THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 697/08

LANGA CJ,	First Appellant
MOSENEKE DCJ	Second Appellant
MADALA J	Third Appellant
MOKGORO J	Fourth Appellant
O'REGAN J	Fifth Appellant
SACHS J	Sixth Appellant
NGCOBO J	Seventh Appellant
SKWEYIYA J	Eighth Appellant
VAN DER WESTHUIZEN J	Ninth Appellant
YACOOB J	Tenth Appellant
NKABINDE J	Eleventh Appellant
JAFTA AJ	Twelfth Appellant
KROON AJ	Thirteenth Appellant

and

HLOPHE, MANDLAKAYISE JOHN	Respondent

Neutral citation: *Langa v Hlophe* (697/08) [2009] ZASCA 36 (31 MARCH 2009)

Coram: HARMS DP, STREICHER, MTHIYANE, NUGENT, CLOETE, PONNAN, MLAMBO**,** SNYDERS AND MHLANTLA JJA
Heard: 23 MARCH 2009
Delivered: 31 MARCH 2009
Updated:
Summary: Judge – complaint of judicial misconduct by other judges – alleged violation of accused judge's constitutional rights – no right to be heard before complaint filed and media statement issued

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ORDER

On appeal from: High Court of South Africa (WLD): Mojapelo DJP (Moshidi J and Mathopo J concurring and Marais J and Gildenhuys J dissenting), a Full Bench sitting as a court of first instance.

(a) The appeal is upheld.

(b) The order of the court below is replaced by an order dismissing the application.

JUDGMENT

THE COURT:

INTRODUCTION

[1] This is an appeal from a judgment of the High Court, Johannesburg, relating to a dispute between Justices of the Constitutional Court ('the CC') and a Judge President of a high court. The court below was unusually though permissibly constituted as a full bench with five judges (Supreme Court Act 59 of 1959 s 13(1)(a)). The majority (Mojapelo DJP with Moshidi and Mathopo JJ concurring) upheld the respondent's claim for declaratory orders in part (*Hlophe v Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC 289, [2009] 2 All SA 72 (W)). Marais J and Gildenhuys J in separate judgments but for similar reasons disagreed; they would have dismissed the application. (References in this judgment to the high court judgment are to the judgment of the majority.)

[2] The high court granted the appellants leave to appeal. The respondent sought leave from the high court to cross-appeal to the CC notwithstanding that high courts (and, for that matter, this court) are not entitled to grant such leave. He asked, in the alternative, for leave to cross-appeal to this court, but that application was fatally defective. In the event both applications were struck from the roll.

[3] As a rule this court sits as a panel of either three or five judges but in view of the importance of the matter, and taking into consideration the request of the appellants, in which the respondent acquiesced, it was directed that the matter be heard by a larger panel (s 12(1)(c) of the Act).

[4] At the request of the court Adv NC Maritz SC and KS Hassim of the Pretoria Bar filed concise heads of argument as *amici curiae*. We wish to express our appreciation for their contribution.

[5] The appellants are the Chief Justice (Langa CJ); the Deputy Chief Justice (Moseneke DCJ); eight CC Justices (Mokgoro J, O'Regan J, Sachs J, Ngcobo J, Skweyiya J, Van Der Westhuizen J, Yacoob J, and Nkabinde J); a recently retired CC Justice (Madala J); and a member of this court (Jafta AJ) and one of the Eastern Cape High Court (Kroon AJ) who both were at the time acting CC judges. The respondent is the Judge President of the Cape High Court, Judge MJ Hlophe.

[6] The case arose from a complaint of judicial misconduct laid by the appellants against the respondent with the Judicial Service Commission (the JSC) on 30 May 2008. The respondent laid a counter-complaint against the appellants on 10 June. While these matters were pending (and they still are) the respondent launched the subject application for an order declaring, in essence, that the CC had violated certain of his constitutional rights by laying the complaint and by issuing a media release stating that the complaint had been laid.

