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IS THE JUDICIAL SERVICE COMMISSION "FIT FOR PURPOSE"?

A Reflection over 15 years

by **Azhar Cachalia**, retired Judge
of the Supreme Court of Appeal

South Africa's democracy is anchored by its Constitution and the rule of law. Judges are the guardians of both. They derive their authority from their competence and their integrity. Without either, they have none. Who and how judges are appointed is the focus of the lecture.

The Judicial Service Commission (JSC) has two functions: It appoints judges and investigates complaints against them for misconduct. The JSC must protect the independence of the judiciary by appointing competent and ethical persons, and safeguard it from undue political interference. It follows that those appointed to the JSC to perform these functions must themselves be "fit for purpose".

Section 174 of the Constitution governs the appointment of judges. It requires the judiciary to "broadly" reflect the racial and gender composition of South Africa and that those appointed to it be "fit and proper" persons. In 1998, under the stewardship of the then Chief Justice, the JSC developed guidelines and criteria to assist it with this task. In short, it required that candidates be technically competent and able to give expression to the values in the Constitution. Importantly, the needs of the court to which the candidate sought appointment was also a consideration.

For just over a decade the JSC functioned without significant complaint. South Africa took its place among leading democratic countries lauded for its progressive Constitution and independent judiciary.

There was, however, increasing disquiet about the functioning of the JSC. The application of Section 174 and the

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guidelines were ignored and distorted giving rise to arbitrary decision making. The National Development Plan of 2011 warned that there was little consensus between the JSC and the legal fraternity concerning the attributes required for appointment to the bench. More alarmingly it observed that the JSC was becoming hamstrung by political and vested interests within the profession.

Sadly, instead of acting on these concerns, the JSC allowed the situation to worsen. In the time available I shall endeavour to provide some context for how this happened, point to particular instances to demonstrate the JSC's failure to execute its mandate and conclude by drawing attention to attempts by civil society, including through litigation, to bring pressure to bear on it to perform its constitutional mandate properly.

THE 2009 JSC HEARINGS

The 2009 JSC hearings for four vacancies in the Constitutional Court (CC) were a defining moment, both for the JSC and the court. To understand the significance of this moment one must recall the events that lead to it.

In 2005, Mr Schabir Shaik, a Durban businessman, was convicted and sentenced on two corruption charges. Mr Jacob Zuma, then the deputy president of the country, was implicated in having received corrupt payments from Shaik. As a consequence, President Thabo Mbeki dismissed Zuma from the government. In August that year, acting on search warrants issued by a judge, the Directorate of Special Operations, also known as the Scorpions, searched several premises and seized documents and computer equipment relevant to a criminal investigation against him. Shortly thereafter, Zuma was charged with 18 counts of racketeering, corruption, money laundering, tax evasion and fraud. Meanwhile Shaik's appeals to the Supreme Court of Appeal (SCA) and the CC failed, and he was imprisoned.

Zuma and his co-accused, Thint, a French company, challenged the validity of the search warrants. After the courts in Pretoria and Durban had delivered conflicting judgments, the SCA, by a majority, found the search warrants valid. They appealed to the CC.

In December 2007 Zuma was elected leader of the ANC replacing President Mbeki. Many of Zuma's supporters were elected to its National Executive Committee. These events would cause a seismic shift in the governance of the country, including the JSC.

The appeal by Zuma and Thint to the CC was heard on 11-13 March 2008. Judgment was reserved. On 13 March 2008, Mr John Hlophe, then judge president of the Western Cape High Court (WCHC), suborned two judges of the CC to rule in Zuma's favour, adding "you are our last hope," an exhortation to clear the path for Zuma's assumption of power as president.

The judges of the CC reported Hlophe's dishonourable conduct to the JSC. He denied the accusation, dismissing it as politically driven by then Chief Justice Pius Langa and Deputy Chief Justice Dikgang Moseneke.

In July 2008 the CC dismissed Zuma's and Thint's appeal on the validity of the search warrants. There was one dissent, by Justice Sandile Ngcobo, who would have invalidated the search warrants. The decision by the court provoked a torrent of outrage by Zuma's supporters. The newly elected secretary-general of the ANC falsely accused the judges of conspiring against Zuma, stigmatised them as "counter-revolutionary" and added, without evidence, that their complaint against Hlophe was orchestrated to undermine Zuma. During Zuma's tenure as president these malicious accusations against the judiciary continued and permeated the JSC.

