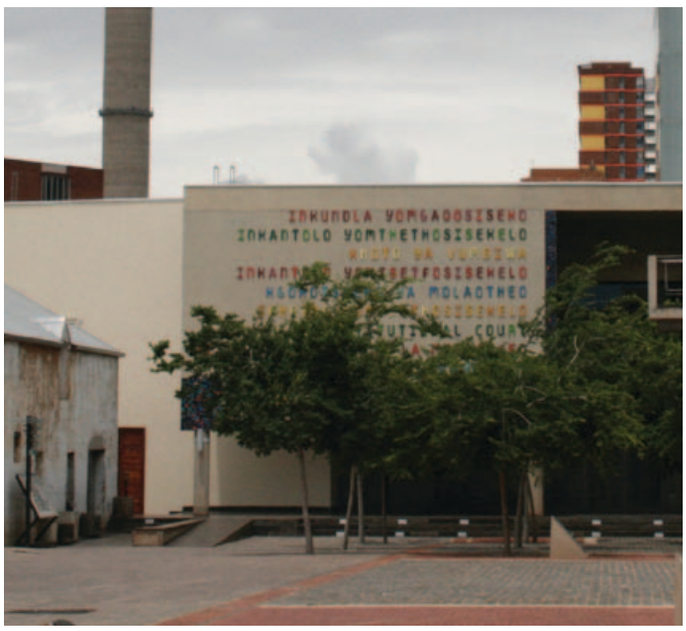
In those two meetings back in 2008, Hlophe said the outcome of the cases was important, that the Supreme Court of Appeal had got it wrong, that Zuma was being persecuted, just as he, Hlophe, was being persecuted. To Justice Jafta he said the infamous words "sesithembele kinina" meaning "you are our last hope".

The political context at the time is important: Jacob Zuma had been elected president of the ANC but not yet president of South Africa. The outcome of the cases pending at the Constitutional Court was widely believed to be crucial to whether he would go on to be president of the country.

Justice Nkabinde said she had asked Hlophe why he was raising the Thint / Zuma matters, he had responded that there "was a feeling" that some of the justices of the Constitutional Court did not understand our history. When she enquired as to who had this feeling, he said there were ministers he advised from time to time. Hlophe has consistently denied this. But the Judicial Conduct Tribunal found her version more probable, on balance. The Judicial Conduct Tribunal found that Hlophe had attempted to influence the two to breach their oath of office. A majority of the JSC agreed and referred their decision to Parliament. Despite an attempt to interdict the proceedings, with no interdict in place, the impeachment followed.

This took almost 16 years and something must first be said about the courage of the justices of the Constitutional Court who, to protect the integrity of that institution, were compelled to break ranks with a colleague and lay a complaint against him. It must have been hard – especially with Hlophe's vitriolic response, accusing them of dishonesty, of political motives and of manipulating and strong-arming Justices Jafta and Nkabinde into the complaint.

I think here especially of Justice Jafta who was personal friends with JP Hlophe. I want to mention Justice Yvonne Mokgoro who was laid to rest last weekend. She gave evidence in the JSC's inquiry in April 2009. Explaining why she was so upset after Justice Nkabinde told her about JP Hlophe's visit, she



Yolanda Booyzen

said: "We don't wheel and deal in justice in South Africa."

As chief justice and deputy chief justice, Pius Langa and Dikgang Moseneke led from the front on the complaint and were the main targets of Hlophe's wrath. To the extent that there was any doubt, they have been vindicated by the impeachment.

Then there is the very complicated question of why everything took so long. There are some obvious points to be made on this score. A first obvious point is one that I already made: impeachments should be difficult. A second: the judicial disciplinary process under the JSC Act takes long. This is not unique to any individual case.

We know this now and we know the Act needs amendment in a number of respects. Deputy Chief Justice Mandisa Maya said as much in her interview for Chief Justice and it looks like there are some amendments to the JSC Act that will be made fairly soon. That's good news.

Third, there was a whole lot of litigation in Hlophe's case. Some of it was unavoidable and litigation does take time. Add to this that the legislation, the JSC Amendment Act, was new law and its provisions were being tested for the first time in most of the cases.

So much for the obvious points, but they only go part of the way. There were key decisions of the JSC – that delayed things – and other long periods of delay that cannot be explained away by these factors. These should not be lost in the wash. We need to think carefully about them or risk their repetition.

There was the u-turn decision by the JSC in July 2009 to investigate the complaints (at the time there were two complaints because JP Hlophe counter-complained) by way of a three-member sub-committee, with no cross-examination. This followed a court order that the process begin "*de novo*".

The JSC had earlier decided to have an oral hearing "in view of the conflict of fact on the papers" – that was according to its own announcement in July 2008. But how else does one resolve disputes of fact other than through cross-examination? Even though they were ordered to begin *de novo*, the factual disputes remained. This u-turn was found to be irrational by the Supreme Court of Appeal.

