

Date: 14 October 2013



**Higher Education
Transformation Network**

Non-Profit Organization (NPO) Reg No: 116-851

Via Email: president@po.gov.za; presidentrsa@po.gov.za
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The Honorable President Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa
Private Bag X1000,
PRETORIA, 0001

Your Excellency:

**Re: Urgent Request to Annul, Cancel or Withdraw Honour for
Disgraced Andrew Paul Hoffman, SC.**

I am writing to you on behalf of the Higher Education Transformation Network (HETN) to request that you exercise the discretionary powers conferred upon you by Sections 84 and 165 of the Constitution to annul, cancel or withdraw the honours of senior counsel or "silk" conferred upon one Andrew Paul Hoffman, SC. We submit this request in light of recent revelations about Hoffman's unprofessional and unethical conduct which make it essential that this honour is withdrawn.

In light of a recent damning unanimous ruling of the Judicial Conduct Committee (JCC), we urge the President, in furtherance of upholding the rule of law and judicial independence - strip Andrew Paul Hoffman of his honour. Hofmann, as an advocate with the status of SC (silk), should not be permitted to make a mockery of the judicial system.

HETN believes that in terms of section 237 of the Constitution, the President is well within his power to strip Hoffman of his silk status

1. Background

The HETN is an independent non-profit network of graduates and alumni from various higher education, and further educational institutions, from across South Africa. We are committed to the process of transformation of education and training. Our members include legal practitioners who have an interest in the transformation of the judiciary. They appreciate the role that equal and quality education contributes in equipping blacks to play a meaningful role in the advancement of a legal culture that is based on the core values and principles of the Constitution.

The HETN is further actively involved in conducting research on how our public and private institutions interpret the requirement of transformation. Amongst its advocacy activities, the HETN works out strategies to defeat anti-transformation elements and lobbies those in positions of power to adopt processes and programmes that are aimed at accelerating the pace of transformation.

In August 2013, Andrew Paul Hoffman, SC, filed with the Judicial Services Commission (JSC) a complaint of gross judicial misconduct against the Chief Justice, Mogoeng Mogoeng.

A copy of the complaint is available on the internet as "**Why Mogoeng Mogoeng should be impeached** - Paul Hoffman; 6 August 2013" <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71651?oid=396737&sn=Detail&pid=71651> . Hoffman's complaint is bristling with insults directed at the Chief Justice, whom he unfairly labels a racist, unethical and a criminal.

Independent of this complaint, we have asked the professional associations namely the Cape Bar Council and the General Council of the Bar to sanction Hoffman for bringing unbecoming behavior, which has brought the judiciary into disrepute.

Moreover, Hoffman has written several op-ed-articles and given interviews to the media some of which pertain to matters which are before the court, in which he is appearing as counsel. Under the General Council of the Bar Uniform Rules of Professional Conduct, article 4(18)(3)(e), states, "it is contrary to professional etiquette for counsel to engage in newspaper correspondence or to issue press statements on the subject of cases in which they are or have been themselves concerned as counsel". Moreover, under article 4.21.1 "A member must not issue statements to any news or current affairs media in connection with any matter in which he/she has been briefed or instructed."

It might well be that Hoffman may not currently maintain his membership of the Bar. Regardless, we submit the President has an independent power to withdraw an honour, such as the status of SC from someone that acts inappropriately. Hoffman has acted inappropriately and unprofessionally by filing of a frivolous, racially motivated and retaliatory complaint of unethical conduct and "gross" judicial misconduct against the Chief Justice Mogoeng.

His actions were motivated by bad faith namely Hoffman's dislike of the Chief Justice's stance on transformation of the judiciary and the legal profession. Hoffman's filing of the complaint with the JSC, his correspondence with the Chief Justice and acts of publishing such communications in the newspapers constitute acts of professional misconduct and unethical behavior warranting disbarment which we hope the professional societies will confirm. Regardless, we call on you to withdraw his status of SC.

Hoffman's actions constitute an attempt to improperly influence the High Court in which two pending cases -one brought by the Helen Suzman Foundation (HSF), and the second, brought by Hoffman's client, Hugh Glenister which involves the Hawks legislation. Hoffman's actions not only involve unlawful attempts to influence the High Court hearings in the pending HSF and Hawks legislation matters, but they also constitute an attempt to influence the Chief Justice and the Constitutional Court outside proper court proceedings.

