REPUBLIC OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

CASE NO: 2013/30021

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: Yes

SIGNATURE

26 September 2014
DATE

In the matter between:

JUSTICE NTSIKELELO MANDLENKOSI POSWA	Applicant
And	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE JUDICIAL SERVICE COMMISSION	Fourth Respondent
JUSTICE BESS NKABINDE	Fifth Respondent
THE PREMIER OF GAUTENG PROVINCE	Sixth Respondent

THE JUDGE PRESIDENT, NORTH GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA Seventh Respondent

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JUDGMENT

C. J. CLAASSEN J:

INTRODUCTION

[1] This full bench court was specially constituted to hear two review applications coupled with certain declaratory orders. There are certain overlapping legal issues which arise in both cases. It is, however, more convenient to issue separate judgments in each case.

[2] In this matter several preliminary issues arose which had to be dealt with from the outset. It is necessary to record the outcome of these preliminary issues.

The Composition of the Court

[3] In chambers a concern was raised whether it was appropriate for this court consisting of three judges from the same division as the applicant, to hear the matter. Counsel for the respective parties were offered an opportunity to take instructions from their clients, but when the hearing commenced, the court was informed that neither party objected to the matter being heard by the current judges constituting this court.

Leave to grant a further Replying Affidavit by the Applicant

[4] At a very late stage prior to the hearing of this matter, the applicant sought leave to file a further replying affidavit wherein he sought to correct certain information about undelivered judgments that he had placed before the fourth respondent, the Judicial Service Commission ("JSC"). Initially there was opposition from the fourth respondent's counsel, but after some debate in court, such opposition disintegrated and the court granted the applicant leave to file such further affidavit.

[5] The application for granting leave to file such affidavit was accompanied by a notice of motion dated 11 August 2014, seeking condonation for the late filing of such further affidavit. Attached to this notice of motion, was an affidavit deposed to by the applicant to which certain annexures were attached. In Annexure FA 1(b) the applicant supplied dates upon which he delivered four of the outstanding judgments that were regarded as still outstanding when the matter was heard before the fourth respondent.

[6] The significance of this further affidavit will be dealt with at a later stage in this judgment.

Extension of Time to launch this Review Application

[7] In terms of section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), proceedings for judicial review must be instituted not later than 180 days after the date upon which the proceedings sought to be reviewed had been concluded. It was common cause that the applicant launched the review proceedings long after the lapse of 180 days after the decisions sought to be reviewed were made. Hence, the applicant brought an

application to extend the period of 180 days in order to permit the launching of these review proceedings.

[8] None of the respondents objected to the aforesaid relief sought by the applicant. Although the court is not bound by the absence of opposition of the opposing parties, we were of the view that it was in the interests of justice to proceed and hear the review application. The issue at stake, namely the appropriate powers of the fourth respondent, is of material import to the judiciary and the public at large. A definitive judgment on the issue was required expeditiously in view of the fact that there are other pending cases that are dependent upon the outcome of this review application. For the aforesaid reasons, the application was granted.

Late Amendment to the Applicant's Notice of Motion

[9] During argument, counsel for the applicant sought leave to amend the notice of motion by the inclusion of further prayers. The additional prayers sought to be included, read as follows:

> "(a) Declaring that the third and fourth respondents are barred from instituting and/or proceeding with impeachment proceedings against the applicant pursuant to a late reserved judgment; and
>
> (b) Directing the fourth respondent to pay costs of the application, including costs consequent upon the engagement of three counsel."

[10] After some initial resistance from the court to allow such a substantial amendment, it was ultimately granted. In granting such amendment to the notice of motion, no order as to costs was made in favour of the applicant. In my view, no such order for costs is required as the matter was not of great moment. Furthermore, in the absence of objection by the respondents, it would be inappropriate, in my view, to burden the respondents with these

costs caused by the applicant's own dilatoriness in getting his papers in order for purposes of a proper hearing.

[11] In my view, the appropriate order regarding the application to amend the notice of motion in the main application for review is as follows:

No order as to costs is made.

THE MAIN APPLICATION

[12] The applicant was appointed a judge of this division in January 2005. It is common cause on the papers that the applicant delayed in delivering several judgments for periods in excess of twelve months after he heard the cases. The delays in doing so extended in certain instances to between two and six years after the matters were heard. It is not the purpose of this judgment to rule on the reasonableness or otherwise for such delays other than to state the general principle that the delivery of judgments, constitutes one of the core functions of a judge. Such core function forms part and parcel of the entrenched rights of access to courts contained in section 34 of our Constitution Act 108 of 1996. This section provides:

> "34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[13] It goes without saying that the right to have a dispute resolved before a court includes the right to have judgment pronounced upon such dispute. Without the latter, the entrenched right would be meaningless and ineffective.[1]

[1] It is, however, unnecessary to consider the extent to which this right may be limited by the provisions of section 36 of the Constitution Act 108 of 1996 , as no argument was addressed on this aspect.

[14] But the right to have disputes resolved by a court also implies that judgment be delivered without undue delay and within a reasonable time. The law in this regard was succinctly stated by Harms JA[2] as follows:

> "There are some who believe that requests for 'hurried justice' should not only be met with judicial displeasure and castigation, but the severest censure and that any demand for quick rendition of reserved judgments is tantamount to interference with the independence of judicial office and disrespect for the judge concerned. They are seriously mistaken on both counts. First, parties are entitled to enquire about the progress of their cases and, if they do not receive an answer or if the answer is unsatisfactory, they are entitled to complain. The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that judges are imperious. Secondly, it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public's confidence in the judiciary. **There rests an ethical duty on judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible.** Otherwise the most quoted legal aphorism, namely that 'justice delayed is justice denied' will become a mere platitude. Lord Carswell recently said:
>
> > 'The law's delays had been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.'
> >
> > In *Goose v Wilson Sandford and Co*[3] the Court of Appeal censured the judge for his delay in delivering his reserved judgment and said:
> >
> > > 'Compelling parties to await judgment for an indefinitely extended period … weakened public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law.'" (Emphasis added)

[15] The aforesaid "ethical duty" of a judge to render reserved judgments timeously has been encapsulated in ethical guidelines that were adopted by all Heads of Court in South Africa and apply to all judges.[4] The guidelines relevant to the present enquiry, contain the following:

> "14. A judge should give judgment or any ruling in a case promptly and without undue delay. Litigants are entitled to judgment as soon as

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[2] See Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO 2005 (3) SA 238 (SCA) 260H – 262C

[3] The Law Times Reports (Feb 19, 1998) 85 at 86

[4] See 117(2000) SALJ 403 at 406 – 418

reasonably possible. The ideal is to deliver all reserved judgments before the end of term, failing which shortly after the beginning of the next term.

