**IN THE HIGH COURT OF SOUTH AFRICA**
**SOUTH GAUTENG, JOHANNESBURG**

**CASE NO:19006/09**
**REPORTABLE**

In the matter between:

**MANDLAKAYISE JOHN HLOPHE**
Applicant

and

**THE JUDICIAL SERVICE COMMISSION AND OTHERS**
Respondents

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**JUDGMENT**

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**WILLIS J:**

[1] The applicant who is and at all times material hereto has been the Judge President of the Western Cape High Court, Cape Town[1] seeks an order "declaring the entire proceedings

[1] Before the proclamation of the Renaming of the High Courts Act, No. 8 of 2008, this was known as the Cape of Good Hope Provincial Division. The President of the

of the Judicial Service Commission commencing on 5 July 2008 are unlawful and therefore void *ab initio*." He seeks this order in both a final and interim form, the interim interdict to await the Judicial Service Commission showing good cause why such an order should not be made. In addition, and in the alternative, the applicant seeks an interim interdict staying the aforesaid proceedings pending the final determination of the applicant's application to the Constitutional Court to appeal to that court against the judgment of the Supreme Court of Appeal ("the SCA") in the case of *Langa and Others v Hlophe*[2] delivered on 31 March, 2009.

[2] The first respondent is the Judicial Service Commission. For the sake of convenience, the first respondent shall hereinafter be referred as "the JSC". The second respondent is the former Minister of Justice and Constitutional Development, Mr Enver Surty. The remaining respondents are the justices and acting justices of the Constitutional Court who, on 30th May 2008, lodged a complaint with the JSC which alleged that the applicant had, in March 2008, approached a judge then acting in the Constitutional Court, Jafta JA[3] and later, in April 2008, Constitutional Court judge Nkabinde J in chambers in an improper attempt to influence the Constitutional Court's pending judgment in

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Republic of South Africa brought the Act to come into force with effect from 1 March, 2009 under Proclamation R13 GG 31948 dated 23 February 2009.

[2] [2009] ZASCA 36

[3] He is a judge of the SCA and, for this reason, the usual abbreviation used in honour of a judge of that court, viz. "JA" (Judge of Appeal) will be used, unless the context otherwise requires. It doe not seem "right" to refer to him as "AJ" (Acting Justice) even though this would, technically, be correct.

certain cases involving, *inter alia*, the investigation of alleged offences against the person who is now the President of the Republic of South Africa, Mr Jacob Zuma. The aforesaid judges of the Constitutional Court also issued a "media statement" relating to the complaint lodged with the JSC. The applicant lodged with the JSC a counter-complaint against the judges on 10 June 2008. The essence of his complaint was that the issuing of the media statement violated certain of his rights. On 5 July 2008, the JSC ruled, after hearing argument from both sides, that there was a *prima facie* case (in respect of both complaints) which required resolution by oral evidence. The ambit of the dispute in the complaint by the justices of the Constitutional Court (hereinafter, for the sake of convenience, referred to as "the Judges") against the applicant is narrow. It is common cause that discussions took place between the applicant and Jafta JA and later between the applicant and Nkabinde J in the chambers of the Constitutional Court concerning the cases in question. The applicant's stance is that these discussions, far from constituting an improper attempt to influence the court were entirely innocuous – they were the kind of discussions that routinely take place among judges in chambers.

[3] On 23 July 2008 the applicant launched an application in the High Court based, *inter alia*, on the alleged unconstitutionality of the conduct of the Judges in relation to the complaint lodged with the JSC and the media

statement that followed it. He simultaneously sought an interdict against the JSC from proceeding. At that stage, it was anticipated that the hearing of the complaint and the counter-complaint would be heard by the JSC in August 2008. A majority of the High Court found that there had been a limited violation of certain of the applicant's rights. The matter went on appeal to the SCA. A bench of nine judges unanimously reversed the findings of the High Court. The judgment in that matter is the case referred to above, *Langa and Others v Hlophe*.[4]

[4] In their respective judgments both the High Court and the SCA considered it in the public interest that the investigation by the JSC into the respective complaints by the applicant and the Judges should proceed. The decision of the High Court is now reported as *Hlophe v Constitutional Court of South Africa and Others*[5] Mojapelo DJP, on behalf of the majority, observed at para [103]:

> I also do not share the applicant's view that a declaratory order in his favour may have the effect of vitiating or tainting the process before the JSC with illegality. The process before the JSC, particularly the complaint against the applicant, remains totally uncontaminated and will be determined on a different basis from the issues decided in this judgment. <u>It is in fact in the interest of public policy, justice and the Judiciary as a whole that the complaint be fully investigated by the JSC. Nothing in this judgment and</u>

[4] [2009] ZASCA 36 delivered on 31 March, 2009. See, para [1] above.
[5] 2009 (2) BCLR 161 (W)

> the proceedings before this Court prevents that and nothing should be construed as preventing that from happening." (emphasis added)

[5] The hearings before the JSC into the complaint and counter-complaint were scheduled to begin on 1 April 2009. On 27 March 2009, new attorneys acting for the applicant wrote a letter to the JSC informing it, *inter alia*, that he may seek an interdict against the JSC should it persist in holding the scheduled hearings. In the letter, it is alleged on the applicant's behalf that the JSC is biased against him, *inter alia*, by reason of the areas of enquiry that the JSC had indicated would be the subject of investigation in a letter to all parties dated 17 February 2009. Prior to receipt of the letter of 27 March 2009, the applicant had not made any complaint concerning the conduct of the JSC.