[7] The backdrop against which this case arose no doubt raises matters of public importance wherever the truth on those matters lies. But it needs to be said at the outset that those matters lie for examination and consideration in another forum,

namely the JSC, and they are only peripherally relevant to this case. This appeal is confined instead to two narrow questions of law relating to alleged violations of the Constitution. The first is whether the appellants, as judges of the CC, were obliged in law to afford the respondent, because he is a judge, a hearing prior to laying the complaint against him before the JSC. And the second is whether, having lodged the complaint, they were obliged in law to keep that fact confidential. The circumstances in which those two questions arise appear later in this judgment. This judgment accordingly is not concerned with the merit of of the complaints to the JSC.

[8] Two of the respondents in the court below are no longer parties to the litigation. The one is the CC as an institution. The thrust of the respondent's substantive application was for an order declaring that the appellants had acted institutionally ('as a Court') and 'not merely as an assortment of individual judges' and, in that capacity, had violated his rights. The high court found that the appellants had not acted as an institution but as a group of persons who were coincidentally judges and that the respondent's application was in that regard misconceived. As a result the court refused to make an order implicating the CC itself and dismissed the application *pro tanto*.

[9] The other party in the high court that does not feature in this appeal is the JSC. The relief sought against the JSC was for a temporary interdict, which became moot, and the JSC has no further legal interest in the appeal.

THE SEQUENCE OF EVENTS

[10] During March 2008, the CC heard the Thint/Zuma appeals from this court. They were of public interest and importance since they concerned the prosecution of a high-ranking politician, Mr Jacob Zuma, on a number of counts. One of the issues related to legal privilege. The CC reserved judgment. It was ultimately delivered after the events that feature in this judgment and was reported as *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC).

[11] Towards the end of that month the respondent visited Jafta AJ who concluded that the respondent had attempted to influence him to find in favour of Mr Zuma. Knowing that the respondent intended to visit Nkabinde J, he warned her of the possibility that the respondent might repeat his attempt.

[12] The anticipated visit to Nkabinde J took place on 25 April, and she, too, concluded that the respondent had sought to influence her. At the beginning of May and soon after the court term began Nkabinde J made a report to another appellant and through her the matter was taken up with other members of the court. They met in the absence of two appellants, discussed the subject, and eventually agreed to lodge a complaint of judicial misconduct against the respondent with the JSC based on the information provided by the two Justices. This was done on 30 May.

[13] The gravamen of the complaint was in these terms:

> 'A complaint that the Judge President of the Cape High Court, Judge John Hlophe, has approached some of the judges of the Constitutional Court in an improper attempt to influence this Court's pending judgment in one or more cases is hereby submitted by the judges of this Court to the Judicial Service Commission, as the constitutionally appointed body to deal with complaints of judicial misconduct.'

The document identified the case involved and stressed that there was no suggestion that any litigant was aware of or had instigated the respondent's action. It contained further statements about the seriousness of the conduct; the democratic values contained in s 1 of the Constitution; the independence of the judiciary and the prohibition in s 165 of interference with courts; the judicial oath; that attempts to influence a court violates the Constitution and threatens the administration of justice; and that the CC and other courts would not yield to or tolerate attempts to undermine their independence.

[14] A media release in virtually identical terms soon followed, which was sent automatically and electronically to all subscribers to the CC's information system.

[15] It should be noted at this early stage that (a) the respondent was not apprised of the allegations or their source; (b) he was not asked for his version or comments;

(c) he received no effective prior notice of the intention to lodge the complaint; and (d) he was not told of the intention to issue a media statement. The public, too, was not given any detail and was left with nothing more than the knowledge that a complaint with serious implications had been lodged.

[16] The JSC held an urgent meeting on 6 June to discuss the matter but due to the lack of information it put the appellants on terms to flesh out the complaint. The respondent, as mentioned, launched his counter-offensive on 10 June, charging the appellants with violating his rights by releasing a public statement about his alleged improper conduct before filing a proper (factual) complaint with the JSC. This, he said, violated his constitutional rights – the same rights implicated in the application before the high court and to which we shall revert.

[17] The two Justices responded to the request of the JSC by stating that they had not lodged a complaint; that they did not intend to do so; and that they were not willing to make statements about the matter. However, the affidavit of the Chief Justice, which they in turn confirmed under oath, stated that the two Justices always considered themselves to have been part of a collective complaint on 30 May and not as individual complainants. They soon afterwards indirectly confirmed their accounts of what had occurred by agreeing that their version as related by the Chief Justice was correct.

