CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 122/16

In the matter between:

BAAITSE ELIZABETH NKABINDE	First Applicant
CHRISTOPHER NYAOLE JAFTA	Second Applicant
and	
JUDICIAL SERVICE COMMISSION	First Respondent
PRESIDENT OF THE JUDICIAL CONDUCT TRIBUNAL	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
XOLISILE KHANYILE NO	Fourth Respondent

Neutral citation:	*Nkabinde and Another v Judicial Service Commission and Others* [2016] ZACC 25
Coram:	Mogoeng CJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J
Judgments:	Unanimous judgment of the Court
Decided on:	24 August 2016
Summary:	Application for rescission of order of Court – Justices of the Constitutional Court disqualified to sit in Colleagues' matter – no quorum – Court unable to adjudicate matter – matter cannot be left pending indefinitely before Court – principle in *Hlophe v Freedom Under Law* applicable – Rule 42 of Uniform Rules of

Court not applicable for rescission of order made at Conference – Applicants knew procedure for application for leave to appeal – Rule 19(3) – argument to be in affidavits – Rule 19(6) – Court may summarily dismiss application for leave to appeal – application dismissed.

ORDER

Application for rescission of order of Court:

The application is dismissed.

JUDGMENT

THE COURT:

Introduction

[1] The first and second applicants are Justices of this Court. They have brought an application for the rescission[1] of an order this Court made on 16 May 2016. That order was made in an application for leave to appeal against a decision of the Supreme Court of Appeal that went against the applicants.[2] The order, together with the narration of the reasons, read as follows:

> "The Constitutional Court has considered this application for leave to appeal. In the light of the principle regulating the position where a court is incapacitated because of conflicts disabling its members from sitting to determine the merits of the application, as set out in *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom*

[1] In terms of Rule 42(1)(a) of the Uniform Rules of the High Court as made applicable to this Court by Rule 29 of the Rules of this Court.

[2] *Nkabinde and Another v Judicial Service Commission* [2016] ZASCA 12; 2016 (4) SA 1 (SCA).

Under Law and Other 2012 (6) SA 13 (CC), the Court has decided that the application must be dismissed.

Order:

1. The application for leave to appeal is dismissed."

Background

[2] In 2008 the applicants, together with a number of past Justices of this Court, lodged a complaint (complaint) with the Judicial Service Commission (JSC) against Judge President John Hlophe of the Western Cape Division of the High Court. The history of what has been happening in regard to that complaint since then is to be found in various reported judgments.[3] It is, therefore, not necessary to set out that history. It suffices to point out that in October 2013 the applicants brought a review application in the South Gauteng Local Division of the High Court for an order setting aside, among others, a decision by the JSC to refer the complaint against Judge President Hlophe to the Chief Justice in his capacity as the chairperson of the Judicial Conduct Committee for consideration. The applicants also sought an order declaring section 24(1) of the JSC Act[4] to be inconsistent with the Constitution.

[3] A Full Bench was constituted to hear the application. It dismissed the application with costs. It also dismissed an application for leave to appeal to the Supreme Court of Appeal. The applicants then applied to the Supreme Court of Appeal for leave to appeal. It dismissed the appeal on the merits but upheld the appeal against the costs order that the Full Bench had made against them. It is against this decision that the applicants brought the application for leave to appeal to this Court.

[3] *Judge President Hlophe v Freedom Under Law* [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC) (*Hlophe*). *Freedom Under Law v Acting Chairperson, Judicial Service Commission and others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA). *Premier, Western Cape v Acting Chairperson, Judicial Service Commission* 2010 (5) SA 634 (WCC).

[4] The Judicial Service Commission Act, 1994 as amended by the Judicial Service Commission Amendment Act, 2008 (which came into operation on 1 June 2010) (JSC Act).

How this Court deals with applications for leave to appeal

[4] The practice of this Court in dealing with applications for leave to appeal is that, as a norm, they are deliberated upon at Conference or a meeting of the Justices. An overwhelming majority of them are dismissed summarily at Conference without any written or oral argument. A few of them are set down for hearing. Those that are set down are those that appear to have reasonable prospects of success and raise important constitutional issues or arguable points of law of general public importance that deserve consideration by this Court.[5] They are then heard in open court where the litigants have a right to attend.

[5] Those applications that do not get set down are dealt with and finalised at Conference and are summarily dismissed without a judgment. Occasionally, a short judgment is written without oral or additional written submissions[6] but sometimes with additional written argument. Litigants have no right to attend Conference or to be represented there when the Court considers applications for leave to appeal.

