THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 52/2011

In the matter between:

FREEDOM UNDER LAW	**Applicant**

and

THE ACTING CHAIRPERSON: JUDICIAL SERVICE COMMISSION	**First Respondent**
THE JUDICIAL SERVICE COMMISSION	**Second Respondent**
CHIEF JUSTICE PIUS NKONZO LANGA	**Third Respondent**
DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE	**Fourth Respondent**
JUSTICE THOLAKELE HOPE MADALA	**Fifth Respondent**
JUSTICE JENNIFER YVONNE MOKGORO	**Sixth Respondent**
JUSTICE CATHERINE MARY ELIZABETH O'REAGAN	**Seventh Respondent**
JUSTICE ALBERT LOUIS SACHS	**Eighth Respondent**
JUSTICE SIRRAL SANDILE NGCOBO	**Ninth Respondent**
JUSTICE THEMBILE LEWIS SKWEYIYA	**Tenth Respondent**
JUSTICE JOHANN VINCENT VAN DER WESTHUIZEN	**Eleventh Respondent**
JUSTICE ZAKERIA MOHAMMED YACOOB	**Twelfth Respondent**
JUSTICE BAAITSE ELIZABETH NKABINDE	**Thirteenth Respondent**
JUSTICE CHRISTOPHER NYAOLE JAFTA	**Fourteenth Respondent**
JUDGE FRANKLYN KROON	**Fifteenth Respondent**
JUDGE PRESIDENT MANDLAKAYISE JOHN HLOPHE	**Sixteenth Respondent**

Neutral citation: *Freedom Under Law v JSC* (52/2011) [2011] ZASCA 59 (31 March 2011)

Coram: STREICHER, BRAND, CACHALIA, THERON and SERITI JJA

Heard: **22 MARCH 2011**

Delivered: **31 MARCH 2011**

Summary: Judicial Service Commission – constitutional duty to properly investigate allegations of gross misconduct on part of judge – cross-examination required to resolve disputes of fact – company whose mission to strengthen independence of judiciary has standing in respect of alleged failure of JSC to properly investigate.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mabuse J sitting as court of first instance)

1 Leave to appeal with costs including the costs of three counsel is granted to the applicant.

2 Leave to cross-appeal is refused with costs including the costs of three counsel.

3 The appeal is upheld with costs including the costs of three counsel.

4 The order by the High Court is set aside and replaced with the following order:

‘1 The decision of the Judicial Service Commission at its meeting on 15 August 2009, “that the evidence in respect of the complaint does not justify a finding that Hlophe JP is guilty of gross misconduct” and that the matter accordingly be “treated as finalised”, is reviewed and set aside.

2 The first and second respondents on the one hand and the sixteenth respondent on the other hand are ordered jointly and severally to pay the applicant’s costs.’

JUDGMENT

STREICHER JA (BRAND, CACHALIA, THERON and SERITI JJA concurring)

[1] This is an application for leave to appeal and a conditional application for leave to cross-appeal. A sub-committee of the Judicial Service Commission (JSC), the second respondent, conducted a preliminary investigation into a complaint by judges of the Constitutional Court (third to fifteenth respondents) against Judge Hlophe, the Judge President of the Western Cape High Court, Cape Town, the sixteenth respondent, and a counter-complaint by Hlophe JP against those judges of the Constitutional Court. Upon receipt of the sub-committee's report the JSC, by a majority vote, dismissed the complaints. The applicant thereupon applied to the North Gauteng High Court, Pretoria for an order setting aside the decision by the JSC to hold a preliminary enquiry and the subsequent decision to dismiss the complaints. The high court's dismissal of the application, the subsequent application for leave to appeal and the conditional application for leave to cross-appeal gave rise to the present application to this court. The application for leave to cross-appeal is conditional upon the application for leave to appeal succeeding and is against the high court's finding that the applicant had standing in the matter. Both applications were referred to the court for oral argument together with an indication that the parties should be prepared to argue the merits of the appeal, which they did.

[2] On 11 and 12 March 2008 the Constitutional Court heard argument in four matters regarding the prosecution of Mr Jacob Zuma and Thint (Pty) Ltd on corruption charges (these matters are at times referred to as the Zuma/Thint matters or simply as the Zuma matters). The cases concerned, among other things, the lawfulness of search and seizure procedures and the question of legal professional privilege over documents held on behalf of clients. The Constitutional Court reserved judgment at the conclusion of the hearing of the four matters. Nkabinde J and Jafta AJ were two of the eleven judges who heard the matters. The latter, at the time, was a permanent member of this court acting as a judge of the Constitutional Court.

[3] Before judgment in the Zuma/Thint matters was handed down Hlophe JP visited Nkabinde J and Jafta AJ separately in their chambers at the Constitutional Court and had discussions with them. These discussions were subsequently reported to the other members of the Constitutional Court and led to a complaint being lodged by the judges of the Constitutional Court with the JSC that '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'. The judges of the Constitutional Court also published a press statement that they had done so. Hlophe JP then lodged a counter-complaint against the judges of the Constitutional Court. He accused them of having undermined the Constitution by making a public statement in which they sought to activate a procedure for his removal for alleged improper conduct before properly filing a complaint with the JSC and of having violated his rights to dignity, privacy, equality, procedural fairness and access to courts by filing the complaint even before they had heard his version of the events.

[4] The JSC requested statements from the judges who were directly involved in the incident whereupon Nkabinde J and Jafta AJ responded that they were not complainants, that they had not lodged a complaint, did not intend to lodge one and did not intend making statements about the matter. Shortly thereafter a statement by Langa CJ on behalf of all the judges of the Constitutional Court and confirmed by, amongst others, Nkabinde J and Jafta AJ, in so far as the contents of the statement referred to them, was filed with the JSC in support of, and in answer to, the complaint and the counter-complaint.