[18] In reaction to press reports the attorneys for Mr Zuma wrote a letter to the Chief Justice expressing concern about the matter and on 23 June he issued a practice direction in the Thint/Zuma case drawing the attention of the parties to the fact that a complaint had been lodged; informing them that the submissions filed were available from the JSC; and inviting the parties to make any consequent submissions. Nothing much eventuated.

[19] On 4 July, the first appellant submitted the response to the JSC of the appellants to the counter-complaint. It, too, set out the allegations of the two Justices involved, and they again subscribed thereto.

THE APPLICATION TO THE HIGH COURT

[20] The respondent's case was premised entirely on the allegation that the appellants had acted together institutionally (what the respondent called acting 'as a court') when they laid the complaint and issued the statement. As he put it in his founding affidavit, the appellants had done so 'as the Court and not merely as an assortment of individual judges' (underlining in the original) 'without affording me an opportunity to reply to the allegations of the judges concerned.' He added:

> 'The question that arises is of a purely legal nature and has to do with whether or not it was lawful for the judges of the Constitutional Court, acting as a Court, to cause untested allegations of gross misconduct against me to be published in the media only on the basis of ex parte representations made to them by some of the judges of the Court, who had already indicated that they do not wish to complain against me.'

[21] The affidavits say more: The respondent was aggrieved by the manner in which the appellants treated the complaint against him. He felt that the appellants had violated the institution of the judiciary and undermined the judicial office, particularly his. He pointed out that the two Justices had not given their version to all their colleagues; that their version was never put in their own terms, and that they appear to have been unwilling complainants and witnesses. The complaint and the press release were in the name of all the CC judges – also those who had no personal knowledge of the matter – and this, he said, per se condemned him in the eyes of members of the public and the profession. In the result an 'institutional' bias had developed that made it unlikely that an unbiased bench of judges or academics could be constituted to hear his case.

THE FUNCTIONS OF THE JSC

[22] Under s 177 of the Constitution matters relating to gross misconduct of judges must be dealt with by the JSC. If the JSC makes a finding of gross misconduct and the National Assembly by a two-thirds majority calls for the removal from office of the judge concerned, the President must comply. That means that once a complaint of that kind has been laid against a judge the JSC must conduct the necessary inquiry and come to a finding.

[23] The JSC is under the Constitution the forum for deciding whether or not a judge is guilty of gross misconduct. Such a conclusion presupposes a finding that the judge committed the conduct complained of, which may involve factual or legal findings. The JSC may find that the complaint is without merit and summarily dismiss it. If it has merit, two value judgments follow: did the conduct amount to misconduct and, if so, was it gross? If it finds that the judge was guilty of misconduct which was not 'gross' that ends the matter. If, however, it finds that the misconduct was gross, impeachment proceedings follow.

[24] The JSC has procedural rules for dealing with complaints. These are exhaustive and there is no suggestion that they do not afford the right to a fair hearing to the judge. The procedure begins with the receipt of a complaint 'from any source' and, although it may require the complaint to be on oath, the JSC is entitled to act on any complaint, whether on oath, in writing or oral. The rules provide that the JSC may permit the media and the public, subject to such restrictions as may be considered appropriate, 'to attend any enquiry unless good cause is shown for their exclusion'.

[25] The respondent's complaint against the appellants before the JSC, as mentioned before, is repeated in the notice of motion and founding affidavit: the appellants violated his constitutional rights to dignity, privacy, equality and so forth. He made it clear that the object of the application was to obtain a finding that the entire process before the JSC was tainted and that his only remedy was a dismissal of the complaint. He said that if the court were to find that the CC had unreasonably and unjustifiably violated his rights under the Bill of Rights or that the CC had abandoned its judicial functions 'then that will be the end of the complaint against me'. In reply he pointed out that a process vitiated by illegality cannot be cured by 'scrupulous attention to considerations of legality at a hearing on the merits' and that he was not prepared to subject himself to a process which he believed was vitiated by illegality and unconstitutionality.

[26] The appellants submitted that the high court had usurped the constitutionally imposed function of the JSC to decide the issue and had thereby failed to have

regard to the separation of powers inherent in the Constitution. In the light of the way the case unfolded it is unnecessary to consider this argument.

DECLARATORY ORDERS

[27] In terms of s 38(a) of the Constitution any person acting in his or her interest has the right to approach a competent court on the ground that a fundamental right has been infringed, and the court may grant *appropriate* relief, including a declaration of rights.

