Read the following set of facts carefully.

Transformation in the higher education sector has been on the agenda for the past few years in South Africa. This was made even more necessary as a result of the fact that at the end of the 2016 academic year, the large majority of learners writing their Grade 12 examinations (Matric) at public schools throughout South Africa performed poorly. A consequence of this is that too few learners obtained Matric Exemption (the right to enroll for tertiary education at a University).

On 26 January 2017, a member of parliament belonging to the Proud South Africans political party sought to introduce a Bill called ‘The Transformation of Tertiary Education Bill’. The purpose of this Bill is to empower the Department of Basic Education to adjust the marks of every Matric student upwards (in other words, the marks of every student in public schools will be automatically increased by 10%) to ensure that more students have access to tertiary education.

On 7 February 2017 the National Assembly passed The Transformation of Tertiary Education Bill with 268 votes in favour. Parliament issued a statement indicating that the law is consistent with the imperative to improve the number of graduates with tertiary qualifications in South Africa.

On 19 February 2017 the Bill was sent to the President of the Republic of South Africa to assent to the Bill in order for it to enter into force. The President signed the Bill and it became known as The Transformation of Tertiary Education Act 6 of 2017.

The Minister of Transformation and Social Upliftment, the Honourable Mrs Jane Ginwala appears in Parliament on 10 March 2017 to report on the important work that her Ministry has been involved in. During this speech she declares that it will be in the country’s best interests if the President issues an order to all public schools that they should increase the marks of every Matric pupil by 20% instead of the 10% as contained in The Transformation of Tertiary Education Act.

On 1 April 2017 you were approached by the parents of Busi Madonsela. Busi is an extremely intelligent child and is presently in Matric. She has always achieved ‘A’ symbols at school and has always wanted to study Law. She is very disappointed that this law was enacted because she believes that it is not fair that she has had to work so hard at school, while other learners’ marks will merely adjusted and they will therefore have the same entitlement to enter University. The Madonselas wish to challenge this Act. They have approached you for help as you are the best constitutional lawyer in South Africa.

You decide on the strategy you will adopt to challenge the Act and institute the legal challenge. The primary substantive argument that you intend making is that section 29 of the Constitution refers to the need to maintain the quality and standards of education in South Africa so that the qualifications obtained will [continue to] be internationally recognized. This is obviously a very important objective in order to promote South Africa’s socio-economic advancement.

To your utter dismay, two weeks later you read in the newspaper that a judge who is not directly involved in the case has approached two of the judges hearing this case and allegedly said “you are our last hope. You must find in favour of the struggle for academic transformation. The new law must stay”. Moreover, the newspapers have reported that the President has issued a statement to all public schools that they should disregard the fact that the new law states that marks should be increased by 10%, and instead, they must increase the marks by 20%.
2.1 The Bill was introduced by an ordinary member of Parliament and not a cabinet minister. Is this permissible? Discuss with reference to relevant case law. (5)

Yes, this is provided for in section 55(2) as read with 73(2) of the Constitution, which provides that any individual member of the National Assembly may introduce a Bill in the National Assembly even if that member is not a Cabinet Member and even if that member belongs to an opposition party. The authority for this position is the case of Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly (2012) which is the case which caused the Rules of the National Assembly to be invalidated because the former Rules required a member of the National Assembly to obtain permission from the National Assembly to initiate and introduce Bills. Bills were regarded as Private Members’ Legislative Proposals and it was the duty of a Committee to decide whether the Bill could be introduced. The Committee’s decision was based on aspects such as whether the Bill is consistent with the spirit and object of the Constitution; whether other legislation on the same issue is soon to be introduced; is frivolous or vexatious or will have financial implications. The Oriani-Ambrosini case is important for the fact that the Court stated that South Africa’s constitutional democracy is designed to ensure that the voiceless are heard and the views of the marginalized or the powerless minorities cannot be suppressed.

