THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 537/10

In the matter between:

THE ACTING CHAIRPERSON: JUDICIAL SERVICE COMMISSION	First Appellant
THE JUDICIAL SERVICE COMMISSION	Second Appellant
JUDGE PRESIDENT MANDLAKAYISE JOHN HLOPHE	Third Appellant

and

THE PREMIER OF THE WESTERN CAPE PROVINCE	Respondent

Neutral citation: *Judicial Service Commission v Premier, Western Cape* (537/10) [2011] ZASCA 53 (31 March 2011).

Coram: HARMS DP, CLOETE, LEWIS, PONNAN and MAJIEDT JJA

Heard: **18 MARCH 2011**

Delivered: **31 MARCH 2011**

Summary: Constitution s 178: Composition and functioning of the Judicial Service Commission: Premier of province forms part of JSC in terms of subsection (1)(k) when complaints against high court judges of the province are considered; majority of members in terms of subsection (6) means majority of members entitled to be present, not majority of members present and voting; proper order when decision taken by improperly constituted JSC, or by invalid vote, is to set the decision aside.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Jones and Ebrahim JJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel, which are to be paid by the Judicial Service Commission and the Judge President jointly and severally.

JUDGMENT

CLOETE JA (HARMS DP, LEWIS, PONNAN and MAJIEDT JJA concurring):

Introduction

[1] The Premier as the executive authority[1] of the Western Cape Province instituted urgent motion proceedings in the Western Cape High Court, Cape Town, against the Acting Chairperson of the Judicial Service Commission (JSC), the JSC itself, past and present Justices of the Constitutional Court and the Judge President of the Western Cape. No relief was sought against the Justices, who were cited because of the interest they might have in the application.

[2] The Premier claimed an order declaring certain proceedings of the JSC and decisions taken by it to be invalid and further claimed that the decisions of the JSC were not taken by the requisite majority. The Justices did not participate in the proceedings. The court a quo (Jones and Ebrahim JJ) granted the declaratory orders sought, and set the proceedings and the decisions of the JSC aside.[2] Leave to appeal to this court was subsequently

1 Section 125(1) of the Constitution provides:
'The executive authority of a province is vested in the Premier of that province.'
2 The judgment of the court a quo is reported as *Premier, Western Cape v Acting Chairperson, Judicial Service Commission* 2010 (5) SA 634; 2010 (8) BCLR 823 (WCC).

granted by the court a quo to the Acting Chairperson and the JSC (to which I shall refer jointly as 'the JSC'), and the Judge President.

The facts

[3] The history of the matter can be stated briefly. The Justices lodged a complaint of judicial misconduct against the Judge President with the JSC, alleging that he had approached two Justices in an attempt to influence them in a case pending before the Constitutional Court which related to the current President of the Republic of South Africa. The Judge President's counter-complaint of judicial misconduct on the part of the Justices was that his constitutional rights had been violated when the Justices published a media release about their decision to lodge the complaint.[3] The JSC convened to consider the complaints on 20 to 22 July 2009 in Cape Town and on 15 August 2009 in Johannesburg. At those meetings, various decisions were taken, culminating in the decision:

'1. That the evidence in respect of the complaint did not justify a finding that the Judge President was guilty of gross misconduct and that the matter was accordingly finalised; and

2. that the evidence in support of the counter-complaint did not support a finding that the Constitutional Court justices were guilty of gross misconduct and that the matter was accordingly finalised; and

3. that none of the judges against whom complaints had been lodged was guilty of gross misconduct.'

The issues

[4] The Premier challenged the validity of the JSC proceedings on three discrete grounds, namely that when the JSC met and took the relevant decisions:

(a) She was not present because the JSC had not notified her when and where the meetings were to take place, and she was accordingly unable to comply with her obligation to attend as required by s 178(1)(k) of the Constitution;

(b) Only ten members of the JSC participated when on the JSC's own

3 More detail about the complaint and counter-complaint appears in *Langa CJ & others v Hlophe* 2009 (4) SA 382 (SCA).

interpretation of s 178(1)(k), the JSC should have been composed of 13 members; and

(c) The decisions of the JSC were not supported by a majority of the members of the JSC, as required by s 178(6) of the Constitution.

The court a quo considered all three issues, and found in favour of the Premier on each. The JSC challenges the correctness of all of these findings and submits that in any event the decisions taken at the meetings should not have been set aside. The Judge President challenges the correctness of the first finding by the court a quo and in addition submits that this appeal is academic and should not be entertained for that reason.