[5] In the statement filed by the Constitutional Court judges in support of their claim Langa CJ related the versions of Jafta AJ and Nkabinde J as to what was said during their discussions with Hlophe JP and how it came about that the complaint was lodged. According to the statement Nkabinde J and Jafta AJ had made it clear to Langa CJ and Moseneke DCJ that in their view the approach by Hlophe JP had been improper and that after they had dealt with the matter by rejecting the approach of Hlophe JP they did not consider it necessary to lodge a complaint or make a statement. A meeting of Constitutional Court judges was thereafter called at which Langa CJ and Moseneke DCJ reported that in their view the conduct of Hlophe JP, as reported to them by Jafta AJ and Nkabinde J, constituted a serious attempt to influence the decision of the Court in the Zuma/Thint cases. After discussion the judges decided to lodge a complaint with the JSC.

[6] Hlophe JP also filed a statement in answer to the complaint and in support of his counter-complaint. He contended that the Constitutional Court judges made themselves guilty of gross misconduct by laying the

complaint and by issuing a media release stating that a complaint had been laid, before even having afforded him a hearing, thereby violating his constitutional rights and undermining the integrity of the judiciary. He stated that the history related by the judges of the Constitutional Court showed a motive by Langa CJ and Moseneke DCJ to get rid of him at all costs. He stated further that it would seem that inappropriate pressure had been brought to bear on Nkabinde J and Jafta AJ to associate themselves with the complaint and that Langa CJ and Moseneke DCJ failed to convey the correct position 'in respect of the so called "complainant judges" to the JSC' and hoodwinked them into supporting a decision without knowledge of the position taken by Nkabinde J and Jafta AJ. Given the personalities involved in the cases which the Constitutional Court had to decide, Hlophe JP suggested, 'it does appear that there may well have been a political motive on the part of the Chief Justice and his Deputy'.

[7] In terms of s 177(1) of the Constitution a judge may be removed from office only if the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct and if the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two-thirds of its members. The JSC may determine its own procedure but its decisions must be supported by a majority of its members.[1] Rule 3 of the rules adopted by the JSC provides:

'3.1 On receipt of a complaint and the responses referred to above, the JSC shall consider the relevant documentation and decide whether, *prima facie*, the conduct complained of would, if established, amount to such incapacity, incompetence or misconduct as may justify removal of the Judge in terms of Section 177(1) of the Constitution.

[1]Section 178(6) of the Constitution.

3.2 In the event of the view of the JSC being that the conduct complained of would not constitute grounds for removal from office, the matter shall be treated as finalised and the complainant and the Judge notified accordingly.

3.3 In the event of the JSC resolving that the pertinent conduct, if established, may justify removal from office, the matter shall be dealt with further as provided below.'

[8] Rule 4 makes provision for a preliminary investigation by a sub-committee and rule 5 provides for a hearing at which the judge is charged in terms of a charge sheet. The judge must be asked to plead to the charge, is entitled to legal representation, may call evidence, cross-examine witnesses and present argument. After the enquiry the JSC must make a finding as to whether or not the judge suffers from incapacity, or is grossly incompetent, or is guilty of gross misconduct as envisaged by s 177(1).

[9] On 5 July 2008 the JSC, after having considered both the complaint and counter-complaint, released a media statement in which they said:

'The Commission unanimously decided that, in view of the conflict of fact on the papers placed before it, it was necessary to refer both the complaint by Constitutional Court and the counter complaint by the Judge President to the hearing of oral evidence on a date to be arranged by the Commission.'

[10] The JSC advised the parties that 1 to 8 April 2009 had been set aside for the hearing of oral evidence on disputes on what it considered to be material disputes of fact which could not be resolved on the papers. It indicated that it believed that judges Nkabinde, Jafta, Langa, Moseneke, Mokgoro and Hlophe would have to give evidence. In a subsequent letter the JSC advised that all questions had to be aimed at resolving the disputes of fact that had been identified.

[11] Upon application by Hlophe JP on 1 April 2009 for a postponement sine die, the JSC postponed the matter until 4 April 2009. On that date an application by Hlophe JP for a further postponement, on medical grounds, for a period of ten days was turned down but the matter was adjourned to 7 April 2009. When a further application for postponement was refused on the last-mentioned date Hlophe JP's counsel withdrew. The matter then proceeded in the absence of Hlophe JP and his legal representatives. The evidence of, amongst others, Nkabinde J and Jafta AJ was received and they were questioned by the Commissioners.

[12] An urgent application by Hlophe JP to the South Gauteng High Court, Johannesburg for an order declaring the entire proceedings of the JSC commencing on 5 July 2008 unlawful and therefore void ab initio was partly successful in that the court set aside the proceedings of 7 and 8 April 2009 and ordered that they were to commence de novo on a date suitable to the parties. The court could find no basis for a finding that the proceedings on 5 July 2008 were unlawful.[2]

[13] On 20 July 2009 the JSC reconvened to discuss the complaint and counter-complaint. In the meantime its composition had changed. A new President, Mr Jacob Zuma, had been elected and a new Minister of Justice had been appointed. The Minister of Justice, ex officio, became a member of the JSC and the newly elected President Zuma, as he was entitled to do, replaced four of its members, who had been appointed by his predecessor, with four new appointees. One of the new members had previously acted as counsel for one of the complainants and recused himself from the discussion leaving four new members who had not

[2] *Hlophe v The Judicial Service Commission & others* [2009] 4 All SA 67 (GSJ).

previously been involved in the matter. The reconstituted JSC decided that it was necessary to commence with the matter de novo. Having reconsidered the matter they concluded in terms of rule 3.1 'that the allegations made in the Complaint and Counter complaint, if established, would amount to gross misconduct' and in terms of rule 4.1 appointed a sub-committee to investigate the complaints by conducting interviews behind closed doors with Langa CJ, Moseneke DCJ, Hlophe JP, Nkabinde J and Jafta AJ.

