IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **52010/2016**

In the matter between: 30/12/2016

NKOLA JOHN MOTATA **APPLICANT**

and

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **FIRST RESPONDENT**

THE JUDICIAL SERVICE COMMISSION **SECOND RESPONDENT**

ORDER

The following order is granted:

The application is dismissed, the applicant to pay the respondents' costs.

JUDGMENT

D PILLAY AJ:

Introduction

[1] The applicant is a Judge of the High Court of South Africa, appointed to the Gauteng Division, Pretoria on 1 December 2000. The first respondent is the Minister of Justice and Correctional Services. The second respondent is the Judicial Service Commission (JSC). The applicant challenges the constitutionality of various provisions of the Judicial Service Commission Act 9 of 1994 as amended by the Judicial Service Commission Amendment Act 20 of 2008 (JSC Act).

The Facts

[2] The applicant was involved in an accident on 6 January 2007 that resulted in his conviction for driving a motor vehicle whilst under the influence of alcohol and sentence of 12 months imprisonment or a fine of R20 000. He appealed unsuccessfully. From 15 January 2007 to 28 February 2007 the applicant was placed on special leave. Such leave continued from 1 March 2007 to 15 April 2007 pending his criminal prosecution. Almost ten years later the special leave is still in place.

[3] In May 2011, the Judicial Service Commission (JSC) received a complaint against the applicant from AfriForum and Adv G C Pretorius SC in terms of s 14(3)(b) of the JSC Act. The JSC referred the complaint to the Judicial Conduct Committee (JCC) established in terms of s 8 of the JSC Act. The applicant appeared before the JCC on charges of alleged gross misconduct. A complaint of gross misconduct can result in the impeachment of the applicant in terms of s 177 of the Constitution of the Republic of South Africa, 1996 (the Constitution). On 21 February 2013, the JCC recommended to the JSC that the complaint be referred to the Judicial Conduct Tribunal (Tribunal) established in terms of s 21(1) of the JSC Act for further investigation into the applicant's conduct in terms of s 16(4)(b) of the JSC Act.

[4] At the request of the JSC, the Chief Justice established the Tribunal. The Tribunal comprised of two judges namely, Jappie JP as the

Tribunal President and Dambuza J. The third member of the Tribunal was Mr Alex, a practising attorney. The applicant was summoned to appear before the Tribunal in June 2013. Those proceedings were however postponed *sine die* and remain pending.

The Constitutional Challenge

[5] The applicant seeks to have ss 8-10, 14-23 and 25-33 of the JSC Act declared inconsistent with ss 177 and 178 of the Constitution and consequently, unconstitutional and invalid. On the applicant's interpretation of the Constitution, the separation of powers and the independence of the judiciary, the power to remove a judge is derived exclusively from ss 177 and 178(6) of the Constitution and not from the JSC Act. Section 177 of the Constitution authorises only three role-players to be involved in the removal of a judge namely the JSC, the National Assembly and the President. Section 178(6) of the Constitution empowers the JSC exclusively to determine its own procedure in relation to its functions,[1] in this instance, the procedure to remove a judge. The Constitution does not provide for delegation of this power to Parliament. Only the JSC is authorised to enquire into a judge's conduct, capacity or competence.[2] In short, the applicant's overarching attack on the JSC Act is that Parliament arrogated unto itself the power to promulgate the JSC Act, to determine the procedures to be followed by the JSC when deciding whether a judge is guilty of gross misconduct, is grossly incompetent or incapacitated. Hence Parliament violated the doctrine of the separation of powers and the independence of the judiciary.

[6] The applicant's secondary but related objection is that the Constitution does not authorise the structures created in the JSC Act namely the JCC and the Tribunal and the functions they perform. For instance s 9(2)(a) of the JSC Act authorises the JCC to determine the procedure to be followed at its meetings and s 10 confers on the JCC the power to receive, consider and deal with complaints. However, in his view ss 177 and 178 of

[1] S 178(6) of the JSC Act.
[2] S 177(1)(a) of the Constitution.

the Constitution confer these powers exclusively upon the JSC. Furthermore, the decision to remove a judge is the decision of the JSC not the JCC or the Tribunal. The tiered process prescribed in the JSC Act relegates the JSC to some form of appeal tribunal.