[6] The applicant did not, however, proceed with any interdict between 27 March and 1 April 2009. On 1 April 2009, however, his counsel sought and obtained a postponement of the hearing until 4 April 2009 on account of the applicant's ill-health. At the hearing before the JSC on 1 April, counsel for the applicant was put on terms to indicate what his attitude was to the allegations of bias against the JSC. The JSC postponed the hearing until Saturday, 4 April 2009. On that day the applicant was represented by a new senior counsel,

Mr Brian Pincus SC. It appears from the record of the proceedings before the JSC that a postponement was sought (on notice of motion and supporting affidavit) on the basis that Mr Pincus SC had very recently been brought into the matter and had insufficient time to prepare. Once again, the question of bias levelled against the JSC was raised. Mr Pincus SC took the attitude that he was not in a position to give his view on the matter and stated that he would not seek the recusal of any members of the JSC unless he was personally satisfied that such was justified. The JSC postponed the hearing until Tuesday 7 April 2009. At that hearing, Mr Pincus SC was no longer instructed by the applicant. Counsel for the applicant sought a further postponement of the hearing. He did so on the grounds of the applicant's ill-health. The application was not supported by an affidavit that the applicant continued to be in ill-health. Reliance was placed on a "doctor's note" or medical certificate by a certain Dr Waynik dated 3 April, 2009 which was vaguely cast as to the expected duration of the applicant's indisposition but which, nevertheless, indicated that he might be well enough by 7 April, 2009. The application for postponement was refused by a majority of the members of the JSC. Counsel for the applicant withdrew from the hearing and the matter proceeded in his absence. The evidence of the Chief Justice, the Deputy Chief Justice, Mokgoro J, O'Regan J, Nkabinde

J and Jafta AJ, all of whom were either justices or acting justices of the Constitutional Court at the relevant time, was heard on 7 and 8 April 2009. Counsel for the applicant made it clear that the applicant regarded the JSC as biased against him.

[7] At the conclusion of the proceedings, the Chairperson of the JSC, the President of the SCA, Lex Mpati ("Mpati P"), stated that it had been decided that the record of the proceedings would be prepared and furnished to the applicant who would be invited to make submissions thereon and, depending upon his attitude, a date would then be arranged for argument. The applicant was furnished with a copy of the record of proceedings of the JSC on 24 April 2009. In a letter dated 24 April 2009, the JSC requested him to indicate by no later than 8 May 2009 whether he intended to take advantage of the invitation to make submissions or to testify before the JSC. The applicant has not done so.

[8] In the present application before this court, the applicant relies on the following:

(i) The JSC wrongfully and unfairly refused the application for a further postponement on 7 April, 2009;

(ii) The procedures which the JSC adopted the hearing that followed, particularly in regard to the hearing of evidence were wrongful and unfair;

(iii) Before deciding on 5 July, 2008 that a hearing into the complaints was warranted, the JSC wrongfully and in breach of Rule 3 of its own rules, had failed properly to establish whether their was a *prima facie* case to justify such a hearing;

(iv) The JSC wrongfully failed, in breach of Rule 4 of its own rules, properly to conduct a preliminary investigation;

(v) The JSC was, by reason of the absence of the second respondent at the hearing, or an alternate designated by him, improperly constituted;

(vi) The applicant was not given a proper "charge sheet" setting out with appropriate particularity the allegations of gross misconduct against him;

(vii) The applicant was not given sufficient notice of the enquiry and had insufficient time to prepare his defence;

(viii) The applicant was not given an opportunity to plead to the allegations against him;

(ix) The JSC acted as "prosecutor and judge" in the same matter;

(x) Nowhere in either the Constitution or the Judicial Service Commission Act, No. 9 of 1994, is "gross misconduct" of a judge defined and, accordingly, no one has a clear sense of what had to be proved against a judge in regard to any "gross misconduct" or any sense of the conduct from which a judge must refrain from doing;

(xi) The JSC took into account irrelevant political factors (a change in government and possible new appointments to the JSC) in deciding to proceed with the hearing on 7 April, 2009 (it has been alleged, *inter alia*, that a member of the JSC, Mr George Bizos SC, referred to possible "shenanigans" on the part of the new government);

(xii) The JSC is biased against him and related to that, Mpati P, ought to have recused himself;

(xiii) The Constitutional Court has not made any decision in regard to the applicant's application to it to appeal against the decision of the SCA in the case of *Langa and Others v Hlophe,*[6] which decision may have a bearing on the proceedings in the JSC.

[6] [2009] ZASCA 36 delivered on 31 March, 2009. See. Paras [1] and [3] above.

[9] Mpati P, in the affidavit filed on behalf of the JSC in the application now before the court has protested that the application is premature. Counsel for the respondents have taken a similar stance. They have argued that the applicant must first exhaust his internal remedies before seeking any review of the proceedings before the JSC. For reasons which will be developed later, I agree with this view and would have directed the applicant accordingly. Accordingly, I must act with circumspection in dealing with the grounds upon which the applicant relies. The reason for circumspection is not timidity but propriety. The applicant may, once the proceedings in the JSC have been finalised, seek to review the final decision of the JSC and may seek to rely on some or all of the grounds listed in paragraph [8] above. Neither the JSC nor any court which may subsequently be seized with the matter should be either influenced or embarrassed by this court's judgment.

[10] There are, however, a few aspects which must be briefly touched upon. Opinions may differ among reasonable men and women as to whether the JSC fairly refused the applicant a postponement and proceeded as it did. Mr *Maleka*, who appears for the JSC, accepts that this may be so. The divergence of opinion among reasonable persons on this issue is obvious from the fact that some members of the JSC,

albeit a minority, were of the view that a postponement should have been granted. The fact that reasonable persons may consider it unfair to refuse the postponement and to proceed is underlined by the fact that the majority of this court clearly have strong opinions on the issue. I consider it unnecessary and undesirable to express a view on the matter in this application.[7] It should be noted, however, that a complex matrix of factors, rather than a single issue, seems to have influenced the decisions of the JSC in this regard. In any event, in my opinion the position has been mitigated to a considerable extent by reason of the fact that the JSC, during the hearing before this court, made a "with prejudice" offer as follows:

(i) The JSC will start proceedings afresh on the basis that the applicant is invited unconditionally to participate therein;

(ii) The applicant will have the right to cross-examine any of the witnesses who have testified before the JSC;

(iii) The applicant will have the right to testify and lead such evidence as he may decide upon;

[7] The author acknowledges, however, that he may be influenced by a strong cultural tradition that views with disdain the inconveniencing of others on account of one's own indisposition. The philosophy underlying this tradition seems to work: in the period of approximately 30 years that the author has been a lawyer he has never missed a consultation, professional appointment or court appearance on account of ill-health. The author has not, however, been immune from mischievous bouts of influenza, coughs and splutters, sniffles and snuffles.

(iv) The applicant may make such submissions as he may choose to make.