[6] This procedure is consistent with both section 173 of the Constitution and Rule 19 of the Rules of this Court. Section 173 provides that this Court has "the inherent power to protect and regulate [its] own process … taking into account the interests of justice". Rule 19(2) provides that a litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to this Court on a constitutional matter "shall …lodge with the Registrar an application for leave to appeal …". Rule 19(3) provides that the application "shall be signed by the applicant or his or her legal representative and shall contain:

(a) the decision against which the appeal is brought and the grounds upon which such decision is disputed;

[5] *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC).

[6] The reference to additional written argument is based on the fact that, if the Court issued directions inviting written submissions, the written submissions submitted in compliance with those directions would be additional to any argument that the applicant for leave to appeal would have included in his or her statement or affidavit pursuant to Rule 19(3).

(b) the statement setting out clearly and succinctly the constitutional matter raised in the decision; *and any other issues including issues that are alleged to be connected with a decision on the constitutional matter*;

(c) *such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court*;

..."

[7] Rule 19(4) makes provision for the lodgement by a respondent of his, her or its response to an application for leave to appeal. Rule 19(5) provides for the lodgement of a cross-appeal. Once the application for leave to appeal and either a response thereto has been lodged, with or without a cross-appeal, or, once the time allowed for the lodgement of the response or a cross-appeal has expired, Rule 19 (6)(a) enjoins the Court to "decide whether or not to grant the appellant leave to appeal". This means that an applicant for leave to appeal does not even have a right to deliver a reply to the respondent's response. Rule 19(6)(b) then provides:

> "Applications for leave to appeal may be dealt with *summarily, without receiving oral or written argument other than that contained in the application itself*."

[8] This practice and procedure as to how this Court deals with applications for leave to appeal was considered and held to be consistent with the Constitution in *Democratic Party*[7] and in *Pennington*[8] and *Mphahlele.*[9] In *Pennington* Chaskalson P had this to say about this procedure:

> "[48] The settled practice of our courts has always been for appeals to be heard in public. Applications for leave to appeal are not ordinarily heard in open court, though a hearing may be called if the application raises issues on which it is considered desirable to hear oral argument. In most cases, however, the applications

[7] *MEC, Development Planning and Local Government, Gauteng v Democratic Party* and Others [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) (*Democratic Party*).

[8] *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) (*Pennington*).

[9] *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC] 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (*Mphahlele*) at para 17.

> are dealt with in chambers and are either granted or refused on the basis of the judgment of the Court a quo and the reasons advanced in the application in support of the submission that such judgment was wrong. There are sound practical reasons for this. If such matters had to be dealt with in open court, the court rolls would be clogged and the result would be additional expense and delays.
>
> [49] The European Court of Human Rights has held that an application for leave to appeal is a special procedure which does not necessarily call for a public hearing under provisions of article 6(1) of the European Convention for the Protection of Human Rights."

[9] This procedure is, obviously, well known to the applicants as they have been party to many decisions made by this Court in applications for leave to appeal. Indeed, they are also familiar with the provisions of Rule 19 including Rule 19(3) and (6) as quoted above.

[10] In dealing with the applicants' application for leave to appeal on 16 May 2016, this Court followed the procedure set out above. This Court treated the applicants in the same way as it would treat any other litigants. Deliberations focused on the fact that a number of members of the Court were disqualified from adjudicating the matter. Moseneke DCJ was disqualified because he, the applicants and a number of other past Justices of this Court were complainants in the complaint against Judge President John Hlophe. Mogoeng CJ and Zondo J were disqualified because they took part in efforts to mediate the dispute between the complainants and Judge President Hlophe. Additionally, the Chief Justice was disqualified because he is Chairperson of the JSC. Madlanga J was disqualified from sitting because, before he was appointed as a Justice of this Court, he was the applicants' counsel in proceedings relating to the complaint against Judge President Hlophe. In addition, all members of the Court may have been compromised because of the personal relationship between colleagues at the Court.

[11] The fact that Justices were disqualified from sitting in the application for leave to appeal meant that ordinarily there would have been no quorum. In terms of the Constitution a matter to be decided by this Court must be decided by at least eight Justices.