[28] The jurisdiction of a high court to grant a declaration of rights is derived from s 19(1)(a)(ii) of the Supreme Court Act. The court may, at the instance of any interested person, enquire into and declare any existing, future or contingent right or obligation, notwithstanding that the applicant cannot claim any relief consequential upon such determination. This involves a two-stage enquiry: First, the court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied, it must decide whether the case is a proper one for the exercise of its discretion (*Durban City Council v Association of Building Societies* 1942 AD 27 at 32).

[29] Marais J and Gildenhuys J devoted some time to the question of that discretion and held that they would not have exercised it in favour of the respondent because the matter was one for the JSC. The majority found otherwise but, once again, in the light of the conclusions we have reached hereinafter on other aspects of the case, the question of discretion does not arise.

[30] The respondent sought to persuade the high court to issue a declaration of invalidity under s 172(1)(a) of the Constitution, which provides that when deciding a constitutional matter a court must declare that 'any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. The court held that the provision did not apply to the case and expressly declined to declare the complaint lodged against the respondent invalid (at para 108). Since there is no cross-appeal that issue is not before us for reconsideration (*Goodrich v Botha* 1954 (2) SA 540 (A)).

THE ORDER

[31] As we indicated earlier, the foundation of the respondent's case was that the appellants had acted institutionally ('as a court'). It is abundantly clear that they did not do so, as the high court correctly found. That should have been the end of the matter. However the court proceeded to examine whether on any basis established by the facts the appellants violated the constitutional rights of the respondent in lodging the complaint and publishing the media statement. The court did so on what it considered to have been a concession of the appellants that the court was at large to consider the declaratory prayers on the basis that the appellants had acted other than institutionally. The appellants' counsel denied that such a concession was made but stated, quite correctly, that it was in any event a matter of law whether there was a proper basis for the relief.

[32] Having found that the appellants had not acted institutionally the high court dealt with the prayers as if they did not contain that qualification. The court held that the Constitution had not been violated (prayer 1); that the respondent's right to privacy (prayer 4) and to access to courts (prayer 7) had not been infringed; and that the lodging of a complaint with the JSC had not been wrongful (prayer 8). In the absence of a cross-appeal the dismissal of those prayers does not require further consideration.

[33] The first three declaratory orders that were issued concerned the *publication* of the complaint which was, in general terms, declared to have been 'unlawful' (para 1.1); to have violated the respondent's constitutional 'right to dignity' (para 1.2); and to have violated his (presumably constitutional) right to a hearing (para 1.3). The fourth dealt with the *lodging* of the complaint, which was declared to have violated his constitutional right to equality (para 1.4). All the declarations were premised on the fact that the complaint was laid and the media release issued 'on the basis of ex parte representations' of the two Justices and additionally, in the case of para 1.1, on their 'untested allegations'. As the high court said, 'all these violations emanate from the applicant not being accorded the right to a hearing in relation to the publication and the laying of the complaint.'

[34] The finding that the appellants had not acted institutionally meant ineluctably that the respondent's cause of action fell away. The duty to hear a person was at

common law always limited to judicial or some administrative organs; and a person acting in a private capacity has never had such a duty. The Constitution is not different. The *audi* principle can only be sourced in either s 33 or s 34 of the Bill of Rights: the former deals with just administrative action and the latter with a fair public hearing before courts. Since the appellants did not 'act as a court' the fair trial provision did not arise and since they did not act as an administrative body the administrative justice provision did not apply either.

THE RATIO OF THE HIGH COURT

[35] The reasoning of the high court is difficult to encapsulate neatly especially in the light of what would appear to be some inconsistencies and conflicting findings. It would, however, be fair to say that the court reasoned along these lines:

(a) A distinction must be made between the 'trigger' stage', ie, the stage leading up to the laying of a complaint and the 'examination' stage, ie, the stage of the proceedings before the body charged with the investigation of the complaint (in this case the JSC). (We derive the term 'trigger' stage from a dictum by Conteh CJ in *Meerabux v. The Attorney General of Belize* (Belize Supreme Court at www.belizelaw.org) which at a later stage came before the Privy Council in *Meerabux v The Attorney General of Belize (Belize)* [2005] UKPC 12, [2005] 2 AC 513).

