REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE_____ _____
SIGNATURE

CASE NO: 13/39093

In the matter between:

BAAITSE ELIZABETH NKABINDE	First Applicant
CHRISTOPHER NYAOLE JAFTA	Second Applicant

And

THE JUDICIAL SERVICE COMMISSION	First Respondent
PRESIDENT OF THE JUDICAL CONDUCT TRIBUNAL	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
XOLISILE KHANYILE N.O	Fourth Respondent

JUDGMENT

H MAYAT J

INTRODUCTION

[1] The unprecedented events giving rise to the present application before the full bench of this court have their roots in four related cases, which were heard by the Constitutional Court during March 2008, more than six years ago. These four cases, which involved companies named Thint (Pty) Limited and Thint Holdings (South Africa) (Pty) Ltd as well as Mr J.G. Zuma, are conveniently referred to in this judgment as "the Zuma/Thint cases". Both the first applicant, Justice Nkabinde, as well as the second applicant, Justice Jafta, (who was an Acting Judge of the Constitutional Court at the time) heard argument in the Zuma/Thint cases as part of the Constitutional Court hearing these cases at the time.

[2] After judgment in the Zuma/Thint cases was reserved, Judge President Hlophe of the Western Cape High Court separately communicated with each of the applicants in their respective chambers at the Constitutional Court. As set out more fully in this judgment, the separate communications between Hlophe JP and the applicants were the subject matter of a joint complaint by Judges of the Constitutional Court (including the Chief Justice and the Deputy Chief Justice) to the first respondent, the Judicial Service Commission ("the Commission") in May and June 2008.

[3] The joint complaint submitted to the Commission in 2008 resulted in various proceedings initiated by the Commission as well as a number of court skirmishes in the High Court and the Supreme Court of Appeal ("the SCA"). These proceedings and court skirmishes culminated in a Judicial Conduct Tribunal, established by the Commission, with retired Judge Labuschagne as Tribunal President. The said Tribunal, which commenced proceedings in October 2013, is referred to in this judgment as "the Labuschagne Tribunal".

[4] The present application for review was instituted in October 2013. In terms of the amended notice of motion (dated the 17th of March 2014), the applicants seek to review and set aside two decisions taken by the Commission on the 18th of April 2012 and on the 17th of October 2012.

[5] The applicants further seek a declaratory order to the effect that section 24(1) of the Judicial Service Commission Act 9 of 1994 as amended, is unconstitutional and accordingly invalid. It may be mentioned in this respect that the said Act was amended by the Judicial Service Commission Amendment Act 20 of 2008. The latter Act introduced certain amendments, including section 24(1), referred to above. These amendments were assented to on the 22nd of October 2008, but only subsequently came into force on the 1st of June 2010. The previous Act, prior to the amendments effected from the 1st of June 2010, is conveniently referred to in this judgment as the "JSC Act" and the amended JSC Act, which came into force on the 1st of June 2010, is conveniently referred to in this judgment as the "Amended JSC Act".

[6] The declaratory relief sought by the applicants in relation to section 24(1) of the Amended JSC Act is premised primarily upon an averment that it is unconstitutional for a Tribunal (such as the Labuschange Tribunal) established in terms of the Amended JSC Act to appoint a member of the National Prosecuting Authority ("NPA"), after consulting the third respondent, the Minister of Justice and Constitutional Development ("The Minister") as well as the National Director of Public Prosecutions ("NDPP"), for the purpose of collecting evidence on behalf of the said Tribunal, as envisaged in section 24(1).

[7] The application to review the two decisions of the Commission taken in April 2012 and October 2012 is opposed by the Commission. The further application relating to the constitutional validity of section 24(1) of the Amended JSC Act is opposed by the Commission as well as the Minister.

[8] It may be mentioned that the time limits specified in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 relating to review

proceedings were not in issue before us. The court accordingly condoned the late institution of review proceedings by the applicants to the extent that it was necessary to do so.

RELEVANT FACTUAL MATRIX

[9] The chain of events giving rise to the present application appear largely common cause on the papers, which incorporate all relevant statements and documents referred to in the affidavits as well as a record of previous proceedings in this matter before the Commission. The said record, which was compiled by the Commission for the purposes of the present review application, included proceedings before the Labuschagne Tribunal.

[10] It appears from the papers on record that after judgment in the Zuma/Thint cases was reserved in March 2008, Hlophe JP visited the chambers of Jafta AJ (as he then was) at the Constitutional Court towards the end of March 2008, without invitation. [1]During the course of such visit, Hlophe JP raised for discussion (again without invitation) with Jafta AJ, the Zuma/Thint cases. Hlophe JP then conveyed to Jafta AJ inter alia that the SCA had made a wrong finding in this context and that he (Jafta AJ) was "sesithembele kinina" (roughly translated to mean "you are our last hope"). [2]

[11] Jafta AJ subsequently reported to the Chief Justice and the Deputy Chief Justice that he had known Hlophe JP for many years as a colleague and a friend and that in this capacity, he was not inclined to breach the confidence of all the communications to him by Hlophe JP at the time. Be that as it may, whilst Jafta AJ indicated that he did not wish to divulge the

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[1] Hlophe JP is of course not a party to the present proceedings. However, without making a finding on the probabilities in this matter, the record in this matter includes a statement signed by Hlophe JP on the 30th of June 2008 under the heading "John Hlope's response to the statement of the Chief Justice Langa filed on behalf of the Constitutional Court Judges" in which he admits the meetings with both the applicants on the dates reported by the applicants. He also does not deny the reported discussions between him and the applicants in such statement. Thus, for example, in paragraph 23 of his statement Hlophe JP admits he visited Justice Jafta at his chambers in the Constitutional Court in March 2008 for approximately 1 hour 30 minutes. He also admits in paragraphs 23.4 and 23.5 of his statement that they discussed the Zuma/Thint cases as well as the issue of privilege and fair trial and a number of other topics as friends.

[2] In para 23.5 of his statement, *supra* fn 1, Hlophe JP admits he said "sesithembele kinana" but states this expression was not intended to convey a positive finding in the Zuma/Thint cases.

confidential part of the communications between him and Hlophe JP at the time, he nevertheless confirmed in general terms the reports, which were subsequently made by Nkabinde J to the former Chief Justice Langa (now deceased) after May 2008. Therefore, as already indicated, Jafta AJ subsequently confirmed that Hlophe JP had conveyed to him at the end of March 2008 words to the effect that he (Jafta AJ) was the last hope.

[12] It is also not in dispute on the papers that a few weeks later, on the 23rd of April 2008, Hlophe JP telephoned Nkabinde J requesting to see her in her chambers in the Constitutional Court on Friday, the 25th of April 2008 by indicating to her that he had a "mandate" to act. She acceded to his request to meet and Hlophe JP subsequently visited her on the 25th of April 2008, as agreed. Nkabinde J, who is a friend of Jafta J, subsequently informed him that she had agreed to meet Hlophe JP, whereupon Jafta AJ warned her by way of response, to be careful as Hlophe JP might wish to discuss the Zuma/Thint cases.

[13] It is not in dispute on the papers that Hlophe JP raised certain matters pertaining to privilege with Nkabinde J during the course of his discussion with her on the 25th of April 2008, in relation to the Zuma/Thint cases. Nkabinde J rebuffed the matters raised by Hlophe JP as "hogwash" and she stated that she reprimanded him for raising these matters with her. She also stated that she made it clear to Hlophe JP at the time that he was not entitled to discuss the Zuma/Thint cases with her. She accordingly conveyed to him that he should not interfere with the workings of the Constitutional Court. Nkabinde J subsequently stated that her discussion with Hlophe JP at the time did not influence her.

[14] Even though Nkabinde J was initially unwilling to furnish a written statement regarding her discussion with Hlophe JP, she subsequently reported her communications with Hlophe JP to the Chief Justice and the Deputy Chief Justice. She stated in this respect that she had wrestled in her mind the communications made to her and Jafta AJ, and she eventually decided to approach Mokgoro J for advice in early May 2008. Both the

applicants then provided an account of their respective discussions with Hlophe JP to Langa CJ and Moseneke DCJ.

[15] Against this background, the Judges of the Constitutional Court (including Jafta AJ and Kroon AJ) lodged a joint complaint from the "JUDGES OF THE CONSTITUTIONAL COURT" dated the 30th of May 2008 stating inter alia in this respect that:

> "8 Any attempt to influence this or any other Court outside proper court proceedings therefore not only violates the specific provisions of the Constitution regarding the role and function of courts, but also threatens the administration of justice in our country and indeed the democratic nature of the state. Public confidence in the integrity of courts is of crucial importance for our constitutional democracy and may not be jeopardised."
>
> 9 This Court – and indeed all courts in our country – will not yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality. Judges and other judicial officers will continue – to the very best of their ability – to adjudicate all matters before them in accordance with the oath or solemn affirmation they took, guided only by the Constitution and the law."

[16] On the 2nd of June 2008, the Commission requested further details of the above complaint and on the 6th of June 2008, the Commission issued a media statement in which it was stated inter alia that it would meet on the 5th of July 2008 to consider whether there was a *prima facie* case of gross misconduct against Hlophe JP, as envisaged in section 177(1)(a) of the Constitution. Thereafter, Howie JA, in his capacity as Acting Chairperson of the Commission, requested a statement from each of the complainant judges in a letter to Langa CJ dated the 6th of June 2008. In a further letter dated the 12th of June 2008, Howie JA also requested Langa CJ to set out the complaint against Hlophe JP with more particularity.

[17] The applicants state that when the letter dated the 6th of June 2008 was brought to their attention, they both sent a joint statement to the Commission dated the 8th of June 2008 stating at the time as follows:

> "For the record we wish to state that we have not lodged a complaint and do not intend to lodge one and consequently, we are not Complainant Judges."

