REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case no: 2022-036684

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED YES

DATE SIGNATURE

AMALGAMATED LAWYERS ASSOCIATION	**First Applicant**
and	
JUDICIAL SERVICE COMMISSION	**First Respondent**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**Second Respondent**
MAAKE FRANCIS KGANYAGO	**Third Respondent**
ARNOLD MAURITIUS LEGODI PHATUDI	**Fourth Respondent**
MOELETJE GEORGE PHATUDI	**Fifth Respondent**
As Amici Curiae:	
BLACK LAWYERS ASSOCIATION	**Amicus**
As Intervening party	
TEBEILA INSTITUTE	**Intervening party**

THE ORDER

(1) The defence raised by the fifth respondent, based on section 47 of the Superior Courts Act 10 of 2013 to the review application and the subsidiary interlocutory applications, that the review was unlawfully issued, is upheld.

(2) The review application is accordingly dismissed.

(3) The costs of opposition, incurred by the fifth respondent, Phatudi J, in respect of the two interlocutory applications brought by the Amalgamated Lawyers Association are to be borne by the Amalgamated Lawyers Association on the attorney and client scale, inclusive of the costs of employing two counsel; such costs to be calculated from the date upon which the condonation affidavit was filed on 26 April 2023.

(4) A referral is made to the Legal Practice Council for it to enquire into the conduct of Adv Maluleke to determine whether or not his behaviour in these proceedings constitutes misconduct.

JUDGMENT

SUTHERLAND, DJP:

[1] In the proceedings before me,[1] a number of discrete issues have been raised. I have already dealt with two of them and it is simply for establishing the context in the giving of this judgment that I allude to the two issues which I have disposed of.

[2] The first issue was an attempt by an entity called Limpopo Legal Solutions to be admitted, by way of a joinder, as an interested party. I dismissed that application and I have already given an oral judgment in which I gave reasons for that result.

[3] The second issue was an application by the Black Lawyers Association (BLA) to be joined as a amicus. It was opposed by the Amalgamated Lawyers Association (ALA) I have already given a judgment dealing with the reasons why I granted that application.

[4] Having disposed of those applications, it then remained for me to address two other interlocutory applications, brought by the ALA, which in terms of the Directive I had issued at a case management meeting on 14 April, were set down for a hearing today.[2] They are interrelated and are both against the fifth respondent, Judge George Phatudi. Both relate to the question of procedural non-compliance. In one case, the complaint is about the failure to provide documents. In the other, the complaint is about a late notice of opposition to the review application against the Judicial Service Commission (JSC), (being the principal issue in this set

[1] The principal issue is a review application brought by the Amlgamated Lawyers Association (ALA) to review a decision of the Judicial Service Commission (JSC). The JSC recommended that G Phadudi J be appointed the judge President of the Limpopo Division of the High Court. That decision is challenged.
[2] The text of the directive has been uploaded to the caselines data file. It is an inocuous timetable and contributes nothing to the decisions taken in the proceedings.

of legal proceedings iniated by the ALA), and the absence of a condonation application by the fifth respondent. Inter alia, in respect of the condonation issue, the relief sought by ALA includes a compelling order that a condonation application be brought.

[5] Since the case management meeting to which I have alluded, the condonation application has been filed.

[6] When it came to that stage in these proceedings for the court to deal with these two matters, I was told by Mr Maluleke, who appeared for the ALA, that the ALA will not persist with any of the relief sought in the two interlocutory applications. He said that therefore, it was unnecessary for me to deal with the applications at all.

[7] However, as costs were incurred by the fifth respondent, the only other interested party in those interlocutory applications, it is required of me to at least address costs.

[8] Counsel for the fifth respondent indicated that they seek a costs order in their favour. Counsel also stated that they had given notice for an order of attorney and client costs for reasons which I shall deal with in due course.

[9] Mr Maluleke in dealing with the matter of the applications - I think it will be fair to say he is dealing with them - contended that the two applications were now moot. On the premise that I have understood him, the argument he advanced is that the applications no

longer needed to be dealt with in any respect whatsoever. Mr Maluleke backtracked on that propostion later on by proceeding to say that there was a costs order still at issue and then, faintly, submitted that the fifth respondent should pay the costs as they were the non-compliant party.