In September 2008, the KwaZulu-Natal High Court, controversially, declared the decision to prosecute Zuma invalid. The National Director of Public Prosecutions (NDPP) appealed and in January 2009, the SCA unanimously upheld the appeal against this judgment, allowing Zuma's prosecution to continue.

The threat posed by a criminal prosecution obviously weighed on Zuma. And soon after being elected president of the republic in April 2009, he took aim at the JSC. The JSC hearings for the CC scheduled for 8 June were postponed to September at the last minute at the request of the justice minister, Jeff Radebe. A JSC statement at the time cited the "vital question of transformation" as the reason for the postponement, which sounded anodyne but was ominous.

President Zuma then hastily replaced four commissioners who had served during Mbeki's tenure, one of whom was the celebrated George Bizos, with four of his choice. The ANC also used its majority in the National Council of Provinces (NCOP) to replace the opposition delegate on the JSC, inviting the suggestion that the JSC was now being packed with its supporters.

In July 2009, as these events unfolded, the JSC appointed an investigation committee consisting of three of its members, a judge and two senior lawyers, to conduct a preliminary inquiry into the CC's complaint against Hlophe and his counter-

complaint against them. Despite there being material disputes of fact between the parties, the committee strangely decided against cross-examination to establish the truth.

In August 2009 the JSC, which had a substantially changed membership, shockingly decided that the case against Hlophe did not disclose a *prima facie* case of gross misconduct warranting a full inquiry, a decision, which public interest NGO Freedom Under Law (FUL) would challenge in the courts.

The newly formed JSC reconvened in September 2009. There were initially 25 candidates for judicial office, but some withdrew. Twenty were interviewed. It was apparent during the interviews that there were dubious political agendas at play. In an understatement Olivier and Hoexter observed that the manner in which the interviews were conducted was "markedly inconsistent".

> "Certain candidates were asked more intrusive questions and occasionally aggressive questions on the subject of transformation, while others including Judge … Mogoeng … were asked … anodyne and unchallenging questions that failed to probe their suitability for appointment … Since then, tough questions on transformation have continued to be put sometimes in a confrontational and irascible manner."

I had the misfortune to be one of the candidates and had a robust exchange with two of the commissioners, who were not interested in assessing my suitability for appointment. One of them, the ANC's appointee and a lawyer by training, disclosed that his approach to appointing judges was to promote the ANC's National Democratic Revolution. He implied that this required him to advance the interests of "Blacks in general and Africans in particular". I insisted that transformation was not a "numbers game." It was apparent that he was either not interested or had no conception of what s174 of the Constitution or the guidelines then applicable to the appointment of judges required of him. It was an abject abuse of political power. I refused to indulge him in this charade.

Another commissioner, inappropriately, wanted to settle a personal score he had with a retired justice of the Constitutional Court, who had been critical of the JSC's handling of the complaint against Hlophe. He pushed me to answer irrelevant questions about the justice, which again, I refused to.

Another candidate, a brilliant lawyer, and one who has consistently represented disadvantaged litigants, was asked by an ANC representative why he always accepted briefs against the government, implying that in doing so he had some *animus* against it. The candidate was not appointed. The commissioner was promoted to justice minister.

These were some but not all the instances of how the interviews were compromised. The post-interview deliberations lasted only 30-40 minutes and produced a shortlist of seven candidates for the president, suggesting that some of the choices were predetermined, which further damaged the credibility of the process.

Hlophe, who was also a candidate, was not recommended for appointment. Mired in controversy, his appointment would have been a bridge too far, even for a Zuma-friendly JSC.

One of the judges who ultimately was appointed was Justice Khampepe, who served the court with distinction. Zuma would have rued appointing her. Before she retired recently, she wrote the majority judgment finding him guilty of contempt of court and sentenced him to 15 months' imprisonment.

After the appalling behaviour of some of the commissioners, I never returned to the JSC as a candidate. I was not the first, and would not be the last.

Shortly, thereafter, in October 2009, Zuma appointed Justice Ncgobo as Chief Justice. Some suggested, perhaps unfairly,

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that he was rewarded for his dissent in the search warrants' case against Zuma. The Deputy CJ, Moseneke who had been appointed to the CC by Mbeki was overlooked after a benign comment he had made at a private birthday function was seized upon by the ANC as evidence that he was ill-disposed to them.