The composition and functions of the JSC

[5] Before dealing with the arguments advanced on appeal, it would be convenient to consider the composition and functions of the JSC. Section 178 of the Constitution provides:

'(1) There is a Judicial Service Commission consisting of ─

(a) the Chief Justice, who presides at meetings of the Commission;

(b) the President of the Supreme Court of Appeal;

(c) one Judge President designated by the Judges President;

(d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) one teacher of law designated by teachers of law at South African universities;

(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) when considering matters relating to a specific High Court, the Judge

President of the Court and the Premier of the province concerned, or an alternate designated by each of them.

. . .

(4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.

(5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1)(h) and (i).

(6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.'

[6] It is therefore apparent that the Judicial Service Commission always comprises 13 persons, being those mentioned in paragraphs (a) to (g) and (j) of subsec (1). When the JSC considers the appointment of a judge, the ten politicians referred to in paragraphs (h) and (i) are included. The contentious paragraph that requires interpretation is paragraph (k) ─ although it is common cause that the Premier is included in the composition of the JSC when it considers the appointment of a judge to a high court in that Premier's province.

[7] The powers and functions assigned to the JSC by the Constitution are the following:

(a) To determine whether a judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, for the purpose of the judicial impeachment provisions contained in s 177 of the Constitution (s 177(1)(a));

(b) To furnish advice to the President on the suspension of a judge who is the subject of a procedure in terms of s 177(1) of the Constitution (s 177(3));

(c) To advise the national government on any matter relating to the judiciary or the administration of justice (s 178(5));

(d) To consult with the President as a prelude to the President appointing the Chief Justice, the Deputy Chief Justice and the President and Deputy President of the Supreme Court of Appeal (s 174(3));

(e) To prepare a list of nominees for appointment as judges of the

Constitutional Court and submit the list to the President (s 174(4)(a)); and

(f) To advise the President, who must appoint judges of all other courts (s 174(6)).

[8] The Judicial Service Commission Act[4] (the JSC Act) was the national legislation promulgated to regulate matters incidental to the establishment of the JSC by the interim Constitution[5] and it remains in force. It does not supplement the JSC's powers and functions. The proceedings that are the subject of this case predate the amendments to the JSC Act effected by the Judicial Service Commission Amendment Act[6] and those amendments are therefore irrelevant for purposes of the appeal.[7]

Section 178(5)

[9] The Premier contends that the complaint against the Judge President was a matter relating to a specific high court, viz the Western Cape High Court. The JSC and the Judge President contend that there is no suggestion in the allegations of misconduct against the Judge President that he was acting in his official capacity or that the complaint has anything to do with the Western Cape High Court and accordingly, that there was no connection between the allegations and the bench on which the Judge President serves.

[10] The question that was before the JSC on the complaint lodged by the Justices was whether the Judge President was a fit and proper person to continue in office as a judge and therefore, as the Judge President of the Western Cape High Court. That is so plainly a matter relating to the specific high court concerned that no further discussion is necessary to make the point.

[11] The JSC submitted that it is difficult to see how the test would be appropriate in respect of allegations of misconduct relating to judges of other

4 9 of 1994.
5 Act 200 of 1993.
6 20 of 2008.
7 In summary, the JSC Amendment Act provides for the establishment of a judicial conduct committee, a code of conduct, a register of judges' registrable interests, procedures for dealing with complaints about judges, and the establishment of judicial conduct tribunals to enquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges.

courts referred to in s 166(a), (b) and (e) of the Constitution. Those courts are, respectively, the Constitutional Court; the Supreme Court of Appeal; and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to the high courts. The short answer to this argument, so far as the Constitutional Court and the Supreme Court of Appeal are concerned, is that they are not high courts. Furthermore the heads of those courts are ex officio members of the JSC and so is a member of the national executive, the cabinet member responsible for the administration of justice. So far as courts having the status of high courts are concerned ─ the Competition Appeal Court, the Labour Appeal Court, the Labour Court, the Election Court and the Land Claims Court ─ they are national courts. In terms of s 178(1)(k) the Judge President of the court concerned would be a member of the JSC when that body is considering matters relating to his or her court, but not a Premier because there is no 'Premier of the province concerned' in the case of a national court.