(b) To impose an obligation on a complainant to afford the accused judge an opportunity to be heard before lodging a complaint would 'stretch the requirements of procedural fairness a bit too far' (at para 24).

(c) It quoted with apparent approval a statement by Professor Martin L Friedland (*A place apart: Judicial independence and accountability in Canada* (1995) p 134) that although it would be very unfair for a body such as the JSC itself to publicize complaints that have not gone on to a hearing, 'one cannot prevent a complainant from going public.'

(d) In the light of this the two Justices involved were not obliged to give the respondent a hearing because they could rely on their personal knowledge.

(e) The appellants 'admittedly had a right and a duty to lodge the complaint' with the JSC 'once they received information about the events and they considered that a breach of judicial conduct had taken place' (at para 48).

(f) However, since the integrity of the judiciary resides in each and every member of the judiciary, the complaint procedure must assume the integrity and innocence of the judge, even in the face of a complaint, until the guilt of the judge has been proven following a fair procedure and process (at para 22). For this the court (at paras 69 and 72) relied on *Rees v Crane* [1994] 2 AC 173 (PC).

(g) The distinction between the 'trigger' and examination stages falls away if the complaint, at its early stages and prior to it being lodged, is conveyed to a senior person who did not observe the alleged misconduct.

(h) Under those circumstances the rules of natural justice require that the judge accused should be afforded an opportunity to be heard when such senior person considers lodging such complaint (at para 76).

(i) The publication of the fact of the complaint was unfair and led to a violation of the respondent's constitutional rights because the underlying facts had not been established; the witnesses were unwilling witnesses and had not conveyed their version to all the appellants personally; they had refused to provide a written statement and at best the complaint was based on hearsay; this should have made the other appellants alive to the fact that there was possibly another version to the same story; the complaint and the press release did not contain any detail, which made it impossible for the respondent to deal with the allegations and refute them immediately (at para 52 and 79); and the appellants acted with undue haste (at para 48).

[36] The essential reasoning that led to the making of the orders seems to us to be contained in the assertions that we have paraphrased in (g) and (h) above. We regret that we cannot agree with those assertions for the reasons that are dealt with more fully below. In particular, it is not readily apparent to us on what legal grounds they were founded. The high court's reliance on *Rees v Crane* (supra) to disregard the distinction between the 'trigger' and examination stages was not justified. That case was not concerned with the 'trigger' stage but with an initial investigation after

the complaint had been laid by the Judicial and Legal Service Commission that was tasked with advising the President to appoint a tribunal to investigate and report to parliament on the judge's alleged misconduct. The case did not deal with the rights of the judge before the complaint was laid with the Commission in the first instance.

[37] Counsel for the appellants challenged the conclusions of the high court on various grounds that need no elaboration but they ultimately came down to contesting that the appellants were obliged in law to afford the respondent a hearing before they laid the complaint. The difficulty faced by the appellant's counsel, however, was the difficulty inherent in establishing a negative, particularly when, as here, the case has mutated over time. We think it is convenient in those circumstances to identify the issues by turning first to the case for the respondent as it came to be presented before us.

[38] But first a matter that calls for comment. In the course of its judgment the court below made certain factual findings that reflected adversely upon the appellants. We were asked by their counsel to draw attention to the fact that these were application proceedings in which a court is not called upon to make factual findings (except in exceptional cases) and ought to have been dealt with it as such. The undesirability of resolving issues of fact on affidavit has often been remarked upon and bears no repetition (*National Director of Public Prosecutions v Zuma* [2009] ZASCA 1 at para 26-27). We do not think we ought to delve into those matters save to say that to the extent that factual findings were made contrary to those ordinary principles we do not endorse those findings.

THE RIGHT TO BE HEARD

[39] It has been difficult to pin down precisely where the rights that are asserted by the respondent are said to be sourced. Although reliance was placed upon the Constitution that reliance was at times expressed in broad and unspecific terms. A court cannot overlook what was said by Kentridge AJ in the earliest case that came before the CC, namely that 'it cannot be too strongly stressed that the Constitution does not mean whatever we choose it to mean' (*S v Zuma* 1995 (2) SA 642 (CC) at para 17).