Meanwhile the Hlophe cloud remained. In 2011 FUL succeeded in having the courts invalidate the JSC decision to drop the investigation into Hlophe's misconduct. Compelled to continue the investigation, a Judicial Conduct Tribunal (JCT) was scheduled for 30 September 2013, but was confronted with a regrettable turn of events.

Two CC justices, Jafta and Nkabinde, who had first reported Hlophe's conduct, appeared reticent to testify. They challenged the JCT's jurisdiction to hear the matter on technical grounds. Their objection failed. They appealed to a full court and lost. Then to the SCA, which dismissed their appeal, lamenting the delay caused by this futile litigation. Undeterred, they appealed further to the CC, the very court in which they were members, again unsuccessfully. When they inevitably failed, they incomprehensibly sought to rescind the judgment and were embarrassingly told in the court's judgment that they could not do so. The judgment was delivered on 24 August 2016 – ten years since the original complaint.

The JCT reconvened only two years later. This time Hlophe sought the presiding judge's recusal on the ground that he had allegedly made disparaging remarks about him at a social gathering – an allegation that the judge denied. He nonetheless recused himself delaying the matter yet again.

The matter was able to proceed only in December 2020 before a new tribunal. On this occasion both Jafta and Nkabinde testified. The tribunal rendered its carefully reasoned decision on 9 April 2021 finding Hlophe guilty of gross misconduct. On 25 August 2021 the JSC voted 8-4 to recommend his impeachment. The four votes in his favour by lawyers demonstrated that some of its members would protect him to the very end, even in the face of the damning unanswerable case against him. It took a further year for the JSC to recommend that President Cyril Ramaphosa suspend him.

Hlophe was impeached after an overwhelming and unprecedented vote by the National Assembly on 21 February 2024. He was then removed by the president as a judge, 16 years after the complaint against him was first made. There were few left to protect him, or so it was thought.

THE JSC'S FAILURE TO FULFILL ITS CONSTITUTIONAL MANDATE

In this section, I shall draw on FUL's research and analysis of the JSC's functioning as the Zuma presidency strengthened its grip over the state and its institutions. FUL assessed how candidates were interviewed, the application of the guidelines and criteria, including race and gender, and importantly the adverse impact of political interference. The assessment, which covered the period until 2022, including through the Ramaphosa presidency, paints a sorry picture of the JSC's failure to execute its mandate properly and lawfully, and emphasised the need for urgent reform. I shall point to a few instances, given the time constraints, to demonstrate this failure.

In April 2011 the JSC interviewed seven candidates for the WCHC – of which Hlophe was the JP – for three vacancies. Only one candidate – a black male or "coloured" according to government statistics – was appointed. The other candidates, a white female, Ms Judith Cloete, and five white males, including the respected Owen Rogers SC, were not. This left two vacancies. The irresistible inference was that there was an undeclared unconstitutional policy not to appoint any white candidate. The courts invalidated the hearings and directed that the JSC reconsider the applications.

The subsequent interviews – two years later – considered eight candidates for five vacancies. On this occasion the JSC filled all the vacancies, including appointing Rogers and Cloete – an implied admission that they were wrongly not appointed earlier. Rogers is currently a member of the CC.

Later that year, after an aborted attempt unconstitutionally to extend Chief Justice Ncgobo's term, President Zuma, controversially nominated the recently appointed justice, Mogoeng Mogoeng, as chief justice, again ignoring the stronger and widely supported Deputy CJ Moseneke. The subsequent "confirmation hearing" of the JSC was an unedifying spectacle, with the majority of its members giving the appearance that they were Justice Mogoeng's defence counsel rather than independent guardians of the judiciary. In response to a question from one of the more skeptical commissioners, however, he said that he believed that his appointment had been ordained by God.

In July 2012 four candidates were nominated for appointment to the CC. One of them was Justice Zondo, who was then a recently appointed high court judge. He had served in the Labour Appeal Court, with little evidence of significant constitutional experience. Another was the exceptional Judge Nugent from the SCA, whose contribution to the law, including constitutional law, was formidable. Zondo was given a friendly interview in contrast to Nugent, who was interrogated on why he had withdrawn earlier as a candidate in 2009. He explained that at the time he had little confidence in the JSC because of the way it had dealt with the Hlophe complaint. His answer aggravated rather than mollified them. Zuma appointed Zondo, a decision he came to regret, after Zondo's damning findings against him at the State Capture Commission.

