

**JUDICIAL SERVICE COMMISSION OF SOUTH AFRICA**

**IN RE: JUSTICE JOHAN KRIEGLER**

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**FORMAL COMPLAINT**

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I, the undersigned,

**VUYANI RICHMOND NGALWANA**

do state under oath that –

**A. INTRODUCTION**

1. I am a member in good standing of the Pan African Bar Association of South Africa (“PABASA”).
  
2. I am a former member of the Cape Bar and the Johannesburg Society of Advocates (“the JSA”). At both Bars, I served on their Bar Councils, one term on the Cape Bar Council and three terms on the JSA Bar Council. While at the JSA, I also served
  - 2.1 on the Silk Committee,

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- 2.2 as Chairperson of Advocates for Transformation (Johannesburg),
  - 2.3 as Chairperson of the Transformation Committee, and
  - 2.4 as Chairperson of the JSA Fees and Professional Committee.
3. I also served as Chairperson of the General Council of the Bar (“the GCB”) from October 2016 until July 2018.
4. I resigned from the JSA, and terminated my association with the GCB-affiliated constituent Bars, in June 2019 when I realised that the GCB and its constituent Bars are not interested in true and sustainable transformation of the legal profession and the Bar in particular. This is not the space to detail my efforts on transformation within the GCB, the JSA and the Cape Bar. I have written extensively about these, and some of that material can be accessed in the GCB’s official publication, *Advocate*.
5. I have acted on many occasions as a Judge of the Labour Court and as Judge of the High Court in Tshwane and Johannesburg since 2007. My latest acting stint ended in December 2020 at the High Court in Tshwane. Over that period I have delivered more than 200 judgments; many of which are reported. I know of only one judgment of mine as a Labour Court and High Court Judge that has been set aside on appeal. That is a judgment I delivered in January 2009 in *Myers v National Commissioner, SAPS and Others (C177/2008)* [2009] ZALC 168 (12 January 2009) which was set aside by the LAC in

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*National Commissioner of the South African Police Service v Myers and Others (CA 4/09) [2012] ZALAC 4; [2012] 7 BLLR 688 (LAC); (2012) 33 ILJ 1417 (LAC) (2 March 2012)*. But then, the LAC judgment was subsequently reversed by the SCA in *Myers v National Commissioner of the South African Police Services and Others (425/2012) [2012] ZASCA 185; (2013) 34 ILJ 1729 (SCA) (29 November 2012)*, with the SCA expressly agreeing with my assessment of the arbitrator's misdirection (at para 30 of the SCA judgment) which the LAC had missed.

6. I make these disclosures in order to convey that I am capable of an objective assessment of professional conduct and determining where it falls on the Judicial Conduct scale of what is commendable and what is objectionable. I do not make this complaint lightly.
7. I joined PABASA which, although not defining itself by reference to the GCB and its constituent Bars, is determined to chart a path with its members and affiliates that avoids the prejudicial practices to which black members and women as a group have over the years been subjected at GCB-affiliated Bars.
8. The facts contained herein are, save where the context indicates otherwise or I expressly say so, within my own personal knowledge and belief, and are all true and correct.

**B. THE PARTY AGAINST WHOM THE COMPLAINT LIES**

9. I lodge this formal complaint against **Justice Johann Kriegler** in my personal capacity and as a concerned officer of the court. I do so pursuant to the provisions of s 14(1) read together with s 14(3) of the Judicial Service Commission Act, 9 of 1994.

10. The grounds upon which this complaint is based are those set out in

10.1 s 14(4)(b), and

10.2 s 14(4)(e)

of the Judicial Service Commission Act, read together with numerous articles of the Code of Judicial Conduct published in terms of s 12 of the Judicial Service Commission Act under GN R865 in GG 35802 of 18 October 2012 on which I shall elaborate below.

