



HELENSUZMAN FOUNDATION

For attention: His Excellency, Mr Cyril Ramaphosa

Email: Angeline@presidency.gov.za

Email: OSewpaul@justice.gov.za

15 October 2021

Dear His Excellency Mr Cyril Ramaphosa

Submission in response to the call for objections on Chief Justice nominees

We attach our written objections in response to the call for objections on the Chief Justice nominees. Our objections concern Judge President John Hlophe and Adv Busisiwe Mkhwebane.

Should you have any queries, it would be appreciated if you could contact Chelsea Ramsden (Email: chelsea@hsf.org.za).

Yours sincerely

Francis Antonie

Director

Director: Francis Antonie

Trustees: Nick Binedell • Cecily Carmona • Max du Plessis • Cora Hoexter • Nick Jonsson • Daniel Jowell • Kalim Rajab • Gary Ralfe • Phila Zulu

Patrons: Prof. Thuli Madonsela • Lord Robin Renwick



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1. Introduction

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make objections to the Chief Justice nominees. The HSF sees this engagement as a way of fostering critical, yet constructive, dialogue between civil society and government.

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability. The HSF’s interest in participating in the process for nominating a Chief Justice centres on our commitment to the Constitution and the advancement of human rights and freedoms. Central to our work is the defence of the rule of law.

The importance of upholding the independence, credibility and integrity of the Judiciary cannot be overstated. Section 165 of the Constitution vests judicial authority in the courts and provides for the independence of the courts.¹ The Judiciary, and the courts, are the guardians of the Constitution and must uphold the rule of law.

The position of Chief Justice can be considered one of the most important positions in our democracy. Integral to a strong and independent Judiciary, which the public can have confidence in, is the Chief Justice. It therefore must be a person of unblemished integrity who

¹ Section 165(2) provides that “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.

embodies the qualities of independence and impartiality, not to mention having the administrative skills which are needed by the head of the Judiciary. The current judicial climate makes the appointment of a person with these qualities all the more important.

The HSF wishes to record its objection to the nomination and shortlisting of Judge President John Hlophe and Adv Busisiwe Mkhwebane for the reasons listed below.

2. Criteria for Appointment as the New Chief Justice

President Cyril Ramaphosa has appointed the Shortlisting Panel and has selected the following persons to sit on the Panel: Judge Navanethem Pillay, Mr Jeff Radebe, Mr Ronald Lamola, Adv Thuli Madonsela, Ms Mmapaseka Steve Letsike, and Professor Ziyad Motala.²

The Panel has provided the following criteria in order to assess each nominated candidate, who:

- a. is a fit and proper person who possess the qualifications, skills, knowledge and expertise reasonably expected of an incumbent of the position of the Chief Justice;
- b. meets the constitutional requirements for appointment including with regard to citizenship and mandatory age for discharge from active service;
- c. as head of the Judiciary, demonstrates the ability and capability to:-
 - i. defend, protect and uphold the Constitution;

² "President Ramaphosa Invites Public Participation in Selection of Chief Justice" (16 September 2021) available at <http://www.thepresidency.gov.za/press-statements/president-ramaphosa-invites-public-participation-selection-chief-justice>.

- ii. create a conducive environment for asserting the independence of the judiciary and respect for separation of powers; lead and spearhead South Africa's transformative jurisprudence geared for the advancement of social justice and access to justice; and
 - iii. promote a culture of work ethic geared to meet the acceptable judicial performance standards and standards of accountability.
- d. is reputed to be, of unblemished integrity, be beyond reproach, possess moral leadership qualities and strong skills that would assist in promoting and enhancing an harmonious environment for the entire judiciary;
- e. Judicial Competence;
- f. Demonstrate a level of sensitivity and objectivity towards equality in terms of race, gender, persons with disabilities, LGBTI people and other vulnerable groups.³

3. Judge President John Hlope

In May 2008, 11 Justices of the Constitutional Court laid a complaint against Judge President John Hlophe for attempting to influence Justices Jafta and Nkabinde to find in favour of former President Jacob Zuma in a pending judgment before the Court.