[18] Some five days later, by way of a response to the above letter from the Commission dated the 12th of June 2008, pursuant to at least two meetings of Constitutional Court Judges, the Chief Justice informed the Commission in a letter dated the 17th of June 2008 as follows:

> "In response to your letter of 12 June 2008, I can now inform you as follows: on 16 June the Judges of the Constitutional Court, including Nkabinde J and Jafta AJ met. Their response is:
>
> 1. The judges do pursue their complaints against Hlophe JP that was lodged on 30 May 2008;
> 2. We attach a set of statements in support of the complaint. The main consolidated statement on behalf of the judges is made by me. Statements confirming the correctness of my statement insofar as it relates to them are furnished by Moseneke DCJ, Jafta AJ, Mokgoro J, Nkabinde J and O'Regan J. If the Commission requires confirming statements by other judges, they will be furnished."

[19] Langa CJ states in paragraph 1 of his main statement, which is described in the heading as "The Statement in Support of Complaint to the Judicial Service Commission by Judges of the Constitutional Court made on 30 May 2008", and which forms part of the founding papers that:

> "I am the Chief Justice of South Africa. This statement is made in my capacity as Chief Justice and Head of the Constitutional Court. This is a consolidated statement made on behalf of all the Judges of the court containing key information relevant to the complaint. My colleagues Moseneke DCJ, Jafta AJ, Mokgoro J, Nkabinde J and O'Regan J have made confirming statements insofar as the contents of this statement relates to them. The other Judges of the court are willing to make confirmatory statements as well should the Commission so require."

[20] As indicated in his covering letter, dated the 17th of June 2008, Langa CJ reiterated in paragraph 3 of his statement:

> "At the outset, I confirm that the complaint having been collectively lodged by the judges of the Court is being pursued by them. Those judges are myself, Moseneke DCJ, Jafta AJ, Kroon AJ; (Jafta AJ and Kroon AJ were appointed to act as judges of the Constitutional Court for the period 15 February 2008 till 31 May 2008); Madala J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J; (O'Regan J acted as ADCJ for the period 15 February to 31 May 2008 and is sometimes referred to as O'Regan ADCJ in this statement); Skweyiya J, van der Westhuizen J and Yacoob J. The basis of that complaint is set out in this statement, and confirmed in the attached statements by Moseneke DCJ, Jafta AJ, Mokgoro J, Nkabinde J and O'Regan J. The judges do not presume to advise the JSC as to the manner in which the complaint should be investigated, including the manner in which it should receive evidence. Should the JSC so require, judges who have not made confirmatory statements are willing to furnish them."

[21] The statement by Langa CJ was followed by "confirming statements" by the relevant Judges. It appeared from each "confirming statement" that the Judge concerned had read the statement of Langa CJ and had confirmed its

contents as being true and correct insofar as the said main statement related to the Judge concerned. The applicants also gave confirming statements at the time to support the joint complaint.

[22] The reasons for the complaint by the Judges of the Constitutional Court are reflected in paragraphs 53 and 54 of the statement submitted to the Commission are inter alia as follows:

> "The attempt to influence Nkabinde J and Jafta AJ in the manner described above –
>
> (a) was calculated to have an impact not only on the individual decisions of the judges concerned but on the capacity of the Constitutional Court as a whole to adjudicate in a manner that ensures its independence, impartiality, accessibility and effectiveness as required by Section 165(5) of the Constitution;
>
> (b) constituted a breach of Section 165(3) of the Constitution which prohibits any person or organ of state from interfering with the functioning of the courts."

[23] Langa CJ further indicated in paragraph 49 of his statement that after the initial communication to the Commission from the Constitutional Court Judges, counsel for the applicants proposed that the following further detail be included in the joint statement of the Constitutional Court in the context of the discussion between Hlophe JP and Nkabinde J:

> "In the course of that conversation, Hlophe JP said he wanted to talk about the question of "privilege", which in his words formed the gravamen of the National Prosecution Authority's case against Mr J.G. Zuma. He further said the manner in which the case was to be decided was very important as there was no case against Mr Zuma without the "privileged" information and that Mr Zuma was being persecuted just like he (Hlophe JP) had also been".

[24] Langa CJ also stated in paragraph 9(c) of the joint complaint submitted that during the course of the conversation between Hlophe JP and Jafta AJ towards the end of March 2008:

> "Hlophe JP sought improperly to persuade Jafta AJ to decide the Zuma/Thint cases in a manner favourable to MR J.G. Zuma."

He further stated in paragraph 10(c) that during the course of the conversation between Hlophe JP and Nkabinde J in April 2008:

> "Hlophe JP sought improperly to persuade Nkabinde J to decide the Zuma/Thint cases in a manner favourable to Mr J.G. Zuma."

[25] On the 30th of June 2008, Hlophe JP responded to the complaint against him and lodged a counter-complaint against Judges of the Constitutional Court on the basis of the publication of a media statement by the Constitutional Court Judges. To the extent that it is relevant in this context, the said counter-complaint has since been withdrawn and is not pertinent to the present application.

[26] Against this background, it is not in dispute on the papers that the complaint in this matter was validly lodged by the Justices of the Constitutional Court in terms of the rules of the Commission, which prevailed in 2008. The said rules are referred to in this judgment as "the Old Rules." It is also not in dispute on the papers that the said complaint was not submitted in the form of an affidavit or affirmation, as contemplated in section 14(3) of the Amended JSC Act. It is further not in dispute on the papers that no provision is made in the Old Rules for the appointment of a Tribunal, such as the Labuschagne Tribunal. Instead, the Old Rules provide for the appointment of a sub-committee consisting of members of the Commission to fulfill the same investigatory function as that of a Tribunal under the Amended JSC Act.

[27] As already indicated, to the extent that it is relevant in this context, it appears from the papers that Hlophe JP admitted that he had discussed the Zuma/Thint cases with the applicants on separate occasions. He also stated in relation to his discussion with Jafta AJ that he had conveyed to Jafta AJ with respect to the Zuma/Thint cases that it was a "very important" matter and that the issue of privilege was "a very concerning one", which had to be dealt with "properly". [3]

[28] The Commission, chaired by Howie JA, then met on the 5th of July 2008 and the central issue at that meeting, apart from the recusal of certain members, was whether a *prima facie* case of misconduct had been made out against Hlophe JP. After the said meeting, the Commission released a media statement in which it stated that:

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[3] See fn 1, *supra*

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

[29] In due course, the hearing of oral evidence took place between the 1st to the 8th of April 2009. Six Constitutional Court Judges testified **under oath** before the Commission namely, Langa CJ, Moseneke DCJ, Mokgoro J, O'Regan J as well as the two applicants. Each of the said six Judges, confirmed in their testimony that they were complainants in the joint complaint submitted on the 17th of June 2008. Thus, for example, the transcript relating to the testimony of Moseneke DCJ, which forms part of the record of the Commission in the present application, reflects as follows:

[Chairperson]:	Deputy Chief Justice is it correct on the 17th of June you deposed a confirmatory affidavit…oh, a statement, not an affidavit, but a statement…a confirmatory statement that the contents of the statement that was signed by the Chief Justice on that day is correct?
[Moseneke DCJ]:	That is correct, President.
[Chairperson]:	And also in a further statement that the Chief Justice signed in response to the complaint by the Judge President of the Cape against the Judges of the Constitutional Court. Do you remember if you signed a confirmatory statement in response to that statement?
[Moseneke DCJ]:	Yes, I did. It was part of the main statement of the 17th of June."

Similarly, the other Justices testified **under oath** confirming that the statement submitted by Langa CJ on the 17th of June 2008 was correct. The evidence of none of the Judges of the Constitutional Court at the time was tested by cross-examination.

[30] The Commission initially decided to hold a formal enquiry into the complaint in this matter in terms of the Old Rules, but reversed its decision to do so on the 20th to the 22nd of July 2009 and held a preliminary enquiry instead. A sub-committee appointed by the Commission then conducted interviews on the 30th of July 2009 and the former Chief Justice, the Deputy Chief Justice as well the two applicants were all interviewed by the sub-

committee. In essence, all the Constitutional Court Judges interviewed confirmed the evidence, which they had already given to the Commission. The enquiry was adjourned to the 15th of August 2009 and the appointed sub-committee reconvened on the 15th of August 2009, when it was decided on the basis of the interviews conducted 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;
>
> - The evidence in support of the counter-application did not support a finding of the Constitutional Court Justices were guilty of gross misconduct and that the matter was accordingly finalised; and
>
> - None of the judges against whom complaints were lodged was guilty of gross misconduct."

[31] As already indicated, the complaint in this matter has been the subject matter of much litigation, including an application instituted by Hlophe JP in the South Gauteng High Court to set aside the entire proceedings of the Commission as well as two review applications instituted against the Commission on different grounds in the High Court by Freedom Under Law and the Premier of the Western Cape (as part of the Democratic Alliance). Both applications for review were successful before the SCA for different reasons. The two judgments in this respect are reported as *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* 2011 (3) SA 549 (SCA) ("the Freedom Under Law case") and *Acting Chairperson: Judicial Service Commission v Premier of the Western Cape Province* 2011(3) SA 538 (SCA).

[32] In an application for an interdict relating to a media statement instituted by Hlophe JP, Langa CJ deposed to an answering affidavit on behalf of all the Judges, who had lodged the joint complaint against Hlophe JP. Langa CJ stated in this respect in his answering affidavit that the complaint in this matter was made in accordance with the rules governing complaints in terms of section 177(1)(a) of the Constitution as well as the rules accepted by the Commission.

[33] The Chief Justice and the other Constitutional Court Judges did not participate in the proceedings in the Cape High Court as the relief sought in that case was directed towards the Commission itself inter alia on the basis of the non-participation of the Premier of the Western Cape in the proceedings of the Commission in terms of the Constitution.