17. Upon resignation, ceasing to be on active service or expiry of an acting appointment, a judge is obliged to complete all part-heard cases and to deliver all reserved judgments as soon as possible and to do such work at the applicable rate."[5]

HISTORY OF THIS CASE

[16] In several cases heard by the applicant, the litigants and/or their attorneys acting on their behalf, lodged written complaints against the applicant for undue delays in rendering reserved judgment. These complaints were contained in letters written to the then Judge President[6] of the division. Initially he approached the applicant for explanations regarding the delays in rendering the judgments, but eventually when satisfactory responses were not forthcoming, he passed these complaints on to the Judicial Service Commission.[7]

[17] It is common cause that the fourth respondent dealt with these matters as constituting delayed judgments. As stated previously, the applicant at a very late stage sought to ameliorate his record of undelivered judgments in a further affidavit by stating that he had in fact delivered some of them at the time of the hearing before the fourth respondent. However, in Annexure FA4 to the further affidavit, it is recorded that at least two of the judgments were

[5] See further "The Judiciary in South Africa" by Hoexter and Olivier, paragraph 7.7 at pp. 232 – 235

[6] Ngoepe JP. Prior to the applicant's appointment and on 10 June 2004 a Practice Directive was issued by the Judge President applicable to the High Court judges in Pretoria and Johannesburg stating: *"An enquiry by an attorney wanting to know when a reserved judgment will be delivered is to be directed to the Deputy Judge President of each Division. In the case of an unrepresented party such request shall be similarly directed."* See further 2004 (6) SA 84

[7] The chronology of these cases heard by the applicant, the period of delays in rendering judgments, the letters of complaints addressed to the Judge President, the applicant's responses thereto and the referral to the Judicial Services Commission, are all contained in the Answering Affidavit of the fourth respondent, paragraph 6 – 10

outstanding at the time of the first and the second hearing of the matter by the fourth respondent. The significance of the further affidavit is, therefore, substantially reduced in that it does not detract from the common cause fact that extensive delays in rendering judgments by the applicant prevailed which led the fourth respondent to make a decision in this regard. Furthermore, it is impermissible for the applicant to seek to review the fourth respondent's decisions in this regard and simultaneously seek to correct wrong information that he supplied to the fourth respondent when it was called upon to render decisions in regard to the complaints. The review of the fourth respondent's decisions has to be decided on the basis of the evidence before it at the time of making its decision. Its decisions are in any event preliminary in nature with the result that incorrect information supplied by the applicant can always be rectified once a final and definitive hearing concerning the applicant's delays, is conducted. But for purposes of this judgment, it must be accepted that at the time of the relevant decisions made by the fourth respondent, there were at least five judgments still outstanding for periods in excess of twelve months.

[18] The complaints were referred to the fourth respondent during December 2008 and January 2009.[8]

[19] The fourth respondent requested the applicant to respond to the complaints during January and February 2009.[9] Thereafter correspondence flowed between the fourth respondent and the applicant. This correspondence discloses that in one of the matters the litigants had actually settled as they

[8] See the Fourth Respondent's Answering Affidavit p. 240 par 10.4.4; the Record pp. 93 – 96; Answering Affidavit p. 228 par 8.2; Record pp. 223; Answering Affidavit p. 230 par 9.6 and the Record pp. 15 – 19; Answering Affidavit p. 234 par 10.2.7 and Record pp. 38 – 52; Answering Affidavit p. 237 par 10.3.6 and Record pp. 74 – 82

[9] Answering Affidavit p. 240 par 10.4.5 and Record p. 97; Answering Affidavit p. 234 par 10.2.8 and Record p. 53; Answering Affidavit p. 228 par 8.3 and Record p. 4

could not wait any longer for the judgment. In another, the applicant could not locate the appropriate files and/or could not remember the case and requested the litigants to supply heads of argument in order to assist him to finalise the matter.

[20] During June 2009 a further letter of complaint regarding a delayed judgment was directed at the fourth respondent by the litigant's attorney of record. The applicant was requested to comment thereon.[10]

[21] The fourth respondent then directed the then Judge President to provide it with a list of judgments outstanding for more than twelve months which list was provided on 9 March 2010.[11] The fourth respondent addressed two letters to the applicant requesting a response to the list of outstanding judgments with a request to finalise such judgments within one month.[12] The applicant responded in writing and attached a memorandum prepared by Southwood J that referred to certain systemic difficulties experienced by judges in the North Gauteng High Court.[13] In the main, the applicant explained his delays as resulting from these systemic difficulties mentioned in the Southwood J memorandum, the difficulty of the Afrikaans language being utilised in judicial processes, his illness (diabetes, cholesterol and high blood pressure) and the Judge President's failure to afford him special "off-time" to write his reserved judgments.

[22] Up to this point in time, being March 2010, the complaints against the applicant were being dealt with in terms of section 177[14] of the Constitution.

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[10] See Answering Affidavit p. 238 par 10.3.9 and Record p. 88
[11] See Answering Affidavit p. 240 par 12 and Record pp. 137 – 142
[12] Answering Affidavit p. 242 par 13 – 14 and Record pp. 143-4 and pp. 145-6
[13] Answering Affidavit p. 243 par 15 and Record pp. 147 – 153
[14] Section 177 reads as follows:
"(1) A judge may be removed from office only if –
(a) the Judicial Service Commission finds that the judge suffered from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

It must be remembered that the JSC is a constitutional institution established in terms of section 178 of the Constitution with the exclusive powers to entertain, investigate and report on complaints lodged against judges. In terms of section 178(4) the "*Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.*" The national legislation contemplated here was promulgated as the Judicial Service Commission Act 9 of 1994 that commenced on 13 July 1994. Section 178(6) provides that the "*Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members".* Pursuant hereto certain rules were issued[15] which laid down procedures to deal with any complaints against judges. I will refer to these as the "Old Rules".

The Old Rules

[23] Clause 2 of the Old Rules deals with complaints against judges, Clause 3 with the consideration of complaints, Clause 4 with the preliminary investigation and enquiry and Clause 5 with a formal enquiry.

[24] Summarised, Clause 2 provides for any complaint received from any source alleging incapacity, gross incompetence or gross misconduct on the part of a judge to be considered by the JSC. The JSC may require that such complaint 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. Such complaint is then to be

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Services Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)."

[15] These rules were supposed to be published in the Government Gazette in terms of s 5 of the unamended Judicial Service Commission Act No 9 of 1994. However, this did not occur

referred to the judge concerned for a response in writing. The judge's response shall then be referred to the complainant (if any) who shall be entitled to reply in writing or otherwise. Such reply may also be referred to the judge concerned. Clause 2.5 of the Old Rules provides as follows:

> "2.5 The JSC shall be entitled to appoint a sub-committee which shall be responsible for dealing with complaints in accordance with the above procedure when the JSC is not in session."