2.2 Describe the general process of law making. In other words, discuss the normal way in which laws are passed in South Africa. (10)

1) At first, policy is formulated via various channels, including through Nedlac, through internal party discussions as well as consultation with affected/interested parties.
2) The proposed legislation is then discussed in a Green Paper. Public hearings are held on the matter.
3) A White Paper is prepared and public hearings are held concerning the proposed legislation.
4) A draft of the Bill as well as an explanatory memorandum is prepared by the Minister responsible for the issue. This is submitted to Cabinet for approval.
5) Once Cabinet has approved the draft Bill, the state law advisers certify that the law is constitutional before it can be submitted to Parliament.
6) The Cabinet Minister responsible for the Bill (eg: education) usually first introduces the Bill in the National Assembly (or the National Council of Provinces). This is the first reading.
7) The Bill is referred to the appropriate portfolio committee for review and amendment after facilitation of public involvement. This is the second reading.
8) If the National Assembly passes the Bill, it is forwarded to the National Council of Provinces for its assent.
9) If the Bill was approved by the National Council of Provinces, it is forwarded to the National Assembly for its assent.
10) Once both Houses of Parliament have passed the Bill, it is presented to the President for signature.

2.3 May the President refuse to assent to a Bill? If so, what are the rules/processes that must be complied with if he is not satisfied about the constitutionality of a Bill? (6)

No, the President does not have a general right to veto Bills. He may only refuse to sign the Bill if he has reservations about its constitutionality. If this happens, the President must refer the Bill back to the National Assembly for reconsideration in terms of section 79(1) of the Constitution. If Parliament adequately addresses the President’s concerns, then the President must sign it. If not (and only if his reservations have not been fully accommodated by Parliament), the President may invoke section 79(4) of the Constitution and refer the Bill to the Constitutional Court. Once the Constitutional Court decides that the Bill is constitutional, the President must assent to it. The relevant case in this regard is the case of Ex Parte President of the Republic of South Africa: In
2.4 In your opinion, is this law constitutional? Refer to both procedural and substantive reasons why the law is constitutional or unconstitutional. Refer to relevant authority, such as case law and provisions of the Constitution to substantiate your answers. (10)

No, this law is not constitutional. As far as procedural reasons is concerned, the fatal failures include that the law was passed in apparent ‘secrecy’ because at no time whatsoever was the Bill made public and further, absolutely no public participation was afforded. Section 59 of the Constitution is unequivocal about the fact that in the legislative process, public participation must be afforded and the views of the public should be properly considered and only rejected if specific views are of no value or relevance. The Constitution emphasizes that accountability, transparency and democracy are central to the governance of the South African state. At a minimum, therefore, we can expect that public participation should be ensured when decisions are being made that affect some or even all of us.

The Doctors for Life case is authority for the assertion that in the absence of public participation in the legislative process, the law is unconstitutional and must be declared invalid because affected persons had absolutely no knowledge of the proposed law, thus it was brought into effect without following the correct processes and procedures and as such constitutes an infringement of the rule of law (as declared in section 59 of the Constitution). Indeed, the Constitutional Court was emphatic that the public have a right (and a duty) to participate in decision-making. Public participation also gives credibility to decisions because they stem from a legitimate source (the people) and have the buy-in of the people.

None of the required steps in the legislative drafting process were followed. In addition to there being a failure to afford public participation, this legislation was not passed by the National Council of Provinces; it was not referred to the Portfolio Committee; the state law advisers never provided their recommendations concerning the constitutionality of the Bill; and it was not assented to in the National Council of Provinces.

Substantively, the legislation is fatally flawed because it infringes section 1 of the Constitution which proclaims that South Africa is founded on human dignity, the achievement of equality and the advancement of human rights and freedoms. By undertaking measures that effectively undermine the entire education system in South Africa, the consequences can only be perpetuation of poverty and inequality instead of social upliftment. As set out in the facts, the primary substantive argument that you intend making is that section 29 of the Constitution refers to the need to maintain the quality and standards of education in South Africa so that the qualifications obtained will [continue to] be internationally recognized. This is obviously a very important objective in order to promote South Africa’s socio-economic advancement. This law thus infringes the Constitutional provision governing education and for this reason, it violates the rule of law.

2.5 Which court have you instituted the action in? Is this the only court that will hear the matter? Explain with reference to the jurisdiction of the relevant courts in South Africa. You are required to refer to relevant authority, including case law and legislation, in support of your answer. (6)

The action has been instituted in the High Court because section 170 as read with section 172(2)(a) of the Constitution provides that a High Court (or a court of similar or higher status) may make an order concerning the constitutional validity of an Act of Parliament or the conduct of the President. A non-exhaustive list of cases could be cited as authority for the fact that in the large majority of instances a matter will first be heard in the High Court.