[34] In the judgment relating to the case of Freedom Under Law, which was handed down by the SCA in March 2011, the SCA reviewed and set aside the Commission's decision to finalise the complaint on the 15th of August 2009 on the basis that Hlophe JP was not guilty of misconduct, as irrational. The SCA concluded in this respect as follows:

> "Any attempt by an outsider to improperly influence a pending judgment of a court constitutes a threat to the independence, impartiality, dignity and effectiveness of that court. In the present case the allegation is that Hlophe JP attempted to improperly influence the Constitutional Court's pending judgment in one or more cases. The JSC had already, when it decided to conduct the interview with the judges, decided that, if Hlophe JP had indeed attempted to do so, he would have made himself guilty of gross misconduct which, *prima facie,* may justify his removal from office. Moreover, it based its decision dismissing the complaint on an acceptance that Hlophe JP probably said what he is alleged to have said. In these circumstances, the decision by the JSC to dismiss the complaint, on the basis of a procedure inappropriate for the final determination of the complaint, and on the basis that cross-examination would not take the matter further, constituted an abdication of its constitutional duty to investigate the complaint properly. This dismissal of the complaint was therefore unlawful." [4]

[35] It may be mentioned by way of background that in the notice of motion, in the court *a quo*, the appellants in the SCA had also requested an order to set aside the decision of the Commission at its meeting on the 20th to the 22nd of July 2009 (to reverse its earlier decision to hold a formal enquiry). However, even though the appeal was successful, as indicated above, the SCA did not set aside the Commission's decision in July 2009 and merely set aside the subsequent decision of the Commission taken at its meeting on the 15th of August 2009, referred to above

[36] To the extent that it is relevant in this context, in accordance with the assertion in the joint statement of the Constitutional Court Judges on the 30th of May 2012 relating to public confidence in the integrity of courts being of

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[4] *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* 2011 (3) SA 549 (SCA) ("the Freedom Under Law case") at para 50

crucial importance for our constitutional democracy and not being jeopardised, the SCA also recognised that:

> "The Constitutional Court judges did not act in their own interest and their complaint is not that they have been wronged in their individual capacities. They acted in what they considered to be the public interest."[5]

[37] Pursuant to the decision of the SCA and on the 18th of April 2012, the Commission decided to investigate the complaint against Hlophe JP in terms of new procedures contemplated by the Amended JSC Act. On the basis of this decision, during or about July 2012, the Commission then established a Judicial Conduct Committee ("the Musi JCC") comprising three judges (including Musi JP) to investigate the complaint of the Constitutional Court Judges as well as a further complaint by Freedom Under Law arising from the former complaint. The Musi JCC also considered whether the complaint against Hlophe JP should be referred to a Judicial Conduct Tribunal in terms of the Amended JSC Act.

[38] The parties then made written representations to the Musi JCC and were also afforded an opportunity to make oral submissions on the 6th of August 2012. At that stage, the Constitutional Court Judges indicated that they did not wish to make any oral submissions. Musi JP concluded in his decision on behalf of the JCC relating to the two complaints as follows:

> "I conclude therefore that the application of the procedure of the new Act to the complaints based on gross misconduct will not violate the rule relating to retrospectivity. Subject to one qualification to be dealt with below, all such complaints fall to be handled in terms of the procedures of the new Act irrespective of when they arose. This will be the case even if the complaint may have been lodged before the coming into operation of the new Act as long as it has not been dealt with."[6]

On the 4th of September 2012, the Musi JCC accordingly recommended to the Commission that the complaint lodged by the Judges of the Constitutional Court be investigated by a Tribunal. To the extent that it is relevant in this context, the further complaint by Freedom Under Law at the time, was dismissed by the Musi JCC.

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[5] Freedom Under Law case, *supra,* fn 4, at para 22
[6] para 13 of the decision dated 4th September 2012.

[39] Thereafter, on the 17th of October 2012, the Commission, constituted as prescribed in section 178(5) of the Constitution, resolved in terms of section 19(1) of the Amended JSC Act to request the Chief Justice to appoint a Tribunal in terms of section 21 of the Amended JSC Act.

[40] In due course, on the 28th of January 2013, the present Chief Justice established the Labuschagne Tribunal in terms of section 19(1) of the Amended JSC Act to investigate and report on the complaint lodged in June 2008 by the Justices of the Constitutional Court against Hlophe JP. As already stated, Labuschagne J was appointed as the Tribunal President. The remaining Tribunal Members were Sandi J and Ms Pather as envisaged in section 22(1) of the Amended JSC Act. The stated purpose of the Labuschagne Tribunal in the Terms of Reference published by the Chief Justice on the 4th of March 2013 was "to investigate and report on" the complaint lodged with the Commission on the 30th of May 2008 by the Justices of the Constitutional Court against Hlophe JP. In accordance with the provisions of the Amended JSC Act, it was stated that the Tribunal was to conduct its investigations "amongst others" by "collecting evidence; conducting a formal hearing; making findings of fact; and making a determination on the merits of the allegations."

[41] On the 6th of March 2013, the office of the NDPP proposed the name of the fourth respondent, as a senior member of the NPA and the Director of Prosecutions, Free State, to the Labuschagne Tribunal as "evidence leader", in terms of section 24(1) of the Amended JSC Act.

[42] The applicants indicate in affidavits on record in relation to the establishment of the Labuschagne Tribunal that following the judgment of the SCA in the case of Freedom Under Law on the 31st of March 2011, they expected the Commission to refer the complaint in this matter either back to the Commission itself or to the sub-committee in terms of the Old Rules in order to resolve disputes of fact by way of cross-examination. Instead, Jafta J asserts in his founding affidavit that the Commission adopted a different approach and so changed the "*rules of engagement"* by utilising a new regime

involving a Tribunal, as contemplated in the Amended JSC Act, which came into effect in June 2010, two years after the complaint in this matter had been lodged in 2008.

[43] Jafta J also makes reference in an affidavit deposed by him for the purposes of the present application to the principle of legality, which he asserts is a component of the rule of law and one of the founding values of our Constitution. As such, he emphasises in his founding affidavit that it is a fundamental principle of the rule of law that statutes, which are passed by Parliament generally apply prospectively only, unless a retrospective application is contemplated by the clear terms of the statute itself. Jafta J accordingly contends in the affidavits deposed by him that the Commission incorrectly applied the Amended JSC Act retrospectively, when nothing in the clear terms of the Act itself permitted the Commission to do so.

[44] The Labuschagne Tribunal commenced proceedings in October 2013. Counsel representing the applicants as well as counsel for Hlophe JP jointly raised a number of preliminary objections. The main preliminary objection was that the complaint in this matter does not comply with section 14(3) of the Amended JSC Act by virtue of the fact that the said complaint was not incorporated in an affidavit or affirmation. An ancillary preliminary objection related to the legality of proceedings before the Labuschagne Tribunal.

[45] The Labuschagne Tribunal noted in relation to the preliminary objections raised that even though this matter had a history approximating five years, and the SCA had considered the complaint in this matter on two occasions, the applicants' counsel only saw fit to make submissions premised upon section 14 of the Amended JSC Act for the very first time in a "pre-trial meeting" on the 30th of September 2013, shortly before the commencement of the hearing of the Tribunal. Be that as it may, the Labuschange Tribunal also recognised that the relevant rules at the time the complaint was lodged (in terms of the JSC Act) included rule 2.1 relating to the Commission considering complaints received by it against a Judge and rule 2.2, in terms of which the Commission could require any complaint to be on oath or not. As

such, it appeared that even though the procedures adopted by the Commission after 2012, were defined in terms of the Amended JSC Act, the initial complaint in this matter was lodged in 2008 in terms of the JSC Act.

[46] The Labuschagne Tribunal ultimately dismissed all the preliminary objections by both the applicants and Hlophe JP on the 3rd of October 2013, inter alia on the basis that there was nothing in the Amended JSC Act, which either expressly or impliedly invalidated complaints made before the said Act took effect. Reasons for the dismissal of the preliminary objections were subsequently handed down on the basis of the unanimous findings of the Tribunal President and the two Tribunal Members on the 1st of November 2013. It appears that the present application was instituted shortly after the preliminary objections were dismissed on the 3rd of October 2013, and before the reasons for such dismissal were subsequently handed down. Be that as it may, after referring to certain case authority, [7] the Tribunal found that:

> "[E]ven if a statute is amended with retrospective effect, the rights of the parties to a pending action must be decided in accordance with the law as it was when the action was instituted, unless a contrary intention appears from the statute."[8]

[47] For the reasons stated, the Labuchagne Tribunal also concluded:

> "On a proper consideration of the facts as a whole, considered in the light of all the legal principles set out above and on any one of the tests referred to, we find that the reliance on section 14 of the JSC Act is misplaced and if applicable, there has been compliance with the provisions of that section. To the extent, therefore, that compliance of the Act was a mandatory requirement, the defect in our view has been cured."[9]

[48] Finally, it may also be mentioned by way of factual background that in response to the legal averments relied upon by the applicants pertaining to the unconstitutionality of section 24(1) of the Amended JSC Act, the Minister states inter alia in his answering affidavit that he supported the appointment of prosecutor for the purposes of Tribunals of this nature as a mechanism to ease the workload of Tribunals efficiently in a cost-effective and convenient

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[7] Para 12 of the reasons of the Labuschagne Tribunal dated 1 November 2013 in which reference is also made to the cases of *Woerman and Schutte NNO v Masondo and Others* 2002 (1) SA 811 (SCA) at para 18; *Bell v Voorsitter van die Rasseklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 684 E-F and *Bellairs Hodnett and Another* 1978 (1) SA 1109 (A) at 1148F-G

[8] Para 12

[9] Para 29 of reasons

manner. This is particularly so as the involvement of independent attorneys and advocates will have unnecessary cost implications for Tribunals of this nature.

