In the South Gauteng High Court

Johannesburg

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

DATE 29.07.09 SIGNATURE

Case 09/30894

Mail and Guardian Limited	First Applicant
Avusa Limited	Second Applicant
Independent Newspapers (Pty) Ltd	Third Applicant
Freedom of Expression Institute	Fourth Applicant
versus	
The Judicial Service Commission	First Respondent
and	Third to Sixteenth Respondents
The Centre for Applied Legal Studies	Amicus Intervening
etv (Pty) Ltd	First Applicant
esat TV (Pty) Ltd	Second Applicant
versus	
The Judicial Service Commission	First Respondent
and	Third to Sixteenth Respondents

Judgment

Malan J:

[1] These are two urgent applications in which the applicants pray for substantially the same relief. The application by the Mail and Guardian is for an order that the decision of the Judicial Service Commission taken on or about 20 July 2009 that a subcommittee be appointed to convene a preliminary investigation into a complaint that has been laid by the fourth to sixteenth respondents ('the Constitutional Court Justices' or 'Justices') against the third respondent, Judge President Hlophe ('the Judge President'), and the latter's counter-complaint against the Constitutional Court justices be reviewed and set aside. In the alternative, an order setting aside the said decision in so far as it denies the public and the media access to the preliminary investigation is requested.

[2] The application by etv (Pty) Ltd and esat (Pty) Ltd is directed at an order somewhat narrower than the order sought in the Mail and Guardian application and seeks the review and setting aside the decision of the JSC that the preliminary investigation will not be open to the public or the media and directing the JSC to permit representatives from the media to attend the preliminary investigation and to permit etv and esat to set up equipment necessary to obtain a sound recording of the preliminary investigation for the purposes of broadcasting it in the form of live or delayed broadcasts and broadcasts on news and or current affairs programmes.

[3] In addition, CALS applied to intervene as amicus curiae in these proceedings. Counsel for the JSC objected to the application inter alia on the basis that some of the factual allegations made were in dispute. Since the matter was urgent I allowed CALS to address me on matters of law only.

[4] Counsel acting on behalf of the Justices submitted a letter to the court in which it was indicated that they abided the decision of the court. They added, in response to paragraph 13 of the affidavit deposed to by the deponent on behalf of the JSC, that 'none of the parties have objected to the proposed procedure' as follows:

'This is a reference to the decision to appoint a sub-committee to conduct a preliminary investigation. While it is true that the Judges have not objected to the proposed procedure, this is because the Judges were unaware that any decision was being contemplated by the JSC and were not heard on the issue.

On 27 July 2009, the Judges sent a letter to Ngoepe JP (as Head of the Sub-Committee) raising various questions concerning both substantive and procedural matters relating to the preliminary investigation to enable them to make an informed decision about their rights and duties. They have not yet received a reply to their queries.'

Since the hearing a letter by Judge President Ngoepe has been delivered to me by the State Attorney responding to the last paragraph of the letter by the Justices and showing that he indeed responded to it as soon as possible. He requested that the letter be forwarded to all the parties concerned.

[5] The Judge President also filed an answering affidavit in which he stated that he abided the decision of this court. He continued:

'4 Let me state at the outset that I have nothing to hide from the public of South Africa relating to the allegations made against me by the Justices of the Constitutional Court. My conscience is clear about these allegations, and I will appear before a properly constituted Judicial Service Commission ... when I am called to do so. ...

5 In my view, the duty that I owe the public is to appear before the JSC and to answer any questions relating to the allegations made against me by the Justices of the Constitutional Court. It is a duty that the public is entitled to demand from me if public confidence in me as a Judge is to

continue. I will accordingly meet with the JSC to answer questions about the allegations against me, whether the meetings are open or whether they are closed. However, my duty does not extend to appearing before the media to answer allegations of wrongdoing. In my experience and view, the media coverage of these allegations against me has been unfair and most disparaging.' ... [See also paragraph 30].