[40] It nonetheless became clear early in argument that, whatever the source of the alleged right might be, the respondent does not assert a right on the part of a judge to be heard by complainants generally before they lay complaints before the JSC, and that is undoubtedly correct (*Kaunda v President of the RSA (2)* 2005 (4) SA 235 (CC) at para 83-84; *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1 at para 35-36; *Wiseman v Borneman* [1971] AC 297 (HL) at 308E-F; *Brooks v DPP of Jamaica* [1994] 2 All ER 231 (PC) at 239g-j). While a judge is obviously entitled to be heard in the course of the investigation of a complaint (as appears from the various cases and protocols referred to by the high court and referred to in the heads of argument) that is not what we are concerned with in this appeal. We are concerned instead with the act that initiates such an enquiry (the 'trigger'), which is the decision to lay a complaint. In that respect there is no authority to which we were referred or of which we are aware – whether in decided cases or in judicial protocols anywhere in the world – that obliges a complainant to invite a judge to be heard before laying the complaint. Indeed, the authorities all say the opposite (*Meyer v Law Society, Transvaal* 1978 (2) SA 209 (T) at 214F-H; *Meyer v Prokureursorde van Transvaal* 1979 (1) SA 849 (T) at 855G-856E; *Moran v Lloyd's (a statutory body)* [1981] 1 Lloyd's Reports 423 (CA) at 427) and a rule to that effect would be absurd, because it would altogether undermine the process of investigating complaints.

[41] The respondent confined himself instead to asserting a right to be heard when the complainant is a judge. The distinction that was drawn between complainants generally, on the one hand, and a complaining judge on the other hand, was said to lie in the oath of office taken by a judge and in s 165 of the Constitution, though as the argument progressed that was developed further to include the more general duty that is cast upon judges to uphold the dignity of the judicial institution. We think a fair summary of the argument in that regard was that judges are obliged at all times, by the nature of the office that they hold, to act judicially when deciding matters that relate to that office, which includes an obligation to observe the rules of natural justice when making such decisions.

[42] There is considerable merit in the submission that a judge who is minded to lay a complaint against a colleague has special duties that are not shared by lay complainants, for there is an overarching duty upon judges, in whatever they do, to preserve the dignity of the judicial institution. Indeed, the Constitution itself commands all organs of state, which include the judiciary, to 'assist and protect the independence, impartiality, dignity, accessibility, and effectiveness of the judiciary'. The duty that is cast upon judges no doubt calls upon them to act with due care and circumspection before exposing the judicial institution, and those who hold office in the institution, to loss of public confidence through allegations of misconduct, as submitted by the respondent's counsel. That might indeed in some cases call for an invitation to be extended to the judge concerned to offer an explanation for the alleged misconduct before a complaint is laid. Whether that will be so in a particular case will necessarily be bound up with the particular circumstances in which the decision comes to be made, for there are peculiar complexities that are capable of arising if such an invitation were to be made. But we are not called upon to consider whether that was called for in this case, in which we are not adjudicating ethical questions but questions of law. And it is there that the submission on behalf of the respondents breaks down fatally on two related grounds.

[43] The first is that those duties are not imposed upon a judge for the protection of the personal interests of other judges but for the protection of the institution in the interests of the public at large. And in this case the respondent does not purport to be asserting the interest of the public in the protection of the judicial institution, which he would have had no proper grounds for doing, but is asserting instead the protection of his personal interests. The court below seems to us to have blurred that distinction, and in that respect we think it erred, when it said in its judgment that the right that he sought to assert was a right that 'is asserted in favour of the applicant as a member of the judiciary'.

[44] But equally fatal to the respondent's case on that score is that the duties we have referred to are not sourced in rules of law that are enforceable in the courts. They are sourced in ethical duties attaching to judicial office that are enforceable ultimately only by the sanction of removal from office.

[45] It was no doubt that consideration that compelled the respondent at the outset to attempt to bridge the chasm between ethical principle and legal rule by founding his case upon the proposition that in making their decision the appellants were acting institutionally ('as a court') in the performance of the judicial function. For there is no doubt that in the performance of the judicial function, by which we mean the adjudication of rights and obligations, judges are bound to observe and apply the substantive rules of law that generally confer a right to be heard upon persons whose rights will be affected by a judicial decision.