The SCA said in its judgment: "By disallowing cross-examination that result was made inevitable. It would have been highly irregular to reject [Hlophe's] evidence without having given him an opportunity to cross-examine his accusers. Utilising this procedure for the final resolution of a complaint of misconduct by a judge will always lead to a dismissal of the dispute where the conduct alleged by the accuser is disputed by the judge because the judge's version can never be rejected without having given him an opportunity to cross-examine his accusers. The procedure adopted was therefore not appropriate for the final determination of the complaint."

It was the JSC's constitutional responsibility to determine complaints of gross misconduct. To choose a process that, by design, would avoid such a determination was an abdication by the JSC of its responsibility. The time the JSC took to make its decision to go to subcommittee to the SCA's judgment in March 2011 accounted for over two years of delay.

Why did the JSC, comprised of so many excellent lawyers, choose a process that the SCA said was "surprising" and found to be irrational?

The complexity of the Hlophe matter may be found, in my view, somewhere in murky waters of the politics of former president Zuma's political aspirations and in the difficult and painful transformation journey of the legal profession and the judiciary.

Leaving aside the political dimension for now, Hlophe's version has consistently been that his real sin was to author a bare-all report about racism at the Western Cape bench and bar in 2005. This was the beginning of all his woes, he always says. Before the report, he was the "darling" of the white legal establishment. After the report, they turned on him. The black judges that had it in for him were jumping on the bandwagon, he said.

His response to the complaint by the justices of the Constitutional Court is a good example: "There was an element of impropriety in the conduct of, in particular, the Chief Justice Pius Langa and the Deputy Chief Justice Moseneke, the motive for which remains a mystery, but more likely being an inexplicable desire to get rid of me, to get me impeached, and to suggest that I am not fit to be a judge anymore,- the kind of bandwagonism that has been in vogue since I published my racism report a few years ago. I make bold to link this to the racism report fully cognisant of the fact that both Langa and Moseneke are Africans and Black, but the point here is that for their own reasons, they have climbed on the bandwagon of those who, since the racism report, have been campaigning for my impeachment on the basis that I am ill-qualified to be a judge."

The riposte that I have heard to this narrative is that his report was a too-late attempt to divert attention from his other transgressions – there had already been the Oasis dispute that had been investigated by the JSC but from which he had been cleared. He had just been castigated by the Supreme Court of Appeal in the New Clicks matter for unreasonably delaying his judgment refusing leave to appeal. For critics, Hlophe's report was a cynical and opportunistic move to exploit the fault lines and vulnerabilities of race in the profession.

I went back to that report this week. I won't repeat its specific contents because they were disputed and may be defamatory. A detailed statement by the Cape Bar Council at the

time addressed those allegations made against the Bar in specific terms – such as listing the names of the black advocates the Cape Bar had supported for appointment to the bench. I have not been able to find the subsequent investigation mandated by the Heads of Court but it reportedly found the specific allegations to have been refuted by the individuals concerned.

However, what I will say is about the contents of Hlophe's report is that the *types* of stories he tells are very familiar: racist briefing patterns, correcting of English, all- white lunches, micro-aggressions like speaking Afrikaans (yet complaining when vernacular languages are spoken) – all of those things were going on at the time. They may still be.

As late as 2022, Hlophe still found support from organisations like the Black Lawyers Association, even while he denigrated highly respected leaders of the judiciary such as Langa and Moseneke, whose antiracism track record was so much stronger than his own.

The journey to address racism within the legal profession – and the judiciary – has been a long and difficult one; and it is ongoing.

I don't know what was in the minds of JSC commissioners when they took some of their decisions. But it seems to me that there might have been concerns about the optics of black judges cross examining each other and credibility findings being made of them; about recommending impeachment of a judge whose sin was to expose racism in the judiciary – whatever his motive and albeit that he had another, graver, sin. There may have been concerns about what impeaching Hlophe would do to the fragile unity that had been achieved in the profession and judiciary at that point – particularly when it was under so much pressure from the executive; and how upsetting that unity could impact the independence of the profession and the bench. There may have been concerns about what would happen if the JSC recommended impeachment and Parliament did not impeach – what would this do to the already tense relationship between the arms of state? Would the fragile, not-transformed-enough, judicial arm survive?

That Hlophe was finally impeached may signify that the profession's, the judiciary's and the JSC's transformation efforts are on a surer footing now.

But as I write, the party led by former president Zuma is garnering election wins in a way that has surprised many. I confess I am alarmed by some of the uMkhonto we Sizwe Party's policy positions, particularly the one that would scrap the Constitution. Zuma has, for years, painted himself as a victim – of many sinister forces, one of them being a racist, untransformed judiciary and a Constitution "based on Roman-Dutch law instead of African law". Hlophe has painted himself in a similar light – the judge version.

As we mark the impeachment of Hlophe and Motata as a milestone in the maturity of our democracy, I would caution that the imperative to transform the legal profession and the judiciary should remain a top priority. If we do not address racism and sexism in the legal profession, we are putting judicial independence at risk. A