The matter may go on appeal to the Supreme Court of Appeal if either of the parties to the litigation are not satisfied with the decision. Even if the matter is heard a second time (ie: on appeal), since it is a constitutional matter, that is not where the matter ends. Indeed, section 172(2)(a) continues
by stating that an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court, thus it must also be heard and decided by the Constitutional Court. Again, any case that has been heard in the Constitutional Court after having been heard in the High Court and Supreme Court of Appeal would be appropriate.

2.6 **Assuming that the judiciary declares the law invalid, is it democratic for the judiciary to declare a law passed by Parliament as invalid? Give a detailed answer that illustrates your understanding of South Africa's constitutional democracy.**

The relationship between a supreme constitution and the court's testing power is that when a constitution is supreme, ALL law and ALL conduct must comply with it and if it does not comply, it MUST be declared invalid. We, the South African people, chose to give our courts this testing power when our representatives drafted the Interim and Final Constitutions in the early 1990s and provisions were included such as section 172 which obliges the courts to declare law invalid. Accordingly, the testing power of the courts reinforces the supremacy of the Constitution and ensures that it remains supreme and that all laws are compatible with it.

The case of *De Lange v Smuts NO* is very important for our understanding of the unique and special form that the separation of powers doctrine takes in South Africa. What the court held is as follows:

… over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa’s history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measure in the public interest.

What this essentially means is that the Constitution itself does not prescribe a specific, fixed form of the separation of powers doctrine. Instead, each case must be assessed on its own merits and guidelines can be developed over time as to the best method of ensuring that each of the 3 principal organs of state (legislature, executive, judiciary) retain their particular areas of power and expertise, but at the same time (as the counter-majoritarian dilemma has taught us), the judiciary is entitled and empowered to declare law or conduct invalid if it does not comply with the Constitution. Essentially, the counter-majoritarian dilemma is where 11 judges (that is the number of judges in the Constitutional Court, but it may even be as little as a single judge in the High Court) have declared a law invalid, but that law that they have declared invalid is a law that was passed by 400 Parliamentarians who had all assumed their positions in Parliament because we, the people had voted for the political party to which they belong, and they represent that political party and thus, they represent us and have been mandated by us to pass laws in our interests. Thus, on the face of it, it appears undemocratic but it is not undemocratic because it is specifically permitted in section 172 of the Constitution.

The *Treatment Action Campaign* case is a good example. We know that the Department of Health (part of the executive) has specialised knowledge about how much money they have to provide health care, and how many doctors and nurses are employed to cater to the health care needs of the people of South Africa, and it is composed of experts who engage in research about the effectiveness of certain medicines. The judiciary definitely does not have all of this information at its disposal and can’t even begin to start trying to decide cases that impact on the sensitive areas, such as budgetary allocations or the effectiveness of certain medicines without receiving sufficient information. In general, in cases like the Treatment Action Campaign case where HIV positive pregnant were not receiving nevirapine even though there were various studies showing the immense benefits of nevirapine as far are prevent the transmission of HIV to unborn children, the court will defer to the knowledge and expertise of the executive if the executive says that they do not have the money to provide the drug and do not have enough medical staff to administer the drug and have reservations about the effectiveness of the drug and not declare that the executive has acted unconstitutionally. But, if the court comes to the conclusion that the excuses being made by the executive are weak and that there is sufficient evidence to prove that nevirapine will save millions of lives and that in fact, millions of the nevirapine tablet had been donated to the
South African government by India, then in order to uphold the Constitution, the court will - and must - intervene and order the executive to make sure that it immediately begins to administer the drug. It appears as though the judiciary is intruding too deeply into the domain of the executive when doing this, which is undemocratic, but in fact, it is done with the purpose of ensuring that real constitutional democracy is realised. As such, the court in the TAC case took timely measures to protect the public interest.

Similarly, if a law appears invalid, a court has the right to declare that law invalid, but (to quote the De Lange v Smuts case) must retain the delicate balance between what the judiciary is permitted to do and what the legislature does, so when the court declares a law invalid, it will only say that the law must be rectified. The court definitely does not re-write the law, because that is the proper role of the legislature. Glenister case and the Fourie case are good examples. Likewise, when declaring executive conduct unconstitutional, the court will also leave it up to the executive to rectify the unconstitutional conduct; it will not tell the executive what to do, unless it is absolutely necessary.