11. According to media reports – which the Learned Judge has, to my knowledge, neither denied nor corrected – the Learned Judge has made public utterances, persistently attacking the person of a senior Judge in active service, Judge President of the Western Cape High Court John Hlophe. The Learned Judge has done so persistently since, as far as I am aware, 2009

following a complaint of gross misconduct against Justice President Hlophe by all the then Justices of the Constitutional Court. The complaint has recently been determined by the Judicial Conduct Tribunal (on 9 April 2021) which has found Justice President Hlophe guilty of gross misconduct.

C. GROUNDS FOR THE COMPLAINT

12. Before setting out the grounds for my complaint, I should confirm that I was part of the legal team that represented Justice President Hlophe in 2008 and 2009 at the JSC and in court litigation following that complaint of the Justices of the Constitutional Court against him. I was again on brief for Justice Hlophe in 2011 when Freedom Under Law, then chaired by Justice Kriegler, successfully challenged in the Supreme Court of Appeal (having been unsuccessful in the high court) the decision of the Judicial Service Commission of 15 August 2009 which had decided that **“the evidence in respect of the complaint does not justify a finding that Hlophe JP is guilty of gross misconduct”** and that the matter accordingly be **“treated as finalised”**. I relinquished the brief when Justice President Hlophe approached the Constitutional Court for leave to appeal against the decision of the SCA and I have not been part of the legal team ever since.
13. I should also mention that I have written critically about the conduct of the Justices of the Constitutional Court, before coming on brief, in their

approach. I have also criticised the judgment of the Constitutional Court in dismissing the application for leave to appeal and for sitting as judges in a matter in which they had a material interest in a case that is reported *sub nom Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Other (CCT 41/11, CCT 46/11) [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567*. I did so in a lecture that I gave at a law school in June 2012, which was published in the August 2012 edition of the GCB official publication, *Advocate*, and which I subsequently then published on my website [www.anchoredinlaw.net](http://www.anchoredinlaw.net).

14. As a preliminary, but important, observation that, I hope, lays bare the context in which the conduct complained of must be seen, let me say this. I lodge this complaint in order to vindicate the integrity, dignity and independence of the Judiciary and the judicial system which are, in my respectful submission, compromised by the sustained wounding public *ad hominem* attacks of Justice Kriegler on Justice President Hlophe. The kind of sustained attack mounted by Justice Kriegler on Justice President Hlophe is not an attack only on Justice President Hlophe; it is an attack on the Judiciary and the judicial system of South Africa. Not only that, Justice Kriegler's attack on Justice President Hlophe has given heart to some Judges of the Western Cape High Court, of which Justice President Hlophe is the leader, to defy his leadership, including refusing to sit with another judge seen by them as being sympathetic to Justice President Hlophe when he denied

having been assaulted by Justice President Hlophe after, allegedly, the said judge had initially told a colleague or colleagues of the alleged attack. This kind of attitude has consequently heralded an open season on judges even by journalists, as demonstrated by the extraordinary attack by a journalist of a publication named *Daily Maverick* on two Justices of the SCA following the judgment in *Jiba and Another v General Council of the Bar of SA and Another; Mrwebi v General Council of the Bar* [2018] 3 All SA 622 (SCA) which found that the conduct of the two appellants did not deserve ultimate censure of being struck off the roll of advocates. The journalist personally and trenchantly attacked two judges of the Supreme Court of Appeal in July 2018, effectively associating them with corruption at the highest level of government. No attempt was made at critically analysing the judgment on its merits.

15. Justice Kriegler's attacks on the Judiciary must be censured by the JSC before more – and possibly irreparable – damage is done to the Judiciary and the judicial system by people who take their cue from him. As an organ of state, it is the obligation of the JSC to protect the dignity, independence and effectiveness of the Judiciary. A sustained attack on the person of the Judge President of a division of the High Court hardly conduces to the protection of the dignity, independence and effectiveness of the Judiciary and judicial system. It requires strong intervention by the JSC to arrest a trend that could possibly denude the Judiciary of its dignity if left unchecked. This is

particularly important when such trend is set by a retired Justice of the Constitutional Court and, importantly, one of the pioneering Justices of that Court.

16. I now turn to some of the utterances that form the basis for this complaint. I do not list them all. My purpose is simply to show a worrying trend and ask the JSC to intervene before it is too late. Many of these utterances are in the public domain and are easily accessible by a basic desktop search.