[25] The consideration of the complaint under the Old Rules contemplates a two-stage enquiry prior to a formal enquiry. This much is evident from Clauses 3 and 4 of the Old Rules. Clause 3 provides as follows:

> "3.1 On receipt of a complaint and the responses referred to above, the JSC shall consider the relevant documentation and decide whether *prima facie* the conduct complained of would, if established, amount to such incapacity, incompetence or misconduct as may justify removal of the judge in terms of section 177(1) of the Constitution.
>
> 3.2 In the event of the view of the JSC being that the conduct complained of would not constitute grounds for removal from office, the matter shall be treated as finalised and the complainant and the judge notified accordingly.
>
> 3.3 In the event of the JSC resolving that the pertinent conduct, if established, may justify removal from office, the matter shall be dealt with further as provided below."

[26] Clause 4 deals with a preliminary investigation or enquiry in the following terms:

> "4.1 The JSC shall be entitled to appoint a sub-committee consisting of one or more of its members to investigate and report to the full Commission. Such sub-committee shall be entitled to hear evidence if necessary and to report back to the full Commission orally or in writing with recommendations as to the future conduct of the matter.
>
> 4.2 The provisions of 5.4 below shall apply *mutatis mutandis* to an enquiry conducted by a sub-committee under 4.1.
>
> 4.3 On receipt of such report from the sub-committee appointed for such purpose, the JSC shall resolve whether or not to accept the

recommendation of such sub-committee and to proceed to a hearing of the issues.

4.4 Where the JSC resolves that, on the basis of the documentation before it [it] does not need to have any evidence-gathering or investigative committee report to it, it may resolve, to proceed straight to a formal enquiry as provided below.

4.5 …"

[27] The formal enquiry contemplated under the Old Rules is governed by Clause 5 in the following terms:

"5. In the event of the JSC proceeding to a formal enquiry, whether in terms of 4.3 or 4.4 above, the following procedures shall apply:

5.1 A pro-forma charge sheet shall be prepared particularising the conduct in question to which the judge must respond and such document shall be served on the judge together with notice to appear at an enquiry at a set time, date and place.

5.2 The notice to appear at the enquiry shall give the judge sufficient time to prepare his/her defence.

5.3 At the commencement of the hearing, the judge concerned shall be asked to plead to the charges.

5.4 The JSC may appoint an attorney and/or counsel to act as pro-forma prosecutor and to undertake any or all of 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 to assist the JSC in fulfilling its task under section 177(1)(a) of the Constitution.

5.5 The JSC shall notify the complainant of the venue, time and date of the enquiry to be held and the complainant shall be entitled to attend the enquiry.

5.6 The JSC shall be entitled to permit the media and public subject to such restrictions as may be considered appropriate to attend any enquiry unless good cause is shown for their exclusion.

5.7 The judge shall be entitled to legal representation by an attorney or advocate and shall have the right to call evidence, to cross-examine witnesses and present argument.

5.8 If, during the course of the enquiry, it shall appear that the judge may have been guilty of any gross misconduct other than as alleged in the charge sheet, the JSC may permit the charges contained in the charge sheet to be amended or supplemented, in which event it shall inform the judge of the amended or additional charges and grants such adjournment, if any, as may be reasonably necessary to enable the judge to prepare his/her defence.

5.9 Any witnesses testifying before the enquiry shall be required to take the oath or affirm the truth of their testimony.

5.10 Proceedings before the enquiry shall insofar as possible, be recorded and a transcript of such proceedings shall be prepared by the JSC.

5.11 All documents filed by the parties in support and rebuttal of the complaint shall form part of the record of the enquiry, together with a transcript of proceedings, if any, including the documentation produced, before any sub-committee.

5.12 Any member of the JSC shall be entitled to ask questions of the witnesses and counsel with the consent of the chair of the JSC.

5.13 In the event of the judge failing to appear before the JSC pursuant to any notice without good reason, the JSC may proceed with the enquiry in the absence of the judge concerned.

5.14 After considering the evidence and argument, the JSC shall make a finding as to whether or not the judge suffers from incapacity or is grossly incompetent, or is guilty of gross misconduct as envisaged by section 177(1). Such decision shall be recorded in writing and the judge and complainant, if any, shall be notified in writing of such decision together with reasons therefor.

5.15 If the finding is adverse to the judge, the written decision of the JSC, together with reasons, shall be forwarded to the Speaker of the National Assembly as soon as possible for further action in terms of section 177 of the Constitution, as well as to the President, advising him as to whether the JSC recommends the suspension of the judge, pending the decision of the National Assembly in terms of section 177(1)(b)."

[28] It is evident from the Old Rules that complaints need not necessarily be on oath. In fact, the complaints levelled against the applicant in this case were

not on oath, but contained in letters written by the litigants' attorneys of record.

[29] The Old Rules contemplate a protective measure of finalising spurious and frivolous complaints without subjecting the judge to any further enquiry. Only if the evidence, if established, would *prima facie* amount to an adverse finding against the judge, will the JSC appoint a sub-committee consisting of one or more of its members to investigate the complaints and then report to the full JSC. Such a sub-committee may appoint an attorney or advocate as a pro-forma prosecutor to assist it by compiling a charge sheet, collecting evidence, cross-examining witnesses and submitting argument. The sub-committee will thereafter file a report containing a recommendation to the Commission as to whether or not it should proceed to a formal enquiry. The formal enquiry is a full scale hearing before the full Commission save for the politicians designated in terms of sub-sections 178(1)(h) and (i) of the Constitution, i.e. six persons designated by the National Assembly and four permanent delegates from the National Council of Provinces.

The Amendment

[30] Such was the regime until the Judicial Services Commission Act was amended by section 9 of Act 20 of 2008 that came into operation on 1 June 2010. In terms of this amendment *inter alia* Chapter 2, Parts I, III and IV and Chapter 3, Parts I and II, were included dealing with complaints against judges. The lodging of such complaints is dealt with in section 14 of the amended Judicial Service Commission Act which reads as follows:

> "**14. Lodging of Complaints**
>
> (1) Any person may lodge a complaint about a judge with the Chairperson of the Committee: Provided that the Chairperson may refer the complaint to the Deputy

Chief Justice to deal with in terms of the provisions of the Act, and the Deputy Chief Justice assumes the role of the Chairperson in respect of that complaint.

(2) When a complaint is lodged with the Chairperson in terms of subsection (1), the Chairperson must deal with the complaint in accordance of section 15, 16 or 17, but in the event of the complaint falling within the parameters of section 15, the Chairperson may designate a head of court to deal with the complaint, unless the complaint is against the head of court.

(3) 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.