This is a breach of specific provisions of the Constitution regarding the role and function of courts, which threaten the administration of justice in our country and indeed the democratic nature of the state. Public confidence in the integrity of the courts is of crucial importance for our constitutional democracy and must not be undermined.

Hoffman's actions, including the filing of the JSC gross misconduct complaint against the Chief Justice was in violation of Sections 165 of the Constitution. It constitutes an attempt to interfere with the Chief Justice's discharge of his constitutional duties. Hoffman's complaint was in bad faith and was filed for ulterior purposes of shifting focus away from transformation and pursuing the agenda of keeping white male dominance.

Consistent with his oath of office, the Chief Justice is obligated to "uphold and protect the Constitution and the human rights entrenched in it" and has a duty to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law." Hoffman's unwarranted attacks on the Chief Justice and Hoffman's extortionate actions through letters and newspaper articles threatening impeachment and defamation of the Chief Justice were calculated to intimidate and blackmail the Chief Justice into silence and to dissuade him from performing his constitutional duties.

Similarly, Hoffman's filing of a judicial misconduct complaint with the JSC was a nefarious act calculated to intimidate, side-line, marginalize and silence the Chief Justice in regard to the important debate surrounding transformation. It constituted a direct interference with his constitutional obligations.

Cumulatively, Hoffman's actions constitute: contempt of court, a long-standing and well recognised criminal offence; attempt to defeat the ends of justice; bringing the judiciary into disrepute; intimidation, which is a statutory offence; violation of the uniform rules of the GCB, which constitutes misconduct, and an unethical breach both deserving of severe sanctions including striking off the roll of advocates. In addition to our complaint, we are informed that a separate complaint of misconduct has also been filed with the General Council of the Bar by Dr. Paul Ngobeni¹.

On the 9 September 2013, the JCC issued a decision dismissing Hoffman's complaint.² The two senior judges on the JCC (including Judge President Musi) unanimously rejected Hoffman's false allegations that Mogoeng engaged in a public political debate about a pending case. They ruled that the subject of the chief justice's speech was "*not a case but an issue that had been publicly debated for a long time. The institution of the HSF case did not have the effect of stopping that debate. Moreover the issue is a practical, on-going one for the JSC, which it will continue to grapple with notwithstanding the pending case.*"

Furthermore, the JCC rejected Hoffman's claims that the Chief Justice participated in a public debate in a manner that undermined the standing and integrity of the judiciary. The judges ruled that it "*was perfectly legitimate for the [chief justice] to participate in a debate about transformation of the judiciary and to express his views on what he perceives to be resistance to it. His frankly expressed views were bound to sit uncomfortably with sections of the legal profession and the judiciary but that cannot be said to undermine the standing and integrity of the judiciary.*" Most important for the purpose of this letter is that the JCC found Hoffman's assertions against Chief Justice Mogoeng "*rather disingenuous*" and "*simply far-fetched*".

The JCC highlighted Hoffman's provocative actions against Mogoeng and stated, "In his letter to the respondent dated 18 June 2013 the *complainant hints at an ongoing confrontation with the respondent.*" The JCC noted that Hoffman disclosed that he had been "*critical of the readiness of the respondent for the office of Chief Justice and that he had addressed a correspondence to the respondent demanding clarification on matters relating to his fitness for that office.*"

¹ Paul Ngobeni Complaint of Misconduct Against Paul Hoffman SC; Friday, September 13, 2013 <http://constitutionalcrossroads.blogspot.com/2013/09/misconduct-complaint-against-paul.html>

² See, <http://www.legalbrief.co.za/article.php?story=20130911085541844>. A copy of the JCC Decision is available on same website.

It is indeed shocking to hear that an advocate could write letters to a sitting judge demanding that the judge explains his fitness for office. We urge the President to take special notice that "disingenuous" which means inter alia " *cunning, deceitful, deceiving, delusive, delusory, designing, devious, dishonest, dodging, evasive, false, false hearted, feigned, fraudulent, hypocritical, insidious, insincere, lacking frankness, lying, mendacious, misdealing, misleading, parum candidus, prevaricating, scheming, shifty, sly, spurious, tricky, truthless, uncandid, underhanded, unethical, ungentle, unprincipled, unscrupulous, unstraightforward, untrustworthy, untruthful, wanting in candor, wily, without truth*" - clearly implies dishonesty. A lawyer who is disingenuous in his approach to the law and who engages in "**shocking**" acts impugning the qualifications and integrity of a sitting chief justice does not deserve to keep an honour conferred by the President.