The JSC, in other words, is willing to make substantial redress to the applicant on the question of the postponement. Insofar as the allegations of bias are concerned, these have been expressly denied by Mpati P and Mr George Bizos SC, a senior member of the JSC and the legal profession as a whole. Moreover, they have both denied the allegations relating to taking into account irrelevant political considerations and have expressly denied that Mr Bizos used the *ipsissimum verbum*, "shenanigans". The second respondent, the former Minister of Justice, Mr Enver Surty, has also, to the extent that he has been accused of bias, expressly denied any such bias. As these are motion proceedings and there is nothing inherently implausible in the JSC's and the second respondent, Mr Surty's version, this court cannot go behind what the respondents have said. Insofar as the disputes of fact are concerned, the time-honoured rules set out in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*[8] and as qualified in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*[9] are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondents together with the admitted or undenied facts in the applicant's founding affidavit which provide the factual

[8] 1957 (4) SA 234 (C) at 235E-G
[9] 1984 (3) SA 623 (A) at 634H-635C

basis for the determination, unless the dispute is not real or genuine or the denials in the respondents' version are bald or uncreditworthy, or the respondents' version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected. These rules have been re-affirmed in innumerable cases and, recently, in the case of *National Director of Public Prosecutions v Zuma.*[10] At times it has been unclear whether the applicant is seeking final or merely interim relief in making application for the proceedings before the JSC to be declared void *ab initio.* Even if the applicant may be regarded as seeking merely interim relief, the disputes of fact are too deep to come to the assistance of the applicant at this stage. See, *Simon NO v Air Operations of Europe AB and Others.*[11] Furthermore, cases such as *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd*;[12] *SAB Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd*;[13] *BHT Water Treatment (Pty) Ltd v Leslie and Another*;[14] *Shoprite Checkers Ltd v Pangbourne Properties (Pty) Ltd*[15] and *Knox D'Arcy Ltd and Others v Jamieson and Others*[16] make it clear that courts must be alive to the fact that applications which are cast in the form of seeking interim relief may, in fact, result in the order being final in

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[10] 2009 (1) SACR 361 (SCA) at para [26].
[11] 1999 (1) SA 217 (SCA) at 228.
[12] 1968 (2) SA 528 (C)
[13] 1968 (2) SA 535 (C)
[14] 1993 (1) SA 47 (W)
[15] 1994 (1) SA 616 (W)
[16] 1995 (2) SA 579 (W)

effect, if it is so granted. Finally, in regard to the aspects in the applicant's case which need to be touched upon, there is the question of the absence of the second respondent, former Minister of Justice, Mr Enver Surty, or an alternate designated by him, at the proceedings of the JSC in April of this year. This aspect must be dealt with by reason of the fact that Mr *Ngalwana*, who appeared for the applicant, submitted, in effect, that this delivered a "knock-out blow" to the JSC which made any further deliberations of the JSC concerning this matter superfluous, regardless of what may transpire in terms of exhausting or attempting to exhaust internal remedies. In other words, "All the king's horses and all the king's men could not put Humpty (Dumpty) together again".[17]

[11] It is common cause that the second respondent attempted to mediate a settlement between the applicant and the other parties in this application. For this reason, according to the affidavit which the second respondent has filed in this matter, he considered it appropriate that he should recuse himself from the hearing in April, 2009. It is common cause that he did not seek the approval of the applicant before recusing himself, that he did not attend the

[17]The author of this judgment acknowledges that those for whom English is not a first language may be unfamiliar with English nursery rhymes from which this quote derives. They are much beloved throughout the English-speaking world: by reason of their rhyme and rhythm they are easy to learn, improve vocabulary and often contain moral truths and political satire. The most common version of the verse is:

*Humpty Dumpty sat on a wall,*
*Humpty Dumpty had a great fall.*
*All the king's horses,*
*And all the king's men,*
*Couldn't put Humpty together agin.*

hearing in April, 2009 and that he did not designate an alternate. Section 178 (1) (d) of the Constitution provides that he, as the Cabinet member responsible for the administration of justice at the time, or an alternate designated by him, would have been a member of the JSC. Section 178 (5) provides that when the JSC considers any matter except the appointment of a judge "it must sit without the members designated in terms of subsection (1) (h) and (i)" (the members designated by the National Assembly and the National Council of Provinces). Accordingly, so the argument went, it is obligatory for the Minister or his designated alternate to be present at the hearing: if he is not, the proceedings are a nullity. In this regard, the applicant relied on the following cases: *Schierhout v Union Government*;[18] *R v Silber*;[19] *R v Price*;[20]; *Schoultz v Voorsitter, Personeel-Advieskomitee van die Munisipale Raad van George en 'n Ander*[21] and *Ras Behari Lal and Others v The King Emperor.*[22] Counsel for every one of the respondents submitted that the applicant had misinterpreted the relevant subsections of the Constitution and has misconstrued the law. Interesting submissions indeed were made in this regard but, for the purposes of the present application, there is only one argument that needs to be considered. It is that since the case of *Oudekraal*

[18] 1919 AD 30 at 44
[19] 1940 AD 187
[20] 1955 (1) SA 219 (A) at 224C-E
[21] 1983 (4) SA 689 (C) at 708H
[22] 150 LTR 3

*Estates (Pty) Ltd v City of Cape Town and Others*,[23] it has been clear that the modern approach in South Africa, when it comes to determining fairness in administrative matters, is not to adopt a mechanical, "checklist" approach but rather to take a holistic view of each matter and, in the light of the overall determination of fairness, then to make an appropriate order. It is instructive, in this regard, also to read the case of *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board : Limpopo Province and Others*.[24] At this stage, one has no idea at all as to what prejudice, if any, anyone suffered as a result of the Minister's absence. According to the respondents, the applicant is free, however, to raise his difficulties on this issue with the JSC and the JSC may attempt to address them. At this stage, one cannot determine with certainty what another court which may be called upon to review the proceedings of the JSC, once they have been finalized, may decide in regard to the absence of the Minister or his designated alternate. Accordingly, it would be inappropriate for this court to intervene at this stage.