(4) The grounds upon which any complaint against a judge may be lodged, are any one or more of the following:

(a) Incapacity giving rise to a judge's inability to perform the functions of judicial office in accordance with prevailing standards, or gross incompetence, or gross misconduct, as envisaged in section 177(1)(a) of the Constitution;

(b) Any wilful or grossly negligent breach of the Code of Judicial Conduct referred to in section 12, including any failure to comply with any regulation referred to in section 13(5);

(c) Accepting, holding or performing any office of profit or receiving any fees, emoluments or remuneration or allowances in contravention of section 11;

(d) Any wilful or grossly negligent failure to comply with any remedial step, contemplated in section 17(8), imposed in terms of this Act; and

(e) Any other wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) to (d), that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts." (Emphasis added)

[31] Section 15 of Part III includes a protective procedure similar to that under the Old Rules, in terms whereof lesser complaints may be summarily dismissed. Such lesser complaints are enumerated in section 15(2) and specify the following:

"15(1)(a) If the Chairperson or Head of Court designated in terms of section 14(2) is of the view that the complaint falls within the parameters of the grounds set out in subsection (2), he or she must dismiss the complaint.

(b) If the Head of Court designated in terms of section 14(2) is of the view that the complaint should not be dismissed under paragraph (a), he or she must refer the complaint to the Chairperson to be dealt with in terms of section 16 or 17.

(2) 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)

[32] Section 16 contemplates the appointment of a tribunal in respect of impeachable complaints comparable to the sub-committee contemplated under Clause 4 of the Old Rules. Section 16 provides as follows:

"16(1) If the Chairperson is satisfied that, in the event of a valid complaint being established, it is likely to lead to a finding by the Commission that the respondent suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, as envisaged in section 14(4)(a), the Chairperson must –
(a) refer the complaint to the committee in order to consider whether it should recommend to the Commission that the complaint should be investigated and reported on by a tribunal; and
(b) in writing, inform the respondent of the complaint.

(2) If a complaint is referred to the committee in terms of subsection (1) or section 15(1)(b) or section 17(4)(c) or 17(5)(c)(iii), the Chairperson must determine a time and a place for the committee to meet in order to consider a recommendation envisaged in subsection (1)(a) and must inform the complainant and the respondent in writing that he/she may –
(a) submit a written representation for consideration by the committee at that meeting; and
(b) with the leave of the Chairperson, address the committee at that meeting.

(3) For the purpose of the meeting referred to in subsection (2), the committee may request such further information from the complainant or any other person as it deems fit.

(4) At the meeting referred to in subsection (2), the committee must consider whether the complaint, if established, will *prima facie* indicate incapacity, gross incompetence or gross misconduct by the respondent, whereupon the committee may –
(a) refer the complaint to the Chairperson for an enquiry referred to in section 17(2); or
(b) recommend to the Commission that the complaint should be investigated by a tribunal.

> (5) The committee must inform the complainant, the respondent and the Commission in writing of any decision envisaged in subsection (4) and the reasons therefor.
>
> (6) The meeting referred to in subsection (2) must be attended by at least three members of the committee."

[33] The "committee" referred to in section 16 refers to a Judicial Conduct Committee established in terms of section 8. In terms of section 8(1) the Judicial Service Commission is vested with a Judicial Conduct Committee comprising the Chief Justice as its chairperson, the Deputy Chief Justice and four judges, at least two of whom must be women, designated by the Chief Justice in consultation with the Minister. For ease of reference, reference to the Judicial Conduct Committee in future will be referred to as "JCC".

[34] In terms of section 17, the tribunal established by virtue of section 16 is to be conducted in an inquisitorial manner "*and there is no onus on any person to prove or to disprove any fact during such investigation*." By virtue of section 17(5)(b)(ii) the formal tribunal hearing is also subject to the provisions of sections 24, 26 to 32. In section 26(3) the tribunal has to determine the merits of any allegations against a judge "*on a balance of probabilities*". In section 17(8) it furthermore provides for several remedies that may be imposed upon an offending judge such as "*apologising to the complainant, in a manner specified, a reprimand, a written warning, any form of compensation"* and subject to subsection 17(9), "*appropriate counselling, attendance to a specific training course, any other appropriate corrective measure"*.

[35] It stands to reason that the fourth respondent henceforth after the amendment had to decide whether current matters were to be dealt with under the Old Rules or in terms of the amended Act after 1 June 2010. Acting prudently, the fourth respondent sought legal advice from senior counsel in this regard.

According to this advice the fourth respondent was to conduct all complaints lodged before and after 1 June 2010 according to the new procedures set out in sections 14, 15, 16 and 17 of the amended Act.

[36] Pursuant to the aforesaid legal advice, the fourth respondent addressed a letter to the applicant on 4 February 2011 advising him that the third respondent appointed a Judicial Conduct Committee to consider whether it should recommend to the Commission that the complaints against the applicant be investigated and reported on by a Judicial Conduct Tribunal as envisaged in section 17 of the amended Act. The applicant was advised that the JCC will meet on 19 March 2011 to consider any recommendation it ought to make to the Commission. The applicant was invited to submit written representations for consideration by the JCC and with leave of the Chairperson to address the JCC at such meeting.

[37] In an e-mail dated 28 February 2011 the applicant responded by setting out his defences to the complaints reiterating those he referred to earlier.

The First Decision (19 March 2011)

[38] On 19 March 2011 a hearing was conducted by the JCC of the complaints against three judges who included the applicant.[16] Throughout this meeting the members of the JCC were at pains to explain to the applicant that the meeting was intended to establish whether or not there was a *prima facie* case against the applicant to be investigated by the appointment of a Judicial Tribunal Committee ("JCT"). The applicant sought to counter this suggestion by insisting upon adjudication by the JCC of his defences, in particular those relating to the systemic problems experienced by judges in the North Gauteng High Court when writing their judgments. This request was denied.

[16] See Record pp. 179 – 219

[39] Towards the end of that, the JCC resolved to defer their decision on the making of any recommendation pending the receipt from the then Judge President of a structural plan in terms whereof the outstanding judgments were to be completed. The applicant is recorded as having cooperated with this proposal by undertaking to revert to the JCC by the end of the week as to when the outstanding judgments will be completed.

[40] The applicant provided his further response to the JCC on 25 March 2011 wherein he required approximately six weeks to write his outstanding judgments. In the same breath he indicated that his secretary had found further outstanding judgments that had to be completed by him.

The Second Decision (14 May 2011)

[41] At a further meeting held on 14 May 2011, the JCC resolved to refer the complaints to the fourth respondent in terms of section 16(4)(b) recommending that a tribunal be appointed by the fourth respondent to investigate the complaints against the applicant. This resolution was taken in the absence of the applicant. He was, however, informed in a letter dated 17 May 2011 of the JCC's recommendation to the fourth respondent.