On 9 April 2021, after years of delays, the Judicial Conduct Tribunal of the Judicial Service Commission, comprised of Judge Joop Labuschagne, Judge Tati Makgoka and Ms Nishani Pather, unanimously found that Judge President John Hlophe was "guilty of gross misconduct as envisaged in section 177⁴ of the Constitution" on the basis that:

³ "Terms of Reference for Shortlisting Panel of Nominations Received for Purposes of Filing the Imminent Vacancy of the Chief Justice of the Republic of South Africa" available at <http://www.thepresidency.gov.za>.

⁴ Section 177 of the Constitution provides that:

1. "A judge may be removed from office only if:-

“[O]n an objective and proper consideration of the facts and probabilities, we find that:

- a. Judge President Hlophe’s conduct breached the provision of section 165 of the Constitution in that he improperly attempted to influence the two Justices of the Constitutional Court to violate their oaths of office;
- b. his conduct seriously threatened and interfered with the independence, impartiality, dignity and effectiveness of the Constitutional Court;
- c. his conduct threatened public confidence in the judicial system.”⁵

The Tribunal’s decision was referred to the Judicial Service Commission as required in terms of section 33 of the Judicial Service Commission Act 9 of 1994. On 25 August 2021, the Judicial Service Commission confirmed the Tribunal’s decision and found that:

“Judge President Hlophe’s conduct rendered him guilty of gross misconduct as envisaged in section 177(1)(a) of the Constitution, in that he attempted to influence, improperly, Justices Nkabinde and Jafta to decide matters that were pending before the Constitutional Court in favour of particular litigants.”⁶

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- a. The Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
 - b. The National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.”

⁵ *Justices of the Constitutional Court v Judge President M J Hlophe* Judicial Conduct Tribunal Decision (9 April 2021) available at https://www.judiciary.org.za/images/news/2021/Tribunal_Decision_on_Complaint_Against_Hlophe_JP.pdf, paras 123-4.

⁶ *Findings of the Majority of the Judicial Service Commission in terms of Section 20(3) of the Judicial Service Commission Act, 9 of 1994, In Re: Judge President Hlophe* (25 August 2021) available at https://www.judiciary.org.za/images/news/2021/Findings_of_the_Majority_of_the_JSC_in_re_Hlope_JP.PDF, para 68.

As a result, the Judicial Service Commission recommended that the National Assembly impeach Judge President John Hlophe in terms of section 177(1)(b) of the Constitution.

Based on the above, the HSF firmly believes that Judge President John Hlophe is a completely unsuitable candidate for the position of Chief Justice.⁷ He falls dismally short of the criteria set out by the Shortlisting Panel. Judge President John Hlophe is unfit to “defend, protect and uphold the Constitution” and he clearly does not “promote a culture of work ethic geared to meet the acceptable judicial performance standards and standards of accountability”. In addition, he is not “reputed to be, of unblemished integrity” and “beyond reproach”. Nor does he “possess moral leadership qualities and strong skills that would assist in promoting and enhancing a harmonious environment for the entire judiciary”. For these reasons, the HSF strongly objects to the shortlisting, and appointment, of Judge President John Hlophe for the position of Chief Justice. It is, in fact, inconceivable that he has been nominated for this post.

4. Adv Busisiwe Mkhwebane

In February 2020, following a motion in the National Assembly, an Independent Panel was appointed to “conduct and finalise a preliminary assessment to determine whether, on the information made available, there is *prima facie* evidence showing that the [Public Protector] has committed misconduct, or is incompetent and to make recommendations in the report to the Speaker” with view of possible removal of Adv Busisiwe Mkhwebane as the Public

⁷ See further Karyn Maughan, “How the WC Judge President has Faced 10 Major Scandals, Without Any Sanction” (5 March 2021) *News24* available at <https://www.news24.com/news24/Opinions/FridayBriefing/how-the-western-cape-judge-president-has-faced-10-major-scandals-in-his-term-without-any-sanction-20210304>.