CONSTITUTIONAL FRAMEWORK

The Commission

[49] The Commission was established in terms of Section 178 of the Constitution.

[50] Section 177 of the Constitution deals with the removal of Judges from office. Section 177(1) of the Constitution provides that a Judge may be removed from office only if the Commission finds that the Judge concerned suffers from "an incapacity, is grossly incompetent or is guilty of gross misconduct", and if the National Assembly calls for the Judge to be removed, by a resolution adopted with the supporting vote of two-thirds of the members. In terms of section 177(2) of the Constitution, the President is then empowered to remove a judge pursuant to the resolution of the National Assembly as envisaged in section 177(1)(b).

[51] In terms of section 178(4) of the Constitution, the Commission has the powers and functions assigned to it in terms of the Constitution and the relevant national legislation. Section 178(6) provides that the Commission

> "may determine its own procedure, but the decisions of the Commission must be supported by a majority of its members."

Judicial Independence and the Separation of Powers

[52] Section 165 of the Constitution guarantees judicial independence. Section 165(2) provides that:

> "The courts are independent and subject only to the Constitution and the law, which they must apply impartially, and without fear, favour or prejudice."

Section 165(3) further provides that:

> "No person or organ of state may interfere with the functioning of the courts."

In addition, Section 165(4) further provides that:

> "Organs of state through legislature and other measures must assist and protect the courts to ensure independence, impartiality, dignity, accessibility, and effectiveness of the courts."

STATUTORY AND REGULATORY FRAMEWORK RELATING TO THE COMMISSION

The Old Rules

[53] The original JSC Act did not deal with the procedure for the lodgment and investigation of complaints against Judges, though section 5 contemplated the publication of procedural rules in the Government Gazette. It is common cause in the present proceedings that even though no rules of procedure were apparently gazetted in terms of section 5 of the previous JSC Act, the procedure previously adopted by the Commission for dealing with complaints against Judges was in accordance with rules issued in this respect under the heading "Rules Governing Complaints and Enquiries in terms of Section 177(1)(a) of the Constitution".

[54] Rule 2.1 of the Old Rules provided as follows:

> "The JSC shall consider any complaint received from any source alleging incapacity, gross incompetence or gross misconduct of a Judge."

Rule 2.2 further provided that:

> "The JSC may require any complaint to be on oath, but shall be entitled to act on any complaint whether on oath or not or in writing or reported to it orally, which it deems of sufficient seriousness to justify investigation or possible action in terms of Section 177 of the Constitution."

The Commission accordingly had a discretion in terms of the Old Rules whether or not to direct that a complaint be made on oath or not. In terms of rule 2.5 of the Old Rules, the Commission was entitled to appoint a sub-committee to deal with complaints in accordance with the procedure set out in the Old Rules.

[55] Rule 4 of the Old Rules governed the preliminary investigation and an informal enquiry pertaining to any complaint received by the Commission. Thus, for example, in terms of rule 4.1 of the Old Rules, the Commission was empowered to appoint a sub-committee consisting of one or more of its members to investigate a complaint and report to the full Commission. In the

event that there was a formal enquiry, the Old Rules provided that the Commission could appoint an attorney and/or counsel to act as a "pro-forma prosecutor" for the task of preparing a charge sheet, leading evidence, cross-examining witnesses and presenting argument.

[56] The Old Rules also envisaged a bifurcated process for the consideration of complaints received by the Commission. There was accordingly provision for a preliminary investigation and an informal enquiry in terms of rule 4 and a formal enquiry in terms of rule 5, if necessary.

[57] Rule 5.2 of the Old Rules provided that any member of the Commission was entitled to ask questions of witnesses and counsel with the consent of the Chairperson of the Commission. Provision was also made inter alia for attendance by the media at the formal enquiry,[10] the right to legal representation for a Judge who is called to attend a formal enquiry[11] and the supplementation of charges against a Judge. [12] Sub-rule 5.4 of the Old Rules provided that:

> "The JSC may appoint an attorney and/or counsel to act as pro-forma prosecutor and to undertake any of all the following tasks: to prepare a charge sheet, to lead evidence, to cross-examine witnesses, to present argument and to do all other things that may be necessary for the JSC in fulfilling its task under Section 177(1)(a) of the Constitution".

Sub-rule 5.12 further provided that any member of the Commission was entitled to ask questions to witnesses, with the consent of the chair of the Commission.

[58] In terms of sub-rule 5.14 of the Old Rules, the Commission was required to make a finding after considering the evidence and arguments in a formal enquiry relating to whether or not the Judge concerned suffers from incapacity, or is grossly incompetent or is guilty of gross misconduct as envisaged in section 177(1)(a) of the Constitution. Sub-rule 5.15 further provided that if the finding was adverse to the Judge concerned, then the

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[10] sub-rule 5.6
[11] sub-rule 5.7
[12] sub-rule 5.8

Speaker of the National Assembly as well as the President must be advised of the Commission's reasons as envisaged in section 177.

The Amended JSC Act

[59] The long title to the Amended JSC Act provides that it seeks:

> "To regulate matters incidental to establishment of the Judicial Service Commission by the Constitution of the Republic of South Africa, 1996; to establish the Judicial Conduct Committee to receive and deal with complaints about judges; to provide for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct which judges must adhere to; to provide for the establishment and maintenance of a register of judges' registrable interests; to provide for procedures for dealing with complaints about judges; to provide for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges; and to provide for matters connected therewith."

[60] The preamble to the Amended JSC Act provides inter alia that:

> "AND SINCE it is necessary to create procedures, structures and mechanisms in terms of which –
> - Complaints against judges could be **lodged** and dealt with appropriately;
> - Allegations that any judge is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct could be **investigated**; and
> - …" (Emphasis added)

[61] As already indicated, with effect from June 2010, the Amended JSC Act now governs the procedure relating to the investigation of and reports in respect of complaints received by the Commission relating to the misconduct of Judges. In terms of section 8 of the Amended JSC Act, an entity called a Judicial Conduct Committee ("JCC") is established to consider complaints received by the Commission.

[62] In terms of the new procedure prescribed in Part III of Chapter 1 of the Amended JSC Act, sections 14 to 18 relate to the "Consideration of complaints by Committee". More specifically, section 14 relates to the lodging of complaints and section 14(3) provides as follows:

> "The complaint must be –
> (a) based on one or more of the grounds referred to in subsection (4); and
> (b) **lodged by means of an affidavit or affirmed statement,** specifying –
> (i) the nature of the complaint; and
> (ii) the facts on which the complaint is based." (Emphasis added)

Once a complaint is lodged as prescribed in terms of section 14(3), section 14(2) provides that the Chairperson of Commission "must" deal with the

complaint in terms of section 15, which relates to "lesser complaints", or section 16, which relates to complaints, which could result in impeachment of the Judge concerned, or section 17, which relates to inquiries into "serious, non-impeachable" complaints by the chairperson or member of the JCC.

[63] Section 14(4)(a) deals with the grounds upon which a Judge may be impeached, namely incapacity, gross incompetence and gross misconduct. As already indicated, section 16 specifically relates to "impeachable complaints", which appear to be as contemplated in section 177 of the Constitution. Section 16(2) makes provision for a complaint to be referred to the JCC. Section 16(4) provides that the JCC must consider whether the complaint, if established, will *prima facie* indicate "gross misconduct", and if so, the JCC "may" recommend to the Commission in terms of section 16(4)(b), that the complaint should be investigated by a Tribunal.

[64] Section 15(2) provides that:

> "A complaint must be dismissed if it –
> (a) does not fall within the parameters of any of the grounds set out in section 14(4);
> (b) **does not comply substantially with the provisions of section 14(3**);
> (c) is solely related to the merits of a judgment or order;
> (d) is frivolous or lacking in substance; or
> (e) is hypothetical." (Emphasis added)

In contrast, section 16 contemplates the appointment of a Tribunal in respect of impeachable complaints, which appears to be comparable to the sub-committee contemplated under rule 4 of the Old Rules. Sections 16(1) and 16(3) in the context of complaints which could result in impeachment, entitles the JCC to convene a meeting and to request such further information from the complainant or any other person as the Commission deems fit.

[65] The Amended JSC Act also envisages referral of the complaint by the Chairman of the JCC in the event that a valid complaint is established. As already stated, in terms of section 16(4), in relation to complaints, which could lead to impeachment, the JCC is to consider whether the complaint against a Judge will, if established, constitute a *prima facie* case of gross misconduct.

The JCC can also consider whether to recommend to the Chief Justice in terms of section 16(4)(a) that a complaint be investigated and reported on by a Tribunal in terms of section 16(4)(b). The Tribunal is comprised of two Judges and one person who is not a judicial officer, as approved by the Chief Justice acting in concurrence with the Minister.

[66] In terms of section 19, the Commission may request the appointment of a Tribunal pursuant to a recommendation of the JCC in terms of section 16(4) relating to complaints which could result in impeachment. Thus, section 19(1) of the Amended JSC Act further provides in this respect as follows:

> "(1) Whenever it appears to the Commission –
> (a) on account of a recommendation of a Committee in terms of Section 16(4)(b) …; or
> (b) on any other grounds, that there are reasonable grounds to suspect that a judge –
> (i) is suffering from an incapacity; or
> (ii) is grossly incompetent;
> (iii) or is guilty of gross misconduct
> as contemplated in Section 177(1)(a) of the Constitution, the Commission must request the Chief Justice to appoint a Tribunal in terms of Section 21".

Sections 22(1) read with 23(1) in Part I of Chapter 3 of the Amended JSC Act further provide that a Tribunal must consist of two judges and a third member who is not a judicial officer.

[67] Section 24(1) of the Amended JSC Act provides that:

> "The President of a Tribunal may, after consulting the Minister and the National Director of Public Prosecutions, appoint a member of the National Prosecuting Authority to collect evidence on behalf of the Tribunal and to adduce evidence at a hearing."