[12] It should be noted, *en passant*, that insofar as the question of the Constitutional Court being called upon to decide how it should deal with the applicant's application for leave to appeal in the matter of *Langa and Others v Hlophe*[25] is concerned, it is common cause that the

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[23] 2004 (6) SA 222 (SCA) at paras [25] to [37]
[24] 2008 (2) SA 481 (SCA)
[25] [2009] ZASCA 36 delivered on 31 March, 2009. See paras [1], [3], and [8] above

Constitutional Court has, since the service of the application before this court, set in motion steps to consider what it should do. It appears the result will soon be known. That aspect therefore falls away. As the parties have agreed that no order as to costs should be made in this matter, the issue does not even impact on the question of costs. Besides, the passage referred to in paragraph [4] above from the judgment of Mojapelo DJP, which the applicant wishes to have reinstated on a further appeal to the Constitutional Court, makes it plain that Mojapelo DJP was of the view that the hearing should proceed. This means that, taking into account the fact that the SCA bench hearing the appeal consisted of nine judges, 12 judges share the same position. In view of the controversy which has clouded the saga of the complaints of the applicant and the Judges against each other, it seems fair to observe that a remarkable consensus exists on the issue of the hearing proceeding.

[13] The issue of the prematurity of this application will now be considered in more detail. It is clear that applications for the review of administrative decisions must be brought in terms of the Promotion of Administrative Justice Act 3 of 2000. This Act is widely known among lawyers as "PAJA". See, in regard to the question of review applications needing to by brought in terms of PAJA, *Bato Star Fishing (Pty) Limited v Minister of Environmental Affairs and Others*;[26] *Sidumo and another v Rustenburg Platinum Mines Limited*

[26] 2004 (4) SA 490 (CC) at paras [24]-[27]

*and Others*;[27] *Walele v City of Cape Town and Others.*[28] Although the applicant's application has not formally been brought in terms of PAJA, it must be assumed that this is the case (otherwise he would have difficulties in the application even being heard). Section 7(2) of PAJA provides:

> 7(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

Inextricably linked to the requirement that internal remedies must be exhausted, is the question of prematurity. It is, in any event, contrary to public policy to permit reviews *in medias res* and these will be permitted in exceptional circumstances only. See, in this regard

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[27] 2008 (2) SA 24 (CC) at paras [92]-[93]
[28] 2008 (6) SA 129 (CC) at para [29]

*Wahlhaus v Additional Magistrate, Johannesburg*;[29] *S v Western Areas Ltd and Others*;[30] *Take and Save Trading CC and others v Standard Bank of SA Ltd*;[31] *South African Commercial Catering and Allied Workers Union and others v Irvin & Johnson Limited (Seafoods Division Fish Processing)*.[32] In terms of subsection 7(2)(c) of PAJA, an applicant must specifically apply to be exempt from the requirement of exhausting internal remedies if he or she wishes such exemption and must show that there are exceptional circumstances justifying such a course of action. No such application was made in the present matter and, in any event, in my opinion, no exceptional circumstances have been put before us to justify such a step especially as the JSC has made it plain that it will consider all submissions that the applicant may make in regard to any alleged unfairness. It must be emphasised that public policy is strongly against interventions of the kind which the applicant is now seeking before the matter has been disposed of by the tribunal in question. In this regard, the issue of precedent is all-important. A court must be careful not to open sluice-gates that could render the functioning of the courts and the innumerable administrative tribunals throughout the land untenable.

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[29] 1959 (3) SA 113 (A) at 120E. The judgment has been followed in a number of cases and, more recently, by the SCA in *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA) at para [13] and *S v Western Areas Ltd and Others* 2005 SA 214 (SCA) at para [20].
[30] 2005 (5) SA 214 (SCA) at para [20]
[31] 2004 (4) SA 1 (SCA) at para [4]
[32] 2000 (3) SA 705 (CC) at paras [4]-[5]

[13] The respondents have sought that the application be dismissed for want of urgency, the reasoning being that if the applicant had a case, he could have and should have brought it earlier: too long he has tarried. Be that as it may, it clearly is urgent, in an overall sense, that the application be determined. Three judges have read the voluminous papers in the matter. In order to avoid confusion, it seems better now to deal with the simpler point which has been raised by Mpati P, in particular: the application has been brought prematurely. The application accordingly should not to be dismissed for want of urgency. I am mindful, however, that the respondents' argument is the inverse of that which commonly comes before the urgent court. The usual argument of respondents is: "Why is the applicant in such a hurry?" Here the argument, at least in respect of some of the issues, is "The applicant should have hurried along much earlier – it is now too late."

[14] In the applicant's replying affidavit the question of alternatives to the hearing proceeding before the JSC and, in particular, being referred to arbitration was raised. This was further explored during argument. In the previously mentioned case of *Langa and Others v Hlophe*,[33] the SCA made it clear that complaints concerning gross misconduct by judges must be determined by the JSC. The SCA said:

> [22] Under Section 177 of the Constitution matters relating to gross misconduct of judges

[33] [2009] ZASCA 36 delivered on 31 March, 2009. See paras [1], [3], [8] and [12] above

> 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.
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> [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.

It seems that the JSC, even if it wanted to, could not abdicate its responsibility to determine the matter. Moreover, it hardly needs be said that this court could not, in the absence of a lawful agreement between the parties, make any order that the parties refer the matter to arbitration.

[15] There were various applications, from both the applicant and the respondents, to strike out matter from the affidavits. As the parts thereof to which objection was taken bear no relation to the question of whether or not the application was premature, no ruling or order should be made in this regard. The offending portions have been ignored.

[16] The parties all agreed that no order as to costs should be made in this matter.

[17] Penultimately: it is important to maintain perspective. As Mr *Soni*, counsel for the second respondent, was astute to point out, sight must not be lost of the fact that, in terms of section 177 (1) (b) of the Constitution, the final decision as to whether or not a judge is to be removed from office may only be made by a resolution of two thirds of the members of Parliament, a mighty forum indeed. This two-tier process, so Mr *Soni* submitted, may have considerable legal implications. Indeed it may: in matters of procedure, less exacting standards may be required of a body that is, in at least certain respects, advisory[34]; in regard to the substantive issues, its findings are merely preliminary. Presumably, provided it does not flout the Constitution, and its own rules, Parliament can take into account any factors it wishes in coming to its decision. In other words, the doors of fairness are not only wide but also open. The order proposed by me will not slam these doors in the face of the

[34] See *Chairman, Board of Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) at para [38]

applicant. Besides, the matter may even not travel as far as Parliament. If one is to gauge from the judgment of the SCA in *Langa and Others v Hlophe*,[35] the affidavit of Mpati P in this matter and the submissions of Mr *Maleka*, much may depend on the willingness of the applicant to cooperate with the JSC.