[12] I share the view of the court a quo[8] that it would be inconsistent and illogical for the Constitution to provide for a Premier to participate in the appointment of a high court judge ─ and, as I have said, the JSC agrees that a Premier is included for this purpose ─ but not in a decision to remove such a judge. Both affect the composition of the bench of a particular high court. But, submitted counsel for the JSC, a determination by the JSC that a judge is guilty of gross misconduct does not affect the composition of a particular high court, because such a finding does not result in the removal of a judge from office. More is required for this to happen: in terms of s 177(1) of the Constitution[9] two-thirds of the members of the National Assembly have to resolve that the judge be removed. In my view the submission on behalf of the JSC does not accord sufficient weight to the fact that the decision by the JSC is the first stage in the removal process and for that very reason involves the consideration of a matter relating to a specific high court.

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8 Para 11.

9 'A judge may be removed from office only if ─
(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
(b) 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.'

[13] The JSC submitted that linguistically, the noun 'matters' in s 178(1)(k) is not qualified, as it is in subsec (5) which provides that the JSC may advise the National Government on 'any matter' relating to the judiciary or the administration of justice, thus making it clear that a wide meaning is intended in the latter section; whereas the unqualified noun 'matters' in the former section may mean that all or only some of the matters relating to a specific high court are to be included. In my view, absent any indication to the contrary ─ and I find none ─ the lack of qualification means that all matters, without qualification, are included ie 'matters' in s 178(1)(k) means the same as 'any matter' in subsec (5).

[14] In similar vein, it was submitted on behalf of the Judge President that the phrase 'relating to' in s 178(1)(k) is capable of a wide or a narrow meaning, and reference was made to *United Dominions Corporation (SA) Ltd v Tyrer*[10] where Roper J said:

'But the phrase "relating to" may connote either a remote or a close relationship. It may be used in a wide sense as embracing almost anything which has any reference to another matter or in a more restrictive sense . . . .'

The submission continued that the meaning of the phrase must be determined with reference to its context; and fundamental in the present context, said counsel, are the principles relating to the separation of powers and the independence of the judiciary. The essence of the submission was that the interpretation for which the Premier contends would violate these principles in that it would result in the Premiers of the various provinces, each of whom is the executive authority of his or her province and all of whom are elected by means of a political process, sitting on the JSC in proceedings for the impeachment of a judge. This, said counsel in his heads of argument, is surely not what was contemplated or intended by the words 'when considering matters relating to a specific high court' in s 178(1)(k). In oral argument the submission was watered down to a suggestion that where possible the Constitution should be interpreted as excluding the executive from participation in the affairs of the judiciary, because of the doctrine of the

10 *United Dominions Corporation (SA) Ltd v Tyrer* 1960 (3) SA 321 (T) at 323A.

separation of powers. But it seems to me that there is no room for a partial invocation of a principle of interpretation and accordingly, either the argument in its original form is good, or it is not.

[15] The fallacy in the argument is this. The doctrine of the separation of powers cannot be prayed in aid to interpret s 178(1)(k) where that section itself does not recognise such a separation but, on the contrary, provides in the same breath for both the Premier and the Judge President to be present in the circumstances it contemplates. A consideration of s 178(1) as a whole leads to the same conclusion. It provides (in subsec (1)(d)) that the cabinet member responsible for the administration of justice shall sit on the JSC at all times when that body functions. Section 178 reflects an intention that it is primarily lawyers that should decide whether a judge is guilty of gross misconduct ─ hence the exclusion of the politicians designated in subsections (h) and (i); but the inclusion of a member of the cabinet shows that it was not the intention that the executive be excluded. If, then, a member of the national executive is expressly included, there can be no objection in principle that a Premier, the executive authority of a province, should also be included when the JSC is considering matters relating to a specific high court ie that in the Premier's province. To hold the contrary would entail the conclusion that a Judge President is also excluded where allegations of misconduct against a member or his or her bench is considered, when his or her presence is plainly not only warranted, but desirable.

[16] For the same reason, the reliance by counsel representing the Judge President on *Van Rooyen & others v S & others*[11] is misplaced. In that matter the court was interpreting a regulation which provides that if a charge is brought against a magistrate and there is a need for a formal hearing, the Magistrates Commission shall appoint 'a magistrate or a person' to preside at the inquiry and a 'magistrate or person' to lead the evidence. Chaskalson CJ, writing for a unanimous court, held:

'Whilst a person leading the evidence need not necessarily be a magistrate, the person charged with the responsibility of making a finding as to whether or not the

11 *Van Rooyen & others v S & others* 2002 (5) SA 246 (CC) para 195.

magistrate concerned has been guilty of misconduct, should be a judicial officer. It is not consistent with judicial independence that a person other than a judicial officer should be charged with this responsibility.'