The Third Decision (25 June 2011)

[42] In line with section 178(1)(k) of the Constitution, the fourth respondent informed various premiers of the intended meeting of the fourth respondent to decide on the recommendations received from the JCC to appoint a tribunal. These letters were sent on 23 May 2011. At the meeting on 28 May 2011 the fourth respondent recorded that the commissioners would be provided with all the documentation that was exchanged between it and the

various judges and the deliberation of the JCC's recommendation was deferred for the commissioners to peruse the documents. Thereafter, a second set of letters was sent to the various premiers advising them of the fact that the next session will be held on 25 June 2011. The applicant was invited to make further submissions for consideration at that meeting.

[43] At the meeting on 25 June 2011 two of the four premiers were present. The fourth respondent was, therefore, able to deal with the recommendations of the JCC. At this meeting the fourth respondent resolved to recommend that a tribunal be appointed to investigate and report on the complaints against the applicant and that suspension of the applicant pending such investigation would not be recommended.

[44] The applicant was then boarded on medical grounds and discharged from active service pursuant to section 3(2)(c) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, with retrospective effect from 1 August 2011.[17]

[45] The President was informed about the need to appoint a tribunal and such tribunal was appointed.

[46] Thereafter the applicant launched the review application to set aside the aforesaid decisions and recommendations.

THE REVIEW APPLICATION

[47] The relief sought by the applicant in his notice of motion (as amended), is in the following terms:

> "1. That there was no complaint entitling the Third Respondent to appoint a Judicial Conduct Committee (JCC);

[17] See Record p. 298, paragraph 2.3 of Applicant's email dated 24 February 2013

2. That the Third Respondent's appointment of the JCC, in respect of the applicant, was irregular and that it be reviewed and set aside;
3. That the proceedings in the JCC, on 19 March 2011, in respect of alleged complaints against the applicant, be declared irregular and unlawful and that they be reviewed and set aside;
4. That the recommendation by the JCC in respect of alleged complaints against the applicant, be declared unlawful, and it be reviewed and set aside;
5. That the proceedings of the Fourth Respondent, on 25 June 2011, to the extent that they were related to the JCC's 'recommendation' in respect of the applicant, be declared unlawful and that they be reviewed and set aside;
6. That the endorsement of the JCC's recommendation, by the fourth respondent, on 25 June 2011 and in respect of the applicant, be declared irregular and unlawful and that it be reviewed and set aside;
7. That the appointment of the tribunal, to investigate the report on the [alleged] complaints against the [applicant] regarding [the applicant's] failure to deliver [his] reserved judgments, be declared irregular and unlawful and that it be reviewed and set aside;
8. That the tribunal has no authority to require the applicant to appear before it;
9. Declaring that the third and fourth respondents are barred from instituting and/or proceeding with impeachment proceedings against the applicant pursuant to alleged reserved judgments; and
10. Directing the fourth respondent to pay costs of the application, including costs consequent upon the engagement of three counsel."

[48] In the heads of argument of the applicant's counsel, his review grounds are set forth as follows:

"5. The application is predicated on the following grounds, namely:

5.1 that, in the light of the inordinate delay in the prosecution of the alleged complaints against the applicant, the third, fourth, fifth and seventh respondents ought to be barred from subjecting the applicant to any impeachment process pursuant to the alleged complaints;

5.2 that the JSC had no authority to effect the retrospective application of the amended JSC Act to alleged complaints made at a time when the JSC Act had not been amended;

5.3 that, in the event that a retrospective application of the JSC Act is permitted –

5.3.1 the purported complaints were not made by a complainant as defined in section 1 of the JSC Act;

5.3.2 the purported complaints were neither on affidavit nor on affirmed statements as prescribed by section 14(3)(b) of the amended JSC Act;

5.4 that procedural unfairness was meted out to the applicant in that:

5.4.1 the *in limine* point raised by the applicant concerning systemic or administrative problems was not taken into account; and

5.4.2 the applicant was not afforded the opportunity of being heard when the JSC sat to consider the recommendation of the JCC concerning the appointment of the tribunal;

5.5 that the JSC was not properly constituted in terms of section 178(1)(k) of the Constitution in that neither the then Premier of Gauteng nor her alternate was present when the decision was taken to establish the tribunal;

5.6 that it is not legally possible to set in motion an impeachment process against the applicant in respect of alleged delayed judgments attracted at a time when the applicant was on active service, after his discharge from such service in terms of section 3(2) of the Remuneration Act due to "permanent infirmity of body"; and

5.7 that the applicant is under no obligation to write judgments after 18 June 2010."

[49] I shall now deal with these issues, not necessarily in the order contained in the review grounds as set out in paragraph 5 of the applicant's heads of argument.

Barring due to Inordinate Delay (5.1)

[50] For the applicant to complain about the delay in prosecuting the complaints lodged against him, after he had delayed in rendering judgments for up to six years, smacks of impertinence which should cause this court to show its displeasure in an appropriate way. At best for the applicant there were two delaying periods of inaction on the part of the fourth respondent. The first related to the period between 26 March 2010 and 4 February 2011, a period

of approximately ten months. On the aforesaid date the fourth respondent wrote a letter to the applicant requesting reasons for the delay in rendering judgments in three matters. Thereafter the Amendment Act followed which was only put into operation on 1 June 2010. On 4 February 2011, the fourth respondent informed the applicant that the complaints laid against him were referred to the JCC in terms of section 16 of the new Act and that a hearing would be held on 19 March 2011. In my view, the delay of ten months is not inordinate at all and does not justify any censure of the conduct of the fourth respondent in regard to the complaints against the applicant.

[51] A further delay occurred during the period 28 June 2010 to 19 October 2012, a period of approximately fifteen months. On 28 June 2011 the fourth respondent informed the applicant of its intention to inform the President of the decision to request the Chief Justice to appoint a tribunal. Such request to the President occurred only on 19 October 2012. Thereafter correspondence ensued indicating the processes required for the appointment of the tribunal and matters related thereto. The applicant responded to this process in an e-mail dated 24 February 2013.

[52] Although there has been no express explanation for the delay of fifteen months, that, in itself, could not have entitled the applicant to assume that the prosecution of the complaints against him came to a halt. The fourth respondent's explanation for the delay is indicated in paragraphs 75 to 84 of the answering affidavit wherein it is pointed out that in terms of the new Act the Chief Justice was called upon to make rules regulating the procedures before a tribunal. These rules were only promulgated on 18 October 2012 in terms of Government Notice R864 as published in Government Gazette 35802. The very next day the President was informed by the Chief Justice that he intended appointing a tribunal to investigate this matter. The members

of the tribunal were appointed on 28 January 2013, some three and a half months later. The terms of reference of the tribunal were set on 18 February 2013 where after the applicant was informed of these events by letter dated 21 February 2013.

[53] In my view, the fourth respondent's contention in paragraph 82 of the answering affidavit that *"prior to the promulgation of the rules for the conduct of the tribunal, such a body could not be appointed"* adequately explains the delay of 15 months between 28 June 2011 and the action of the fourth respondent on 19 October 2012. I am, therefore, of the view that the alleged delay relied upon by the applicant was neither inordinate nor unreasonable and cannot be regarded as an "affront to his dignity and calling as a judge" as contended by the applicant.