2.7 With specific reference to the notion of the rule of law, explain whether the President has the power to declare that the public schools have the right to ignore the provisions of The Transformation of Higher Education Act and adjust the marks by 20% instead of 10%. Apply appropriate case law and legal theory to substantiate your answer. (8)

No, the President does not have the power to declare that the provisions of The Transformation of Higher Education Act can be ignored. The rule of law means that if the law states a specific thing, then it must be complied with. The rule of law also means that no one is above the law. According to Dicey, the rule of law comprises three main principles: Firstly, the law is supreme; public power can only be exercised in terms of authority conferred by law. Secondly, the law must be applied equally to all persons, irrespective of their status. Thirdly, courts are responsible for enforcing the law in the manner that protects the basic rights of all. However, the framers of the Constitution of the Republic of South Africa, 1996, had in mind a much broader concept of the rule of law than Dicey's restrictive understanding of the term "rule of law". The doctrine of the rule of law is incorporated in section 1 of the Constitution. Further, the fact that the Constitution is supreme and contains the Bill of Rights entails that the reference to the rule of law should be understood in the broadest sense, that is, as a system of government in which the law reigns supreme. Therefore, in the South African context, the rule of law means that government must have authority provided by a law for everything it does, regardless of the procedural or substantive qualities of that law.

The courts have invoked the rule of law as a mechanism primed to limit, to regulate and to give more precise meaning to how government power is exercised. Thus, the rule of law has emerged as a powerful practical principle that can be invoked before our courts to ensure that the exercise of state power conforms to basic minimum criteria. In Fedures Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1998 (12) BCLR 1458 (para 56), Fedures Life challenged the Johannesburg local government's power to levy substantially higher property rates. The Court held that the local government was permitted only to exercise powers that it had lawfully conferred on it. Moreover, the Court held that it was central to the conception of our constitutional order that the legislature and the executive are constrained by the doctrine of the rule of law and that they may not exercise any powers or perform any functions that go beyond the powers or functions conferred upon them by law.

The doctrine of the rule of law was further applied in the Constitutional Court judgment of Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (para 98). This case arose from conduct of the President, who had mistakenly brought into force legislation that required the prior or simultaneous promulgation of regulations and schedules so that it could be implemented properly. The Court found that the President’s decision to bring the Act into operation in such circumstances was objectively irrational in that the Constitution requires that public power vested in the executive
be exercised in an objectively rational manner. Accordingly, South African courts have invoked the rule of law in ensuring that the executive exercises its powers within the ambit of the law.

2.8 Assume that the opposition parties are outraged about the President’s instructions to ignore the law. Is there any particular institution established by the Constitution which could investigate the President’s conduct? What is the status of the findings of this institution? Explain your answer.

Yes, the opposition could refer the matter to the Public Protector. In terms of section 182(1), the Public Protector has the mandate of investigating “any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice”. As far as the status of the findings of this institution is concerned, the findings of the Public Protector should be implemented.

The case of Hlaudi Motsoeneng, the former CEO of the South African Broadcasting Corporation (SABC), highlights the confusion that has surrounded the status of the findings of the Public Protector. Initially, in Democratic Alliance v South African Broadcasting Corporation Ltd and Others 2015 (1) SA 551, Schippers J in the Western Cape High Court held that:

The fact that the findings of and remedial action taken by the Public Protector are not binding does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject. (para 59)

The subsequent litigation in the Supreme Court of Appeal, on the other hand, lends support to the fact that the Public Protector’s findings are, indeed, binding. In South African Broadcasting Corporation Limited and Others v Democratic Alliance and Others (393/2015) [2015] ZASCA 156, the Supreme Court of Appeal held that:

The Public Protector cannot realise the constitutional purpose of her office if other organs of state may second-guess her finding and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation.