[46] So far as the respondent's counsel relied upon the oath of office, and on s 165 of the Constitution, to distinguish judge complainants from other complainants, the submission simply takes us back to the proposition upon which the respondent founded his claim in the first place, namely, that the appellants were acting institutionally when they laid the complaint. The oath of office, and s 165, are concerned with the performance of judicial functions in the exercise of judicial authority. The insurmountable barrier that is encountered by counsel's submission, as rightly found by the high court, is that in making their decision the appellants were not performing a judicial function (or as the respondent would have it, acting 'as a court').

[47] It was no doubt in recognition of the insurmountability of that barrier that the respondent's lead counsel found himself compelled to abandon that argument and concede that the order made by the high court in paragraph 1.4 could not be sustained. And while a valiant attempt was made by one of his juniors, who presented part of the respondent's case, to later resuscitate the argument, contrary to the wiser appreciation by his leader of the futility of pursuing it, we have no doubt that the concession was inevitable on a proper analysis and was rightly and properly made.

THE MEDIA RELEASE

[48] That leaves the question whether it was unlawful for the appellants to publish (by way of the media release) the fact that the complaint had been made. As mentioned, the orders that were made by the high court in that regard were all

premised on its finding that the appellants acted unlawfully in failing to afford the respondent an opportunity to be heard before making the complaint. When seen in the light of the reasoning of the court, in which the laying of the complaint and the publication of the allegations were intertwined, we think it is clear that the court did not consider, and it was not called upon to do so in view of its findings, the question that is now before us, which is whether the publication was unlawful notwithstanding that it was lawful to have laid the complaint.

[49] Much of the argument of the respondent's junior counsel, who presented that part of his case, was founded upon the supposition that the appellants were obliged to allow the respondent an opportunity to be heard, on much the same basis that we dealt with earlier, and in view of our findings on that issue they do not serve to take the matter further. He also sought to persuade us that the publication of the allegations was unlawful because its effect was to reflect adversely upon the judicial institution notwithstanding that it was lawful to have laid the complaint. But once more one needs reminding that in making his claim the respondent did not purport to be asserting the broader interests of maintaining the dignity of the institution but to assert his personal interests. In any event it was not the case of the respondent that the publication of the allegations, in itself, violated his rights. His case was that it violated his rights because he had not been permitted an opportunity to refute them.

[50] Once having found the appellants did not act unlawfully in laying the complaint we can see no basis for finding that they were obliged to keep that secret for the reasons dealt with more fully below. On the contrary there is much to be said for the contrary proposition (bearing in mind the circumstances in which it occurred) that the constitutional imperatives of transparency obliged them to make the fact known. The appellants said in this regard:

> 'In the circumstances where the independence of the Constitutional Court had been threatened and the integrity of the administration of justice in South Africa generally, it was considered imperative and appropriate that this be publicly disclosed. Should the facts have emerged at a later stage there would have been a serious risk that the litigants involved in the relevant cases and the general public would have entertained misgivings about the outcome and the manner in which the decisions were reached.

> It was especially important that the litigants and the general public were informed of the attempt and that the Constitutional Court had not succumbed to it.'

[51] So far as counsel sought to rely upon the constitutional protection of the respondent's right to dignity he was constrained to confine that aspect of his dignity that was impaired to the personality rights that attach to his reputation but in that respect counsel moved onto slippery ground. For it is well established in our law, and not in conflict with the Constitution, that the prima facie wrongful violation of the right to dignity may be justified (*Khumalo v Holomisa* 2002 (5) SA 401 (CC) at paras 29-34). Justification, as Gildenhuys J pointed out (at para 51), can be raised validly if the statement was true and for the public benefit; constituted fair comment; or was made on a privileged occasion. These are all specific applications of the broader principle that conduct, which is reasonable, having regard to all the circumstances of the case, is not wrongful (*Hardaker v Phillips* 2005 (4) SA 515 (SCA) at para 15; *Wentzel v SA Yster en Staalbedryfsvereniging* 1967 (3) SA 91 (T) at 98).