[10] However, in the context of these applications, on the papers, a highly controversial issue had been raised by the fifth respondent. That issue was a thesis the review appliocation per se was unlawful, based on the effect of the provisions of section 47 of the Superior Courts Act 10 of 2013. That section provides:

> ‘ Issuing of summons or subpoena in civil proceedings against judge
>
> (1) Except for an application made in terms of the Domestic Violence Act, 1998 (Act 116 of 1998), no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be.
> [Sub-s. (1) substituted by s. 20 of Act 116 of 1998 (wef 14 April 2023).]
> (2) Where the issuing of a summons or subpoena against a judge to appear in a civil action has been consented to, the date upon which such judge must attend court must be determined in consultation with the relevant head of court.[3]’

[3] In the oral delivery of this judgment I quoted this section from the text in the volume, ‘Judicial Regulatory Instruments, 2nd Ed which had not captured the amendment to the first sentence of the section. The error was pointed out by counsl for the 5th respondent after delivery, whereupon it was corrected. The amended portion is in any event irrelevant to any

[11] The proposition advanced was that if the review proceedings were fatally irregular, it must follow that the review application and all that was ancilary thereto must be dismissed.

[12] It was, on the view taken on behalf of the ALA, controversial whether or not it was appropriate to deal with the section 47 argument as a part and parcel of the interlocutory applications or at all.

[13] However, the fifth respondent had especically set down the section 47 point for decision, having given a Rule 6(5)(d)(iii) notice in regard thereto. The issue of section 47 had been traversed in the answering affidavit by the 5th respondent to the interlocutory applications and had been replied to and traversed by the ALA in its replying affidavit. Moreover, both the ALA and the 5th respondent had dealt fully with the issue in their heads of argument.

[14] The question of the effect of section 47, therefore, cannot be said to have not been raised and fully traversed by the parties.

[15] Mr Maluleke contended that on a basis, which was difficult to grasp, that despite what I have just described, the Rule 47 point could not be argued in these proceedings. The suggestion, as I understood it, was that the rule 47 point has to a point *in limine* and it could only be argued the same time as the review

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controversy in the case.

application itself, and at no other juncture. I think that, if I understood Mr Makuleke correctly, that proposition is clearly incorrect. I solicited from him whether there was any other premise on which his proposition could be advanced. I did not understand him to advance anything more that would inevitably exclude the court from dealing with the section 47 point.

[16] The point was, of course, a critical legal issue in the matter because if the section 47 point is good, it is an attack on the very substance of the review and if that is to fail, then everything else must collapse like a house of cards.

[17] I would like to have heard Mr Maluleke's submissions on the section 47 point but then an episode took place which was unsavoury to say the least.

[18] It became clear from the submissions and the conduct of Mr Maluleke on behalf ALA that he was bent on avoiding the Court pronouncing on the section 47 point.

[19] At an earlier time in the proceedings he had had the audacity to intimate to me that an appeal would be noted, should an unfavourable decision to be made on a particular aspect. I cautioned him that that was bad manners to express that to a court. The exchange we had, which I presume will reflect on the record, did not result in any meaningful progress.

[20] That episode was the foreshadowing of what was later

to come. When I indicated that on what I understood had been placed before me, the section 47 point was not one that I could legitimately avoid dealing with, Mr Maluleke then indicated that he would walk out. I told him that I would not excuse him and that should he leave the court, he must do so at his own peril.[4]

[21] Then the highpoint to this episode was reached. In the course of engaging with him, my hand, with my pen in it, was then in the air and Mr Maluleke then falsly accused me of pointing at him, something that he not only took umbrage at, but then tried to turn into a catastrophe. I understand what followed was an attempt by him to make use of the fact that these proceedings are not televised but that there is a full audio-recording, to build a version that would later be available to him to contend that I had behaved improperly. His conduct in this regard is totally reprehensible. He then, if that was not enough, conveyed to me that a complaint to the Judicial Service Commission had been lodged against me this morning (presumably either before or during the proceedings) about what he called "my whole conduct in the case". I have no knowledge of such a complaint or what the content of that might be. Once again, for a second time in these proceedings, an attempt has been made to intimidate me.

