

36 Pearson Avenue
Eshowe 3815
KwaZulu-Natal
29 November 2020

The Honourable Deputy Chief Justice Raymond Zondo
Member of the Judicial Conduct Committee
Judicial Service Commission
c/o Commission of Enquiry into State Capture
Hillside House, 17 Empire Road
Parktown
Johannesburg 2193

And to cc list

Dear Judge Zondo

UNRESOLVED, EXCEPTIONALLY SERIOUS GROSS MISCONDUCT
COMPLAINTS AGAINST MLAMBO JP AND WAGLAY JP

I write to you in your capacity as *de jure* member of the Judicial Conduct Committee ('JCC') of the Judicial Service Commission ('JSC') under section 8(1)(b) of the Judicial Service Commission Act.

One year ago today, I wrote to Chief Justice Mogoeng Mogoeng in his capacity as JSC chairperson, protesting his JCC's failure to have determined my several gross misconduct complaints filed two-and-a-half years earlier in mid-2017 against Dunstan Mlambo, Judge President of the North and South Gauteng Division of the High Court, and Basheer Waglay, Judge President of the Labour- and Labour Appeal Courts. A copy of my letter to the Chief Justice is enclosed.

In response, JSC secretary Sello Chiloane telephoned me in February this year, urgently requesting copies of my complaints, the accused judges' responses, and my invited comments on them, and assuring me that they would be dealt with at last. I provided him these documents in PDF via Dropbox right after his call, and he acknowledged receipt.

Hearing no more from the JCC in the next six months, I wrote to Chiloane in August demanding action. A copy of my letter to him is enclosed. He didn't respond, and a further three silent months have passed.

It's now been three-and-a-half years since I filed my capital complaints against Mlambo JP and Waglay JP, and besides requiring them to answer them a year later (which they did, atrociously, and profoundly aggravating them), and then asking me for copies, the JCC has taken no further steps to resolve them – at least none that I've been told about.

A week ago on the 23rd, as you were ordering legal action against former President Jacob Zuma for walking out of your Commission of Enquiry into State Capture, you remarked very correctly that it was:

a serious matter. It impacts on the integrity of the Commission, the rule of law and public accountability. ... The rule of law and public accountability are values fundamental to our constitutional order and our Constitution promises that all are equal before the law. This is a principle of our Constitution and of a society built upon the rule of law.

Summarised in my letter to Mogoeng CJ, my nine complaints to the JCC against the respondent judges are likewise an extraordinarily 'serious matter'. All but one are squarely founded on supporting documents. Two charge crimes. As said in my letter to the Chief Justice, the misconduct of which I complain dwarfs, or at least equals, anything of which Hlophe JP, head of the Western Cape Division of the High Court, stands accused.

The JCC's inaction in the matter contradicts everything you said about the 'rule of law and public accountability' being 'values fundamental to our constitutional order'.

Although indeed 'our Constitution promises that all are equal before the law', the JCC has failed to deliver on this most 'fundamental' 'principle of our

Constitution and of a society built upon the rule of law.’ Contrariwise, it appears to be laughing it off.

Manifestly your JCC is not treating the two accused judge presidents as ‘equal before the law’, like the rest of us.

In sum, the JCC’s shameful failure to prosecute my complaints negates these most basic principles of our constitutional democracy that you rightly emphasized when taking Zuma to task for holding himself above the law.

In my letter to JSC secretary Chiloane I raised the possibility of having to refer my complaints to the court of public opinion, both local and international, should the JCC continue sitting on its hands; and I identified several likely interested and concerned parties – my list of which I’ve since amplified very considerably in preparation for this baleful eventuality, should it be necessary.

I should report that both the media and Hlophe JP are already onto this scandal.

At a meeting with her here in Eshowe a month ago on 27 October, I gave Marianne Thamm, Deputy Editor of *The Daily Maverick* and one of our country’s leading judicial-watching, corruption-exposing journalists, an in-depth briefing about this matter, during which I furnished her with copies of my letters to the Chief Justice and JSC secretary Chiloane.

Earlier that month, I wrote to Hlophe JP, alerting him 1) to the fact that the JCC was selectively prosecuting him; 2) to the JSC’s repeated, shocking, illegal and unconstitutional suppression of records that I’d duly requested under the Promotion of Access to Information Act (‘PAIA’), which I need, *inter alia*, to support a further gross misconduct complaint against Mlambo JP; and 3) to the JSC’s shielding of Mlambo JP in this manner, apparently to protect him from being held to account for his further grossly unethical abuse of power, which had threatened Hlophe JP with extreme prejudice. Two days ago on the 27th, Hlophe JP telephoned to thank me for informing him about this, and confirmed first hand certain hearsay information stated in my letter to him, which I’d

received from a reliable, well placed source, pertaining to Mlambo JP's staggering further misconduct that I intend reporting.

I appreciate that you are hands-full with your all-important State Capture Commission, but my extraordinarily grave complaints against the respondent judges, duly made to the JCC on which you serve, can't go on collecting dust.

Any reasonable person must wonder why the JCC is not bringing Mlambo JP and Waglay JP to book for their capital misconduct, as it energetically goes about prosecuting Hlophe JP.