[6] These applications all stem from the now public dispute between the Judge President and the Constitutional Court Justices and the complaints made by them against each other and the subsequent litigation flowing from them. I need not dwell on these issues. The principal decision under attack was made on 22 July 2009 and reads as follows:

'The decisions of the Complaints Committee of the Judicial Service Commission (the Commission) are the following;

1 The Commission decided, following the ruling of the South Gauteng High Court, that that the complaints to be considered *de novo*.

2 The Commission decided, in terms of Rule 3.1 of the Rules Governing Complaints and Enquiries, that the allegations made in the Complaint and Counter Complaint, if established, would amount to gross misconduct.

3 In terms of Rule 4.1 the Commission appointed a sub-committee consisting of Ngoepe, JP, who will be convenor of the sub-committee, Moerane, SC, and Semenya, SC.

3.1 The sub-committee will investigate the complaints by conducting interviews behind closed doors, with Langa CJ, Moseneke DCJ, Hlophe JP, Nkabinde J and Jafta JA.

4 As to its Terms of Reference, the sub-committee will consider the notices that were previously sent to the parties involved and from those documents consider the issues to be investigated.

5 The sub-committee will proceed with its investigation as from the week of 27 July 2009 and will report back to the Commission on Saturday 15 August 2009.

6 The sub-committee will make available to the rest of the members of the Commission a record of the proceedings as well as their report for consideration before 15 August 2009.'

[7] In July 2008 the JSC effectively determined that there was a prima facie case of incapacity, incompetence or misconduct against the Judge President. On 14 July 2008 the JSC issued an invitation to interested parties to make written submissions as to whether the proposed hearing into the complaints made against the Judge President should not be public and, if so, what media coverage should be permitted. No hearings took place in 2008 and the hearing was set down for 1 to 8 April 2009. On 28 March 2009, after asking the etv applicants whether they wished to make further submissions, the JSC decided that the hearing would not be open to the public or the media. However, on 31 March 2009 Willis J set aside the decision (the 'Willis decision') and ordered inter alia that

'(ii) The hearing is to be open to the public and the media;

(ii) The ... chairperson ... is to permit the applicants to set up such equipment as is necessary to in order to obtain a sound recording of the hearing for the purposes of broadcasting such hearing in the form of live or delayed broadcasts, and broadcasts on news and/or current affairs programmes;

(iii) The ... chairperson ... shall retain his ordinary powers to make appropriate rulings in the hearing upon good cause shown to him.'

[8] The hearing took place at the beginning of April 2009. Oral evidence was given by five Constitutional Court Justices. The media and public were present and sound recordings were made and broadcast to the public.

[9] In May 2009 the Judge President launched a review application in relation to the hearing before the JSC. The majority of the court in its judgment of 1 June 2009 (the 'Tsoka judgment') found that

'there is no basis upon which this Court could find that the proceedings of 5 July 2008 to 1 March 2009 are unlawful'

but that

'the proceedings of the JSC of both 7 and 8 April are unreasonable and unlawful [and] ought to be set aside'.

The following order was 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.'

[10] On 8 July 2009 the JSC resolved not to appeal the Tsoka decision and to commence the hearing de novo. On 21 July 2009 the JSC was reported to have decided on a closed inquiry into the complaints and would conduct a preliminary investigation rather than a formal open hearing. On 22 July 2009, however, it was reported that the JSC had cancelled its closed preliminary investigation (see para 33 of the founding papers in the Mail and Guardian application). On 23 July 2009 it was announced that the decision cited above had been taken. This led to the present applications.

[11] The applicants seek to set aside the decision of the JSC on both constitutional and administrative law grounds under PAJA. It was argued that it was procedurally unfair because neither the public nor the media was invited to make representations to the JSC but also in view of the decision of Willis J, referred to above, that the hearing (albeit it not the preliminary investigation) had to be open to the public and the media. Secondly, it was submitted that the decision violated the Constitution or failed to afford sufficient weight to the relevant constitutional considerations. Thirdly, it was submitted that the decision disregarded considerations in favour of allowing media access and broadcasting of the preliminary investigation. It was not possible within the time available to me to do justice to all the arguments presented.