[12] In *Hlophe*[10] this Court dismissed an application for leave to appeal against a decision of the Supreme Court of Appeal on the basis that there were so many of the Justices of this Court disqualified from sitting that, if the matter were to be heard by those Justices who were not disqualified, there would be no quorum. There, this Court decided that constitutionally it was not open to have Acting Judges specially appointed to fill the "vacancies" that would arise when disqualified Justices recused themselves. It was also pointed out that a matter could not be left pending indefinitely and that, therefore, the application should be dismissed, not necessarily because it had no prospects of success on the merits, but because, there being no quorum, the matter could not be heard and could not simply be left indefinitely pending.

[13] On 16 May 2016 this Court also deliberated upon the applicability of the principle established in the decision of this Court in *Hlophe* and on whether we should issue directions and invite the parties to furnish written submissions. This Court took the view that the principle established in *Hlophe* was applicable to the applicants' application for leave to appeal. A unanimous decision was also taken that there was no need to issue directions and that the Court should not do so. A unanimous decision was then taken to dismiss the application on the basis of the principle established in *Hlophe*.

The application for rescission

[14] As already indicated, the applicants brought their application for rescission in terms of Rule 42(1)(a). Rule 42(1)(a) reads as follows in so far as it is relevant:

[10] Id above n 3.

> "(1) The Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) an order erroneously … granted in the absence of any party affected thereby."

An applicant for rescission who brings an application under this Rule must show that the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought.

Submissions

[15] In essence, the applicants advance two broad grounds in support of the contention that the order was granted in error:

i. They argue that the Court based its decision to dismiss their application for leave to appeal on an issue not raised with the parties. This, so the argument goes, deprived the applicants of an opportunity to make representations on the ground in respect of which their application was dismissed. They contend that this unhinged their section 34 right of access to court. They maintain that it was their right to have any dispute that can be resolved by the application of law decided in a fair public hearing. The applicants attribute the "error" to what they call "an innocent oversight on the part of our esteemed Colleagues". They further assert that "[w]e have no reason to think that they [our Colleagues] could deliberately deny us such a basic right".

ii. They argue that, although the Court asserted that some of its members were disqualified, those members, nevertheless, took part in the decision to dismiss their application. In other words, the applicants contend that this was irregular. The applicants therefore seek the rescission on the ground that "[the order] was tainted by irregularity which was fatal to its validity".

[16] The JSC and the Minister of Justice and Correctional Services, the first and third respondents, opposed the application. They filed opposing affidavits. The JSC contends that this is not a case in which Rule 42 may be invoked because the adjudication of the application for leave to appeal did not involve a public hearing. It also points out that the procedure followed in adjudicating the applicants' application for leave to appeal is one that has been held by this Court to be consistent with the Constitution. In support of this, it relies on the cases to which reference has already been made above. The JSC also submits that this is not a case where it can be said that this Court erroneously granted the order of 16 May 2016.

[17] The Minister submits that the application lacks merit and should be dismissed. With regard to the complaint that this Court dismissed their application on the basis of a point on which they were not given an opportunity to be heard, the Minister submits that the procedure that was followed by this Court is authorised by section 173 of the Constitution and Rule 19(6) of the Rules of this Court.

[18] The Minister also contends that the applicants cannot claim to have been ignorant of the inherent conflict that was bound to arise in this matter before this Court. He submits that the principle adopted by this Court in *Hlophe* was applicable. He submits that such differences as there may be between this matter and the *Hlophe* matter are "minuscule".

Consideration of the matter

[19] As already stated, the applicants brought their rescission application in terms of Rule 42(1)(a) read with Rule 29. Rule 42(1)(a) has no application when this Court considers and decides applications for leave to appeal at Conference. The litigants involved have no right to be present at Conference. The requirement in Rule 42(1)(a) that the order sought to be rescinded must have been granted in the absence of the rescission applicant is based on the assumption that the litigant was entitled to be present in Court when his or her matter was heard or adjudicated but that this happened in her absence.

[20] Rule 42(1)(a) seeks to ensure that a litigant will be present in Court when the matter is heard again after the order granted in his or her absence has been rescinded. In terms of our practice when we decide applications for leave to appeal which, of course, is well known to the applicants, no litigant has a right to be present at Conference. In the cases in which Rule 42(1)(a) applies, a party who successfully applies for the rescission of an order that was granted in his or her absence has a right to be present in Court when , after the rescission , the Court has to hear his or her matter. Here, if we were to rescind the order of 16 May 2016, the applicants would still have no right to be present at Conference when we consider their matter again. This ground alone is sufficient for us to dismiss the application.