That the JSC had become mired in political intrigue, bad decision-making and unconstitutional conduct was evident. In April 2013, Izak Smuts SC, the Bar Council's representative, resigned from the JSC. He explained that it had failed to appoint candidates "of intellectual forensic excellence steeped in the values of the Constitution" – a statement he qualified by adding that the issue was more nuanced than simply not appointing white males. The reasons he gave for his resignation accorded with the observations of many, including my own.

The JSC ignored the criticism. Worse, it doubled down: immediately thereafter, Judge Plasket, who had a distinguished career on the Eastern-Cape bench was overlooked for appointment to the SCA. During his interview, he was subjected to a heated exchange on transformation. In contrast, other candidates had congenial interviews. He was ultimately appointed at his fifth attempt a few years later, after having endured an unspeakable humiliation, to which others have also been subjected.

The 2015 interviews for the CC followed after Sudanese president Al-Bashir, indicted by the ICC for war crimes, was

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allowed to leave the country in contravention of a high court order. Justice Minister Masutha questioned the interviewees about judges being "dangerously wrong". On this occasion the courts were not wrong, the government was, first to ignore a court order, and second for the Minister to misuse the JSC for political purposes.

During the April 2021 interviews for the CC the questioning of the candidates caused public outrage at the apparent hostility shown to Judge D Pillay, who had recently ruled against Zuma in the high court. Commissioner Malema, made baseless racially loaded allegations against her, including accusing her of pursuing a political agenda. Instead of rebuking him the CJ (Mogoeng) joined the inquisition.

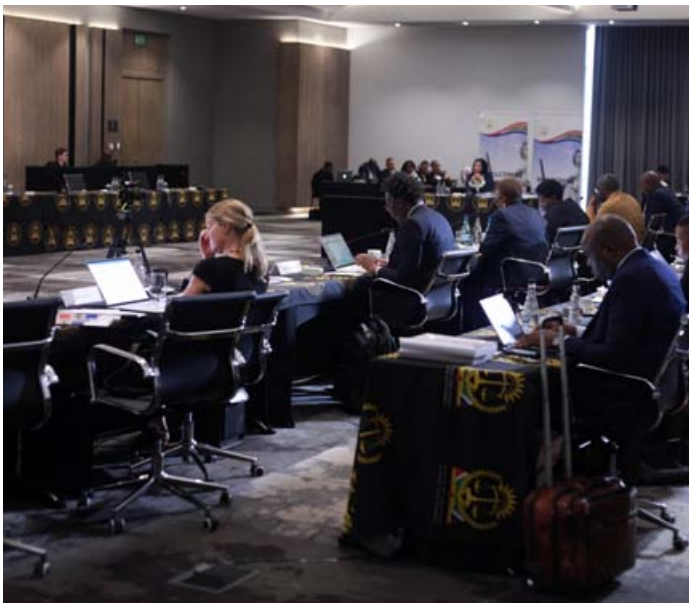
Their behaviour prompted yet another review to declare the sitting unlawful and unconstitutional. The Council for the Advancement of South African Constitution (CASAC), which launched the review, argued that the JSC was being misused for political and other ulterior purposes, including commissioners questioning judges who had made rulings against them, and attempting to settle scores against judges against whom they held grudges. Pillay was not the only candidate who had endured the travesty. Ultimately, the JSC was unable to defend itself and agreed to re-run the interviews. Judge Pillay had had enough, and did not return.

Meanwhile, at the "State Capture Inquiry" evidence of the governing party's political misuse of the JSC was laid bare when it emerged that that the ANC's secretive "Deployment Committee" had identified judges for appointment including and especially to the CC and SCA. It hardly availed its President, Ramaphosa, who testified on its behalf, to suggest that its members on the JSC were not bound by the recommendations of its Deployment Committee.

In April 2022, after much pressure from NGOs and others, the JSC adopted new guidelines. This too seemed to have had little disciplining effect on many of its members.

In October last year, the JSC conducted interviews to fill four vacancies in the SCA after several senior judges had retired. Over the last decade the court had lost skilled judges, whom the JSC failed to replace with suitable appointments. The loss was particularly acute in commercial law, a problem that has become manifest at all levels of the judiciary, including the CC – one reason why commercial litigants choose arbitration rather than the courts.