[18] The applicant seems to have been unimpressed by the submissions of Mr *Soni* in regard to the final decision lying with Parliament. After the hearing in this matter, his counsel filed supplementary heads in which was asked the following question: even if the applicant were to survive a vote in Parliament, what of his reputation? It is a good point but it should not be pressed too far. In the "courts of public opinion" there is no grander forum than Parliament. Besides, an intervention by the court at this stage, could damage the reputation of the JSC, Mpati P and the second respondent. That would be unfortunate, more especially as they have denied, on oath, in affidavits, any wrongdoing. If they believe that they have done nothing wrong, there is no other step which is available to them at this stage. The applicant, however, has other options. As controversial a measure as an intervention at this stage may result in an appeal. Appeals matter in the reputation of judges. In the absence of tested evidence to the contrary, it must be accepted that the Judges, when lodging their complaint against the applicant did so out of a sense of duty rather

[35] [2009] ZASCA 36 delivered on 31 March, 2009. See paras [1], [3], [8], [12] and [14] above

than malice. The Judges, too, have rights. They have the right that their complaint be fully considered. One can do worse than to remind oneself that a recurring theme of one of the great philosophers of the twentieth century, Sir Isaiah Berlin, was that in human societies we can manage imperfection to the best of our abilities but we can never eliminate it. The order which I propose may be imperfect but, in my opinion, it is the best that can be made in the circumstances.

[19] I propose that the following be the order of the court:

> The application (including both Parts A and B thereof) is dismissed.

[20] I have had the benefit of reading the judgment of my brother Tsoka J with which judgment my brother Maluleke J agrees. I had intended to be more circumspect about the issue of the JSC's refusal of a postponement on 7 April, 2009 and its decision to proceed in the absence of the applicant on that day and 8 April, 2009. In my opinion it has become necessary that I deal with this aspect more directly. Assume, with the benefit of "retrospective foresight", that the JSC, in refusing a postponement on 7 April, 2009 and in deciding to proceed in the absence of the applicant on that day and 8th April, 2009 made a blunder. Assume further that the blunder was serious. The fact remains that for this court to order, *in medias res*, that the proceedings of 7 and 8 April, 2009 be set

aside and commenced *de novo* would be unprecedented in the annals of South African legal history and, in my understanding of the law, impermissible. It may do the applicant no favour. He did not even ask for such an order. Of course, I accept that the applicant has the right to confront his accusers eye-to-eye.[36] It is trite that the applicant has the right to cross-examine those who have testified against him. Nevertheless, the applicant must at least inform the JSC as to which witnesses, if any, he wishes to have recalled.[37] He has not done so. On the contrary, it is my understanding of his position that the JSC, in refusing a postponement on 7 April, 2009 and in deciding to proceed in the absence of the applicant on that day and 8 April, 2009, made an irremediable blunder, an irreversible error, a fatal mistake. In the view of the applicant, this mistake, whether taken singly or together with the applicant's other criticisms of the whole process, will result in any finding of the JSC against him, in regard to the substantive complaint of the Judges, being quashed on review. The JSC has, however, made no such finding. It is not, at this stage, clear whether the applicant's position concerning the JSC's decision to proceed on 7 and 8 April, 2009 is provisional or final. The applicant is, of course, entitled to adopt such positions as he considers best. Ultimately, the decisions which he makes in this regard are for him and him alone. He may decide that his overall position is strong enough to justify his refusal to

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[36] See *S v Motlatla* 1975 (1) SA 814 (T) at 815F

[37] If the applicant asks that all the witnesses be recalled, and the JSC acquiesces, this will result, in effect, in holding the hearing *de novo*.

participate in the proceedings at all. He may decide, in effect, to "close his case" without giving any evidence. Nevertheless, it seems clear that before the JSC makes any finding, the applicant must decide whether he wishes:

(i) to participate in the proceedings at all; and/or

(ii) to make any further representations to the JSC; and/or

(iii) any of the witnesses to be recalled; and/or

(iv) to give evidence (or lead his own witnesses) before the JSC.

Ideally, and as a matter of rudimentary courtesy, he should let the JSC know of his elections. His choices may, however, be inferred from his responses to requests from the JSC. It is precisely and particularly because the JSC has not yet made any finding against the applicant and the applicant has not yet made his elections clear that it would, in my opinion, be inappropriate for the court to intervene in this application. The order of the majority of this court may create difficulties for the JSC. Nevertheless, the order may create even greater difficulties for the applicant: he will be deprived of his opportunity to argue that, on 7th and 8th April, 2009, an irreversible wrong was perpetrated against him.

**DATED AT JOHANNESBURG THIS 1ST DAY OF JUNE, 2009**

**N.P. WILLIS**
**JUDGE OF THE HIGH COURT**

**IN THE HIGH COURT OF SOUTH AFRICA**
**SOUTH GAUTENG, JOHANNESBURG**

**CASE NO:19006/09**
**REPORTABLE**

In the matter between:

**MANDLAKAYISE JOHN HLOPHE**
Applicant

and

**THE JUDICIAL SERVICE COMMISSION AND OTHERS**
Respondents

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**JUDGMENT**

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**MALULEKE J:**

I have read the judgments of my brothers Willis and Tsoka JJ. I agree with the judgment and order of Tsoka J. Accordingly, the order of the court is the following:

1. The proceedings of the JSC on 7 and 8 April 2009 are set aside;

2. The proceedings are to commence *de novo* on a date suitable to the parties.

**DATED AT JOHANNESBURG THIS 1ST DAY OF JUNE, 2009**

**G.S.S. MALULEKE**
**JUDGE OF THE HIGH COURT**

**IN THE HIGH COURT OF SOUTH AFRICA**
**SOUTH GAUTENG, JOHANNESBURG**

**CASE NO:19006/09**
**REPORTABLE**

In the matter between:

**MANDLAKAYISE JOHN HLOPHE**
Applicant

and

**THE JUDICIAL SERVICE COMMISSION AND OTHERS**
Respondents

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**JUDGMENT**

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**TSOKA J:**

[1] The applicant seeks, on urgent basis, an order, amongst others, declaring the entire proceedings of the Judicial Service

Commission ("the JSC") commencing on 5 July 2008 unlawful and therefore void *ab initio*.