[14] Shortly after the decision had been taken, Mail and Guardian Ltd and others applied to the South Gauteng High Court, Johannesburg for an order setting it aside. They contended that the JSC could not have reversed its earlier decision to hold a formal enquiry and that the interviews should not be closed to the public. In the answering affidavit filed by the JSC in that application the deponent Mr Semenya SC stated that the decision to commence with the matter de novo was considered to be the best route to follow because there was a question mark over the issue as to whether the previous decision to commence with the hearing was properly made 'in that there was a challenge raised as to whether a preliminary investigation, in terms of rule 4.1 of the Rules of the JSC, had preceded the decision to commence with the hearing'. This contested issue could not be ignored, so the JSC decided, as it could expose the JSC to further litigation. Malan J held that the JSC was entitled to reverse its earlier decision and conduct a new preliminary hearing but reviewed and set aside the decision that the interviews be held behind closed doors and ordered that they be open to representatives of the media.[3]

[3] *Mail and Guardian Ltd v Judicial Service Commission and others* 2010 (6) BCLR 615 (GSJ).

[15] The JSC sub-committee held the interviews and upon conclusion thereof in a report to the JSC recommended ‘fresh deliberations to the complaint and the counter-complaint’ in light of the proceedings before them and the transcript of the proceedings of April 2009. The JSC reconsidered the matter and dismissed both complaints. When the complainants did not take the matter any further the applicant applied for the decision of the JSC to hold a preliminary enquiry and the subsequent decision to dismiss the complaints to be reviewed and set aside. Hlophe JP opposed the application on the grounds that the applicant did not have standing in the matter and that it was in any event not entitled to the relief claimed. The high court held that the applicant did have standing but that it was not entitled to the relief claimed. The applicant now applies for leave to appeal the high court’s decision and Hlophe JP opposes the application also on the basis that the high court erred in finding that the applicant had standing in the matter. I shall deal with the standing of the applicant first and then with the decision to hold a preliminary enquiry and the decision to dismiss the complaints in turn.

Standing

[16] The applicant is a not for profit company registered in terms of s 21 of the Companies Act 61 of 1973. Its mission is, amongst others, to promote democracy under law, advance the understanding and respect for the rule of law and the principle of legality and secure and strengthen the independence of the judiciary. It states that the application is being brought in its own interest, in the public interest, and in the interest of all litigants and future litigants before the courts over which the fourteen judge respondents may preside.

[17] The applicant's case is that the decision by the JSC to have a preliminary enquiry and its decision to dismiss the complaint and counter-complaint was in breach of s 165(4) of the Constitution and also constituted unlawful administrative action in breach of s 33 of the Constitution. Section 165(4) of the Constitution provides that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. In terms of s 33 of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair and the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was enacted to give effect to these rights as required by s 33(3) of the Constitution.

[18] In terms of s 38 of the Constitution anyone acting in the public interest has the right to approach a competent court, alleging that a right in the Bill of Rights, which includes a right in terms of s 33, has been infringed or threatened.

[19] The Constitutional Court has repeatedly stressed that a broad approach to standing should be adopted also in matters that involve an infringement of rights other than those protected in the Bill of Rights.[4] In *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC) para 165 Chaskalson P said that he could see no good reason for adopting a narrow approach to the issue of standing in constitutional cases.[5] In *Kruger v President of Republic of South Africa & others* 2009 (1) SA 417 (CC) the Constitutional Court recognised the standing of an attorney who applied in his own interest and in the public interest for a proclamation to be

[4] *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) para 33.
[5] See also para 229 where O'Reagan J expressed a similar view.

declared invalid in circumstances where s 38 was not of direct application. Skweyiya J said:

'Where the practitioner can establish both that a proclamation is of direct and central importance to the field in which he or she operates, and that it is in the interests of the administration of justice that the validity of that proclamation be determined by a court, that practitioner may approach a court to challenge the validity of such a proclamation.'[6]

[20] In *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC) para 17 the Constitutional Court once again confirmed that a broad rather than a narrow approach should be adopted to standing to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. In respect of litigation in the public interest they adopted the approach advocated by O'Reagan J in *Ferreira v Levin* when dealing with the standing provisions of the Interim Constitution which they considered for all practical purposes to be the same as the standing provisions of s 38 of the Constitution. According to that approach a court will be circumspect in affording standing to applicants purporting to act in the public interest. Various factors to determine whether a person is genuinely acting in the public interest were identified by O'Reagan J and some were added. They stressed that the list of relevant factors is not closed and stated that 'the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations'.[7]

[21] There is no reason to doubt the applicant's statement in its founding affidavit that it is acting in the public interest. Every South

[6]Para 25.
[7]Para 18.

African citizen has an interest to be served by judges who are fit for judicial office and by courts which are independent and impartial. But no judge may be removed from office unless the JSC has found that he suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct. It is therefore in the interest of every South African citizen that the JSC should properly and lawfully deal with every complaint of gross misconduct by a judge that may threaten the independence and impartiality of the courts and may justify the removal of that judge from office. Should it shirk its duty as is alleged it had done in this case it can have grave repercussions for the administration of justice.

[22] The Constitutional Court judges did not act in their own interest and their complaint is not that they have been wronged in their individual capacities. They acted in what they considered to be the public interest. I therefore agree with counsel for the applicant's submission that this 'is not a matter that can or should be left to the judges individually involved. They are entitled to act in their own interests and are not required to litigate in the public interest. They are also inhibited by the constraints of the reserve appropriate to judicial office, which renders them averse to involvement in public controversy'. One can also not expect individuals to call the JSC to account in expensive court actions. It is for bodies like the applicant that can afford to do so and whose very mission is to secure and strengthen the independence of the bench to take action.

[23] For these reasons I am satisfied that the high court correctly held that the applicant has standing in this matter, which means that the counter-appeal must fail.