[54] Even if the delay was inordinately long, it would not entitle the applicant to the relief sought in the notice of motion to bar the respondents from pursuing impeachment processes arising from the alleged complaints. What the applicant is seeking is in effect an interdict prohibiting the respondents from executing their statutory duty in regard to the complaints lodged against the applicant. No authority was cited for this rather extraordinary proposition and I could find none within the short period of time available for research.

[55] Having found that the delay was not inordinate or unreasonable, there is no justification to issue any type of order in the nature of barring the respondents from pursuing their statutory duties against the applicant. For this reason it would not be competent to grant the prayer contained in paragraph 9 of the amended notice of motion.

The Prospective/Retrospective Application of the Amended JSC Act (5.2 and 5.3)

[56] In my view, the crux of the entire matter boils down to answering the question: Was the fourth respondent correct in applying the new procedural provisions of the amending Act to complaints lodged against the applicant prior to the amendment coming into force on 1 June 2010?

[57] Counsel for the applicant submitted that the complaints should have been dealt with by the fourth respondent under the Old Rules since the procedures against the applicant had commenced in terms thereof prior to the amending Act coming into force. In the alternative it was submitted that if it was proper and lawful for the fourth respondent to implement the further impeachment proceedings against the applicant in terms of the new Act, then compliance thereof had not been proved as the complaints were not made under oath or affirmed. Emphasis was placed on section 15(2)(b) of the new act which expressly requires that complaints which did not substantially comply with the statutory demand to be on oath or affirmed, should be dismissed. In effect counsel's argument is a two-edged sword which suggests that the fourth respondent must fail either because it did not deal with the complaints under the Old Rules alternatively could not do so under the new Act because of non-compliance with the statutory demand for complaints to be on oath or affirmed.

[58] In support of the argument that the Old Rules were still applicable and should have been utilised for purposes of carrying through the complaints against the applicant, counsel relied on the judgment of Olivier JA[18] in the **Unitrans** case where paragraph [19] states the following:

[18] See **Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others** 1999 (4) SA 1 (SCA)

> "[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)

[59] The aforesaid passage must, however, be read in conjunction with the postulate in paragraph [23] of the judgment. There, Olivier JA 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."

[60] The answer posed in paragraph [56] above is, therefor, dependent upon a proper construction of the effect of the amending statute. Such construction depends on the intention of the legislature as determined from the language used and the context and setting in which the legislation was passed. Both the quoted passages from the **Unitrans** case, i.e. paragraphs [19] and [23] confirm this proposition.

Proper construction of the Amending Act

[61] It has been said that "context is everything" when it comes to the interpretation of statutes, contracts and documents. What are the background facts that affect the proper interpretation of the new Act?

[62] First of all, one should remind oneself that it is trite that there is a presumption against the retrospective operation of any amending Act.

Retrospectivity is defined as the taking away or impairing of vested rights under existing laws.[19]

[63] The new statutory provisions regarding the **lodgement** of complaints against judges (section 14) must be distinguished from the new procedures for their **investigation** (sections 16 and 17). I am fortified in the aforesaid interpretation by the preamble to the new Judicial Service Commission Act that distinguishes between the lodgement of complaints against judges and the investigation thereof. It states:

> "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)

[64] Under the Old Rules the investigation component was to be initiated by the appointment of a subcommittee. After 1 June 2010 and by the time the first hearing took place on 19 March 2011, the Old Rules requiring the appointment of a subcommittee no longer existed. They were impliedly repealed by the new Act. As at 19 March 2011 the only authority capable of investigating complaints in any kind of hearing was indeed the JCC.

[65] As previously stated, the lodgement of complaints occurred prior to the amending Act taking effect on 1 June 2010. As at that date, the complainants had lodged valid complaints even though they were not on oath and were to be dealt with by the JSC. The amending Act in section 14(3)(b) refers to the manner in which a complaint is to be lodged and requires it to be on affidavit or in an affirmed statement. The Legislature must have known that several

[19] See **Unitrans** case *supra* at paragraph [12]

complaints against several judges had been lawfully lodged under the Old Rules when section 14(3)(b) came into force. Applying the presumption against retrospectivity to this new section would simply mean that the lodgement of unsworn complaints **prior** to 1 June 2010 would be regarded as having been validly lodged. All complaints lodged after 1 June 2010 would have to be either affirmed or made under oath. The amending Act contains no express provision for section 14(3)(b) to operate retrospectively to the extent that it would nullify unsworn claims that were validly lodged prior to 1 June 2010. In my view, no such intention can be inferred from the language of or context in which the amending Act was passed.

[66] It can also be cogently argued that the Legislature intended the provision in section 15(2)(b) nullifying complaints that are not on oath to operate in regard to lesser complaints only. This would be consonant with the attitude that judges should not be burdened with spurious or frivolous complaints. Thus interpreted, the summary dismissal of complaints will only apply to such frivolous or spurious complaints and not to impeachable complaints. In the case of impeachable complaints, their lack of having been sworn to under oath ought not to make any difference and should be dealt with by the JSC under sections 16 and 17. This conclusion is further borne out by a proper reading of sections 16 and 17. A careful reading of these two sections clearly evince an intention to deal with complaints that fall into a category where *"the Chairperson is satisfied that, in the event of a valid complaint being established, it is likely to lead to a finding by the Commission that the respondent suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, as envisaged in section 14(4)(a), …"* In such instance the Chairperson is obliged to refer the complaint to the JCC. The object of the Act to deal with the constitutional injunction to remove seriously offending judges will be manifestly undermined by any interpretation of sections 16

and 17 which would prevent them being implemented. This consideration further strengthens the conclusion that the Legislature could never have intended section 14 to act retrospectively.

[67] Another feature that bears upon the proper interpretation of the Act presently under consideration is the fact that the amending statute establishes new internal procedures of the same forum or authority, namely the fourth respondent. In the **Unitrans** case the amendment completely abolished one forum in favour of another. In the present case, the Old Rules provided for a subcommittee to do the investigations of complaints against judges. Under the new Act a distinction is drawn between lesser complaints and impeachable complaints. Lesser complaints may be summarily dismissed by the Chief Justice or a Head of Court.[20] Impeachable complaints are dealt with by the Judicial Complaints Committee ("JCC").[21] The JCC is established in terms of section 8. Comparing the two schemes contemplated, the composition of the subcommittee investigating a complaint under the Old Rules consisted of one or more of the members of the fourth respondent (in the absence of the political members) whereas under the new Act the investigating authority, the JCC, comprises the Chief Justice, the Deputy Chief Justice and four judges. The investigative procedure in both instances resorted under the JSC i.e. the fourth respondent and it is the latter body that ultimately has to make the recommendation for the institution of a formal hearing. The new Act does not establish a completely different forum for dealing with complaints against judges. Such complaints are still within the jurisdiction of the only lawful authority entitled under the Constitution, to deal with complaints against judges. The Legislature's intention in doing so

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

[21] See section 15(1)(b) as read with section 16(1) and the definition of "Committee" in section 7(1)(d)

can only be to keep the process "in-house" within the constitutionally selected body authorised to deal with such complaints. In the present instance the applicant did not seek to establish any prejudice or breach of his substantive rights should the investigation be carried out by the JCC under the new dispensation. In any event, one cannot obtain vested rights in a procedure.