16.1 The latest salvo occurred on 17 April 2021, when *News24* reported Justice Kriegler as calling not only for the impeachment of Justice President Hlophe but also for his being “**prosecuted and jailed**”. This comes in the wake of a guilty finding against Justice President Hlophe by the Judicial Conduct Tribunal on a charge of gross misconduct on 9 April 2021. This conduct by Justice Kriegler breaches numerous articles of the Code of Judicial Conduct, including

- (a) article 11 which requires judges, including retired judges, to “**refrain from public criticism of another judge**” and act towards other judges with courtesy and collegiality said to be indispensable attributes of a judge;



(b) article 12(1)(d) which prohibits the use or lending of the **“prestige of judicial office”** for the advancement of private interests of the judge or those of others. It is a matter of public record that a political party, the Democratic Alliance (“the DA”), wants Justice President Hlophe impeached. In a statement published on 12 April 2021, the DA urged the JSC to act **“urgently”** so as to **“get rid of him”**. By publicly calling for the prosecution and jailing of Justice President Hlophe, while the judicial process is still ongoing (the Tribunal’s report must still serve before the JSC, and Justice President Hlophe may possibly yet take the decision on review), Justice Kriegler is lending the prestige of judicial office for the advancement of the interests of a political party. This is a breach of article 12(1)(d). Whether Justice Kriegler does so intentionally or inadvertently is an irrelevant consideration. The measure is not so much his intention as the effect that his utterances have in the further conduct of the complaint by the JSC and by the high court and SCA.

16.2 This is not the first time that Justice Kriegler has breached the Code in relation to Justice President Hlophe. In a September 2009 report, *Independent Online* quoted Justice Kriegler as saying Justice President Hlophe was a **“manifestation of the problem”** with the

judiciary, and warning that judicial independence should not be sacrificed on the “**altar of transformation**.” This amounted to a prejudging of the very issue that the JSC was yet to determine in relation to a serious and potentially impeachable “charge” against a senior judge. As a result, Justice Kriegler’s prejudging of the complaint was in breach of

- (a) article 4(a) of the Code of Judicial Conduct which requires judges, including retired judges, to “**uphold the independence and integrity of the judiciary**”. Prejudging a serious and potentially impeachable complaint against a senior Judge in active service hardly conduces to the upholding of the independence and integrity of the judiciary;
  
- (b) article 5 of the Code of Judicial Conduct which requires judges, including retired judges, to behave “**in a manner that enhances public trust in, or respect for, the judiciary or the judicial system**”. Prejudging such a serious, and potentially impeachable complaint, eviscerates public trust not only in the judge being implicated in impeachable conduct before that determination has even been made by the JSC, but also in the Judiciary and the judicial system as a whole. The processes of the JSC form part of the judicial system. When a retired Justice of the

Constitutional Court runs ahead of that process and effectively pronounces on the guilt of a judge in active service by labelling him a **“manifestation of the problem”** with the Judiciary, public trust in, and respect for, the Judiciary and the judicial system is bound to wane if not evaporate. This is demonstrated by the avalanche of attacks (many uninformed) in recent times on the integrity of judges and courts not only by ordinary members of the public questioning the impartiality of the North Gauteng High Court and specific judges of that division, but also by politicians and members of the “Fourth Estate” imagining judges as being corrupt for delivering judgments they do not like;

- (c) article 11 of the Code of Judicial Conduct which requires judges, including retired judges, to **“refrain from public criticism of another judge”** and act with courtesy and collegiality (said to be indispensable attributes of a judge) towards other judges. Justice Kriegler’s attack as reported, and labelling a judge as **“a manifestation of the problem”** before the JSC had determined that very issue, was not germane to judicial proceedings before Justice President Hlophe, or scholarly presentation made for the purpose of advancing the study of law. It appeared mean-spirited and seems to have been intended to sting;