<u>The decision not to hold a formal enquiry</u>

[24] The applicant submitted that the JSC decided on 5 July 2008, in terms of rule 3.1 of its Rules, in respect of the complaint as well as the counter-complaint, that prima facie the conduct complained of would, if established, amount to such misconduct as may justify removal of the judges concerned in terms of s 177(1) of the Constitution. In consequence it decided to embark on a formal enquiry in terms of rule 5 of its Rules. It submitted further that when the JSC on 22 July 2009 decided to appoint a sub-committee in terms of rule 4.1 to investigate the complaints by conducting interviews behind closed doors, it did so under the misapprehension that it had never before decided that a prima facie case as aforesaid had been made out and that a formal enquiry in terms of rule 5 should be undertaken. Having been based on a mistake of fact, so the applicant submitted, the decision to appoint a sub-committee should be reviewed and set aside.

[25] In support of its submission that the JSC had on 5 July 2008 taken the prima facie decision referred to in rule 3.1 the applicant relied on an affidavit by Mpati P, at the time the acting chairperson of the JSC. The affidavit was filed on behalf of the JSC in the urgent application by Hlophe JP to have the entire proceedings of the JSC commencing on 5 July 2008 set aside on the basis first, that such a prima facie decision had not been taken and second, that the procedure adopted in respect of the enquiry embarked on did not comply with rule 5. In his affidavit Mpati P stated that three documents referred to by him showed that Hlophe JP's contention that no prima facie decision had been taken was incorrect. He denied furthermore that the procedure adopted in respect of the enquiry scheduled for 1 to 8 April 2008 did not comply with the provisions of rule 5. Mr Bizos SC, who, at the time, was a member of the JSC deposed to a confirmatory affidavit. The three documents relied upon are: (i) The

media statement issued by the JSC on 5 July 2008 in terms of which the JSC stated that it had unanimously decided that, in view of the conflict of fact on the papers placed before it, it was necessary to refer the complaint and counter-complaint to the hearing of oral evidence; (ii) The document in terms of which the JSC advised that 1 to 8 April 2009 had been set aside for the hearing of oral evidence of the judges specified on disputes that it considered to be material disputes of fact; and (iii) A document, issued by the chairman of the JSC, containing directions to be observed during the hearing. One of the directions being that all questions put to witnesses in cross-examination had to be aimed at resolving disputes of fact that had been identified.

[26] In the present application the JSC, in an answering affidavit by Mr Semenya SC, one of the newly appointed members of the JSC, made a complete turnabout and denied that a prima facie decision had been taken at the meeting of 5 July 2008 and that a rule 5 formal enquiry had been embarked on. No explanation for the turnaround was proffered. Mr Moerane SC who was a member of the JSC at the time when the 5 July decision was taken, deposed to an affidavit confirming what Mr Semenya SC said.

[27] The applicant submitted that the JSC, in terms of its rules, could only have proceeded to an enquiry after having taken the prima facie decision required and that it had indeed instituted an enquiry in terms of rule 5. The newly constituted JSC on the other hand submitted that the three documents relied upon by the applicant for drawing the inference that the required prima facie decision had been taken is not susceptible to the drawing of the inference contended for. It submitted furthermore that the enquiry instituted was not an enquiry in terms of rule 5 in that no

charge sheet was prepared, the judges accused of misconduct were not asked to plead and cross-examination was restricted contrary to the provisions of rule 5.

[28] The court below held in favour of the JSC but in my view it is not necessary to resolve the dispute. The affidavits filed are not the affidavits of the JSC but are affidavits by individual members of the JSC. There is obviously no unanimity among the members of the JSC concerning the decision that was taken on 5 July 2008 and whether the enquiry proceeded with thereafter was intended to be an enquiry in terms of rule 5. That being the case and in the light of the fact that the composition of the JSC had changed the sensible course to follow would have been to reconsider the matter de novo whatever the previous decisions may have been. I cannot accept, as contended by the applicant, that the decision to reconsider the matter de novo was taken by the JSC on the basis of the members being agreed that no prima facie decision as required had been taken on 5 July 2008 or on the basis of it being agreed that the enquiry proceeded with was not intended to be a rule 5 enquiry. The decision could in the light of the different versions of the members of the JSC only have been taken on the basis that whatever the position may have been it should be reconsidered.

[29] It follows that it cannot be said that the decision taken on 22 July 2009 was taken on the basis of a mistaken view as to what had been decided on 5 July 2008. The applicant submitted that the JSC in any event had to afford the parties to the complaint and counter-complaint a hearing before reversing its earlier decision whatever it may have been. I will assume without deciding that the parties should have been afforded a hearing before the decision was taken. However, although the judges of

the Constitutional Court indicated that they were reserving their rights they did not take the matter any further but attended the interviews conducted by the sub-committee as did Hlophe JP. The parties concerned, therefore, accepted the decision of the JSC. In these circumstances it is not for the applicant, an outsider to the proceedings, to complain about the JSC's failure to give them a hearing.

The decision to dismiss the complaint

[30] The JSC decided to dismiss the complaint and the counter-complaint because the majority of its members were of the view that the evidence of Nkabinde J and Jafta AJ, together with that of Hlophe JP did not establish and, at a formal enquiry, could not establish that Hlophe JP had attempted to improperly persuade them to decide the cases in Mr Zuma's favour.

[31] At the hearing in April 2009 the complainants' evidence was not tested by cross-examination as Hlophe JP and his legal representatives were not present or represented. The interviews conducted on 30 July 2009 were, as submitted by the applicants, brief and perfunctory. They consisted of the confirmation of the correctness of the evidence given at the hearing in April 2009 and questions by the three members of the sub-committee. No cross-examination was allowed. The JSC was therefore confronted with the untested evidence of Jafta AJ and Nkabinde J on the one hand and the untested evidence of Hlophe JP on the other hand.