[2] The application is opposed by the JSC, the first respondent. Although no order is sought against the second to the fifth respondents, the Minister of Justice and Constitutional Development ("the Minister") and the Chief Justice have filed affidavits. The affidavit filed by the Chief Justice is on behalf of all the Justices of the Constitutional Court. The Minister's affidavit explains his reasons for recusing himself from the proceedings of the JSC commencing on 1to 8 April 2009.

[3] The Chief Justice's affidavit opposes the relief sought by the applicant.

[4] The history of this matter is on record and is public knowledge with the result that no purpose would be served in repeating it in this judgment.

[5] The crisp issue to be decided is whether the entire proceedings of the JSC commencing on 5 July 2008 are unlawful and void *ab initio* or only the proceedings of the 7 and 8 April 2009 are unlawful and ought to be set aside.

[6] I deal with the proceedings of the JSC in two parts. Firstly, the proceedings from 5 July 2008 to 31 March 2009 and Secondly, the proceedings from 1 to 8 April 2009 in particular the hearing of 7 and 8 April 2009.

*The proceedings from 5 July 2008 to 31 March 2009.*

[7] On 17 June 2008 the Justices of the Constitutional Court filed a formal

complaint against the applicant. The applicant, who had already lodged a counter-complaint against the Constitutional Court Judges, responded to the complaint. As the JSC concluded that there is a dispute of fact that could not be resolved on affidavits, it advised the parties that it intended to hear oral evidence. The applicant participated in the processes of the JSC as "the accused" and the complainant. At no stage did he mention that the JSC was in breach of its rules and the law.

[8] In the South Gauteng High Court, the then Witwatersrand Local Division in the matter of *Hlophe v Constitutional Court of South Africa and Others* 2009 (2) BCLR 161 (W), the applicant conceded that the enquiry of the JSC and the violation of his rights, for which he was seeking relief from that court

were separate and that the JSC may proceed with its enquiry. In fact this was the finding of the majority of the court in that matter. The matter went on appeal. The Supreme Court of Appeal also confirmed this finding.

[9] In the result there is no basis upon which this Court could find that the proceedings of 5 July 2008 to 1 March 2009 are unlawful.

*The proceedings of 7 and 8 April 2009.*

[10] After having identified the dispute of fact to be resolved and witnesses to testify in resolving the dispute of fact, the JSC determined that the hearing would commence on 1 April 2009. On 1 April 2009 the proceedings did not commence as the applicant was indisposed due to ill-health. A medical certificate was submitted in support of the application. The applicant requested

that the hearing be postponed sine die. The JSC refused to postpone the hearing sine die. The hearing was postponed to 4 April 2009. On this date the applicant had engaged new counsel who requested a further postponement for a period of ten days as he required time to consult and prepare. Counsel further stated that the applicant's ill-health was a further reason for the application for postponement. A substantial application supported by affidavit and medical certificate was furnished to the JSC. The JSC refused to postpone the hearing as requested by Counsel. The hearing was adjourned to 7 April 2009.

[11] On 7 April 2009 again the applicant sought a postponement as the applicant had not fully recovered from his illness. The application was requested by a different

counsel as the one who requested a postponement for a period of 10 days was no longer representing the applicant. This application for a further postponement was refused. Counsel for the applicant withdrew from representing the applicant. They walked out of the JSC hearing. The hearing proceeded in the absence of the applicant and his counsel. In its reasons for refusing the postponement the JSC states:

"*15 Taking all the circumstances into account, the Commission considered that good cause had not been shown for the further postponement of the matter and that fairness required that the hearing should proceed, if necessary without Hlophe JP being present. It was manifestly in the interest of the parties, of the administration of justice and of the public that there should be no further delays in the finalizing of the complaint and counter - complaint by the Commission"*

[12] The question that must be asked and be answered is whether the Applicant had shown no good cause for further postponement on 7 April 2009. If the answer is that the applicant indeed had shown no good cause, then the JSC was entitled to proceed in his absence. If, on the other hand, the applicant had shown good cause, the JSC was not entitled to proceed in the absence of the applicant. It is therefore vital to determine the reasons for the applicant's absence on 7 April 2009.

[13] The starting point is the state of health of the applicant. It is common cause that on 1 April 2009 the applicant was ill and a medical report was furnished in support of the application for postponement. On 3 April 2009 the applicant consulted with Dr Waynik. Dr Waynik furnished the JSC with

an affidavit. The affidavit appears on page 160 of the paginated papers as *Annexure* "*MJH7*." Dr Waynik's medical report is attached to his affidavit.

[14] From the medical report, the applicant was seen by Dr Waynik on 3 April 2009 at home. He diagnosed the applicant with **acute-sino-bronchitis**. He advised the applicant to remain indoors for 3 to 4 days from 3 April 2009. He further advised the applicant not to travel or venture out of his home surrounds until his symptoms have completely abated. During this period, the applicant was medically advised not to consult with his legal representatives until early the following week.

[15] Dr Waynik's affidavit and the medical report are not disputed by the JSC. It is Dr Waynik's evidence that resolves the question

whether the applicant had not shown good cause for the postponement of 7 April 2009.

[16] The JSC held the hearings in Johannesburg. The applicant was confined to bed in Cape Town. Although he had seen a doctor prior to consulting with Dr Waynik on 3 April 2009, his health had not improved resulting in him consulting Dr Waynik on 3 April 2009. Dr Waynik diagnosed the applicant with *acute-sino-bronchitis* that warranted the applicant not to leave his home, travel or consult with his legal representatives. In Dr Waynik's opinion, the applicant would only be able to consult, leave his home and travel to Johannesburg at the earliest on 7 April 2009, the date of the hearing. The opinion was premised on the fact that the applicant's symptoms would have by then completely abated.

[17] On 7 April 2009, the applicant, his symptoms not having completely abated, did not travel to Johannesburg. As he was unable to attend the hearing, he instructed his counsel to ask for a further postponement. The court is mindful of the fact that this application was not a new application.

[18] The delay in finalizing the hearing of the complaint and the counter-complaint of the parties appear to be irritating to both the JSC, the Judges of the Constitutional Court and the public. The delay puts the judiciary in the spotlight. The credibility and the confidence of the public in the judiciary, because of the delay, is daily bruised and eroded. It is therefore in the interest of both the JSC, the Judges of the Constitutional Court, the judiciary and the public that the

hearing should be finalized without undue delay.