[22] Mr Maluleke's behaviour is totally inconsistent with

[4] Mr Oosthuizen, for the 5th respondent, at this juncture, protested that this was a tatic to endevour to procure a rescission of any order that might follow.

the Code of Conduct which applies to all admitted legal practitioners in the country and I am obliged by reason of what what I have described, to refer his conduct to the Legal Practice Council for its attention.

[23] The result of Mr Maluleke's malicious behaviour is that he then walked out of the court before any debate could take place about whether or not the section 47 point is sound or not. Therefore in the absence of anybody on behalf of the ALA, I heard Mr Oosthuizen for the fifth respondent.

[24] He has provided me with full heads and with copies of the case law. I am familiar with the case law and it is unnecessary to belabour the point at issue.

[25] Having regard to the text of section 47, which I have already cited, the question remains whether there is any saving of proceedings after having been commenced, if consent from the relevant head of court had not been procured, prior to the time of comencement.

[26] There are several decisions of the Courts which have come to that conclusion that such proceedings are irregular. I cite only the most recent decision in this Division, *Freedom Under Law v Judge Motata* 2021 JDR 0077(GP), [5] a decision of Mlambo JP in which an

[5] Esp at paras [29] to [34] pf the judgment:

[29] The second declaratory order sought by FUL is that the phrase 'civil proceedings' in section 47(1) should not be interpreted to countenance review proceedings instituted against administrative decision makers such as the JSC and not against Judges even if such Judges have an interest in the matter or outcome thereof. The argument advanced by FUL in this regard is that in the first place the review proceedings are not "instituted against any judge" but against the administrative decision maker, the JSC in this instance. In the second place it is argued that the review proceedings can proceed with or without the interested Judge's participation. In the fourth place it is argued that that review proceedings

argument is addressed about whether compliance with section 47 was necessary when a Judge was an ancillary respondent in an application against Judicial Service Commission. The question of the need for consent being necessary in respect of the judge who was implicated in that decision of the JSC was traversed at length and the conclusion reached was

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are "*sui generis*" proceedings whose objective is to test the lawfulness of an administrative decision maker's decision.

[30] Based on the foregoing the submission is advanced that section 47(1) cannot be used as a means to limit a litigant's access to Court when such review proceedings are at issue. It is argued that interpreting "civil proceedings" as found in section 47(1) to encompass review proceedings of the nature we are dealing with "would limit not only the right of access to court found in section 34 17 of the Constitution but also the

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right to administrative justice".

[31] FUL has come up with an interpretation of section 47(1) suggestive that a refusal of consent to cite a Judge who has an interest in review proceedings not instituted against the Judge, would amount to a denial of access to courts and administrative justice to the litigant instituting such proceedings. To avoid such obvious unconstitutionality, FUL argues that the way to interpret the section is that the phrase "civil proceedings" found in the section should be interpreted to exclude such review proceedings from the ambit of the section. This would, in FUL's view obviate the need to seek the requisite consent.

[32] I cannot find any basis to regard the phrase "civil proceedings" to be capable of more than one interpretation simply because the target thereof is not a Judge who has an interest in the said proceedings. Review proceedings are "civil proceedings" and that is the only interpretation that applies. It cannot be that the interpretation of the phrase has a double meaning simply because the relief sought is against one respondent but not against another who also has an interest in the same proceedings. In my view FUL's argument advocating for a restrictive interpretation of the phrase "civil proceedings" excluding judicial review from the ambit of section 47(1) is ill conceived and must be rejected.

[33] The fact of the matter is that such review proceedings do not depend on the participation of the judge who has an interest in the proceedings, a point FUL also make. Those proceedings can take place and be finalized with or without the

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participation of the Judge, a fact recognized by FUL. FUL's interpretative argument has the effect of limiting the ambit of section 47(1) which cannot, on the objective of the section and the act in general, be justified on any basis. The clear language of section 47(1) is that the consent of the head of the Court where the Judge has been appointed, must be sought to cite the Judge in the intended proceedings. Should such consent be granted it will be up to the Judge to decide whether to participate in the proceedings or abide the decision of the court hearing the review application.