[32] The evidence of Jafta AJ in so far as it is relevant to the question whether Hlophe JP attempted to influence the Constitutional Court's pending judgment in the Zuma cases was that Hlophe JP made an appointment to visit him in his chambers at the Constitutional Court.

During their meeting Hlophe JP initiated a discussion about the Zuma matters. He, inter alia, said that: (a) the matters had to be looked at properly because he believed that Mr Zuma was being persecuted just like he, Hlophe JP, had been; (b) the SCA had got it wrong in its judgment; and (c) 'sesithembele kinina' meaning 'we pin our hopes on you' and understood by Jafta AJ to mean 'you are our last hope'. Although he did not at the time think that Hlophe JP was trying to influence him, Jafta AJ did think that Hlophe JP 'was wishing for a decision which would favour Mr Zuma because the SCA had found against Mr Zuma and Thint'. Jafta AJ then terminated the discussion by saying that the matter would be decided on its facts and according to the law.

[33] Some four weeks later, when Jafta AJ learnt that Hlophe JP had made an appointment to see Nkabinde J, he told her that Hlophe JP might want to discuss the Zuma matters with her as he earlier had done so with him. It was then that Jafta AJ formed the view that Hlophe JP had attempted to influence him. Asked whether he accepted that Hlophe JP might not have been attempting to influence him he answered that one can only work on an inference and that he 'would not know what intention he had'. He confirmed that he and Hlophe JP were friends but stated that they had not met since 2003.

[34] Nkabinde J's evidence in so far as it is relevant to the question whether Hlophe JP attempted to influence the Constitutional Court's pending judgment in the Zuma cases was that Hlophe JP telephonically made an appointment to visit her in her chambers. When he made the appointment Hlophe JP told her that he had a mandate and that they could talk about privilege. During the visit to her chambers Hlophe JP said that

the reason why he was there was, among other things, that ‘a concern had been raised that people who are appointed at the Constitutional Court should understand our history’. Asked who those people were he said that ‘he has connection with some ministers whom he from time to time advised’. He then started talking about the Zuma case and said that it was an important case and that the issue of privilege was also important. It had to be decided properly because the prosecution case rested on that aspect of the case. Having been warned by Jafta AJ that Hlophe JP might want to talk about the case of Mr Zuma she ‘snapped’ and said ‘my brother, you know that you cannot talk about this case. You have not been involved in the case, you have not sat on it and you are not a member of the Court to come and talk about the case’. His response was that he did not mean to interfere with her work but he went on to explain ‘that the point is that there is no case against Mr Zuma.’ He went further and said ‘Mr Zuma has been persecuted, just as he was persecuted’. He stated that there was a list containing names of people who were also implicated in the arms deal. He had obtained the list from the National Intelligence and said something to the effect that some of the people who appeared in the list were going to lose their jobs when Mr Zuma became President. She was adamant that Hlophe JP visited her to discuss the Zuma case and nothing else.

[35] Nkabinde J denied Hlophe JP’s version that she initiated the discussion about privilege and that she told Hlophe JP that she was busy writing a note about privilege. She said that she could not have done so as the note had long since been written. Asked whether it was possible that Hlophe JP had not tried to influence her she said that she did not know what his intentions were.

[36] Hlophe JP, during his interview by the members of the sub-committee, denied that he asked Jafta AJ whether or not the judgment in the Zuma matters had been handed down and said that he knew that that was not the case. He denied that he said that Mr Zuma was persecuted just like him, in the context mentioned by Jafta AJ and claimed that that was said in the context of a discussion about himself and the Western Cape. He admitted that he said that the matters should be properly decided but claimed that it was not said in the context of Mr Zuma being persecuted but in the context of the uncertainty created by the SCA judgment. He did not think that he said that the SCA got it wrong but did express concerns about the judgment. He also denied that he said 'sesithembele kinina' in the context alleged by Jafta AJ and claimed that he used the phrase by way of encouragement when he left, some time after the discussion of the Zuma matters.

[37] Hlophe JP denied that during his telephonic discussion with Nkabinde J he could have said that he had a mandate and said that the word mandate was used by him in the context of a mandate having been given to him by the Chief Justice to chair a Local Organising Committee. He also denied that he initiated the discussion about privilege, and that he said: (a) that the reason why he was there was that a concern had been raised that people in the Constitutional Court should understand our history; (b) that he had political connections; (c) that the issue of privilege should be decided properly because the prosecution's case rested on it. Finally he denied: (a) that Nkabinde J rebuffed him when he started talking about the Zuma case; (b) that they ever spoke about the facts in the Zuma matter; (c) that he expressed an opinion about the strength of the Zuma case; (d) that he spoke about a list obtained from National

Intelligence; and (e) that he said that some of the people whose names were on the list could lose their jobs.

[38] Hlophe JP's version, on the other hand, was that he and Nkabinde J started talking about the Zuma matter when he noticed the Zuma files in her chambers and asked when judgment was going to be delivered. According to him he did say that the issue of privilege was an important one for a trial lawyer and also that he said that Mr Zuma was being persecuted but denied that the latter statement was made in the context alleged. He claimed that the statement was made when he was asked how he was doing in the Western Cape to which he replied that he was like Zuma, people will always find something wrong with him.

[39] Jafta AJ and Nkabinde J did not at their interviews deviate from their earlier evidence at the enquiry held in April 2009. Standing on its own there was no reason not to believe their evidence. Consequently, without having tested the evidence of Hlophe JP, the JSC had no basis for rejecting the evidence of Nkabinde J and Jafta AJ and did not do so. For the purposes of its decisions the JSC accepted that Hlophe JP probably said what he is alleged to have said.

[40] All the aforementioned evidence of Jafta AJ and Nkabinde J relating to their meetings with Hlophe JP is clearly relevant to the question whether he attempted to influence the Constitutional Court's pending judgment in the Zuma/Thint matters. Both Nkabinde J and Jafta AJ, on the strength of that evidence, drew the inference that he did attempt to do so.