Protector.⁸ The Independent Panel was composed of Justice Nkabinde, Adv Ntsebeza SC, and Adv De Waal SC.

On 24 February 2021, the Independent Panel found that there was *prima facie* evidence of both incompetence as well as misconduct on the part of Adv Busisiwe Mkhwebane and recommended that she be charged on both counts and that the matter be referred to a “committee of the Assembly as provided for in the [National Assembly] rules”.⁹ In support of the finding of incompetence, the Independent Panel found that there were numerous examples, over a number of years, indicating her “sustained lack of knowledge to carry out; and ability or skill to perform the duties of the [Public Protector] effectively and efficiently”. More specifically, the Independent Panel found that Adv Busisiwe Mkhwebane had “grossly overreached and exceeded the bounds of her powers” and that “there [were] repeated errors of the same kind, such as the incorrect interpretation of the law and other patent legal errors”.¹⁰ With regards to the findings of misconduct, the Independent Panel found that there was “evidence of intentional or gross negligent failure to meet the standard of behaviour or

⁸ “Report: Preliminary Assessment and Recommendations of the Independent Panel Established in terms of the Rules of the National Assembly on the Removal From Office, in terms of Section 194 of the Constitution, of a Holder of Public Office in a State Institution Supporting Constitutional Democracy; In Re: a Motion from Mrs NWA Mazzone, MP to Initiate and Enquiry in terms of Section 194(1) of the Constitution of the Republic of South Africa, 1996 for the Removal of Adv Mkhwebane from the Office of the Public Protector on Grounds of Misconduct and/or Incompetence” (24 February 2021) available at https://www.parliament.gov.za/storage/app/media/Pages/2021/march/01-03-2021_Report_of_the_independent_Panel_on_the_Public_Protector/FINAL_REPORT_OF_THE_INDEPENDENT_PANEL_EST_i.t.o_NA_RULE_129U_AND_Sect_194_OF_CONSTITUTION.pdf, paras 1-2.

⁹ Report (n 8 above) at paras 254; 256; 260-1.

¹⁰ Report (n 8 above) at para 254.

conduct expected of a holder of a public office” in respect of a number of reports prepared by the Public Protector.¹¹

The HSF holds the view that Adv Busisiwe Mkhwebane is completely unfit to hold the office of the Chief Justice. She does not meet the criteria set out by the Shortlisting Panel. Adv Busisiwe Mkhwebane has failed to demonstrate that she “possess[es] the qualifications, skills, knowledge and expertise reasonably expected of an incumbent of the position of the Chief Justice”. In addition, based on the above details, it cannot be said that Adv Busisiwe Mkhwebane, “is reputed to be, of unblemished integrity” and “beyond reproach”. Accordingly, the HSF firmly objects to the shortlisting, and appointment, of Adv Busisiwe Mkhwebane for the position of Chief Justice. As in the case of Judge President Hlophe, it is equally inconceivable that she has been nominated for this post.

5. Conclusion

The HSF’s objections to the nominations of Judge President John Hlophe and Adv Busisiwe Mkhwebane are made for the overriding purpose of enhancing the credibility, integrity and independence of the Judiciary. As the only arm of government with “no constituency, no purse and sword, the judiciary”,¹² is reliant on the public’s trust and confidence to function properly and uphold the rule of law.¹³ It is therefore essential that only a suitably qualified and independent person, with the requisite integrity, who is able to uphold the values of the Constitution should be appointed as the new Chief Justice.

¹¹ Report (n 8 above) at paras 255-9.

¹² *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC) at para 16.

¹³ *Mamabolo* (n 4 above), at para 19.