[19] However, the considerations outlined above, laudible as they are, cannot, in the face of evidence of Dr Waynik's report, overshadow the right of the applicant to a fair hearing and to be heard by the JSC. On the uncontested evidence of Dr Waynik, the applicant was not able to travel to Johannesburg and attend the hearing on both 7 and 8 April 2009. The JSC was, in the circumstances, wrong in concluding that the applicant had shown no good cause for the postponement of the hearing on 7 April 2009. The prior attempts by the applicant to secure postponement should not have clouded the real reason for the postponement on 7 April 2009, being the state of health of the applicant.

[20] That the refusal for the postponement and the willingness to proceed with the hearing, in the absence of the Applicant, was unhelpful and prejudicial to the Applicant, is apparent. The JSC was unable to resolve the dispute between the Judges of the Constitutional Court and the Applicant. They had identified areas of dispute of fact for resolution by oral evidence. The applicant, in this context, as a witness and a role player, was the main actor without whose participation, the dispute of fact could not be resolved, unless for no good cause he elected to absent himself from the hearing.

[21] It is without doubt that the participation of the applicant in the hearings was of vital importance. His participation would have assisted the JSC to resolve amongst others the following:-

21.1 Whether in discussing the issue of privilege with Justices Nkabinde and Jafta, he intended to influence them in making a finding favourable to Mr. Zuma bearing in mind that the two Justices prior to 17 June 2008, did not wish to lodge a complaint or to make any statement about the encounter between them and the applicant;

21.2 The intention or motive for the applicant in uttering the words "*sesi thembele kinina*". It is common cause that the applicant uttered these words. As Justices Nkabinde and Jafta, prior to 17 June 2008, made no complaint and intended not to complain and were not the complainant Judges, it is only the applicant, in his testimony, who could explain his intention or motive in uttering these words. His absence, despite the testimony of the

two Judges and all the other Judges who testified at the hearing, could not have resolved this dispute;

21.3 Whether the applicant informed Justice Nkabinde that he had the mandate to act as he did. As pointed out above, the applicant was an important witness who could have assisted the JSC in this regard. The testimony of Justice Nkabinde and all the other Judges of the Constitutional Court represented one side of the story and could not resolve this dispute. This fact is within the knowledge of the Applicant. By proceeding with the hearing in the absence of the applicant, the JSC became poorer for it.

[22] The JSC appreciated the seriousness of the hearing hence eight days were set aside for it. It is in this context that it is not

understandable as to why, even if the applicant was able to travel to Johannesburg on 7 April 2008, the JSC was of the opinion that the hearing could have been finalized on 8 April 2009. As it transpired, after the hearing on 8 April 2009, the matter was postponed sine die whereafter the JSC furnished the applicant with the record of the proceedings requesting him to make representations and to make election either to cross-examine the witness who testified on 7 and 8 April 2009 or to testify. This conduct emphasizes the vital participation of the applicant in the process leading to his possible impeachment.

[23] Does the fact that the Applicant was invited to make representations to cross-examine the witnesses who testified on 7 and 8 April

2009 render the refusal to grant the Applicant the postponement, reasonable?

[24] The invitation is not without difficulties. It is not for certain that the JSC would recall the witnesses to be cross-examined. The invitation, it seems to me, will first be considered before a yes or no decision is given.

[25] Purposeful and effective cross-examination flow from evidence in chief of any witness. The integral part of the right to cross-examination is in observing the witness's demeanour in the witness stand. To cross examine a witness whom one has not observed and noted such witness' demeanour is an impoverished and a futile exercise. For cross-examination to be the best vehicle ever invented to discover the truth, (*see Eric Morris*: The technique in Litigation) it must benefit from hearing and

observing any witness who testify in a particular matter. It is in this context, that I understand the Bapedi saying that "*Ditaba di tswa mahlong*" (which may loosely and contextually be translated as: to truly appreciate and evaluate testimony one must have looked at and observed the witness testify).

[26] In the circumstances , I find that the invitation extended to the applicant to make representations is unhelpful and would serve no purpose. The invitation cannot render the refusal of the JSC to grant the applicant the postponement due to the ill–health, reasonable. The invitation cannot be an adequate cure for the prejudice suffered by the applicant in not attending the hearing on 7 and 8 April 2009.

[27] In the result, I find that on 7 April 2009 the applicant had good cause for not attending the hearing of the JSC. The JSC acted improperly and unreasonably in refusing the applicant a further postponement. The decision of the JSC unjustifiably violated the applicant's right to a fair hearing and to participate freely in the proceedings which affect him. The proceedings of the JSC of both 7 and 8 April are unreasonable and unlawful. They ought to be set aside. Although the applicant is not entitled to an order setting aside the entire proceedings of the JSC from 5 July 2008 to 8 April 2009, the court is, in terms of the provisions of the Promotion of Administrative Justice Act, No 3 of 2000 (*PAJA*), entitled to make an order that is just and equitable. I find that the order I intend making, is in the circumstances, just and equitable.

[28] *Is the application in medias res?*

[29] The JSC and the Judges of the Constitutional Court contend that this is so while the applicant contends to the contrary although his attack and submissions is directed mainly at the interdicts prayed for.

[30] The applicant's challenge of the proceedings of the JSC is based on various grounds such as the procedure adopted in the hearing of oral evidence, the non-observance by the JSC of its own rules, bias on the part of the JSC and the improper composition of the JSC. These grounds, however must be separated from the applicant's complaint that the JSC acted unfairly and unreasonably in refusing a further postponement on 7 April 2009, otherwise the application of the principle of in *medias res* would become blurred. I

therefore deal with the in *medias res* in two parts. Firstly as it relates to bias and all the other grounds raised in the application and secondly as it relates to the applicant's absence in the hearing of 7 and 8 April 2009.

*Bias, Improperly constituted JSC, Non-observance by the JSC of its own rules, Absence of the Minister of Justice and Constitutional Development or his Delegate etc.*

[31] The starting point is the law and the case law. In terms of the provisions of *section 7(2) of PAJA* a court or a tribunal cannot review an administrative action until internal remedies available to a party have been exhausted. If there are exceptional circumstances a court or a tribunal may, on application, review an administrative action

only if the court or a tribunal deems it in the interest of justice to do so.