In a replay of the impugned 2011 interviews for the WCHC, ten candidates were interviewed for five vacancies. Only two were appointed, leaving three positions vacant despite there being several eminently suitable candidates. One who failed to make the cut was Judge David Unterhalter, a lawyer and judge of vast experience in many areas of the law, including



constitutional law and commercial law. He had earlier also been controversially overlooked for appointment to the CC. The failure to appoint him and others was roundly criticised by legal commentators.

Asked to provide reasons for its decision not to fill all the vacancies, the JSC explained that only two of the candidates had received 12 or more votes, the threshold of votes required, there being 24 commissioners. The JSC was unable to provide convincing or any reasons why only two of the judges were considered suitable for appointment. This is because commissioners vote by secret ballot, without providing reasons.

FUL instituted review proceedings against the JSC seeking relief in two parts. In Part A it sought an order for the JSC to reconvene urgently to consider whether or not the candidates to fill the remaining posts were qualified to fill them. That the matter was urgent was evident from the crisis in the SCA. In Part B FUL sought an order that the JSC publish assessment criteria and require each member to assess candidates in writing against the published criteria.

What the JSC did disclose in response to the review was startling. Its confidential deliberations following the public interviews revealed that the deputy president (the DP) of the SCA had motivated four candidates for appointment. His strongest pitch was for Unterhalter, whom he described as a "big hitter" with vast skill who took more than his share of work. He had the support of the senior members of the court. The CJ supported appointing two candidates, including Unterhalter. He added that he was unsure about the others. The CJ was followed by Minister Lamola, who also supported Unterhalter, even though he thought that "he [had] tried to be too clever" during his interview. He also supported two other candidates. This was followed by Commissioner Singh, an MP who supported three of the candidates recommended by the DP, but not Unterhalter. Singh's view of him was: "he is a great jurist [but he] did not have the impression … that he was a team player" – an astonishing remark in the light of the contrary view of the SCA judges. Commissioner Dodovo then followed. He preferred another candidate and would not recommend Unterhalter because he believed he was "arrogant" and had a "sense of entitlement and self-importance". He preferred appointing

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Judge Kgoele, who he described as a "black African woman", instead of Unterhalter.

Commissioner Malema, also an MP, came next. He had nothing to say about any of the candidates other than Unterhalter. What he did say amounted to crude racial stereotyping and revealed the depths of the discourse to which the JSC had now sunk:

> "A well experienced judge who has been before us many times … who has a sense of entitlement and superiority … [which was apparent from how he addressed the Commission]. I like the racism of the Afrikaners because they don't hide it … I will never support subtle racism that masquerades itself as being intelligent … I don't agree with the Minister that he was trying to be clever. He was being himself. A person who looks down at very senior judges because they are of a different colour … We have dealt with such characters before who felt they could go to the Constitutional Court … He comes across as arrogant … and intellectually superior. [T]he racism of liberals … That's what I wanted to say about him."

One or two other commissioners echoed the unsubstantiated claim of arrogance against Unterhalter, with one observing that he is a "good judge" but added the disqualifier: "one cannot take away the appearance of arrogance".

An attempt by Commissioners Baloyi and Ngcukaitobi – both respected silks and recent appointments to the JSC – to introduce some rationality into the process failed to gain sufficient traction. They emphasised the importance of giving due weight to the recommendations of the head of the court; that lack of humility and arrogance were not disqualifying criteria and that, in any event, these did not outweigh other factors that redounded to a candidate's credit.

Ngcukaitobi was severe in his criticism of his fellow commissioners, who, he said, were treating the looming crisis in the SCA lightly. He argued that Unterhalter was the only candidate singled out for criticism except for one other. He insisted it was untrue that he was not a team player, a rebuke directed at Commissioner Singh. His own experience appearing before him, he explained, was that he was pleasant to appear before. In regard to the allegations of entitlement, arrogance and racism he pointed out, correctly, that no one had put any of this to the candidate during his interview. He added that Unterhalter was not without flaws, one being that he had not read "the mood of the room", but added that he was "head and shoulders" above the other candidates. He emphasised that Unterhalter was the only judge among those interviewed, who had a clear theory of how to reconcile the common law with the Constitution.

Only 12 of the 23 Commissioners expressed their views.

The chief justice then called for the vote. Only two candidates obtained 12 or more votes. They were appointed. Unterhalter received 11 votes and was not, as were none of the others. Two posts were thus left vacant despite there being suitable candidates to fill them and despite clear judicial authority since the 2011 debacle in the WCHC that a failure to appoint suitable candidates for vacancies without good reason was unlawful.