[68] The objects of a Tribunal as set out in section 26(1)(a) are to enquire into allegations against a Judge by collecting evidence, conducting a formal hearing, making findings of fact and a determination of the merits of the allegations, and thereafter submitting a report to the Commission, containing its findings.

[69] In terms of section 26(2) of the Amended JSC Act:

> "A Tribunal conducts its enquiry in an inquisitorial manner and there is no onus on any person to prove or disprove any fact before a Tribunal."

LEGAL ISSUES

[70] Against this background, the main legal issue in this application relates to whether the decisions taken by the Commission in April 2012 and October 2012 should be set aside by this court on review, on the basis that such decisions constitute an impermissible retrospective application of the provisions of the Amended JSC Act. If the said main issue is determined against the applicants, the applicants also make submissions in the alternative relating to the validity of the complaint in this matter, given the fact that it was not compliant with section 14 of the Amended JSC Act.

[71] A further legal issue relates to the constitutionality of section 24(1) of the Amended JSC Act to the extent that it is averred that the separation of powers has been blurred and that the appointment of a prosecutor in the context of a Tribunal in terms of the Amended JSC Act compromises the independence of the judiciary.

Retrospective or prospective application of the Amended JSC Act

[72] The applicants' counsel contended in this context that the retrospective application of the Amended JSC Act (on the basis of the decisions taken in April and October 2012) was in breach of the principle of legality and resulted in the unlawful establishment of the Labuschagne Tribunal. It is not in dispute in this context that the complaint, which was lodged on the 30th of May 2008, and thereafter particularised by a consolidated statement on the 17th of June 2008, was validly submitted in terms of the Old Rules, as envisaged in section 177(1)(a) of the Constitution. The said Old Rules were, of course, determined by the Commission on the basis of the power conferred to the Commission in terms of 178(6) of the Constitution. It may be mentioned in passing that it is common cause that the Old Rules were never published pursuant to section 5 of the JSC Act. As such, it can reasonably be assumed that the Amended JSC Act was specifically enacted to fill the lacuna.

[73] The applicants' counsel accordingly averred that statutes such as the Amended JSC Act are generally applied prospectively only, unless retrospective application is clearly contemplated in the relevant statute itself.

As such, it was averred on behalf of the applicants that there was nothing in the Amended JSC Act, which indicates that retrospective application was contemplated, and the Commission was accordingly not entitled to apply the said Act retrospectively through its decisions in April and October 2012, based upon new procedures, which were not applicable when the complaint was lodged in 2008.

[74] Against this background, the applicants seek inter alia an order setting aside the Commission's decision on the 18th of April 2012 and the 17th of October 2012 (triggered by the decision of the SCA in the Freedom Under Law Case) on the basis that these decisions impermissibly applied the procedures envisaged in the Amended JSC Act (including the establishment of a Tribunal) retrospectively.

[75] At a general level, before dealing with the submissions pertaining to the retrospective application of legislation, it is significant that in terms of section 177(1)(a) of the Constitution, the Commission is vested with the exclusive power to deal with any complaint of misconduct against a Judge, including impeachable misconduct. Thus, the National Assembly and the President cannot take any constitutional steps to remove a Judge from office on the basis of a complaint of serious misconduct, until the Commission has exercised its exclusive power to investigate such complaint and to make a finding in relation to the said complaint, as envisaged in the Constitution.

[76] As indicated in the case of *Justice Alliance of South Africa v President of the Republic of South Africa*,[13] another significant consideration at a general level is that constitutional and statutory provisions must be interpreted on a purposive basis, with due regard to the context of the relevant statute.[14] Furthermore, legislation premised upon constitutional dictates (as in the present case) must also be interpreted holistically and within the relevant

[13] 2011 (5) SA 388 (CC) at para 37

[14] See for example *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) para 61 and *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) paras 17-18

framework of applicable constitutional rights and norms.[15] Therefore, it is my view that due regard must be given to the fact that the Commission remains the exclusive forum for initially investigating and reporting on complaints from any source alleging incapacity, gross incompetence or gross misconduct, as envisaged in the Constitution.

[77] Against this background, it ineluctably follows, as the SCA found in the Freedom Under Law case, that there is a legal duty on the Commission to investigate allegations of misconduct, which may threaten the independence or impartiality of the judiciary.[16] This is the legal basis for the SCA's further finding that the Commission's conduct in dismissing the complaint in August 2009 constituted an abdication of the Commission's "constitutional duty to investigate the complaint properly".[17]

[78] I mention as an aside in this respect that the averment by the applicants in their affidavits that after the SCA decision, they expected the Commission to refer the complaint in this matter either back to the Commission itself or to the sub-committee in terms of the Old Rules, cannot be sustained as the Commission's decision in July 2009 not to hold a formal enquiry was essentially academic when the SCA heard the matter in 2011. Counsel for the Commission correctly averred in this regard that this is the very reason for the SCA not granting the appellant (which was successful) all the relief it initially claimed in its notice of motion to set aside both the decisions in July 2009 as well as August 2009. The SCA accordingly only set aside the August 2009 decision dismissing the complaint as irrational, as the July 2009 decision not to have a formal enquiry was effectively moot when the SCA heard the matter.[18]

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[15] See generally *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC)
[16] fn 4, *supra* at para 49
[17] fn 4, *supra* at para 50
[18] fn4, *supra* at para 58, where the SCA sets out the relief the appellant initially sought in its notice of motion and stated that the appellant was not entitled to set aside the decision taken by the Commission at the meeting on 20 to 22 July 2009 to reverse its earlier decision to hold a formal enquiry

[79] Returning to the issue of retrospectivity, within the framework of the above constitutional obligations and powers of the Commission, the legal position relating to the retrospective application of any statute is trite in our law [19] and most foreign jurisdictions. In the case of *Yew Bon Tew v Kenderaan Bas Mara* Lord Brightman said in this regard that:

> " A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself … "[20]

The learned Judge accordingly further stated that:

> " Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive…Their Lordships consider that the proper approach to the construction of…(an Act)…is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations." [21]

[80] Therefore, a statute is presumed not to apply retrospectively, unless it is expressly or by necessary implication provided otherwise in the relevant legislation.[22] It is accordingly presumed that the legislature only intends to regulate future matters, [23] and that unless a contrary intention appears from new legislation, which repeals previous legislation, it is presumed that no

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[19] See for example the cases of *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007(3) SA 2010 (CC)

[20] [1982] 3 All ER 833 (CA) at 836b – d as approved in our courts by Marais JA in *Minister of Public Works v Haffejee N.O*. 1996 (3) SA 745 (AD) at 752C – G; in *Euromarine International of Nauren v The Shipburg and Others* 1986 (2) SA 700 (A) at 710E – H and in *Transnet Ltd v Ngcezula 1*995 (3) SA 538 (A) at 549G – I.

[21] *supra* fn 19 at 839d – f

[22] *S v Mhlungu* 1995(3) SA 867 (CC) at para 64

[23] *Transnet Ltd v Ngcezula, supra* fn 20

repeal of an existing statute has been enacted in relation to transactions completed prior to such existing statute being repealed.[24]

[81] The justification for the presumption against the retrospective application of legislation is premised upon the reluctance of the courts to interfere with vested rights. In the seminal authority in this respect, Innes CJ stated in the case of *Curtis v Johannesburg Municipality*:[25]

> **"**The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation."[26]

However, Innes CJ also noted that one of the exceptions to the general presumption against retrospectivity, falls within the sphere of procedural matters to the extent that acts committed prior to the commencement of a statutorily prescribed procedure are adjudicated in terms of the new procedure. The learned Chief Justice stated in this respect as follows:

> " Every law regulating procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even though the suit may have been then pending. To the extent to which it does that but to no greater extent, a law dealing with procedure is said to be retrospective."[27]

[82] In effect, on the basis of the above *dicta*, the presumption against retrospectivity is rebutted in relation to matters of procedure only, which do not affect any existing substantive rights. Many years later, the Constitutional Court considered this issue in the case of *S v Mhlungu*[28] and Kentridge AJ, in (with whom Chaskalson P, Ackerman J and Didcott J concurred) in a minority judgment, referred to the above *dicta* of Innes CJ in relation to changes in procedure, and stated that it is not always easy to decide whether a new statutory amendment is purely procedural or whether such amendment affects substantive rights. Thus, the learned Judge stated that:

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[24] *Chairman, Board of Tariffs & Trade v Volkswagen of SA (Pty) Ltd* 2001(2) SA 372 (SCA) at p380
[25] 1906 TS 308
[26] *supra* fn 25 at 311
[27] *supra* fn 25 *at 312*
[28] *S v Mhlungu supra* fn 22

> "Rather than categorizing new provisions in this new way, it has been suggested, one should simply ask whether or not they would affect vested rights if applied retrospectively."[29]

[83] In the subsequent case of *Haffejee,*[30] Marais JA made reference to the *Curtis* case, *supra,* at 319 and restated the common law position, which did not recognize vested rights in procedure *simpliciter.* [31] The learned Judge stated in this regard that this common law position is supported by section 12(2)(c) and (e) of the Interpretation Act 33 of 1957, in relation to repealed laws. These sections provide that where a law repeals any other law, the repeal does not affect rights, privileges, obligations or liabilities, accrued or incurred in terms of the previous legislation, nor does the repeal affect any legal investigation, legal proceedings or any remedy in respect of such rights, privileges, obligations or liabilities, accrued or incurred in terms of previous legislation.[32] On this basis, the learned Judge found that whether or not an amending statute will be interpreted to have retrospective effect will ultimately depend upon a consideration of its impact upon existing substantive rights and obligations.[33]

[84] Mokgora J then reiterated in the *Veldman* case that:

> "[28] The distinction between procedural and substantive provisions cannot always be decisive in the operation of the presumption against retrospectivity. As Marais JA recognized in *Minister of Public Works v Hafejee N.O.* :-
>
> > "[I]t does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If these substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply."[34]

Furthermore, the Constitutional Court has also stated in another context that:

> "The principle against interference with vested rights is a component of the presumption against retrospectivity. No statute is to be construed as having retrospective operation, which would have the effect of altering rights

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[29] *supra* fn 22 at para 66
[30] *supra* fn 20
[31] *supra* fn 20 at p 755 B-C
[32] *supra,* fn 20 at p 755 E-H
[33] *supra,* fn 20 at 753 B-C
[34] *supra* fn 19 para 28

> acquired and transactions completed under existing laws, unless the legislature clearly intended the statute to have that effect. This stems from the belief that at some point the State, the parties and third parties are entitled to rely on a common understanding of the nature of rights acquired or transactions completed." [35]

[85] Against this background, one of the counsel for the applicants, who was also one of the counsel in another application (instituted by Judge Poswa, which was heard by this full bench in the North Gauteng High Court[36]), submitted that the complaints in both cases should have been dealt with by the Commission in terms of the Old Rules, simply by virtue of the fact that the complaints in both cases had been lodged prior to the Amended JSC Act coming into force. Specifically, counsel submitted in this regard that the notion of procedural and substantive rights in relation to the retrospective application of legislation was definitively settled by the SCA in the case of *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission* [37] and subsequently by the Constitutional Court in the case of *Justice Mpondombini Sigcau v President of the Republic of South Africa.* [38] In these circumstances, much reliance was placed on paragraph 19 of the *Unitrans* judgment where Olivier JA stated as follows:

> "[19] What is the correct approach in cases such as the present, where the action was instituted or the application was initiated *before* the amending legislation came into being?
>
> The rule is that **unless a contrary intention** appears from the amending legislation, the existing (old) procedure remains intact." (Emphasis added)

Thereafter, it was contended that the Constitutional Court settled the law in this respect by stating as follows in the *Sigcau* case:

> "[20] …The ordinary rule of our law is that statutes operate only prospectively. A distinction was often made between substance and procedure, which then allowed rules that affected only procedural matters to operate retrospectively. In *Unitrans*, the Supreme Court refined this to a distinction between cases where the amending

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[35] In footnote 23 in *Du Toit v Minister of Safety and Security* 2010 (1) SACR 1 (CC)

[36] The full bench of this court in the present matter was specially constituted to hear the present application as well as the case of *Justice Ntsikelelo Mandlenkosi Poswa v The President of the Republic of South Africa and Others,* instituted in the North Gauteng High Court under case number 30021/13. Counsel for the applicants in both matters relied upon similar submissions in relation to whether the Amended JSC Act could be interpreted to have retrospective or prospective application and section 14 of the Amended JSC Act. I concur with the judgment of my brother Claassen J in the application instituted by Justice Poswa for the reasons given in that judgment.

[37] 1994(4) 1 (SCA)

[38] 2013(9) BCLR 1091 (CC)

> procedures come into effect before the old procedures had been initiated and situations where the amendments only come into effect after the old procedures had been initiated. In the latter case, **unless a contrary intention is clear from the amendment**, the old procedure remains intact." (Emphasis added)

[86] In my view, Claassen J in the case involving Judge Poswa, correctly found that the much-quoted paragraph [19] of the *Unitrans* case must be read in conjunction with the postulate in paragraph [23] of the said judgment, where Olivier JA further states the following:

> "[23] Of course, there may be cases where an amending statute introduces new procedural provisions which may, **on a proper interpretation**, leave intact the steps that have already been taken and operate prospectively only. But that will not be the position where the prospective operation would render abortive the steps taken in the past – unless such was the clear intention of the legislator. To apply the statute to the pending application in the present case would extinguish there and then the ability to proceed with the application." (Emphasis added)

[87] Therefore, neither the *Unitrans* case (decided in 1999) nor the *Sigcau* cases were at variance with the well established principles set out above in cases such as *Haffejee*. Therefore, our courts did not effectively discard the distinction between substantive rights and procedural rights, as suggested. Furthermore, to the extent that the *Sigcau* case related to an impairment of an existing statutory right of the Royal Family to be consulted in a matter involving the removal and appointment of a Chief or King, that case is distinguishable from the present case. This is particularly so as the applicants in the present case do not aver that any of their substantive rights have been impaired by application of the JSC Amendment Act. They simply contend that the new regime in terms of the JSC Amended Act does not permit any proceedings emanating from a pending complaint, which was not on oath, without making reference to any impaired right on their part, or indeed on the part of any interested or affected party. Remarkably, the applicants are also completely silent on the undisputed consideration of public interest in an impartial and independent judiciary, as asserted by Langa CJ in 2008.

[88] In these circumstances, a "proper interpretation" of the Constitutional and statutory context is required with respect to whether the Amended JSC Act can be retrospectively applied, without affecting vested substantive rights.

As already indicated, it is pertinent in the circumstances of the present case, that pursuant to the judgment of the SCA in March 2011, when the Amended JSC Act was already in force, the SCA directed the Commission to investigate the complaint in the present case further on the basis of the Commission's constitutional obligation to do so. Therefore, the SCA held in this context:

> "Once it had been determined that he [Hlophe JP] did attempt to influence them [the applicants in the present matter], the JSC had to decide whether his attempt to do so constituted gross misconduct of such a nature that it may justify his removal from office." [39]

It may be mentioned as an aside that when the SCA found that the "JSC had to decide", the SCA specifically did not refer the decision back specifically to the sub-committee of the Commission, which considered the matter in July 2009 in terms of the JSC Act, as the applicants indicate they understood the decision to mean. In my view counsel for the Commission correctly contended in this respect that the SCA obviously remitted the matter back to the Commission to investigate the complaint in this matter on the basis of the applicable procedures of the Commission prevailing at the time.

[89] It is also my view in relation to the "proper interpretation" of the JSC Amendment Act that Claassen J correctly distinguished between the **lodgement** of complaints against Judges (section 14) and the new procedures for their **investigation** (sections 16 and 17). [40] This appears to be sustained by the fact that the preamble to the Amended JSC Act distinguishes between the lodgement of complaints against Judges and the investigation thereof.

[90] It can hardly be disputed in this respect that at the time section 14(3)(b) came into force, the legislature must have been aware of complaints against Hlophe JP as well as other Judges, which had already been lawfully lodged in terms of the Old Rules. From this perspective, the effect of applying procedures provided for in the Amended JSC Act retrospectively would simply mean that the lodgement of unsworn complaints **prior** to 1 June 2010 would be regarded as having been validly lodged. As the stated objectives of the

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[39] at para 42 of the Freedom Under Law case, *supra* fn 4
[40] in para 63 of the *Justice Poswa* case, *supra* fn 36

Amended JSC Act are inter alia premised upon the constitutional injunction relating to the removal of a Judge in the event of serious misconduct, and as the Act itself contemplates an investigation for "allegations" of serious misconduct (as opposed to "lesser" complaints), a prospective interpretation of sections 16 and 17 would, in my view, completely undermine the constitutional dictate as well as the stated purposes of the Amended JSC Act.

[91] As Claassen J has also pointed out in this context the present case is distinguishable from the circumstances of the *Unitrans* case as the amendment in the latter case completely abolished one forum in favour of another. [41] In the present case, the Old Rules envisaged informal or formal enquiries as well the appointment of a sub-committee to investigate all complaints received by the commission. In terms of the new regime, a distinction is drawn between the investigation of lesser complaints and impeachable complaints. The Amended JSC Act accordingly makes provision for lesser complaints to be summarily dismissed by the Chief Justice or a Head of Court.[42] Furthermore, in terms of the new procedure, the JCC is enjoined to consider more serious complaints, and if it is established by the JCC that there is a *prima facie* case of "gross misconduct", the JCC can recommend to the Commission, in terms of section 16(4)(b), that a Tribunal investigates such complaint of gross misconduct. More importantly, the "procedures, structures and mechanisms" created by the new legislation simply constitute a more effective way to carry out the investigative functions, which the Commission has in terms of both regimes.

[92] Comparing the two schemes, Claassen J notes that the composition of the sub-committee investigating a complaint in terms of the Old Rules consisted of one or more of the members of the Commission (in the absence of the political members) whereas the Amended JSC Act envisages an investigating authority, the JCC, comprising the Chief Justice, the Deputy Chief Justice and four judges. In these circumstances, the Amended JSC Act

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[41] in para 67 of the *Justice Poswa* case, *supra* fn 36

[42] See section 14(2) as read with section 15(1) and (2) and the definition of "Chairperson" in section 1

does not establish a completely different forum for dealing with complaints against judges, suggested, but rather more structured "procedures, structures and mechanisms". It can hardly be stated in these circumstances that all serious complaints lodged prior to the 1st of June 2010, fall outside the ambit of the structured procedural innovations.

[93] It is accordingly my view that the decisions taken by the Commission in April and October 2012 to adopt the procedures in the Amended JSC Act are lawful and cannot be set aside. This is particularly so as no vested rights of either the applicants or any other party have been retrospectively violated. To the contrary, as already stated, in terms of section 177(1)(a) of the Constitution, the Commission is compelled to investigate the complaint against Hlophe JP. Therefore, the presumption against retrospectivity falls away.[43] I was also not persuaded that the SCA decision setting aside the decision of the Commission as irrational effectively meant that the previous sub-committee of Commission in terms of the JSC Act had to reconsider its decision on the 22nd of July 2009. As indicated above, the SCA did not grant relief in relation to the sub-committee's decision of the 22nd of July 2009, which was effectively moot, when the SCA heard the matter. Thus, the SCA only set aside the decision of the 15th of August 2009, and pursuant to the order of the SCA, the Commission was entitled to enforce the newly introduced procedures to reconsider the matter.