[34] My conclusion, having considered FUL's submissions is that consent as ordained by 47(1) is required to cite the respondent in the review proceedings. As to whether good cause has been shown to warrant the requisite consent, this is a case where consent must be granted. The respondent has retired and has not been called to act or participate in judicial functions since retiring. Prior to his retirement in February 2017, the respondent was on special leave for almost a decade. The respondent's involvement in the review proceedings will in no way impede the functioning of the High Court in which he formerly served. Nor will his inclusion in the review proceedings undermine the independence of the judiciary. All these facts illustrate the case by case approach implicit in such matters and that consent is warranted in the circumstances of this matter. Furthermore, the review proceedings aimed at upsetting the JSC's decision contain a justiciable issue. The objective thereof is to challenge the lawfulness, rationality and validity of the JSC's decision. The objective of the review proceedings is therefore aimed at asserting the proper standard by which Judges' misconduct should be dealt with by the JSC. Issues of judicial integrity and accountability will of necessity be ventilated in the review proceedings. It is common cause that the Judicial Conduct Tribunal, established to

that that consent was indeed necessary.

[26] Self-evidently, one of the considerations for non-compliance in the proceedings before this Court is whether or not condonation of a failure is appropriate. It was contended to me in the course of argument in these proceedings that one must give full weight to the purpose of section 47, which is to protect the judiciary from frivolous or inappropriate litigation, and thereby distracting Judges from their public functions.

[27] Therefore, in that context, its makes perfect sense that there is no room for condonation if consent is not granted before the commencement of the proceedings. The proceedings are void *ab initio* and that must be the fate of this particular application. There is no room for condonation and therefore there is no room for latitude.

[28] Had Mr Maluleke afforded this Court the courtesy of representing the ALA and advanced arguments, I would have heard him on that, but in his absence I am unaware a reason or a basis upon which a rebuttal of this proposition is open to him.

[29] The conclusion is as follows:

29.1 Because relief in the two interlocutory applications

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investigate allegations of gross

misconduct against the respondent, had recommended that the respondent be found guilty of gross misconduct which carried with it the prospect of impeachment but the JSC rejected that recommendation opting instead to return a verdict of misconduct *simpliciter*. The review is aimed testing the appropriateness of that finding.

[35] This is, in my view, a clear case where consent is warranted, and it is for the respondent to decide if he would want to participate in the review proceedings. An administrative decision was taken by the JSC against the respondent and the review application threatens the respondent's interest as he has complied with that decision.'

have been effectively abandoned, there is no need for any order on that score, and I simply note that fact.

29.2 As far as the defence raised on the section 47 point is concerned, the point is good and I must uphold it.

29.3 Given the costs incurred in the interlocutories it is appropriate that there be costs *de bonis a propriis* from the time that the condonation application was filed.

29.4 Further opposition by ALA after that moment and an abandonment whilst in the hearing itself was wholly inappropriate and resulted in considerable wasted costs to the 5th respondent.The date upon which condonation application was filed was 26 April 2023.

[30] Because of these considerations, I make the following order:

(1) The defence raised by the fifth respondent, based on section 47 of the Superior Courts Act 10 of 2013, to the review application and the subsidiary interlocutory applications, that the review was unlawfully issued, is upheld.

(2) The review application is accordingly dismissed.

(3) The costs of opposition, incurred by the fifth respondent, Phatudi J, in respect of the two interlocutory applications

brought by the Amalgamated Lawyers Association are to be borne by the Amalgamated Lawyers Association on the attorney and client scale, inclusive of the costs of employing two counsel; such costs to be calculated from the date upon which the condonation affidavit was filed on 26 April 2023.

(4) A referral is made to the Legal Practice Council for it to enquire into the conduct of Adv Maluleke to determine whether or not his behaviour in these proceedings constitutes misconduct.

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SUTHERLAND, DJP

Date of oral delivery: 30 August 2023

Date edited: 11 September 2023

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Appearances:

For the Amalgamated Lawyers Association:

Adv T K Maluleke, with him

Adv H D Munzhelele

Instructed by Ntsako Phylis Mbhiza Attorneys

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For the Fifth respondent, G Phadudi J

Adv MM Oosthuizen SC, with him.

Adv L Meintjies

Instructed by P J Van Staden of

Espag Magwai Attorneys.