[41] The JSC concluded that the evidence of Jafta AJ standing alone was not sufficient to establish that Hlophe JP attempted to improperly influence him to decide the Zuma/Thint matters in a particular way. In regard to the evidence of Nkabinde J the JSC pointed out that there were contradictions between her evidence and that of Hlophe JP and said that the question arose whether her evidence was material. Dealing with this issue the JSC said that the evidence contradicted by Hlophe JP did not appear to have a material bearing on the central question that it was required to consider namely 'did Hlophe JP attempt to improperly influence Nkabinde J to give judgment in a particular way against her conscience or better judgment'.

[42] This finding by the JSC is irrational. Hlophe JP contradicted almost everything that Nkabinde J said. It follows that the JSC considered virtually everything that Nkabinde J said ie virtually everything on the strength of which she drew the inference that Hlophe JP tried to influence her, to be immaterial in respect of the question whether he tried to influence her. It cannot conceivably, rationally be considered to be immaterial to the question whether Hlophe JP tried to influence Nkabinde J that Hlophe JP said, when making an appointment to see her, that he had a mandate, that, when he visited her, he said that the reason why he was there was that a concern had been raised that people in the Constitutional Court did not understand our history, that he said, when asked who those people were, that 'he has connection with some ministers', that he said that the question of privilege should be decided properly because the prosecution's case rested on it, that Nkabinde J reprimanded him for speaking about a case he was not involved in, that he said that there was no case against Mr Zuma and that Mr Zuma was being persecuted, that he said that some of the people implicated in the arms deal whose names

appeared on a list he had obtained from National Intelligence were going to lose their jobs when Mr Zuma became President. These were the facts which the JSC had to consider together with Jafta AJ's evidence, to determine whether Hlophe JP attempted to influence them. Once it had been determined that he did attempt to influence them the JSC had to decide whether his attempt to do so constituted gross misconduct of such a nature that it may justify his removal from office.

[43] The JSC nevertheless concluded:

'The CJ's statement says what was communicated to Jafta JA was that the matters must be decided in favour of Mr Zuma. That is not what Jafta JA said in his evidence. As pointed out, at best, he said he had made that inference. On a proper analysis of her evidence, this is what Nkabinde J also said. Having regard to the totality of the facts and the context, we do not accept that that is the only reasonable inference to be drawn. We cannot reject Hlophe JP's contention that he did not attempt to improperly attempt to influence the two judges to decide the cases in Mr Zuma's favour.'

[44] The JSC therefore came to the conclusion that there are two possibilities. The one being that Hlophe JP attempted to influence the two judges as alleged by them and the other being that he did not attempt to do so as alleged by him. It did not decide that it was more probable that Hlophe JP had not attempted to influence the two judges and, therefore, must have dismissed the complaint simply on the basis of another innocent possibility. It follows that it applied the criminal standard applicable at the end of a criminal trial, namely proof beyond reasonable doubt, to dismiss the complaint, at a stage when neither of the conflicting versions of the two judges on the one hand and Hlophe JP on the other hand had been tested by cross-examination.

[45] The finding that it could not reject Hlophe JP's version is quite correct. By disallowing cross-examination that result was made inevitable. It would have been highly irregular to reject his evidence without having given him an opportunity to cross-examine his accusers. Utilising this procedure for the final resolution of a complaint of misconduct by a judge will always lead to a dismissal of the dispute where the conduct alleged by the accuser is disputed by the judge because the judge's version can never be rejected without having given him an opportunity to cross-examine his accusers. The procedure adopted was therefore not appropriate for the final determination of the complaint.

[46] The requirement of proof beyond reasonable doubt (the only reasonable inference) was similarly not appropriate. Not even in a criminal trial is proof beyond reasonable doubt required before the trial has run its course and an investigation of a complaint of gross misconduct is not a criminal enquiry but more in the nature of a disciplinary enquiry where proof on a balance of probabilities is required at the conclusion of the enquiry.[8]

[47] The JSC purported to justify their decision to dismiss the complaint without proceeding to a formal enquiry by saying that cross-examination would serve no purpose. It advanced a number of reasons in support of its view. These are their reasons: First, it would be naïve to believe that Hlophe JP will not persist in his denial that he had the intention to influence the two judges. It must also be realistically be accepted, they said, that he will adopt the same stance in respect of his claimed links with the National Intelligence and the other matters on which there are sharp disputes of fact. Second, there are factors that support Hlophe JP's

[8] *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A) at 495 in fine to 496H.

version that he did not try to influence the two judges. They are: (i) One would have expected him to follow up had he tried to influence them; (ii) There is no evidence that he attempted to influence other judges of the Constitutional Court; (iii) The Zuma/Thint matters were heard by a panel of ten judges and the decisions in the Constitutional Court are taken by a majority; (iv) Jafta AJ did not find it sufficiently concerning to make anything of his discussion with Hlophe JP until Nkabinde informed him that she was going to meet with Hlophe JP; (v) Nkabinde J did not raise the alarm about the conduct of Hlophe JP until nearly two weeks later; (vi) Jafta AJ and Nkabinde J did not complain in their individual capacities. Third, Nkabinde J reported what Hlophe JP had said to Langa CJ and Mokgoro J and confirmed the statement submitted by Langa CJ to the JSC in support of the complaint but there are discrepancies as to the point in time it is alleged that he said that he had a mandate. Fourth, similar considerations obtain in respect of other matters which are not identified. Fifth, Hlophe JP did not know that the judges of the Constitutional Court did not discuss matters with other judges who were not involved in the particular matters.

