

Independent commission needed to investigate allegations of corruption against judges

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The Office of Chief Justice and Judicial Administration was allocated its first budget vote as from 1 April 2015. The transfer of administrative functions and identified staff attached to the Superior Courts from the Justice Department to the Office of the Chief Justice (OCJ) commenced on 1 October 2014. The Department has continued to support the administration of the magistrate's courts.

Significant gains have been achieved by this office, and the management of its budget continues to be well received by the Auditor General. In dealing with the Covid pandemic, some notable successes were achieved, but the growing backlog in the court rolls cannot be ignored, as is the case with dwindling court hours.

Significantly, the Constitution Seventeenth Amendment Act designated the Chief Justice as head of the Judiciary with responsibility over the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts. This responsibility includes presiding over the Judicial Services Commission, responsible for appointing judges, and safeguarding the integrity of the Judiciary. And unfortunately, in the current prevailing circumstances, a discussion on Judicial integrity is unavoidable, despite the fact that our Judiciary has been a shining light in difficult times and has justifiably earned the respect of most South Africans.

Explosive allegations of corruption were made in February at the Zondo Commission of inquiry by Acting SSA director-general Loyiso Jafta, who told Deputy Chief Justice Raymond Zondo that allegations have not been levelled at a particular judge. The bribes were allegedly paid in order to influence judges in favour of President Zuma.

Our Constitution provides that the courts are *"independent and subject only to the Constitution and the law"*, which must be applied impartially and without fear, favour, or prejudice. The Bangalore Principles, which provide the international best practice standard for judicial conduct, require that judges exercise their functions *"free of any extraneous influences, inducements, pressures, threats or interference"*. It is surely impossible for any judge to act consistently with these requirements if they have received money from the SSA.

These allegations turn an unwelcome spotlight onto the possibility of corruption in the judiciary. There has never been any definite evidence of corruption by judges, but the allegations made at the Commission will be harmful for public confidence in the judiciary.

The evidence of Sydney Mufamadi, concerning the so-called "Project Justice", allegedly aimed at paying millions of Rands to members of the Judiciary, has not helped this perception, and the most recent evidence of millions of Rands in cash being handed to David Mahlobo (for onward passage to members of the Judiciary) have underlined this very serious potential risk. Unfortunately, the processes of the JSC in this regard are noted only for their glacial pace, taking 20 years to deal with the Motata matter, and over 12 years to deal with Judge President Hlophe, and that matter is far from over.

Any allegation of this serious nature must be investigated, but it is not ideal to involve judges in this investigation, as the appearance of the judiciary investigating itself will not inspire confidence. The process of a judicial commission of enquiry appears to be the most appropriate course of action, with serious consequences in the form of prosecutions by the National Prosecuting Authority (NPA)

should the findings warrant it. The NPA has the mandate for prosecuting criminal offences, and a judge receiving a bribe would be a serious criminal offence.

An independent commission headed by credible legal professionals that could include a retired judge is urgent and necessary to ensure that the judiciary are not permanently stained by the allegations that have been made.

In demonstrating that the JSC is capable of acting against Judges when their conduct falls short of the mark, the JSC announced two recommendations for suspension for complaints of gross misconduct some time ago. It has been recommended that Pres Ramaphosa suspends Judge Parker and Judge Makhubela, pending the outcome of their hearings by the Judicial Conduct Tribunal. If they are suspended, they will be the first suspensions on gross misconduct claims in SA's history since 1994.

While the conduct of both is serious and falls woefully short of the conduct expected from Judges, neither can hold a candle to the conduct of Western Cape High Court Judge President John Hlophe when it comes to seriously egregious conduct.

Hlophe has most recently accused the judiciary *"of being soaked in politics, battling to deal with transformation, and allowing apartheid-era judges to dominate the narrative"*, tellingly after he had been found guilty of gross misconduct by the Judicial Conduct Tribunal.

One suspects that his disenchantment with South Africa's system of law arises, instead, from the fact that after 14 years of serious complaints the legal system has finally found him guilty of gross misconduct. Recently the Judicial Conduct Tribunal found that Hlophe had attempted to *"improperly influence"* Justice Bess Nkabinde and Justice Chris Jafta in a pending case before the Court at the time, regarding Jacob Zuma. The tribunal ruled that Hlophe (in a classic example of a judge *"soaked in politics"*?) had *"breached Section 165 of the Constitution"* in that he attempted to *"improperly influence the two justices of the Constitutional Court to violate their oaths of office"*.

The truly remarkable aspect of Judge Hlophe's case is that despite the Tribunal's finding, the Judicial Services Commission – supposedly the guardian of the integrity of South Africa's judicial system – has consistently refused to recommend his suspension, and also permitted him to participate in its deliberations on the appointment of judges to the Western Cape High Court.

That Judge President Hlophe has allocated to himself the Public Protector's challenge to the constitutionality of an inquiry into her fitness to hold office, is evidence of his nonchalance in the face of a judicial crisis, and until these very pressing issues are resolved, a dark cloud will continue to hover over the judiciary, and the public's perception thereof.

The Chief Justice has now embarked on a well-earned sabbatical and will not return to office prior to his vacating office when his term ends in October. Whoever is chosen to fill that position will have to take cognisance of these important issues, and deal with them as quickly as is possible, or the Office of the Chief Justice will invariably continue to suffer from a serious perceived lack of credibility.