It cannot legitimately be argued that only lawyers, and much less only judges, should judge the judges for otherwise judicial independence would be eroded, where not only the minister is included, but also the four persons nominated by the President as head of the executive ─ none of whom has to be a lawyer, much less a judge.

[17] It would have been possible for the drafters of the Constitution to have adopted a model where only judges could remove judges. In Israel, for example, the Basic Law on the Judiciary provides that judges may be removed upon the decision of the Court of Discipline[12] which comprises only judges and judges retired on pension appointed by the President of the Supreme Court.[13] Or a model could have been adopted where only the elected representatives of the people could do so. In the United States of America, a country very much aware of the proper separation of powers, the House of Representatives has the 'sole power'[14] to impeach federal judges and the Senate has the 'sole power'[15] to try all impeachments.[16] The model ultimately chosen for our country was one somewhere between the two. The first stage is a decision taken predominantly by judges and lawyers. The second is a decision by the National Assembly by a two-thirds majority.

[18] In conclusion on this point, I would endorse the views expressed by Jones J in the court a quo:[17]

'But I can also see merit in a dispensation which, for reasons of both constitutional policy and social accountability (as to which, see s 1(d) of the Constitution), particularly in the light of the history of the administration of justice in this country,

12 Sections 7(5) and 13.

13 Although a judge may also be removed by a decision of the Judges' Election Committee, which comprises 9 members, some of whom are politicians, by a majority of 7 votes (ss 4(b) and 7(4)).

14 Constitution of the United States I.2.

15 Ibid. I.3.

16 There is a view that removal of federal judges can be achieved by other means although the view to the contrary seems to be more generally held and is supported by authority: Melissa H Maxman 'In Defense of the Constitution's Judicial Impeachment Standard' 86 *Mitch L Rev* 42 - especially at pp 435-6 and footnotes 81 to 86.

17 Para 16.

widens the adjudicative process to include in the investigation tribunal persons who are not judges or lawyers . . . It is not in my view possible to conclude that the Constitution did not have the doctrine of separation of powers and the independence of the judiciary very much in mind when it constructed the JSC. I can find no justification for concluding that the Constitution does not mean what it says when it includes members of the executive branch of National Government (the Minister and the President through his nominees) and Provincial Government (the Premiers) as members of the JSC in matters involving the High Court of the province in question.'

The composition and majority vote of the JSC

[19] As indicated, another issue before the court below was whether the impugned 'decision' of the JSC was taken by 'a majority of its members' as required by s 178(6) of the Constitution. For purposes of deciding the point, it can be assumed, as alleged by the JSC and notwithstanding the conclusion to the contrary for the reasons already given, that the JSC comprised 13 members for purposes of considering the complaints against the Judge President. The Premier in her founding affidavit alleged that, based on press reports, ten members took part in the proceedings of whom six voted in favour and four against the decision to terminate the investigation. The JSC, in its answering affidavit sworn to by a member who is a senior advocate, refused to divulge the relevant facts by stating that it was the policy of the JSC 'not to publish how members voted with regard to any particular decision' and that 'the JSC has never published the particulars of the vote with regard to the size of the majority and the way each member decided'. An evasive answer like this by senior counsel on behalf of a body like the JSC cannot be countenanced. It is the number of members who voted either way, not their identities, that is relevant. The JSC knew that this information was crucial for the determination of an issue legitimately raised and upon which the court would be required to adjudicate. Nor is this attitude of the JSC reconcilable with our constitutional democracy which values openness and transparency, and this is particularly so when regard is had to the constitutional functions and obligations of the JSC. In the *First Certification* judgment[18] the Constitutional Court emphasised that the JSC is a constitutionally

18 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

independent body[19] and that it 'has a pivotal role in the appointment and removal of Judges'.[20]

[20] The unavoidable conclusion on the failure to disclose the facts is that the deponent to the JSC's answering affidavit considered that the point made by the Premier was unanswerable. And indeed it is. The Constitution is clear on the issue: decisions must be supported by a majority of the members of the JSC. I accordingly agree with the reasons of the court a quo[21] for rejecting the argument that s 178(6) of the Constitution requires no more than a majority of members present and voting.