[48] I find the reasoning surprising. Courts frequently have to decide where the truth lies between two conflicting versions. They often do so where there is only the word of one witness against another and neither of the witnesses concedes the version of the other. Civil cases are decided on a balance of probabilities but where there is a dispute of fact it is rarely possible to do so without subjecting the parties to cross-examination and without allowing them to test what are alleged to be probabilities in the other parties' favour. A court may of course after cross-examination still be unable to decide where the truth lies. That

possibility does not entitle a court to decide the matter without allowing cross-examination and it does not entitle the JSC to do so.

[49] As stated above, in terms of s 165(4) of the Constitution organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts and in terms of s 177(1) a judge cannot be removed from office for having made himself guilty of misconduct unless the JSC has found him guilty of misconduct. It follows that there is a duty on the JSC to investigate allegations of misconduct that may threaten the independence, impartiality, dignity, accessibility and effectiveness of the courts.

[50] Any attempt by an outsider to improperly influence a pending judgment of a court constitutes a threat to the independence, impartiality, dignity and effectiveness of that court. In the present case the allegation is that Hlophe JP attempted to improperly influence the Constitutional Court's pending judgment in one or more cases. The JSC had already, when it decided to conduct the interviews with the judges decided that if Hlophe JP had indeed attempted to do so he would have made himself guilty of gross misconduct which, prima facie, may justify his removal from office. Moreover, it based its decision dismissing the complaint on an acceptance that Hlophe JP probably said what he is alleged to have said. In these circumstances the decision by the JSC to dismiss the complaint on the basis of a procedure inappropriate for the final determination of the complaint and on the basis that cross-examination would not take the matter any further constituted an abdication of its constitutional duty to investigate the complaint properly. The dismissal of the complaint was therefore unlawful. In addition, the JSC's decision to

dismiss the complaint constituted administrative action and is reviewable in terms of s 6(h) of PAJA for being unreasonable in that there was no reasonable basis for it.

The decision to dismiss the counter-complaint

[51] Concerning the counter-complaint Jafta AJ and Nkabinde J explained that they willingly participated in the collective complaint and the statement filed in support of that complaint but that they did not want to be individual complainants. For that reason, when called upon by the JSC to file statements, they issued the statement that they were not complainants and that they did not intend filing statements as complainants. They were in fact, at the time when they issued their statement, collaborating in the preparation of a collective statement that was issued shortly thereafter.

[52] Hlophe JP made it clear at the interview that he had no complaint in so far as the Constitutional Court judges were exercising their right to report him to the JSC. He conceded further that he had to accept the version of the Constitutional Court judges as to how it came about that the complaint was lodged with the JSC. He accepted the statement by the Constitutional Court judges that their conduct 'was inspired by their desire to protect the institutional integrity or the constitutional integrity of the court.' His complaint was that they made the complaint public by releasing a media statement to journalists including the Mail and Guardian and to the Democratic Party which caused him to draw the inference that they were actuated by political considerations and indicated to him that they were trying to get rid of him.

[53] Moseneke DCJ told the sub-committee that the judges of the Constitutional Court believed what they were told by their colleagues Nkabinde J and Jafta AJ and that they were satisfied that there was a complaint that should be placed in the hands of the JSC. The judges collectively considered that the independence of the Constitutional Court was being threatened and that they were duty-bound to let the public know that a complaint had been lodged with the JSC 'in order to protect the integrity of the judicial process . . . which would otherwise have been dogged by rumour'. He explained that the court had a mailing list and anybody could apply to have his name placed on the mailing list. Once the decision had been taken to release a statement the registrar would have disseminated the statement to whoever's name appeared on the mailing list. He denied that any pressure had been brought to bear on Nkabinde J and Jafta AJ to be parties to the collective complaint. Langa CJ's evidence was to the same effect.

[54] The JSC pointed out that the Supreme Court of Appeal had already held that what the judges of the Constitutional Court had done was lawful.[9] It stated that the publication of the complaint might have been an infringement of the principle of collegiality or comity among judges or some ethical principle but that it could not amount to gross misconduct. Although it might have been unwise to publish the media statement there was in its view no reasonable possibility that the JSC would at the conclusion of a formal enquiry find that the Constitutional Court judges made themselves guilty of gross misconduct. Hlophe JP's allegations against the judges of undue pressure on Nkabinde J and Jafta AJ to act

[9] See *Langa CJ & others v Hlophe JP* 2009 (4) SA 362 (SCA) in which this court, in respect of an earlier application by Hlophe JP, held that the filing of the complaint by the Constitutional Court judges and the making of a public statement that they had done so, before he had been given a hearing, was not unlawful.

contrary to their conscience, of the concealment of the complete and true facts, of acting with an ulterior motive and of masterminding leaks to the media in a well orchestrated media campaign were according to the JSC as unfortunate as they were incapable of establishment on the evidence before them. They concluded:

'It is clear from the evidence of Hlophe JP to the sub-committee that he based his allegations almost entirely on conclusions and inferences that he drew from what they had said and done on various occasions. The CJ and DCJ emphatically deny the conclusions and inferences. We accept the denials.

. . .

In the result, there is no basis for finding that any of the Judges of the CC is guilty of gross misconduct.'

[55] Unlike in the case of the complaint there was no evidence contradicting the evidence of the Constitutional Court judges on the basis of which the allegations against them could be established. The JSC was therefore entitled to dismiss the counter-complaint on the basis that the allegations were incapable of establishment.

[56] In his submissions to the JSC Hlophe JP did not call for a formal hearing but submitted 'that the JSC should determine the counter-complaint on the material already before it'.

[57] One of the prayers in the applicant's notice of motion is that the decision of the JSC in relation to the counter-complaint be set aside. Counsel for the applicant, however, initially did not address this issue at all. When asked whether the applicant was persisting with its request for this relief counsel for the applicant confirmed that it was but the only submission they made in support thereof was that they thought that the complaint and counter-complaint went hand in hand. None of the other

parties advanced another reason for reviewing the JSC's decision in respect of the counter-complaint. No reason was advanced as to why it was thought that the two complaints could not be separated and I can see no reason why the JSC was not entitled to dismiss the counter-complaint if they were satisfied, as they said they were, that there was no evidence to support it.