In the recent Constitutional Court judgment of Economic Freedom Fighters v Speaker of the National Assembly; the Democratic Alliance v Speaker of the National Assembly (CCT143/15; CCT171/15) [2016] ZACC 11 (31 March 2016), the Court affirmed that findings of the Public Protector were binding. Members of the public, including MPs, had lodged complaints with the Public Protector, Thuli Madonsela, concerning aspects of the security upgrades that had been carried out at President Zuma’s Nkandla private residence. The Public Protector investigated the matter and concluded that several improvements were non-security features and that any installation that has nothing to do with the President’s security amounts to undue benefit or unlawful enrichment to him and his family. In this regard, the Public Protector said the President had acted in breach of his constitutional obligations in terms of the Constitution. The Public Protector took remedial action by requiring the President to pay a reasonable percentage of the cost of the non-security measures (refer to para 10). The Public Protector submitted her report to the President and the National Assembly. The National Assembly set up an ad hoc committee to examine the Public Protector’s report and nominated the Minister of Police to do a further investigation based on the findings of the Public Protector. Parliament considered the reports of the ad hoc committee and the Minister of Police, which exonerated the President, and subsequently resolved to absolve the President from all liability. Consequently, the President did not comply with the remedial action taken by the Public Protector. Dissatisfied with the decision of the National Assembly, the EFF, joined by the DA, requested an order affirming the legally binding effect of the Public Protector’s remedial action, directing the President to comply with the Public Protector’s remedial action and declaring that both the President and the National Assembly acted in breach of their constitutional obligations.
The Court found that, in disregarding the remedial action taken by the Public Protector against him, the President had failed to uphold and to defend the Constitution as the supreme law of the land (para 83). The Court moreover found that the conduct of the National Assembly of passing a resolution purportedly nullifying the findings and remedial action taken by the Public Protector and replacing them with their own findings offended the rule of law and was another way of taking the law into their own hands (para 95). This case cleared any uncertainty about the legal status of the findings of the Public Protector. The person against whom the findings are made cannot ignore such findings since they are binding.

2.9 Would the President’s conduct justify his removal from office? Explain the two methods by which the President could potentially be removed from office. Use examples where either of these methods have been invoked in the past.

Yes. In terms of the Constitution, there are two methods of removal of the President from office. The first method by which the President can be removed from office is in terms of a resolution passed pursuant to section 89(1) of the Constitution. In such an instance, the National Assembly must have objectively concluded that one of the specific grounds for the removal of the President exists, including a serious violation of the Constitution or the law, serious misconduct or inability to perform the function of office. Accordingly, these grounds serve to safeguard the nation against the abuse of power by the President. Should one of these grounds exist, a two-thirds majority (66.6%) vote is required. Schedule 3 of the Electoral Act 73 of 1998 has set the number of members of the National Assembly at 400. Therefore, 267 out of 400 member of the National Assembly must vote in favour of the removal of the President. The removal of the President in this manner has no relation with political reasons, such as the President having lost the support of the majority party in Parliament.

The other method by which the President can be removed from office is in terms of section 102(2) of the Constitution and this is for purely political reasons. This form of removal takes the form of a motion of no confidence in the President being passed. In order for a motion of no confidence to succeed, all that is required is a simple majority vote (51%). 204 out of 400 members of the National Assembly must vote in favour.

It is thus obviously easier to remove the President by way of passing a motion of no confidence, rather than impeachment because of the lower threshold of votes required. This, however, is not as straight forward as it may seem, because given that the minority parties combined only have 161 seats, which is quite a considerable number off the required number of 204, it would be extremely difficult for them to achieve a majority, unless members of the majority party also vote in favour of the motion of no confidence, which is highly unlikely in the South African context where members of political parties support the political leadership, under virtually any circumstance.

This method can only be achieved when the President loses the support of his party. The impact of the constitutional provision concerning motion of no confidence is that now any member of the National Assembly can propose a motion of no confidence in the President (and not only the majority party) and this motion must be debated in the National Assembly. This transpired as a result of the case of Mazibuko Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others (2012) where the Western Cape High Court considered whether the National Assembly and its Speaker had erred in not scheduling a debate on a vote of no confidence in the President which had been tabled by the official opposition. The most relevant part of the Court’s decision was when it stated: “you must operate within a constitutionally compatible framework; you must give content to section 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence; however, how you allow this right to be vindicated is for you to do, not for the courts to so determine”.