[21] The contention that our previous order was erroneously granted also falls to be rejected. The applicants argue that the order was erroneously granted because we dismissed their application on a point which none of the parties had raised in the papers without inviting them to deliver written argument on the point. They contend that this infringed their right to be heard and their right of access to court in terms section 34. They imply that this Court was obliged to issue directions and invite them to deliver written submissions. The point is that we lacked a quorum because some of our Colleagues were disqualified from taking part in the adjudication of the matter. Rule 19(6) of our Rules, which has been quoted above, makes it clear that, when this Court deals with applications for leave to appeal, it may do so summarily and without oral argument or additional written submissions. The applicants are familiar with this procedure. They could not have expected their application to be treated differently. They have been party to many such decisions over the years concerning other litigants.

[22] When the applicants prepared their application, they knew:

(a) who their Colleagues were before whom their application would come;

(b) that some of their Colleagues were disqualified from taking part in the adjudication of the merits of their application or the appeal that would have to be heard if leave was granted;

(c) the identity of their Colleagues who were disqualified from sitting in this matter because some of those Colleagues disclosed their reasons for disqualification in 2011 in *Hlophe*;

(d) that one of our Colleagues at the time was one of the complainants together with them in the complaint against Judge President Hlophe;

(e) that one of our Colleagues had been their Counsel in proceedings relating to the complaint against Judge President Hlophe before he joined this Court;

(f) that, when one had regard to the number of our Colleagues who were disqualified from taking part in the adjudication of the matter, this Court would lack the required quorum of eight Judges;

(g) that Rule 19(3)(c) of the Rules of this Court contemplated that they could include their argument in their affidavits on any issue that they wanted to bring to this Court's attention just as they have done in their affidavit in this rescission application.

[23] With this knowledge and the knowledge that usually this Court decides applications for leave to appeal on the basis of the affidavits filed and without oral argument or inviting separate written argument, it was up to the applicants, if they wished to be heard on how the Court would deal with the matter, to include in their founding affidavits their argument or submissions on that and other issues. Since they were also aware of the *Hlophe* decision, they could have also included in their affidavits submissions on that decision because they must have known that the decision was likely to exercise the minds of the members of the Court. They should not have waited in the hope that directions would be issued.

[24] The applicants' contention that this Court denied them an opportunity to be heard has no merit. Furthermore, the suggestion that the members of this Court who

made the order of 16 May 2016 did so because of "innocent oversight" has no proper basis. The members of the Court who made that order did so after a proper deliberation of the issues including whether it was necessary to issue directions and invite the parties to deliver written submissions. The order of 16 May 2016 was not an oversight nor was the fact that directions were not issued.

[25] In *Hlophe* we issued detailed directions stating which members of the Court were disqualified in that matter and allowed the parties to make representations about disqualification amongst other things. However, in *Hlophe* this Court was dealing with this type of disablement of its members for the first time. This time, the applicants knew this Court's decision in *Hlophe* and, if they thought that it should not be followed or was distinguishable, they should have addressed that in their affidavits. They did not do so and cannot now complain.

[26] Finally, even now, after we have been joined by two Acting Judges, we would still not have a quorum to deal with the applicants' rescission application or appeal if we were to exclude those Colleagues who are disqualified.

[27] The contention that the disqualified members of this Court should not have sat even for purposes of making the decision that the application should be dismissed because there was no quorum is also without merit. What this Court did in this matter is what it did in *Hlophe*.

[28] Although it is true that the order of this Court made on 16 May 2016 and this judgment mean that the applicants have not had their application for leave to appeal against the decision of the Supreme Court of Appeal decided on the merits, their complaint against the decision of the JSC has been heard by no fewer than ten Judges. It was heard by two Judges who are members of the Tribunal plus another member who is not a Judge. It was then heard by three Judges who constituted the Full Bench. Thereafter, it was heard by five Judges of the Supreme Court of Appeal. All these

Judges considered their complaint and dismissed it. Their complaint about the alleged unconstitutionality of section 24 of the JSC Act has been heard by eight Judges.

[29] In conclusion, we would be failing in our duty if we did not take this opportunity to emphasise that it is in the interests of justice that the matter of the complaint against Judge President Hlophe should be dealt with and concluded without any further delay. The events that gave rise to the complaint occurred in 2008. Eight years later, the matter has not been finalised. It is in the interests of justice that this matter be brought to finality.

[30] In the result the application is dismissed.