[21] The court a quo also found that the JSC, again on its own version, was not properly constituted, in that one of the practising advocates to be appointed in terms of s 178(1)(e) had not been appointed by the President. The point adds little to the previous one and I prefer to leave it open especially in view of the fact that it is not known why the advocate had not been appointed. The reason for the omission is not something that necessarily falls within the knowledge of the JSC.

The relief granted

[22] The JSC and the Judge President submitted that the relief granted by the court a quo ─ an order declaring the proceedings before the JSC on the dates in question and the decision to dismiss the complaint and counter-complaint, which were the subject matter of those proceedings, to be unconstitutional and invalid together with a further order setting them aside ─ was inappropriate.

[23] The submission on behalf of the JSC was that the order setting aside the decision of the JSC was not just and equitable either in terms of s 8 of the Promotion of Administration of Justice Act[22] (PAJA) or s 172(1)(b)[23] of the

19 Para 128.
20 Para 120.
21 Para 19.
22 3 of 2000: '8(1) The court or tribunal, in any proceedings for judicial review in terms of s 6(1), may grant any order that is just and equitable . . . .'
23 'When deciding a constitutional matter within its power, a court . . . may make any order

Constitution having regard to a number of factors. I should point out immediately that PAJA has nothing to do with this case, which concerns the composition of the JSC, something governed by the Constitution. It does not relate to its procedure, which may amount to administrative action regulated by PAJA. The factors relied upon by the JSC were the following:

(a) The Premier emphasised that she did not impugn the merits of the decisions by the JSC;

(b) the matter has had a long history and the Premier never asserted her right to attend the proceedings of the JSC or her duty to participate in them until after the decisions had been made;

(c) the effect of the order is that the JSC would have to reconsider the complaints, and it is not a foregone conclusion that she would be entitled to participate in view of the allegations of bias made by the Judge President; and

(d) the Justices and the Judge President who testified during the proceedings of the JSC have expressed the desire to move on and accordingly considerations of pragmatism and practicality do not justify the setting aside of the proceedings and decisions.

[24] The submission on behalf of the Judge President was that the Premier has disqualified herself from acting as a member of the JSC in respect of the complaints made by the Justices against him, inasmuch as (on the evidence of the Judge President, which was not dealt with by the Premier) she has 'publicly adopted an attitude extremely critical of, and negative towards, the Judge President on the matters in question' and that 'she has been at the forefront of a political campaign attacking the Judge President'.

[25] I pause to remark that it would indeed be a sorry day for our constitutional democracy were serious allegations of judicial misconduct to be swept under the carpet for reasons of pragmatism and practicality, as suggested by the JSC. The public interest demands that the allegations be properly investigated, irrespective of the wishes of those involved. The question raised on behalf of the Judge President whether the Premier would be entitled to participate in the deliberations of a properly constituted JSC, or for that matter to appoint an alternate, is irrelevant. The arguments advanced

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that is just and equitable . . . .'

on behalf of the appellants lose sight of the fundamental significance of the findings made by the court a quo that will be confirmed by this court. The declaratory order had to be made. There was no discretion. Section 172(1)(a) of the Constitution is in imperative terms:

'(1) when deciding a constitutional matter within its power a court ─

(a) must declare that any . . . conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency . . . .'

So far as the further order setting the proceedings and decisions aside is concerned, against which the arguments were directed, it is the constitutional mandate of the JSC in terms of s 177 of the Constitution[24] to investigate allegations of judicial misconduct and to make a finding on whether or not a judge is guilty of gross misconduct.[25] The JSC (properly constituted and by majority vote) has done neither. The order made by the court a quo setting the decision of the JSC aside was accordingly imperative to enable the JSC to perform the function it is still obliged to perform.

Order

[26] The appeal is dismissed with costs, including the costs of two counsel, which are to be paid by the Judicial Service Commission and the Judge President jointly and severally.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

FIRST AND SECOND APPELLANTS:
V Maleka SC (with him B Valley SC)

Instructed by The State Attorney, Cape Town
The State Attorney, Bloemfontein

THIRD APPELLANT:
J A Newdigate SC (with him T Masuku)

Instructed by Xulu Liversage Inc, Cape Town

24 Quoted in n 9 above.
25 *Langa CJ and others v Hlophe* above n 3, para 22.

	Lovius Block, Bloemfontein
RESPONDENTS:	S Rosenberg SC (with him A Katz SC and N Mayosi)
	Instructed by Fairbridges Attorneys, Cape Town McIntyre & Van der Post, Bloemfontein