[94] I note also that in terms of section 19(1)(b) of the Amended JSC Act, the Commission can request the appointment of a Tribunal not only pursuant to a recommendation in terms of section 16(4)(b) arising from a complaint (as in the present case), but also whenever, there are reasonable grounds to "suspect" any of the grounds of misconduct specified in section 19(1)(b). As such, whilst the appointment of the Labuschage Tribunal appears to be premised on a complaint as envisaged in section 19(1)(a), it appears that in

[43] See, for example the case of *Khumalo v Director-General of Co-operation and Development* 1991(1) SA 158 AD at 165D-4. In a more recent case of *Loureiro v Imvula Quality Protection* 2014 (3) SA 394 (CC) the court in para 31 appeared to accept in the context of argument for leave to appeal that the general presumption against retrospectivity of law is rebutted in instances when one is dealing with procedural aspects, which does not affect a party's substantive rights

terms of section 19(1)(b), the Commission is in any event empowered to appoint a Tribunal at any stage when it considers that there are reasonable grounds to "suspect" that a Judge is guilty of "gross misconduct", which could result in impeachment.

[95] In these circumstances, I agree with the rationale of the Labuschagne Tribunal that in the absence of the impairment of any substantive rights of the applicants (or for that matter Hlophe JP or any of the complainants) nothing in the Amended JSC Act either expressly or impliedly invalidates the complaint lawfully made under the auspices of the late Chief Justice. [44] It is in my view also not insignificant in this context that the SCA recognised in the Freedom Under Law case, [45] as I have emphasised above, that the Chief Justice and the other Constitutional Court Judges did not act as complainants in their own interest, but were motivated purely by the public interest. More importantly, I find it difficult to conceive of any legitimate purpose, which might be served by the invalidation of the existing complaint, which was lawfully lodged in 2008.

[96] It also bears mentioning in another context that the SCA has accepted that an unlawful administrative act is capable of producing legally valid consequences.[46] *A fortiori*, it is my view that a lawfully submitted complaint by the Chief Justice, the Deputy Chief Justice and other Judges of the Constitutional Court in terms of the Old Rules (premised upon the public interest) as well as the two impugned decisions triggered by a decision of the SCA, cannot automatically be rendered a nullity in terms of the Amended JSC Act, simply by virtue of the fact that subsequently enacted procedures were not followed.

[97] In these circumstances, the submissions by the applicants premised upon the principle of legality cannot be upheld and the review application to set aside the Commission's decisions in April and October 2012 must fail.

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[44] Para 12 of the Tribunal's reasons for dismissing the preliminary objections raised by the applicants.
[45] *supra* fn 4 at para 22
[46] *Oudekraal Estates v The City of Cape Town* 2004 (6) SA 220 (A)

Requirement relating to affidavits in terms of section 14 (2)(b)

[98] In the alternative to the above submissions, the applicants' counsel relied upon the provisions of section 14(3)(b) of the Amended JSC Act relating to a complaint being lodged by means of an affidavit or an affirmed statement, which sets out the nature of the complaint, and the facts upon which the complaint is based. It was emphasised in this respect that section 15(2)(b) of the Amended JSC Act expressly provides that complaints which do not substantially comply with the statutory demand to be on oath or affirmed, "must be dismissed". It was accordingly contended on behalf of the applicants in this respect that as the provisions of section 14 of the Amended JSC Act were peremptory, non-compliance with section 14 effectively rendered the complaint before the Commission invalid in terms of the amended legislation.

[99] As with all matters of this nature, a simple literal interpretation of a statute is generally not sufficient for the purposes of determining the intention of the legislature, particularly so if such interpretation is not effected in context. Therefore, taking into account the scope and objects of the Amended JSC Act (including the preamble), and given the fact there is nothing to suggest the automatic invalidity of previous complaints, it is my view that an affidavit is not mandatory in all instances. This is particularly so, as already stated, by virtue of the fact that complaints "must" be dealt with in terms of section 15, 16 or 17, and there are different procedures for "lesser complaints" in terms of section 15, and complaints which could lead to impeachment in terms of section 16. It is significant in this regard that with lesser complaints, dealt with in terms of section 15, a complaint, which is not on affidavit "must" be dismissed in terms of section 15(2). It is further significant that section 16 relating to complaints, which could result in impeachment, does not incorporate a comparable sub-section to 15(2). To the contrary, the JCC is permitted in terms of 16(3) to request further information from the complainant or any other person as it deems fit. As such, the clear difference between the effect of non-compliance of the provisions of section 14 in the context of sections 15 complaints as opposed to section 16 complaints, can in my view only mean that the requirement of an affidavit in section 14 is directory, but

not peremptory at the time the complaint is lodged, in relation to impeachable conduct (in section 16).

[100] My view in this respect can be demonstrated by the hypothetical example of a very serious substantiated complaint against a Judge being reported, such as, for example, relating to bribery or undue influence, to the Commission verbally or by way of a written document, which does not constitute an affidavit. In such circumstances, the clear purpose of the Amended JSC Act would be completely negated if the Commission was not vested with authority and/or responsibility of investigating this hypothetical complaint because of non-compliance with section 14(3). To hold otherwise would be to elevate form over substance.

[101] It is also my view that there was in any event considerable merit in the submissions by counsel for the Commission that even if the provisions of section 14(3) are peremptory, as averred, the complainants in this matter effectively complied with section 14(3) on the basis of the joint statement submitted in terms of the Old Rules. This is so as the initial statements in this matter were fortified by the evidence of the Constitutional Court Judges on the 7th and 8th of April 2009 as well as the answering affidavits filed by said Judges in the context of litigation in this matter. To hold otherwise would also constitute elevating form over substance within the framework of the important Constitutional powers of the Commission in terms of section 177. Therefore, the suggestion that the complaint lodged in 2008 would effectively be rendered a nullity within the framework of the Amended JSC Act would belie the foundational purpose of section 177 of the Constitution.

[102] In these circumstances, I agree with the conclusion of the Labuschagne Tribunal that on a proper consideration of the facts as a whole, considered with the legal principles set out above, the reliance by the applicants on section 14 of the Amended JSC Act is misplaced. Moreover, in the event that section 14 is applicable, as averred, then there has been compliance with the provisions of that section by the Constitutional Court Judges in the present matter. Therefore, to the extent that compliance with

section 14 was a mandatory requirement, the defect has been cured by the evidence under oath and the affidavits on record relating to the complaint in this matter.

[103] For the reasons given, the decisions taken by the Commission in April and October 2012, cannot be set aside on the basis of non-compliance of section 14 of the Amended JSC Act.

Section 24(1) of the Amended JSC Act

[104] As regards section 24(1) of the Amended JSC Act, the applicants' counsel contended that this section violated the fundamental constitutional principles relating to the separation of powers and judicial independence to the extent that a prosecutor is involved in disciplinary proceedings against a Judge. Thus, to the extent that the Minister and the NDPP play a role in the appointment of a member of the NPA, **if** the President of a Tribunal elects to appoint a prosecutor, as the collector of evidence on behalf of a Tribunal, it is averred that a non-judicial person plays a role in the removal of a Judge and the separation of powers is inappropriately blurred. It is accordingly suggested in this context that government functionaries in the office of the NDPP (as part of the executive) could potentially play a role in a "disciplinary enquiry" relating to a Judge, which would effectively be no different to the function of a prosecutor in a criminal trial.

[105] Before considering the applicants' submissions in this regard, it is useful to set out the values underlying the fundamental constitutional principle of separation of powers. It has always been accepted in this context that whilst each branch of government (including of course the judiciary and the executive) must be functionally independent from other branches of government, this principle is not absolute in the sense that some intrusion by each branch into the terrain of the other branches (with appropriate checks and balances) is inevitable at certain levels.

[106] The Constitutional Court has stated in this respect in the case of *In re: Certification of the Constitution the Republic of South Africa*[47] ["the First Certification case] as follows:

> "[109] The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of branch on the terrain of another. No constitutional scheme can reflect a complete separation of power…"

The court has also held in relation to the appointment of Judges that:

> "An essential part of the separation of powers is that there be an independent Judiciary. The mere fact, however, that the executive makes or participates in the appointment of Judges is not inconsistent with the doctrine of separation of powers or with judicial independence…What is crucial to the separation of powers and the independence of the Judiciary is that the Judiciary should enforce the law impartially and it should function independently of the Legislature and the Executive."[48]

[107] Therefore, whilst an independent judiciary (as guaranteed in section 165 of the Constitution) is an essential part of the separation of powers, [49] and judicial impartiality and independence is also implicit in the rule of law, which is the founding premise of the Constitution,[50] the Constitutional Court has found that it is not inconsistent with the principle of the separation of powers for the executive arm of government to participate for example in the appointment of Judges, or for a Judge to preside over a commission of enquiry.[51] To the extent that it is relevant in this context, counsel also referred the court to case authority from the Constitutional Court relating to when it is permissible to assign a non-judicial function to a Judge.[52]

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[47] 1996 (4) SA 744(CC) . See also the case of *Justice Alliance supra* fn 13 at para 33
[48] First Certification judgment para, *supra,* fn 47 para 123
[49] First Certicification judgment, *supra,* fn 47, para 123. See also the case of *Justice Alliance, supra* paras 34-36 and the authorities quoted there. Chaskalson P in the case of *South African Association of Injury Lawyers v Heath and Others* 2001(1) SA 883 (CC) also noted that the majority of the members of the Commission, whose central role is the appointment of Judges and matters relating to the judiciary are not judicial officers. It is also well-known in this respect that the majority of the members of the Commission are now politicians and/or members of the executive.
[50] Per Chaskalson CJ in the case of *Van Rooyen and Others v The State and Others* 2002(5) SA 246 (CC) para 17.
[51] *First Certification* judgment, *supra,* fn 48 para 111
[52] *Heath* case, *supra* 49

[108] It is important to contextualize the power of a Tribunal to "investigate and report" on an inquisitorial basis, purely with a view to making a recommendation to the Commission, which is then empowered to make a finding in terms of section 177(1)(a) of the Constitution relating to whether a Judge is guilty of "gross misconduct". Pursuant to a finding of "gross misconduct" by the Commission (and not a Tribunal appointed by the Commission) the President and two-thirds of the National Assembly are empowered in terms of section 177(1)(b) read with 177(2) of the Constitution, to take further steps to remove a Judge from office on the grounds of the Commission's finding of "gross misconduct". Against this background, the function of a Tribunal such as the Labuschagne Tribunal in terms of section 26(1)(a) of the Amended JSC Act, is limited to collecting evidence, conducting a formal hearing, making findings of fact as well as a determination of the merits of the allegations against a Judge, and thereafter to submit a report to the Commission, containing the Tribunal's findings of fact only.