[52] An allegation that a judge is guilty of judicial misconduct by having sought to influence another judge is defamatory and violates that judge's dignity. The media release contained at least such an innuendo and was therefore prima facie unlawful. To consider whether the publication was in fact unlawful on that score would call for us first to decide whether the factual averments made by the appellants (following the standard approach that is adopted in motion proceedings – *Delta Motor Corporation (Pty) Ltd v van der Merwe* 2004 (6) SA 185, [2004] 4 All SA 365 (SCA)) establish the truth of the innuendo. (The appellants went further, and submitted that on the respondent's own version the imputation or innuendo was true.) Counsel for the respondent wisely declined to invite us to embark on that enquiry. Instead he fell back on the bald assertion that it is always unlawful for a judge to allege in public that another judge stands accused of serious misconduct and can never be justified, even if the allegation is true and the publication is for the public benefit.

[53] The basis of the submission appears to have been that it can never be for the public benefit to know that a judge stands accused of gross judicial misconduct, especially if by another judge. There are indications that the high court agreed. It said the following (at para 49):

> ‘In deciding to go public at that initial stage of the complaint the respondents had to act in a manner that ensured a delicate balance between the right of the public to know and the inevitable result that publication itself may result in the corrosion of public confidence in the judiciary. The public right to know had to be balanced with the way that knowledge and information is purveyed. . . . The applicant was dealt with unfairly and his rights were violated by the failure to strike a balance between the right of the public to know and the need to maintain public confidence in the judiciary.’

The court also quoted the following passage from the Belize judgment (referred to above) in respect of the news that a judge of the Supreme Court was to appear before a body for the purposes of investigation (at para 50):

> ‘But the public weal itself will be damaged if the news is not handled with care and circumspection; for it may inevitably result in the corrosion of public confidence in the judiciary itself, with deleterious effects on the administration of justice as a whole.’

[54] The fallacy of the finding that the appellants had failed to strike a balance between the right of the public to know and the need to maintain public confidence in the judiciary is that the court would seem to have considered the truth or untruth of the defamatory allegation to be irrelevant. Disclosure of an allegation of gross misconduct against a judge may in certain circumstances not be for the public benefit but that could hardly be the case if the allegation is true. If the respondent in fact approached the two Justices in an attempt to influence their judgment it would have been to the public benefit that that fact be made known. The fact that the respondent is a judge does not give him special rights or special protection. Judges are ordinary citizens. What applies to others applies to them (*Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang NO* 2005 (3) SA 238 (SCA) at para 39). They, too, like government, pressure groups, or other individuals, ‘may not interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision’ (*The Queen in Right of Canada v Beauregard* (1986) 30 DLR (4th) 481 (SCC) quoted with approval in *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at para

70). The Belize judgment, it may be added, was not concerned with the issue whether the publication of a complaint against a judge was improper of wrongful. It also did not suggest that it was – only that publication must be handled with care and circumspection.

[55] It will always be distressing for a judge to learn in the media that he or she has been accused of misconduct but that seems to us to be an inevitable hazard of holding public office. The remedy that is available to a judge who finds that he or she is in that position is to insist that the body charged with investigating such a complaint does so with expedition so as to clear his or her name. Nor should it be thought that such accusations may be made with impunity: a judge, like any member of the public, is entitled to the consolation of damages for defamation if the publication of the statement cannot be justified (*Argus Printing and Publishing Company Ltd v Esselen's Estate* 1994 (2) SA 1 (A)). But we do not think that his or her remedy lies in stifling the fact that a complaint has been made (*Moran v Lloyd's (a statutory body)* [1981] 1 Lloyd's Reports 423 (CA) at 427).

[56] For those reasons we conclude that the court below erred by making the declaratory orders. The appeal must be upheld and the order of the court below replaced with an order dismissing the application. Costs were not in issue. It is accordingly ordered as follows:

(a) The appeal is upheld.

(b) The order of the court below is replaced by an order dismissing the application.

On behalf of: HARMS DP, STREICHER, MTHIYANE, NUGENT, CLOETE, PONNAN, MLAMBO**,** SNYDERS AND MHLANTLA JJA

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L T C HARMS
DEPUTY PRESIDENT

For Appellant:	G J Marcus SC M Sikhakhane
Instructed by:	State Attorney Johannesburg
	State Attorney Bloemfontein
For Respondent:	D B Ntsebeza SC V Ngalwana T Masuku
Instructed by:	Nongogo, Nuku Inc Cape Town
	E G Cooper & Sons Bloemfontein