[32] The case law is also clear. A court or a tribunal, although it has power to review administrative action piecemeal, this is used sparingly and only in exceptional circumstances or where injustices would occur. In *Wahlhaus v Additional Magistrate, Johannesburg 1959(3) SA 113(A) at page 120A* the court stated the principle in the following terms:-

"*While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise upon unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be*

*attained..... In general, however, it will hesitate to intervene, especially having regard to the effect of such procedure upon the continuity of the proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available"*

[33] In *Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd And Another 1978(4) SA 379(T)* the court at page *382 D-E* stated the abovestated principle as follows-

"*I am of the view that this approach is not an absolute approach and is not necessarily the correct approach. I am of the view that the court has jurisdiction to review this type of ruling, and at this stage. But it is a step which will be resorted to only in exceptional circumstances,...*"

[34] In *Take and Save Trading CC and others v Standard Bank of SA Limited 2004(4) SA 1 (SCA)* dealing with *medias res* regarding a review recusal application, the court in *paragraph 4* of the judgment said:-

*"A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration. In any event, an appeal in medias res in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that*

*the case be brought to a conclusion at the first level and the whole case then be appealed"*

[35] It is apparent that from the cases cited above, these issues such as bias raised by the applicant amount to in *medias res.* They may still be raised at the hearing in due course. The JSC's rulings on these issues are unknown. If known they cannot be subjects of review until a final pronouncement is made by the JSC. In the result I agree with the submissions of respondents' counsel that it is undesirable for the court to intervene at this stage.

*The absence of the applicant in the hearing of 7 and 8 April 2009.*

[36] The declarator prayed for is not hit by the prohibition of review of unterminated

proceedings. In the cases cited above the applicant was present at the hearing and applied for postponement. In the present matter the applicant was indisposed. He was unable to attend the hearing due to ill-health. The applicant's right to be present and observe the witnesses testifying was compromised by the refusal for a postponement. This, according to *Wahlhaus*, amounts to *"grave injustice"* entitling the court to interfere at this stage. The provisions of *section 7(2) of PAJA* are not applicable. There are no internal remedies for the applicant to exhaust before approaching the court for review. The ruling is contrary to *Rule 5.13 of the JSC's Rules governing Complaints and Enquiries* in terms of section 177 (1) (a) of the Constitution. It resulted in the JSC proceeding to lead evidence in the absence of the applicant and his counsel. The ruling is final in effect. It

curtailed the applicant's right to attend and be present when the evidence of the Judges of the Constitutional Court is led. The invitation to make representations and the *"with prejudice tender"* are no more than palliatives used by the JSC in an attempt to remedy the obvious injustice.

[37] On 4 April 2009 the applicant submitted a substantial application for postponement sine die due to his ill-health. The medical report attached to the application reveals that the applicant was confined to bed and not to leave his home. He was also advised not to travel for a period of four days. The fourth day fell on 7 April 2009. The doctor who consulted with the applicant further advised him not to leave his surroundings until his *"symptoms have completely abated".*

[38] On April 2009 the applicant did not travel to the hearing as his symptoms had not completely abated. He

instructed his counsel to request a further postponement. The postponement was refused.

[39] Following the refusal for a postponement, his legal representatives withdrew from acting for him. The hearing proceeded in his absence. The applicant was, as a result of the refusal for postponement, denied the right to observe the witness testifying. As a result, the witnesses' testimony was not put to rigorous test of cross- examination. The applicant's right to a fair hearing has been compromised through no fault of his own.

[40] The reported cases referred to above are distinguishable to the present. In all those cases, the applicant was present and able to proceed with the hearing as so advised. In the present matter neither the applicant nor his legal representatives were present to proceed with the hearing. The applicant's absence, which was explained and justifiable did not entitle the JSC proceed in his absence. The application for review of the ruling of the JSC of 7 April 2009 is not an in *medias res* hearing. If it is, it falls within

the exceptional cases which entitles the court to intervene at this stage.

[41] However the other issues raised by the applicant such as bias and the absence of the Minister of Justice or his alternate in the hearing of both 7 and 8 April 2009 and all the other issues, may be raised at the hearing of the complaints in due course. The JSC's rulings on these issues are unknown. If known, they cannot be subjects of review until a final pronouncement is made by the JSC.

[42] That the applicant suffered prejudice as a result of the refusal for postponement is beyond doubt. The hearing was to resolve a dispute of fact as to what exactly transpired between the applicant and Justices Nkabinde and Jafta. In this kind of testimony, credibility finding is of crucial importance. A proper finding on credibility could only be made if the applicant participated in the hearings. His participation could have enabled the JSC, the witnesses and the applicant to observe the demeanour of one another. The observation would empower the parties to embark on

purposeful and effective cross-examination. In the absence of the applicant's participation in the hearing, cross-examination of the witnesses, based on evidence already on record, would serve no purpose.

[43] During the hearing of the application, a with prejudice tender was made to the applicant. Apart from the fact that the tender is with prejudice and unconditional, it still does not cure the prejudice suffered by the applicant in not attending the hearing and observing the witnesses testifying. It is inconvenient for the witnesses to be recalled and testify. However, this inconvenience cannot be elevated to the same prejudice suffered by the applicant. Truth does not change. It is universal. There is no suggestion therefore that in the event that the witnesses are recalled there is a likelihood of the witnesses perjuring themselves.

[44] The following order is made:-

44.1 The proceedings of the JSC of the 7 and 8 April 2009 are set aside.

44.2 The proceedings are to commence *de novo* on a date suitable to both parties.

**DATED AT JOHANNESBURG THIS 1ST DAY OF JUNE, 2009**

**M.P. TSOKA**
**JUDGE OF THE HIGH COURT**

Counsel for the Applicant: *V.Ngalwana* (with him, *T. Masuku*)
Attorneys for Applicants: Xulu Liversage Inc

Counsel for the First Respondent: *V.I. Maleka* SC (with him, *M. Lekoane*)
Attorneys for the First Respondent: The State Attorney

Counsel for the Second Respondent: *V.Soni* SC (with him, *M. Sello*)
Attorneys for the Second Respondent: The State Attorney

Counsel for the Remaining Respondents: *G.J Marcus* SC (with him, *M.Sikhakane*)
Attorneys for the Remaining Respondents: The State Attorney

Date of hearing: 18th May, 2009

Date of Judgment: 1st June, 2009