(d) article 12(1)(d) of the Code of Judicial Conduct which proscribes the use or lending of the prestige of judicial office for the advancement of private interests of the judge or those of others. It is a matter of public record that the Democratic Alliance has not been enamoured to Justice President Hlophe since, at the latest, August 2009 following the dismissal by the JSC of the complaint against him by Justices of the Constitutional Court. In a weekly newsletter dated 28 August 2009, then DA leader (Ms Helen Zille) wrote: **“What today’s decision cannot be allowed to do is alter the fact that Judge Hlophe’s character and reputation remain fundamentally tainted”**. In a statement published on its website some 11 years later on 12 April 2021, the DA urged the JSC to act **“urgently”** so as to **“get rid of him”**. By his various attacks on Justice President Hlophe over the years, and by labelling him a **“manifestation of the problem”** with the Judiciary in relation to conduct that was then yet to be determined by the JSC, Justice Kriegler lent the prestige of judicial office for the advancement of the interests of a political party, the main opposition DA. This is a breach of article 12(1)(d) of the Code of Judicial Conduct;

(e) article 17(2) and (3) of the Code of Judicial Conduct which requires a retired judge to always act honourably and in a manner

that is befitting his status and compatible with his status as a judge. The sustained public attacks by Justice Kriegler on Justice President Hlophe, prejudging a complaint lodged with the JSC and mounting a public attack not only on his person but also on his reasoning in a judgment that was destined for appeal, is a clear breach of these articles of the Code.

16.3 In a 3 July 2018 media report, following a postponement of the hearing of the complaint against Justice President Hlophe, Justice Kriegler is reported as having expressed “**disgust**” and blaming Justice President Hlophe for the delay. He is quoted as saying: “**FUL is disgusted but not surprised. Hlophe has attempted for more than 10 years to defeat the attempts to bring him to justice. This is just the latest attempt,**” What Justice Kriegler omitted was

- that the complaint had been finalised by the JSC in August 2009
- that Chief Justice Langa had said, under oath, that he did not wish to see Justice President Hlophe impeached
- that Justice Jafta had expressed the view, categorically, that “**it would not be wise for anyone to reopen**” the enquiry. He gave the following reason for this view

*“I think the matter has done so much damage to the judiciary and to this Commission, as an institution, as well and I think even if one doesn’t agree with the outcome, one has to bear in mind that dragging it causes more damage to the institutions,*

*leaving aside the individuals involved. Individuals may come and go but doing damage to the institutions is something that I find unfortunate.”*

- that Justice Kroon, who was acting in the Constitutional Court when the allegations against Justice President Hlophe arose, expressed himself in similar vein when he said

*“I think in the interests of the judiciary as a whole, of the Constitutional Court and of Judge Hlophe, the chapter must be regarded as closed.”*

- that Justice Kriegler’s Freedom Under Law had unsuccessfully sought to challenge that decision on review in the high court in 2010
- that his Freedom Under Law then appealed the high court decision in the SCA in 2011
- that the Western Cape Premier also challenged the JSC decision, separately, in the Western Cape High Court in 2009, and that the decision went on appeal to the SCA principally at the instance of the JSC in 2010 and was decided in March 2011
- that from 2013 until late 2016, the delay had been occasioned by litigation at the instance of two Justices of the Constitutional Court to which Justice President Hlophe was not party

This public attack on Justice President Hlophe was in breach of numerous articles of the Code of Judicial Conduct, including 4(a), 5, 11, 12(1)(d), and 17(2) & (3).

- 16.4 In a news report dated 1 March 2021, *TimeLive* quoted Justice Kriegler as accusing Justice President Hlophe of employing “**contrived reasoning**” following the Justice President’s acquittal of a politician. This public attack is in flagrant breach of article 11(1)(a) of the Code which says a judge must “**not comment publicly on the merits of any case pending before, or determined by [another judge]**”. Quite apart from the fact that the judgment in issue is, to the knowledge of Justice Kriegler, the subject of appeal, the public excoriation by Justice Kriegler of a Justice President of a division of the High Court for his reasoning in a judgment is, in my submission, clearly incompatible with the status of a judge. This conduct is also in flagrant breach of articles 11(1)(b), (e) and (f) of the Code. These articles prohibit the public criticism by a judge of another judge or judgment on any aspect of the case, enjoin judges to avoid personality clashes with one another but rather to foster collegiality, and to refrain from public criticism of other judges.