The Remedy

[58] Apart from asking for an order that leave to appeal be granted and that leave to cross-appeal be refused the applicant asked for an order that the appeal be upheld and that the order of the high court be set aside and replaced with an order in terms of prayers 1.2 to 1.7 of the applicant's notice of motion, namely:

'1.2 The decision of the JSC at its meeting on 20 to 22 July 2009, to reverse its earlier decision to hold a formal enquiry into the complaints and to hold a preliminary enquiry instead, is reviewed and set aside.

1.3 The decision of the JSC at its meeting on 15 August 2009, "that the evidence in respect of the complaint does not justify a finding that Hlophe JP is guilty of gross misconduct" and that the matter is accordingly "treated as finalised", is reviewed and set aside .

1.4 The decision of the JSC at its meeting on 15 August 2009, "that the evidence in support of the counter-complaint does not support a finding that the judges of the Constitutional Court are guilty of gross misconduct" and that the matter is accordingly "treated as finalised", is reviewed and set aside.

1.5 The decision of the JSC at its meeting on 15 August 2009, "that none of the judges against whom complaints had been lodged is guilty of gross misconduct", is reviewed and set aside.

1.6 The JSC is ordered to hold a formal enquiry into the complaints in terms of rule 5 of its Rules Governing Complaints and Enquiries in terms of section 177(1)(a).

1.7 The JSC and any respondent who opposes this review, if any, are ordered jointly and severally to pay the applicant's costs.'

For the above reasons the applicant is not entitled to an order in terms of 1.2, 1.4, 1.5 and 1.6.

[59] The JSC as well as Hlophe JP submitted that the court has a discretion not to review and set aside the decision of the JSC to terminate the enquiry. In this regard they relied on s 172(1) of the Constitution and s 8 of PAJA. Section 172(1) provides that when deciding a constitutional matter a court must declare that any conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. Section 8 of PAJA provides that a court, in proceedings for judicial review in terms of s 6(1), may grant any order which is just and equitable.

[60] Counsel representing Hlophe JP sought to find support for their submission in the decision of the Constitutional Court in *J T Publishing (Pty) Ltd & another v Minister of Safety and Security & others* 1997 (3) SA 514 (CC) para 15 to the effect that the fact that a court is enjoined to declare a law that is inconsistent with the Constitution invalid to the extent of its inconsistency does not mean that a court is 'compelled to determine the anterior issue of its inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration'. They also referred to *Islamic Unity Convention v Independent Broadcasting Authority & others* 2002 (4) SA 294 (CC) para 10-12 in which the Constitutional

Court reaffirmed the statement in *J T Publishing* and stated that a court should not ordinarily decide a constitutional issue unless it is necessary to do so and that it should not decide a constitutional issue that is moot.

[61] In this case the applicant raised a constitutional issue which cannot be said to be of an abstract, academic or hypothetical nature or one that cannot produce a tangible result. It was therefore necessary to decide the issue. In light of our determination that the JSC's decision to dismiss the complaint was inconsistent with the Constitution we are obliged to declare the decision invalid.

[62] I shall assume that the high court nevertheless had a discretion to order that the enquiry into the alleged misconduct of Hlophe JP be terminated. The respondents submitted that it should have done so because:

(i) Both the Constitutional Court judges and Hlophe JP have accepted that the complaints have been finalised. Their attitude is based upon a recognition of the fact that it is in the interests of the judiciary, the legal system and the country as a whole that this unhappy series of events in our history be regarded as finalised.

(ii) The costs of re-opening the enquiries in these circumstances are unjustifiable.

(iii) Considerations of public interest require that there should be finality on a matter which has continued for so long without any definitive resolution.

[63] There is no evidence that the Constitutional Court judges consider it in the interests of justice, the interests of the judiciary, the legal system and the country that the matter should be regarded as finalised. It is

alleged that a very high ranking judge, the head of one of the biggest divisions of the high court, attempted to influence two of the judges of another court to decide a matter in a particular way. The allegation was considered to be so serious as to constitute gross misconduct which if established may justify the removal of the judge from office. It cannot be in the interests of the judiciary, the legal system, the country or the public to sweep the allegation under the carpet because it is being denied by the accused judge, or because an investigation will be expensive, or because the matter has continued for a long time.

[64] Professor Kader Asmal was allowed to join the proceedings as an amicus curiae in which capacity he submitted heads of argument. We appreciate his assistance. In light of the fact that all the parties were well represented we do not think that it is appropriate to make any cost order in his favour.

Order

[65] For these reasons the following order is made:

1 Leave to appeal with costs including the costs of three counsel is granted to the applicant.

2 Leave to cross-appeal is refused with costs including the costs of three counsel.

3 The appeal is upheld with costs including the costs of three counsel.

4 The order by the High Court is set aside and replaced with the following order:

‘1 The decision of the Judicial Service Commission at its meeting on 15 August 2009, “that the evidence in respect of the complaint does not justify a finding that Hlophe JP is guilty of gross

misconduct" and that the matter accordingly be "treated as finalised", is reviewed and set aside.

2 The first and second respondents on the one hand and the sixteenth respondent on the other hand are ordered jointly and severally to pay the applicant's costs.'

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P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

For appellant:	W Trengove SC T Bruinders SC N Fourie L Sisilana B Macola Instructed by: Bowman Gilfillan, Johannesburg McIntyre & Van der Post, Bloemfontein
For 1st & 2nd respondents:	I V Maleka SC B Vally SC L Gcabashe M Sello Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein
For 16th respondent:	J Newdigate SC V Ngalwana T Masuku Instructed by: Xulu Liversage Inc, Cape Town Lovius Block, Bloemfontein