[12] On behalf of both the applicants in the Mail and Guardian application and CALS it was submitted that the JSC was *functus officio* in respect of and bound by its decision of 5 July 2008 to convene a formal enquiry into the complaint of the Justices and the counter-complaint of the Judge President. In the alternative it was submitted that the decision to convene the preliminary investigation was nonetheless

invalid on account of procedural unfairness as against the Justices and the Judge President. In particular it was submitted that a decision in favour of a person may not be revoked or amended subsequently by the authority that made the decision unless the authority is empowered to do so (Baxter *Administrative Law* (1984) 372 ff). The decision of 5 July 2008, it was submitted, was never lawfully withdrawn. It was submitted that the procedural unfairness to the Justices and the Judge President consisted therein that the decisions of 8 June 2009 and 22 July 2009 were taken without affording the Justices, the Judge President and the two sets of applicants any hearing. Nor were they afforded any opportunity to make representations before the decisions were taken.

[13] The deponent to the answering affidavit of the JSC justifies the decision taken by the JSC and traces the history of the hearings and litigation concerning this matter. The point of departure is the decision of the South Gauteng High Court to order the JSC to commence with the hearing *de novo*. The JSC resolved on 8 June 2009 not to lodge an appeal against this decision and to commence with the hearing *de novo*. My interpretation of the judgment, however, is that only the commencement of the 'proceedings' ie the proceedings of 7 and 8 April 2009 was ordered to commence *de novo* and not the entire proceedings from inception. It was further stated in the answering papers of the JSC that the composition of the JSC had changed through the appointment of new members with no or little knowledge of the facts and circumstances of this case. It was thus decided to commence with the hearing *de novo*. In addition, it was stated that the previous decision to commence with the hearing was challenged by the Judge President on the basis of whether a preliminary investigation in terms of Rule 4.1 of the Rules of the JSC had preceded the decision to commence with the hearing. Apparently, on 20 July 2009 the new

Complaints Committee met for the first time and resolved to commence with the hearing *de novo*. On 22 July 2009 the JSC considered the matter afresh and resolved to proceed with it in terms of Rule 4.1.

[14] I am not convinced that the JSC was *functus officio* when it took the decisions objected to. In terms of s 178(6) of the Constitution it has the power to 'determine its own procedure, but decisions of the Commission must be supported by a majority of members'. It is implicit in this provision that the JSC may vary earlier decisions on the procedure to be followed provided only that its decision is supported by the majority of members. The very nature of the disciplinary process may indeed require different decisions from time to time concerning the procedures to be followed. It does not follow, however, that because no final decision has been reached as to the complaint and counter-complaint that the JSC may disregard rules of procedural fairness in varying or amending earlier decisions (see *Earth Life Africa (Cape Town v Director-General: Department of Environmental Affairs & Tourism* 2005(3) SA 156 (C) para 64).

[15] The decisions of the JSC appear to be 'administrative action' and falls to be reviewed under the Promotion of Administrative Justice Act. They are 'decisions' of an 'administrative nature' and which adversely affect the rights of the applicants. I need not say more about their standing to lodge this application. However, if my conclusion is incorrect a case for constitutional review has been made out. The JSC Rules provides for a procedure in three stages for the adjudication of complaints alleging incapacity, gross incompetence or gross misconduct. The first stage is dealt with in Rule 3 and requires the JSC to determine 'whether prima facie the conduct complained of would, if established, amount to such incapacity, incompetence or misconduct as may justify removal of the Judge in terms of section 177(1) of the