The JSC realised it would not be able to defend its failure to fill the vacant positions. Also clear was that the apparent – though not clearly articulated – reasons for not appointing Unterhalter, in particular, were unlawful. That he was allegedly arrogant was not a disqualifying factor, even if true. The allegation of racism was baseless, highly prejudicial and constituted unfair discrimination prohibited by the Constitution.

The record revealed that several commissioners used irrelevant considerations laced with personal invective and overlooked relevant considerations in voting the way they did. Regrettably, the chief justice, as chair, gave no guidance on these matters before calling for a vote. He thus abdicated his constitutional duty to ensure a fair process and a satisfactory outcome.

The JSC was therefore constrained to agree, under pressure of the FUL review, to re-advertise the vacancies before the scheduled hearing in October this year. It did so in May and filled the three vacancies advertised. Two of those were filled by Unterhalter and Judge Smith who were both deemed not suitable in the previous hearing.

However, the issues that gave rise to the relief sought in Part A of the FUL review, especially the failure to apply the guidelines adopted for appointments clearly and consistently, and which form the basis of the Part B review – for the JSC to adopt clear assessment criteria – remain and that litigation is pending.

PARLIAMENT'S DESIGNATED MEMBERS FOR THE JSC

The Zondo Commission's investigations revealed how key role players enabled state capture to take hold in state entities, which Parliament, then dominated by a single party, ignored. The president undertook to act on its recommendations.

When the Seventh Parliament was elected there was an expectation that it would act to fix the institutions that required fixing. It was hoped that Parliament would designate suitable persons to serve on the JSC – hardly a difficult task. It failed dismally by appointing two members who clearly were not suitable: Malema and Hlophe.

Malema has consistently abused his authority on the JSC. He has also been found guilty of breaching the Members of Parliament Code of Conduct; he had inappropriately questioned a judge being interviewed by the JSC in 2021 about a ruling the judge made against him (Malema) in a defamation action – a matter in which he had a personal interest. In that matter, the judge had held that Malema had defamed Mr Trevor Manuel by causing falsehoods about him to be published.

Turning to Hlophe again, once the CC had invalidated Zuma's quest to lead his newly formed party, uMkhonto we Sizwe Party (MK) in Parliament due to his criminal conviction for contempt of court, MK dubiously anointed the disgraced Hlophe to be its parliamentary leader, and then cynically nominated him to be one of Parliament's representatives on the JSC. FUL and several other NGOs wrote to the Speaker to register their indignation. They cautioned that Hlophe's appointment would subvert Parliament's duty to guard the independence of the judiciary and be legally assailable. The Speaker responded that there was no legal requirement for persons appointed to the JSC to be "fit and proper", nor any other legal impediment to his appointment. With respect, she was ill-advised.

The National Assembly thus proceeded to select Hlophe to serve on the JSC – the very body that had found him guilty of gross misconduct and unfit to be a judge. In ongoing litigation, FUL challenged Parliament's designation of Hlophe to the JSC.[1]

CONCLUDING REMARKS

In my years on the bench and thereafter as a member of FUL and now the chairman of its board, I and many others have sought to arrest the decline of the JSC, by raising our voices. That it has increasingly abused its power and become captured by political interests has been laid bare. It was not only the politicians on the JSC who were responsible for this. Some judges have acquiesced in this development. Senior lawyers with vested interests have not only watched, but also been complicit. Some, the storied Justice Cameron recently described as "dangerous." He trenchantly commented that:

> "They seek to propel [an] agenda. They are skilled liars, dissemblers, manipulators and propagandists. [They] employ the instruments of legal practice to bedevil, confuse and dismay … They have even used the JSC to wreck the advancement of conscientious and capable candidates for judicial preferment."

The consequence of the combined conduct of these malevolent actors, often aided and abetted by the insipid amongst them, has been a loss of public confidence in the JSC, an institution that is vital to ensure the competence of the judiciary and protect its independence from political and other interests. Without this the rule of law is imperilled. I ask Rhodes University and the graduates from its iconic law faculty to be vigilant, to speak out, and not to look the other way. A

Note

1. This speech was edited to comply with *Advocate*'s policy not to publish comment on pending litigation. Dr Hlophe has also since resigned from the JSC pending the outcome of the litigation.