[109] Significantly, no powers are given to a prosecutor (if one is appointed by a Tribunal) to either investigate or to make a determination on the complaint, or even to make legal submissions to the Tribunal. Thus, the appointed prosecutor has no "investigative role" within the ambit of the inquisitorial Tribunal, nor does the appointed prosecutor decide which witnesses are to be called on particular aspects of a complaint against a Judge, nor is the appointed prosecutor obliged to advise witnesses on the presentation of their case, nor does the prosecutor play "a major role" in the removal of a Judge, as suggested. It is further significant, as pointed out by both counsel for the Commission as well as the Minister, that even though the applicants challenge the appointment of a prosecutor in this context on the basis that a non-judicial person plays a role in the removal of a Judge, it appears that, without any apparent consistency in this regard, the applicants have no difficulty with the third non-judicial member of a Tribunal, appointed in terms of section 22(1) and 23(1).

[110] The Minister tenably asserts in his answering affidavit in this respect, that the Chief Justice, acting with the concurrence of the Minister also

approves the participation of non-judicial persons as members of a Tribunal of this nature. Be that as it may, the deponent to the answering affidavit on behalf of the Minister also rationally, plausibly and tenably justifies the appointment of a prosecutor from the members of the NPA by obvious considerations of costs and convenience for all parties **if** the Tribunal elects to appoint a prosecutor. As such, the Tribunal is spared the inconvenience and costs of appointing an evidence collector from the independent bar and/or attorneys in private practice.

[111] I was also not persuaded by submissions to the effect that members of the NPA are precluded from carrying out a function, which is not "incidental" to a prosecutorial function. As such, prosecutors, as attorneys and functionaries are not "exclusively linked to the prosecution of crime" or only to "prosecutorial duties" assigned to them, as contended. As already stated, just as Judges are required to undertake certain non-curial functions, such as commissions of inquiry, the functions of members of the NPA on a day to day basis go beyond merely prosecuting, and could include other functions, including of course, mundane administrative functions which are implicit in every role in every branch of government.

[112] It is further significant, as already stated, that the provisions of section 24(1) of the JSC Amendment Act are not peremptory in the sense that the Tribunal can discharge its functions without appointing a prosecutor for the purposes of collecting evidence. Therefore, the Labuschage Tribunal correctly emphasised in its reasons for dismissing the applicant's preliminary objections in October 2013 that a Tribunal appointed in terms of the Amended JSC Act can on its own accord obtain evidence or call witnesses, without the assistance of a prosecutor, as contemplated in section 24.

[113] It is further significant that the inquisitorial powers granted to a Tribunal are far wider than the powers of inquiry stipulated in terms of the Old Rules. Be that as it may, if a prosecutor is appointed in terms of section 24(1), as in the present case, such prosecutor is subject to the inquisitorial powers of a Tribunal and directions from the said Tribunal pertaining to specific evidence

and factual enquiries required by the said Tribunal. In these circumstances, the prosecutorial role in the context of a Tribunal (which is limited to adducing evidence) is materially different to the prosecutorial role in the context of a criminal trial before a Judge governed by statutory procedures. As such, unlike a criminal trial or even for that matter a disciplinary hearing, a "prosecutor" of a Tribunal in terms of the Amended JSC Act has no authority "to prosecute" in the sense of establishing the guilt of a person arraigned on a particular charge. Indeed, the fourth respondent and any other prosecutor appointed in a similar position is not even required to make legal submissions to the relevant Tribunal. Furthermore, unlike the pro-forma prosecutor, who might have been appointed in terms of sub-rule 5.4 of the Old Rules, the fourth respondent is not required to prepare a charge sheet or to present argument to assist the Tribunal in fulfilling its tasks.

[114] In contrast to the patently limited role of a "prosecutor" in this context, it is significant that in a formal enquiry in terms of sub-rule 5.12 of the Old Rules, any member of the Commission is entitled to ask questions to witnesses and counsel with the consent of the chair of the Commission. Notionally speaking, the questions in this regard could be much more far-reaching than the limited evidence-collecting function of a prosecutor such as the fourth respondent. Similarly, the questions posed in terms of the previous sub-section 5.12, could notionally speaking be more akin to questions posed by a prosecutor in the conventional sense in a criminal trial and/or a disciplinary hearing.

[115] It was further averred that the role of prosecutor in the Tribunal is unconstitutional to the extent that section 41 of the Constitution, which relates to co-operative governance, effectively prevents a member of the NPA assuming "any power or function except those conferred on them in the Constitution." As already indicated, the principle of the separation of powers has never been absolute in the sense that each branch of government can intrude on the terrain of other branches, with appropriate checks and balances.

[116] I had difficulty appreciating the further suggestion that the independence of the judiciary may be compromised by an appointment of a prosecutor in terms of section 24(1), Similarly, I had difficulty with the notion that a perception "may also be created" in the eyes of the public that judges are not independent. Be that as it may, as already indicated, the significant feature of the prosecutor's role in a Tribunal is that such role is neither necessary, nor defined, nor adversarial, in the usual sense.

[117] In these circumstances, I accept that a balanced view of all material information in this context can include the notional, though admittedly remote, possibility of a prosecutor presenting evidence at a Tribunal, and also subsequently prosecuting in a criminal trial. However, if one objectively balances all considerations, the appointment of a prosecutor within the framework of section 24 does not at a practical level create any perception that the "prosecutor" is part of the "executive", as suggested. This is particularly so as the Constitutional Court has accepted in the case of *Van Rooyen* [53] that perception in this context must necessarily be premised upon all the material information and must be reasonable considering the matter realistically and practically. It is in my view difficult to appreciate even the hint of any perception in these circumstances on the part of any member of the public to the effect that a prosecutor appointed in terms of section 24 *qua* evidence collector can be subject to executive control or discretion,[54] or create the risk of judicial entanglement in matters of a political nature,[55] as suggested by the applicants' counsel.

[118] To the extent that the applicants' counsel suggested the potential for abuse of functional separation of the judiciary and the executive, the Constitutional Court has held in the *Van Rooyen* case that:

> "[37] Any power vested in a functionary by the law (or indeed the Constitution itself) is capable of being abused. That possibility has no bearing on the

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[53] *supra* fn 50

[54] See *Wilson v Minister for Aborignal Affairs* (1996) 189 CLR 1 at 17-20 referred to in the *Heath* case, *supra* in fn 50

[55] See *Mistretta v United States* 488 US 361 (1989) at 407; *Wilson v Minister for Aborignal Affairs* (1996) 189 CLR 1 at 9 and *Groller v Palmer* (1995) 184 CLR 348 at 366, all of which are referred to in the *Heath* case, *supra* fn 49

> constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute."[56]

[119] My findings in this respect are also supported by the Labuschagne Tribunal, which states in its reasons that the fourth respondent

> "was appointed in terms of section 24 of the JSC Act and in our view her role as evidence leader has nothing to do with her duties and functions as a prosecutor."[57]

[120] For all the reasons given, objectively assessed, section 24(1) is not inconsistent with the Constitution, nor is the independence of any branch of government compromised by the appointment of a prosecutor in terms of the said section.

CONCLUSION

[121] In these circumstances, the implementation or enforcement of new procedural provisions of the Amended JSC Act do not affect any substantive rights of the applicants or any other party. Similarly, the decisions of the Commission taken in April 2012 and October 2012 in terms of the Amended JSC Act do not impair the substantive rights of any party, which may have accrued prior to 1 June 2010. As such, the application to set aside any averred impermissible retrospective application of the Amended JSC Act on the basis of these decisions, must fail.

[122] The provisions of section 14(3)(b) of the Amended JSC Act relating to complaints being lodged by means of an affidavit or an affirmed statement are directory and not peremptory in respect of impeachable complaints as envisaged in section 16. In any event, to the extent that such provisions are peremptory, there has been substantial compliance with these provisions in the circumstances of the present case. The decisions of the JSC in April and October 2012 are accordingly not invalidated by virtue of the fact that the complaint in this matter was not initially lodged on an affidavit in terms of section 14.

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[56] *supra* fn 50. The same point is made by the Constitutional Court, albeit in a different context, in the case of *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC) at para 52

[57] para 67 of reasons

[123] Section 24(1) of the Amended JSC Act is not inconsistent with the Constitution and the declaratory relief sought in this context must also fail.

COSTS

[124] Even though the applicants have not been successful in respect of any of the relief claimed, counsel for all parties agreed that as this matter involves constitutional issues of national significance, the applicants should not be mulcted with an adverse costs order. I therefore propose making no order as to costs.

ORDER

[125] Based on the aforegoing, the following order is made:

i) The application is dismissed.

DATED AT JOHANNESBURG THIS 26th SEPTEMBER 2014

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H MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

I concur

_____

CJ CLAASSEN J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

I concur

_____

F KGOMO J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

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Date of Hearing : 18th to the 19th of September 2014
Date of Judgment : 26th of September 2014