Constitution.' This determination was made by the JSC on 5 July 2008 as is confirmed by the affidavit of Mpati J in earlier proceedings which was annexed to the Mail and Guardian application (see paras 38, 39 41 and 42 at 267-8 and para 45 at 270 and para 9.3 at 350 of the first and second respondents' answering affidavit). In addition, in the application proceedings before Tsoka, Maluleke and Willis JJ only the proceedings of 7 and 8 April 2009 were set aside and not also those proceedings preceding them. Where a preliminary investigation is appointed it may hear evidence and report to the JSC regarding the further conduct of the matter in which case the JSC must resolve whether to accept the recommendations of the sub-committee (Rule 4.3). Rule 4.3 is silent on the question whether a preliminary investigation should be open to the public and it follows that a discretion is given to the JSC. The final stage of the process is set out in Rule 5 which provides for a formal enquiry into the complaint. Rule 5.6 provides that the 'JSC shall be entitled to permit the media and public, subject to such restrictions as may be considered appropriate, to attend an enquiry unless good cause is shown for their exclusion.' The JSC commenced a formal enquiry on 1 April 2009 but, as I have said, the proceedings of 7 and 8 April 2009 were set aside.

[16] The Justices pointedly made the remark in their letter of 28 July 2009 that they did not object to the proposed procedure but added that 'this was because they were unaware that any decision was being contemplated by the JSC and were not heard on the issue'. They nevertheless abide the decision of this court and have not taken part in these proceedings except to this limited extent. I am not altogether certain that they or the Judge President are entitled to determine the nature of the enquiry or hearing (in other words 'the procedure') being complainants or interests they have that deserve consideration in this respect. As far as the Judge President is

concerned, I have already referred to his statement that he abides the decision and expressed his willingness to appear before the JSC. My decision will be made on other grounds.

[17] The media's right of access to the formal enquiry was emphasised by the judgement of Willis J. I need not dwell on the considerations referred to by him. They are not really disputed. The public and the media attended the hearings of 1, 4, 7 and 8 April 2009. The judgment of Tsoka J did not affect any of the rights enjoyed by the media or the public in any resumed hearing. Nor would the decision of the JSC of 8 June 2009 to commence the formal enquiry de novo affect those rights. At the risk of labouring the point reference may perhaps be made to *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 532 (CC):

'[27] Ultimately, however, what is central to the issue is not the responsibility and rights of the SABC as a broadcaster. What is at stake is the right of the public to be informed and educated ...

[28] The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to a democracy. ... A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.

[29] This case, then, is not essentially about the rights of the SABC. Rather it concerns the right of South Africans to know and understand the manner in which one of the three arms of government functions, namely, the Judiciary. This is a strong constitutional consideration. The right of the people to be informed of judicial processes presupposes that courts are open and accessible. The fact that courts do their work in the public eye is a key mechanism for ensuring their accountability.'

[18] It was argued on behalf of the JSC that their decision could be justified with reference to the new members that joined the committee; by the powers they have to vary earlier decisions and by the provisions of s 178(6) enabling them to regulate their own procedures. As I have said, I think they do have the power to embark on a new preliminary hearing: this power seems to be necessarily implied. It could well be that an administrative decisions stands until set aside but the JSC has the power to regulate its own conduct and can vary or change decisions made. This, it seems, they have done by implication. However, this power does not absolve them from acting in accordance with the Constitution (*President of the RSA v SARFU and Others* 1999 (10) BCLR 1059 (CC) para 148).

[19] I am not sure that the decision to commence a preliminary investigation is in breach of Willis J's order. However, this is not the end of the matter. Our constitutional scheme embraces a preference for openness in the conduct of public affairs (cf ss 195(1)(g), 34, 41(1)(c), 59(1)(b), 52, 182(5), 188(3) of the Constitution). Moreover, the public is entitled to know how the judiciary functions and that it functions consistently with the principles of independence, fairness and impartiality. The media is the watchdog of society keeping the public informed of matters of public interest to enable them to make informed choices about government and democracy. See the remarks on freedom of the press and s 16 of the Constitution in *Dotcom Trading 121 t/a Live Africa Network News v King NO* 2000(4) SA 973 (C) paras 59 ff; *SABC and Others v Public Protector and Others* 2002 (4) BCLR 340 (T) 347 ff. Any limitation on the right of the media must be in accordance with s 36 and proportional to the purposes which the limitation seeks. Organs of state exercising discretionary powers are required to do so with appreciation of the impact of their decisions on the constitutional rights of those affected. No such appreciation is

apparent from the answering affidavit of the JSC (see the discussion in *Dotcom's* case *supra*).