- 16.5 In that same *TimesLive* news report of 1 March 2021, Justice Kriegler is reported as saying the Justice President is “**unfit to be a judge**” in

light of the complaint by Justices of the Constitutional Court the determination of which was still pending. Again, this conduct is in clear breach of articles 4(a), 5, 11(1)(a), (b), (e), (f) and 17(2) and (3) of the Code of Judicial Conduct.

17. These are just some of the inappropriate and objectionable public attacks by Justice Kriegler on the Judiciary and the judicial system, and which are in flagrant breach of the Code of Judicial Conduct. I do not intend to be exhaustive. There are numerous other utterances of similar sort which are available should the JSC wish for a list as exhaustive as possible.

18. By these public utterances, Justice Kriegler has

18.1 failed to uphold the independence and integrity of the Judiciary in breach of article 4(a) of the Code of Judicial Conduct;

18.2 failed to act honourably in a manner befitting judicial office, compatible with the status of judicial office, and in a manner that enhances public trust in, or respect for, the Judiciary and the judicial system in breach of articles 5 and 17(2) and (3) of the Code;



18.3 launched an acerbic and public attack on the merits of a judgment of another judge, which are pending before an appeal court, in flagrant breach of article 11(1)(a);

18.4 publicly criticised another judge and the merits of his judgment in flagrant breach of article 11(1)(b);

18.5 failed to avoid personality clashes with Justice President Hlophe, to foster collegiality, and to refrain from public criticism of another judge but, instead, stoked controversy and a personality clash with him on a public platform in flagrant breach of articles 11(1)(e) and (f).

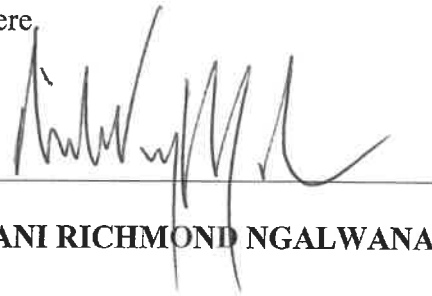
**D. CONCLUSION**

19. For all these reasons, I request the Judicial Service Commission to investigate this complaint and, if it should find Justice Kriegler to have acted in breach of any of these (and other) articles of the Code of Judicial Conduct, to sanction him in whatever manner it considers appropriate and which will serve as a deterrent to a repetition of similar conduct either by him or by others, bearing in mind that as a very senior retired Justice of the Constitutional Court, one who was picked by President Mandela as one of the pioneering Justices of the Constitutional Court, everything Justice

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Kriegler says carries considerable weight not only with other judges but also with the general public and members of the media.

20. This is demonstrated in recent times by the many (largely uninformed) attacks on the Judiciary by members of the public, including members of “the Fourth Estate”. It is not difficult to imagine why people, lay in matters of law, would take heart from the persistent attack by a retired Constitutional Court Justice on a member of the Judiciary and follow the example set by that Constitutional Court Justice. It is a function of his agency as a retired and pioneering Constitutional Court Justice. His status lends the prestige of highest judicial office (of the Constitutional Court) to such attack. Unless the JSC intervenes now to put a stop to it, attacks on the Judiciary will likely get worse. While it may be Justice President Hlophe today, it will be another judge tomorrow. The sniping at individual judges today has, in the medium to long term cumulatively, the potential to collapse any judicial system. If nothing else, I ask the Judicial Service Commission to bear this in mind as it deliberates on this complaint. The integrity, dignity and independence of the South African Judiciary is firmly in its hands. Let it never be said that it did not know just how corrosive of that integrity, dignity and independence of the Judiciary Justice Kriegler’s attacks were.



VUYANI RICHMOND NGALWANA

I hereby certify that the deponent declares that she knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at **SANDTON** on this 20<sup>th</sup> day of APRIL 2021 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.



**COMMISSIONER OF OATHS**

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