The HETN recognizes and accepts that the President has no power to strike any advocate off the roll. A withdrawal of silk status, which is a mere honour, does not have the effect of disbarment of the advocate. Although the procedure provided under Section 8A of the Admission of Advocates Act 74 of 1964 is technically not applicable to Hoffman, it suggests that withdrawal of silk appointment has no adverse effect on the right to remain an advocate per se. The Act provides that the "*President may at the request of any person appointed as a senior counsel of the Republic while in the service of the State, withdraw such appointment, and thereupon such person shall revert to the status which he had as an advocate immediately prior to that appointment.*"

2. Legal and Moral Basis for Annuling, Canceling or Withdrawing Honour for Hoffman

The above findings of the JCC have very serious implications for the responsibilities of the executive, to wit, the Minister of Justice and the President (both in his capacity as head of the executive and head of state) which are discussed below.

First, in terms of section 165 of the Constitution. That section states 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. Further, it states **no person** or organ of state may interfere with the functioning of the courts. *Organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts.* Hence, we urge the Minister of Justice and the President to take action against Hoffman, an officer of the court, for his "shocking" conduct which constitutes amongst other things, contempt of court and scandalizing the Chief Justice.

In considering the harm Hoffman has caused to the judiciary and administration of justice, the executive must realize that judges are in a unique position in which their ability to answer back is limited. As the European Court of Human Rights observed in **Prager and Oberschlick v Austria** (1996) 21 EHRR 1: "*Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed state, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.*"

While the JCC lacked the power to take direct action against Hoffman for his outrageous behavior and charges against the CJ, the JCC's findings are profound and should be considered by the President and the Minister of Justice. We urge you to act to deter persons from encroaching on the independence, impartiality, dignity, accessibility and effectiveness of the courts. A failure to forfeit the "silk" honours conferred on Hoffman undermines entire judicial system and the Office of the Chief Justice.

Second, Hoffman's actions have implications for the President's powers as head of state. The President's powers in this regard are set forth in Section 84(2) (k) of the Constitution provides as follows:

"Powers and functions of the President:

(1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for –

...

(k) **conferring honours.**"

The logic of the SCA's recent ruling in **General Council of the Bar and Another v Mansingh** (417/12) [2013] ZA SCA 9 (15 March 2013) makes a compelling case for the forfeiture of honours by senior council or silks who have disgraced themselves and the profession. The SCA ruled that the power to confer honours bestowed upon by the President under section 84(2)(k) of the Constitution included the authority to confer the status of 'senior counsel' on practising advocates. The judgment quotes a formulation of Lord Watson in Canada in 1898 that the position occupied by Queen's Counsel "... **is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred.**" The terminology of Senior Counsel replaced that of Queens Counsel when South Africa left the Commonwealth. The Court of Appeal

upheld the President's contention that "I regard silk as an honour" and supported the President that to read the word "honour" in section 84(2)(k) of the Constitution as excluding the conferment of senior counsel status to deserving practising advocates is, to do unnecessary violence to the values of the Constitution. The SCA ruled: "The fact that section 84 confers some of the former royal prerogatives powers on the president and that they include the power to confer honours is beyond debate." The SCA agreed with the President's position that the conferment of senior counsel status to practising advocates who qualify is an "honour" within the ordinary construction of the word "honour."

The SCA also endorsed the President's view that the framers of the Constitution must have been comfortable that the power of the President to confer honours includes the power of the President, among other honours, to confer senior counsel status to practising advocates who qualify. Most importantly, it ruled that the reason the president could not also confer seniority on accountants, doctors was "probably that ***the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice, which in turn is properly the concern of the head of state***".

The above mentioned provisions of the Constitution clearly mandate that the President in his capacity as head of state, and head of the executive should not honor those who act in defiance of the supreme law of the land. They should not be given awards, honors, endorsements or platforms which would suggest support for their actions. Allowing Hoffman to retain the national honour as "silk" would be in direct defiance of the Constitution's mandate and a slap in the face of our judiciary. Before further damage is done to the judiciary's reputation as a pillar of our democracy, we respectfully ask you to annul, cancel, or withdraw the honours of "silk" status conferred on disgraced Andrew Paul Hoffman SC and uphold the sanctity of our Constitution.