Of significant importance in the context of a motion of no confidence, sections 187 to 190 in Chapter 12 of the Rules of the National Assembly contained provisions which permitted the majority party in the National Assembly or any of the minority parties to block the tabling, discussion, consideration and voting on a motion of no confidence. The unconstitutional provision
was thus declared invalid by the Constitutional Court in the case of *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC), where Deputy Chief Justice Moseneke did not hesitate to highlight the importance of a motion of no confidence in a democratic society, at paragraph 43, where he said:

A motion of no confidence in the President is a vital tool to advance our democratic hygiene. It affords the Assembly a vital power and duty to scrutinize and oversee executive action ... The ever-present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him. If a motion of no confidence in the President were to succeed, he or she and the incumbent Cabinet must resign. In effect, the people through their elected representatives in the Assembly would end the mandate they bestowed on an incumbent President.

2.10 Is there anything fundamentally flawed with the fact that a judge approached the other two judges to give advice on the decision that they should reach? Does this potentially infringe any constitutional provisions/principles? Explain fully with reference to relevant case law. (7)

Yes, this is a direct violation of section 165 of the Constitution. In terms of section 165(2), the judicial authority of the republic is vested in the courts who are independent and subject only to the constitution and the law which they must apply impartially, and without fear, favour or prejudice. Significantly, section 165(3) then states that ‘no person may interfere with the functioning of the courts’. Moreover, when that judge assumed office, he was required to swear an oath in terms of Section 6 of schedule 2 of the Constitution that he would uphold and protect the Constitution and will administer justice without fear, favour of prejudice.

Compounding matters is the fact that section 2 of the Constitution obliges the judge to act strictly in accordance with section 165 and section 6 of Schedule 2, failing which his conduct is invalid and unconstitutional.

It therefore also constitutes an infringement of the rule of law. The epitome of the rule of law is that no one is above the law and the law applies equally to everyone. In addition, if the law gives an indication that things should be a certain way, then that is precisely what should happen.

The situation is directly analogous to the situation which occurred in May 2008, when it was alleged that the judge president of the Cape High Court, Judge John Hlophe, approached some of the judges of the Constitutional Court in an improper attempt to influence this Court’s pending judgment in favour of Mr Zuma in the Zuma/Thint matter by stating “you are our last hope; you must find in favour of our comrade”.

2.11 Assuming your answer to question 2.10 is answered affirmatively, which body will have jurisdiction to deal with the fact that the judge said “you are our last hope. You must find in favour of the struggle for academic transformation. The new law must stay” to the two judges. Explain. Has this body been successful in upholding its mandate so far? (6)

Yes, the Judicial Service Commission is the relevant body, in terms of section 178 of the Constitution. The JSC’s mandate is to ensure that the judiciary remains independent and impartial and for that reason it has the additional mandate of deciding whether or not judges should be removed from office because they no longer have the requisite integrity or have brought the judiciary into disrepute, etc.

At the time that the complaint against Judge John Hlophe was lodged, the commission did not have the jurisdiction to hear a matter where a judge was accused of conduct not amounting to gross misconduct, as the provisions of the Judicial Service Commission Amendment Act, whose object, inter alia, is to allow for inquiries into and sanctions for alleged misconduct by judges which does not constitute gross misconduct leading to the removal of the judge from office, were yet to come into effect.

On 15 August 2009, after considering the matter and taking into account the limits of its powers, the commission, by a majority, reached the conclusion that the evidence in respect of the complaint did not justify a finding that Hlophe JP was guilty of gross misconduct and should accordingly be removed from office. Various courts have found that the JSC is obliged to reinstate this hearing. However, we are now exactly 9 years down the line since Judge Hlophe
allegedly tried to improperly influence the Constitutional Court judges, yet to date, nothing has happened, despite the fact that every few months the JSC says that it “is about to open the matter once again, using the procedure that has now been created by the Judicial Service Commission Amendment Act”, which is that a judicial misconduct tribunal has been set up.

Even the matter against Judge Motata who was accused of using racist language and driving under the influence of alcohol serves to prove that the Judicial Service Commission has not been able to properly execute its mandate to maintain the integrity and good reputation of the judiciary. Similarly, the JSC never dealt decisively with Judge Mabel Jansen and she resigned prior to the JSC conducting any investigation or hearing.