[20] The Judge President referred to foreign literature and jurisprudence on the need for caution and confidentiality during any preliminary investigation into a judge's conduct. I accept the need for such caution and confidentiality during the early period of any investigation. Confidentiality would encourage the filing of complaints but also protect judges from unwarranted and vexatious complaints and maintain confidence in the judiciary by avoiding premature announcements of groundless complaints. Moreover, it would facilitate the work of the disciplinary authority by giving it flexibility to accomplish its functions through voluntary retirement or resignation (see the Judge President's answering affidavit at page 375 para 15). Confidentiality is required to protect a judge from frivolous and unfounded complaints; to allow a judge to recognise and correct his or her own mistakes; to resolve the complaint prior to formal proceedings and to protect the privacy of the judge.

[21] However, none of these considerations apply in this matter. This case has long progressed beyond the stage of a preliminary investigation. The JSC according to its own papers has already determined that there is a prima facie case of incompetence, incapacity or misconduct. The identity of the judge involved is known as are the names of the complainants. Some of them have already testified in open public hearings. An order made by Willis J ensured the openness of the hearings and access to the media and the public to them. The details of the complaint and counter-complaint are in the public domain: not only in the media but also in the form of affidavits in the various court proceedings. The complaints are not frivolous and have indeed been made by the Justices of the Constitutional Court. The public deserves access to the further proceedings.

[22] The reasons advanced by the JSC do not justify the closed nature of the proposed proceedings. Any benefit that may or might have been be gained by a hearing 'outside the intrusive glare of publicity' will be discounted by negative perceptions of the judiciary and the administration of justice in general. This matter has attracted immense public interest and has been the subject of a debate in the media. There is every need to ensure the public's continued access to the issues.

[23] The JSC has also referred to various aspects of the preliminary investigation such as the fact that no oath will be administered, only legal representatives of the parties would be allowed, and that no findings of fact will be made. These considerations, it was submitted, justified the closed nature of the investigation. To my mind, this does not justify the exclusion of the media and the public. Nor do I think does the contention that the closed nature of the investigation will allow the parties to speak 'freely without the pressures of a witness in a public hearing'. This objection loses sight of the fact that some of the Justices have already testified in an open hearing. There is no suggestion, and there can be none, that the Justices or the Judge President will be intimidated and not speak 'freely'. Finally, neither the Justices nor the Judge President oppose the relief sought. I fail to see how the purpose and objective of the preliminary investigation would be defeated by an open investigation.

[24] The answering papers hardly contain any justification for the decision to hold the investigation confidential. Nor is there any suggested justification for limiting the rights of the media under s 16(1) of the Constitution (cf *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 15 ff; *Dotcom Trading v King and Others* 2000 (4) SA 973 (C) paras 47 ff). There is hardly a suggestion that the JSC took freedom

of expression and the media into account at all in coming to their decisions (cf *SABC & Others v Public Protector & Others* 2002 (4) BCLR 340 (T) 353).

[25] In these circumstances, I am entitled, whether under s 8(1)(c)(ii)(aa) PAJA or otherwise to substitute my own decision for that of the JSC. See *Commissioner Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA) paras 14-5). The result appears to be a foregone conclusion and there is a need that matters be expedited.

[26] An order is made:

(a) Reviewing and setting aside and substituting the first respondent's decision taken on 22 July 2009 that the preliminary hearing/investigation of the complaint of the Justices of the Constitutional Court and the counter-complaint of the Judge President will not be open to the public or the media;

(b) Directing the first respondent to:

(i) permit representatives from the media to attend the preliminary hearing/investigation; and

(ii) permit the applicants in both applications to set up such equipment as is necessary in order to obtain a sound recording of the preliminary hearing/investigation for the purposes of broadcasting it in the form of live or delayed broadcasts, and broadcasts on news and /or current affairs programmes.

(c) Directing the first respondent to pay the costs of the applicants in both applications.

Malan J

Judge of the High Court