The power of the President to confer honours under Section 84 of the Constitution includes the right of the President to withdraw the honour. Countries such as the UK have done so whenever the conduct of the award holder or his credibility has made him unworthy of continuing to be a member of the honorees' group or that it is no longer proper to keep the honours because the holder's credibility is found to be questionable. Examples abound but the few will suffice here:

- Banker Fred Goodwin was recently stripped of his knighthood last year after leaving the Royal Bank of Scotland teetering on the brink of collapse and needing a taxpayer-funded rescue.

- Zimbabwean president Robert Mugabe was stripped of his honorary knighthood in 2008 over his alleged "abuse of human rights" and "abject disregard" for democracy. The Queen approved the annulment on the recommendation of then Foreign Secretary David Miliband.

As a general rule, in the UK, honours can be cancelled if an individual has been found guilty by the Courts of a criminal offence and sentenced to a term of imprisonment of more than three months; or has been *censured/struck off etc by the relevant Regulatory Authority or Professional Body for actions or failures to act which are directly relevant to the granting of the honour*. They have a committee and it is not restricted to these two criteria, as the Cabinet Office explains: "*Any case can be considered where there is other evidence to suggest that the retention of an honour would bring the honours system into disrepute.*"

In this emerging democracy, Presidential honours should only be presented to role models and persons of impeccable integrity – such honours are an aspirational gesture reserved only for the best proving the highest degree of integrity.

The HETN is firmly convinced that the silk status is no different than other national honours award - it is a very important part of the symbols of the country's values in which deserving persons are admitted into the ranks of those honoured by South Africa. The President, as head of state, must ensure that silks that fall short of our collective expectations, especially those who launch unbridled sledgehammer assaults on the integrity of black judges, including the Chief Justice, must be exposed and be stripped of the national honour.

The very rationale for the President's power to confer silk is that "***the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice, which in turn is properly the concern of the head of state.***" The President's decision to strip undeserving silks of the national honours will ensure that those who have the national honours are truly worthy of the honours and possess a sense of value as officers of the Court.

Third, failure to strip Hoffman of the silk honour creates a palpable risk that he will continue to exploit that title in a manner damaging to our struggle icon and former President Nelson Mandela. Hoffman continually boasts about his "***conferral of silk in 1995 by Nelson Mandela***" to anyone who cares to listen.³

³ Paul Hoffman: Africa Governance Institute; http://www.iaq-agi.org/spip/fiche-personne-167_en.html

Even more egregious, in an insolent letter he wrote to the JSC demanding Judge President Hlophe's suspension a few years ago, Hoffman exploited and traded on President Mandela's name by stating: "I derive my locus standi to address this communication from the public interest, *from the interests of the judiciary and my fellow legal practitioners, as well as from my own duty to justify the **trust and confidence in my fidelity, integrity and ability which the then President, Nelson Mandela, bestowed on me when he awarded me silk in 1995.***"⁴

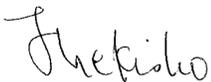
Only Hoffman's forfeiture of the silk status will signal to the nation and the world, the Presidency's re-commitment to the ideals Madiba dedicated all his life towards achieving and for which he was willing to pay the ultimate sacrifice - these are the ideals of non-racialism, freedom, equality, dignity for all and national reconciliation. To allow Andrew Paul Hoffman to continue misusing former President Mandela's name in the fashion alluded to above not only trivializes his leadership and sacrifice, but that of the thousands of other gallant freedom fighters who gave their lives and livelihoods in the name of what is just, noble good and right. It would be almost blasphemous to allow the name of Mandela to be hijacked by those like Hoffman hell-bent on using his message to further their selfish goals. Only decisive action from the President will safeguard the honour of our icon.

And finally, HETN fully supports the independence of the legal profession but does not view such independence as synonymous with protection of white male interests. Nor do we believe that the price for such independence must be the dignity and integrity of black judges.

3. Conclusion:

Based on the damning unanimous ruling of the Judicial Conduct Committee (JCC) against Hoffman, we urge the President to withdraw Andrew Paul Hoffman of the honour of silk. A failure to do so would reinforce the actions of those that undermine the judicial system. The President has the power to withdraw the silk status under section 165 of the Constitution. There is a well-established basis for the grant of the request detailed in this letter.

Respectfully submitted



Lucky Thekisho
Chairperson: Higher Education Transformation Network

⁴ Paul Hoffman; Agenda item for next JSC meeting (cont.); The Institute for Accountability in Southern Africa; http://www.ifaisa.org/Agenda_item_for_next_JSC_meeting.html