The gross unreasonableness of the JCC's delay in deciding my complaints is pointed up by the Norms and Standards for the Performance of Judicial Functions, issued by the Chief Justice in 2014. Unless a case is unusually complex or massive, a judge must 'strive to finalise' it 'as expeditiously as possible' within one year and must deliver any reserved judgment within three months. In the case of my complaints to the JCC, the papers have long all been in and the matters ripe for adjudication, but nothing's happening. As said, I lodged my complaints back in mid-2017, and they were answered (appallingly) the following year; yet contrary to JSC secretary Chiloane's assurance to me in February that they would finally be attended to, they've yet to be decided. The delay is outrageous.

If as the second most senior ranking member of the JCC you're seen to be giving a free pass to two fellow senior judges charged with the grossest impeachable misconduct, even as your State Capture Commission duly holds corrupt politicians, corrupt public servants, and other corrupt persons to account, it may well adversely 'impact on the integrity of the Commission' that you chair, or at least on public confidence in it. It will certainly impact on the integrity of the judiciary.

Besides the public's compelling interest in the JCC's determination of my complaints without further delay, I have a direct personal and professional interest in it of my own. As mentioned in my letter to the Chief Justice, Legal Aid South Africa ('LASA'), formerly chaired by Mlambo JP, is trying to

annihilate the witness against him by having me struck off the roll of advocates. My offence? Allegedly disgracefully unprofessionally scandalizing the court by complaining of Mlambo JP's misconduct in my papers in my labour litigation against LASA and then in my complaints to the JCC. In so doing, LASA – actually Chief Legal Executive Patrick Hundermark, who Mlambo JP has rewarded for his servility with an acting judicial appointment in the past – is employing a grotesquely perverse, cynical offence-as-defence strategy to turn the tables and depict me as the malfeator in the matter, rather than the accused judges. (Think Zuma's spurious complaint to the JCC against you after you dismissed his recusal application.)

Mentioned in my letter to the Chief Justice, I'd assumed that LASA's complaint against me to the Society of Advocates of KwaZulu-Natal ('the Society') made in 2015 had been dismissed in 2017 after I submitted copies of my complaints against Mlambo JP as my complete answer to LASA's complaint against me, because after I did so I heard no more. But I've just learned in September from a document elicited from the Society with a PAIA request that its Litigation Committee had recommended that the Bar Council await the JCC's decision of my complaints against Mlambo JP and Waglay JP before deciding whether to act on LASA's complaint against me. The Legal Practice Council, which came into being in 2018, has inherited the Society's file in the matter, and its local provincial disciplinary officer Nadira Harripersad told me two days ago on the 27th, in response to my telephonic enquiry about this, that it's still open.

The Auditor-General's Investigations division – which is dealing with my documented complaints against several of LASA's top management executives regarding their massive ongoing contraventions of the Public Finance Management Act, numerous criminal offences committed under that Act and other laws, and a host of 'material irregularities' as defined by the Public Audit Act – is also concerned to know about progress in the JCC's disposal of my complaints to it, because its Senior Manager Kamesha Naidoo asked me about this in July.

Having already appealed to the Chief Justice a year ago – fruitlessly in the result – I now repeat my plea to you, as the second most senior member of the JCC, to see to the long overdue decision of my complaints.

I'm not prepared to wait any longer. The JCC's dereliction of its statutory responsibilities in the Mlambo JP and Waglay JP matters is scandalous.

I hope to have your reply by 31 December – failing which, after calling local and international attention as widely as I can to the JCC's failure to prosecute my complaints, I'll be applying to the High Court in the new year for a mandamus against the JSC, alternatively for relief under the Promotion of Administrative Justice Act – as indeed JSC secretary Chiloane himself suggested I seek if I was dissatisfied with the JCC's further handling of my complaints.

I conclude by recording that I'm sensitive to the enormous damage to the reputation of the South African judiciary that the prosecution of my complaints portends, and accordingly I reiterate my preference for a global, conciliatory settlement and resolution. But this is something for the JSC and the LASA Board to decide and work out. Otherwise the law must take its course, and I'm working full-time to make sure that it does.

Yours sincerely

ADV ANTHONY BRINK
anthonybrink.sa@gmail.com
083 779 4174

PS: I've addressed this letter to you for delivery at your physical address at the Commission on State Capture where you currently work, *first* to ensure you receive it as soon as possible; and *second* to prevent it from being intercepted and not reaching you. Although my letter couriered to the Chief Justice was addressed to him for his personal attention, I'm now wondering whether his

office staff ever placed it before him to read, seeing as there's been no conclusive follow-up in the year since I wrote to him.

Cc:

The Honourable Chief Justice Mogoeng Mogoeng, chairperson of the Judicial Service Commission;

The Honourable Judge President John Hlophe, Western Cape Division of the High Court;

Memme Sejosengwe, Secretary General, Office of the Chief Justice;

Jakes Jacobs, Chief Director, Office of the Secretary General, Office of the Chief Justice;

Nathi Mncube, Spokesperson, Office of the Chief Justice;

Sello Chiloane, Secretary of the Judicial Service Commission;

Adv Marissa Bezuidenhout, Head of Corporate Legal and Provisioning Services, Management Executive Committee, Auditor-General South Africa;

Adv Paul Pretorius SC, Evidence Leader, Commission on State Capture;

Marianne Thamm, Deputy Editor: *The Daily Maverick*.

This letter and the documents to which it refers are accessible in PDF online at illegal-aid.co.za.

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