[68] The applicant's contention that the complaints should have been heard under the Old Rules is met with a further stumbling block. It is common cause that the Old Rules were never published pursuant to section 5 of the old Act. Knowledge of this fact must be imputed to the Legislature when it passed the new legislation. It, therefore, stands to reason that the Legislature intended to rectify this *lacuna* by the passing of the new Act which incorporates the new procedures for investigating complaints against judges, both lesser as well as impeachable complaints. This, to my mind, constitutes a contextual surrounding fact which ineluctably leads to a conclusion that the Legislature intended the investigatory sections in the new Act to operate retrospectively in order for the complaints validly lodged prior to 1 June 2010 not to evaporate into thin air but to be responsibly dealt with by the JSC and its structures.

[69] The scheme of the new Act also distinguishes between the lodging of complaints under section 14 on the one hand and the investigation of **serious** complaints under section 16 on the other. In my view, the intention of the Legislature is clearly to strengthen both the procedure of lodging complaints and the procedure of investigating complaints, to prevent spurious complaints against judges being made to the detriment of the judiciary.

[70] Thus construed, all complaints validly lodged prior to the amending statute taking effect on 1 June 2010 had to be investigated by the appropriate authority that existed at the time after 1 June 2010 and that, in this case, was the JCC. To my mind, this interpretation accords with the intention of the Legislature. It makes common sense, prevents unnecessary delays in finalising complaints that were lodged prior to 1 June 2010 and allows those complaints to be properly adjudicated by the appropriate authorities in existence at the time when such hearings had to take place. To interpret it in any other way would mean that valid complaints which were not under oath or affirmed, would be nullified if section 14(3)(b) is to operate retrospectively to such claims. In my view, such nullification would conflict with the intention of the Legislature. The interpretation contended for above would therefore not render abortive complaints validly lodged prior to 1 June 2010. In my view, it was correct for the first preliminary hearing to be held under the new procedures by the JCC and no other.

[71] The effect of the above interpretation is that section 14 of the new Act dealing with lodgement of complaints does **not** act retrospectively but section 16 dealing with the hearing of valid complaints does act retrospectively. I find authority for such a bifurcated interpretation in the case of **Yew Bon Tew v Kenderaan Bus Mara** [1982] 3 All ER 833 (C) at 836b – d where Lord Brightman said:

> "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** (e.g. 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** (e.g. 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 …
> (and further at 839d – f)
> Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive…the 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." (Emphasis added)

[72] The aforesaid quoted passage from the **Yew Bon Tew** case was approved by Marais JA in **Minister of Public Works v Haffejee N.O.** 1996 (3) SA 745 (AD) at 752C – G and in **Euromarine International of Nauren v The Shipburg and Others** 1986 (2) SA 700 (A) at 710E – H and in **Transnet Ltd v Ngcezula** 1995 (3) SA 538 (A) at 549G – I.

[73] In my view, the context of the amending Act in the present case was not to deny complainants who have already lodged their claims purely because they were not under oath. Such a conclusion would, in my mind, be contrary to the intention of the Legislature by necessary implication. Section 15(2)(b) expressly states that a complaint must be dismissed if it does not comply substantially with the provisions of section 14(3). It could never have been the intention of the Legislature to have this provision apply to serious impeachable complaints as contemplated in the new section 16. One example to illustrate this proposition will suffice. If, for example, a serious complaint against a judge, such as having taken a bribe, was validly lodged prior to 1 June 2010 in a letter and not under oath, would that mean that such serious complaint is nullified because it did not comply with section 14(3)(b)? Would it mean, as the applicant contends, that such serious impeachable complaint must be dealt with under the Old Rules and not section 16? To my mind, the intention of the Legislature in carefully elaborating and

strengthening the provisions dealing with the process of hearing impeachable complaints in sections 16 and 17 admit of no other interpretation but that these should apply retrospectively to complaints that had been validly lodged prior to the new Act coming into force. I say this for the following reasons:

1. The new procedures contemplated in sections 16 and 17 include beneficial provisions such as clause 17(2) which require the enquiry to be conducted in an inquisitorial manner where neither party is burdened with an onus to prove or disprove any fact during such investigation. It could not have been intended to deny a judge this benefit in regard to complaints validly lodged prior to 1 June 2010.

2. Section 17 of the new Act also includes beneficial provisions for enlarging the remedial steps that may be imposed by a JCT under section 17(8). This subsection states:

> "(8) Any one or a combination of the following remedial steps may be imposed in respect of the respondent:
> (a) Apologising to the complainant, in a manner specified;
> (b) A reprimand;
> (c) A written warning;
> (d) Any form of compensation;
> (e) Subject to subsection (9), appropriate counselling;
> (f) Subject to subsection (9), attendance of a specific training course;
> (g) Subject to subsection (9), any other appropriate corrective measure."

It makes little sense to deny a judge who has committed an impeachable offence these benefits when adjudicating and deciding the correct remedy to be applied to complaints lodged prior to 1 June 2010.

3. Section 18 includes an additional appeal process that would be beneficial to any judge found to have committed an impeachable

offence. It would be absurd to deny a judge this benefit against whom a complaint was lodged prior to 1 June 2010.

4. Section 19(1)(b) of the amended Act is not subject to the provisions dealing with the lodging of complaints in terms of section 14 and the investigatory procedures under sections 15, 16, 17 or 18. In particular, it is not subject to the provisions of section 15(2)(b). Section 19(1)(b) stands on its own. It enlarges the powers of the Commission to request the Chief Justice to appoint a tribunal under section 21 and harks back to section 177(1)(a) of the Constitution for such empowerment. The context of this provision can only mean that the Legislature intended to give the Commission the widest powers possible to act as the watchdog over misbehaving judges concerning their past and future conduct. In fact, this provision grants the Commission powers to act *mero motu* without the necessity of any complaint being laid, to call for the appointment of a tribunal to investigate the conduct of a judge. This is also consistent with an intention that section 19(1)(b) was intended to operate retrospectively to cover **all** instances of complaints against judges howsoever they were committed.

