

SUBMISSIONS BY THE CENTRE FOR CONSTITUTIONAL RIGHTS TO THE JUDICIAL SERVICE COMMISSION ON THE DESIRABILITY OF HEARINGS INTO THE CHARGE AGAINST JUDGE HLOPHE AND THE COUNTER CHARGE AGAINST THE CONSTITUTIONAL COURT BEING HELD IN THE PUBLIC.

1. Locus Standi

The objectives of the Centre are, in broad terms, to uphold the Constitution and to ensure constitutional compliance. Threats to the constitutionally guaranteed independence of the judiciary and the constitutional principles of openness, transparency and accountability thus fall squarely within the Centre's ambit. As such the Centre is an interested party.

2. Unconstitutionality of closed proceedings

The Centre for Constitutional Rights believes that there are a number of compelling constitutional reasons as to why the proceedings should be conducted in the public. These are set out below:

1.1 Organ of state

Although the JSC is in terms of s 178(6) of the Constitution entitled to determine its own procedure, by majority decision, as an organ of State, the Constitution requires that the JSC conduct its proceedings in an open, transparent and accountable

manner. This responsibility will only be discharged if proceedings are conducted in public.

1.2 Fair Public Hearing

The Constitution itself is premised upon founding values which include accountability, responsiveness and openness as well as the rule of law. The Bill of Rights provides for dispute resolution "in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". An opposed complaint aimed at the impeachment of a sitting judge is by definition a "dispute." If a fair "public hearing" is the standard under s 34 of the Bill of Rights, it is clear that the state and its organs are obliged to respect, protect, promote and fulfill this right guaranteed to all as is prescribed in s 7(2).

1.3 Principle of openness

The rule of law is buttressed by the principle of open justice which requires that unless exceptional circumstances apply, members of the public must be granted access to public inquiries. The Centre concedes that there may well be arguments to be made in favour of keeping preliminary investigations private in the interests of preserving the dignity and effectiveness of the courts [see s 165(4)]. However, once it is decided

that the disputes of fact apparent on the papers justify resort to oral evidence, there can be no possible basis for proceeding in secret. Indeed, to do so is to undermine not only the constitutional values adumbrated above, but also the impartiality, dignity, accessibility and effectiveness of the courts. The spectre of a Star Chamber type of secret investigation is raised in a manner which is subversive of the independence and dignity of the judiciary as a whole.

1.4 Nature of the Charge

Since the charges relate to influencing the outcome of four judgments, in the interests of the administration of justice the proceedings should be conducted in an open manner in order that public confidence in the independence of the judiciary is not undermined. Apart from the serious allegations of judicial misconduct, this is particularly the case because of the broader political issues that have become involved and because of the allegations made by the Secretary-General of the ANC that the Constitutional Court, one of the complainants, is counter-revolutionary and politically biased.

1.5 Independence of the Judiciary

The JSC should learn from its experience with the previous complaint against Judge Hlophe that secret hearings can seriously undermine public confidence in its activities. Open proceedings on that occasion would have dispelled perceptions that the JSC had failed to deal thoroughly and cogently with all of the complaints against Judge Hlophe. The issues that the JSC will now be considering are of such great consequence for public perceptions of the judiciary and for the independence and integrity of our courts that they must be held in public. There is simply no acceptable alternative.

1.6 Press Freedom

Section 16 of the Constitution enshrines freedom of expression including the freedom of the press and other media and the correlative right of the public to receive information on matters of public interest. A corollary of these rights is that the media should have access to at least the formal stages of proceedings of the JSC in regards to complaints against judges.

3. Conclusion.

Denying the public access to the current hearings into allegations of misconduct by the most senior judge president in the country and counter allegations of misconduct against the two most senior judges in the country will undermine the principle of openness which the JSC is constitutionally enjoined to promote. Secret hearings will sap public confidence in the judiciary and *a fortiori* undermine the independence of the Judiciary which the JSC is similarly constitutionally mandated to protect. Closed proceedings will also deny the parties themselves their constitutional right to have a dispute decided in a fair public hearing. Lastly, a hearing into alleged judicial misconduct of the most senior judge president is undoubtedly a matter of clear public interest. The manner in which the Judicial Service Commission (“the JSC”) conducts the hearings is itself equally a matter of extreme public interest. Refusing access will thus be in violation of the public’s right to be imparted information on matters of major public interest

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