[74] None of the aforesaid additional provisions formed part of the Old Rules. It would lead to an absurdity if unsworn complaints validly lodged prior to 1 June 2010 cannot be heard subject to these beneficial provisions and such a result could never have been intended by the Legislature.

[75] In my view, this interpretation falls squarely within the postulate stated by Olivier JA in the first sentence of paragraph [23] of the **Unitrans** case referred to above. My conclusion therefore on this issue is that the JSC had authority to appoint the JCC to commence a preliminary hearing of the

complaints on 19 March 2010 validly lodged against the applicant prior to 1 June 2010 although not under oath or affirmed. This conclusion renders it unnecessary to deal with the review ground stated in paragraph 5.3 of the applicant's heads of argument.

Procedural Unfairness (5.4)

[76] In paragraph 5.4 of the applicant's heads of argument it complains of procedural unfairness in that his point *in limine* dealing with systemic problems in the North Gauteng High Court were not taken into account when the JCC arrived at its conclusion and that he was not afforded an opportunity of being heard when the JSC considered the recommendation of the JCC that a tribunal should be appointed. It is common cause that the meeting held on 19 March 2011 was constituted in terms of section 16(2) of the new Act. In accordance therewith, the applicant was invited to submit written representations for consideration and was granted leave to address the committee at its meeting. In terms of section 16(4) the purpose of the meeting is to establish whether or not the complaint, if established, will *prima facie* indicate incapacity, gross incompetence or gross misconduct by the applicant. After hearing the applicant, the JCC concluded that a *prima facie* case against the applicant entitling the JCC to recommend to the Commission that a tribunal be appointed, was established. However, they deferred that decision to a later date at which the applicant was not present and they expressly refused to entertain his defences regarding the alleged systemic shortcomings in the North Gauteng High Court.

[77] The applicant criticises this decision *inter alia* on the basis that such a decision was not made in respect of the other judges appearing before the committee on the same occasion. This defence is totally untenable. The

complaints against each judge had to be investigated separately and independently of one another according to the circumstances in each case. The outcome of the JCC's decision in regard to other judges is *res alios inter acta* and cannot therefore be equated to the circumstances surrounding the case of the applicant.

[78] Furthermore, section 16(4) does **not** contemplate a full hearing or a finding on all the relevant facts. Such duty is specifically left to an enquiry in terms of section 17. In the event of a section 17 enquiry being instituted, the applicant will have a comprehensive opportunity of establishing his defences. This much is plain from the provisions of section 17(3) which states the following:

> "17(3) For the purpose of an enquiry referred to in subsection (2), the Chairperson or member concerned –
> (a) must invite the respondent to respond in writing or in any other manner specified, and within a specified period, to the allegations;
> (b) may obtain in the manner that he or she deems appropriate, any other information which may be relevant to the complaint; and
> (c) must invite the complainant to comment on any information so obtained and on the response of the respondent within a specified period."

[79] It is plain to see that the scheme envisaged by the Legislature excludes the complainant from appearing before the committee at the section 16(4) stage. It is only at the stage of the final enquiry in terms of section 17 that both the applicant and complainant will be afforded a full hearing in which all relevant aspects will be examined and covered by oral and/or documentary evidence. It is at this stage that the defences of systemic shortcomings should be disclosed to the tribunal conducting the enquiry for a decision or finding.

[80] In any event, the systemic shortcomings referred to by the applicant were indeed placed before the JCC in his written submissions. It would not,

however, be appropriate for a preliminary hearing to delve into the merits or demerits of such a defence at that stage. The duty to make a *prima facie* conclusion necessarily indicates an element of one-sidedness. At that stage, the JCC had not yet been afforded an opportunity to hear both sides to the complaints. It is, however, trite that any *prima facie* conclusion can always be put right or altered once a full scale hearing is conducted. For these reasons I am of the view that there was no procedural unfairness by not considering the so-called point *in limine* in full.

[81] No basis in fact or in law has been established by the applicant entitling him to be heard when the JSC sat to consider the recommendation of the JCC to establish or appoint a tribunal. The facts are that the applicant was again invited to make written submissions before the JSC sat to consider such recommendation but he had no right to appear personally at such meeting nor does he establish in his founding affidavit in paragraph 83 any basis for such right of appearance. For these reasons I hold that the alleged procedural unfairness in this regard has also not been established.

Improper Composition of the JCC in terms of Section 178(1)(k) (5.5)

[82] The applicant takes the point that the Premier of Gauteng or her alternate was not present at the time when the decision was taken to establish a tribunal. In paragraphs 101 to 114 of the answering affidavit the fourth respondent explains that all the premiers involved were notified to attend the meeting and that the Member of the Executive Council, Mr Creecy, attended the meeting as a representative of the Premier of Gauteng on 28 May 2011. At the deferred meeting two of the relevant premiers, i.e. of Mpumalanga and Limpopo were present. As such there is no substance in this complaint and it is rejected.

No Duty or Obligation to Complete Judgments after his Discharge from Active Service (5.6 and 5.7)

[83] This allegation, to say the least, is quite outstanding. At no stage anywhere in the proceedings or in the applicant's affidavits is any allegations made that he is not competent to complete the judgments that are still outstanding. There is no medical evidence indicating that he is not *compos mentis* to do so. Hence the allegation that he is under no obligation to write further judgments after 18 June 2010 is without substance. The applicant's contentions in this regard fly in the face of the ethical duties of a judge, whether before or after discharge or retirement, to render judgments.[22]

[84] In terms of section 3(2)(c) the President may discharge a judge from active service on account of permanent infirmity of mind or body that renders him/her incapable of performing his/her official duties. That, however, does not discharge such judge from obligations to render judgments that were outstanding at the time of such discharge. To interpret this section any other way would fly in the face of the core duty of a judge to render judgments and also fly in the face of the constitutional imperative in section 34 for access to justice.

CONCLUSION

[85] For all the reasons aforesaid I am of the view that the applicant's application should be dismissed.

COSTS

[86] In a separate memorandum prepared by counsel acting on behalf of the applicant a request was made for the costs occasioned by three counsel. That

[22] See paragraphs [12] to [15] above

will only apply, of course, if the applicant was successful in the application. Once the application has been dismissed, the extent of an appropriate costs order remains to be decided.

[87] As far as the first respondent is concerned no costs are requested or are to be awarded against the President.

[88] In my view, the matter was of sufficient complexity and length to entitle the fourth respondent to employ two counsel and it would be fair and reasonable to include such an order in the costs order.

[89] For the aforesaid reasons the following order is made:

The application is dismissed with costs that are to include the costs occasioned by the employment of two counsel.

DATED AND SIGNED THIS 26TH DAY OF SEPTEMBER 2014 AT JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

N. F. KGOMO
JUDGE OF THE HIGH COURT

I agree

H. MAYAT
JUDGE OF THE HIGH COURT

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The case was argued on Monday 15 September 2014.