[7] Equally repugnant to the applicant is the appointment of non-JSC members to the JCC and the Tribunal, and the participation of 'politicians' in the enquiry. For instance, ss 8 and 22 of the JSC Act permit the JCC and the Tribunal to be composed of persons other than members of the JSC. Furthermore, the Minister, who is a member of the executive, is consulted in the appointment of both the majority of the members of the JCC[3] and the non-judicial member who is selected to serve on the Tribunal from the list approved by the Chief Justice.[4]

[8] The National Assembly, the President and members of the National Assembly and Provincial Councils serving on the JSC do not participate in the enquiry that could result in findings leading to the removal of a judge. By excluding politicians from decisions when the JSC considers removing a judge in terms of ss 177 (1)(b) and (2) and 178 (5) of the Constitution, judicial independence is preserved. Consequently the JSC Act, in so far as it prescribes procedures, establishes the JCC and the Tribunal and permits any person or entity other than the JSC and its members from removing a judge from office, is unconstitutional.

[9] With regard to s 180 of the Constitution, the applicant contends that the respondents have misread its provisions. On the applicant's interpretation, Parliament enacted national legislation to provide procedures for dealing with complaints against judicial officers; that is a matter already dealt with in the Constitution. Section 178(6) of the Constitution assigns this

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[3] S 8(1)(c) of the JSC Act.
[4] S 23(1) of the JSC Act.

power to the JSC to determine its own procedures. Hence s 180(1)(b) occludes Parliament from legislating for such procedures.

[10] Similarly, s 178(4) of the Constitution which assigned to the JSC the powers and functions accorded to it in both the Constitution and national legislation, must be construed to refer to national legislation that complies with s 180 of the Constitution, that is, legislation on matters that are not dealt with in the Constitution. In other words the national legislation referred to in s 178(4) is not the JSC Act. Hence Parliament violated the doctrine of separation of powers. The applicant's challenge to the remaining provisions of the JSC Act are on similar themes.

The Opposition

[11] The respondents raise two points *in limine*. The first is the non-joinder of Parliament in the application.[5] The second is the applicant's failure to establish a 'factual predicate' or 'substantive, concrete and demonstrable evidence'; as a result the respondents were unable to plead comprehensively. The applicant's attacks are 'mere conclusions of law with no probative value'.[6] Hence the applicant has failed to establish that the impugned provisions of the JSC Act are unconstitutional.

The points *in limine*

[12] Regarding the first point *in limine*, the applicant relied on *Helen Suzman Foundation v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC) para 13 to resist the non-joinder of Parliament. The Constitutional Court stated:

> '[12] Only when the constitutionality of the procedure followed by Parliament in processing and passing legislation is challenged, does it become necessary to join Parliament as a party. This is so because

[5] Para 11 of the respondents' Answering Affidavit; para 14 of the applicant's Replying Affidavit.
[6] Paras 20-27 of the respondents' Answering Affidavit.

> Parliament bears the constitutional responsibility to ensure that the correct procedures are followed in passing legislation. And it is for this reason, as well as its resultant material interest in the matter, that it must be afforded the opportunity to be heard and to defend itself before potentially adverse conclusions are arrived at in relation to its primary area of responsibility. This would explain why Parliament had to be cited in *Matatiele Municipality* when the regularity of the constitutionally required consultative process necessary to pass the impugned legislation was challenged.
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> [13] Parliament is, however, not to be cited when the substance of a provision is challenged, save under exceptional circumstances, like where Parliament or the provincial legislature itself initiated and prepared legislation as was the case in *Premier, Limpopo Province*. Ordinarily, it is the executive branch that initiates, prepares and introduces draft legislation in the National Assembly. Only thereafter does Parliament get down to the business of ensuring that constitutionally prescribed procedures are followed in passing Bills into law. For this reason, when the content of legislation is impugned, it is usually only the executive that must be cited.' (Footnotes omitted)

[13] The applicant attacks both the substance and the fact that Parliament promulgated the JSC Act. In doing so Parliament usurped the powers of the JSC. His attack is not on the procedure it adopted in passing the JSC Act but on its very powers to do so. A challenge to the powers of Parliament albeit not to the substance of the content of legislation as in *Helen Suzman Foundation,* is a matter of substance. The question remains: Did Parliament initiate the JSC Act?

[14] The unequivocal answer to this question is to be found in s 5, which reads:

> 'The Minister must by notice in the *Gazette*, make known the particulars of the procedure, including subsequent amendments, which the Commission has determined in terms of section 178(6) of the Constitution.'

[15] Self-evidently s 5, and as will emerge below, the Preamble and the various other provisions of the JSC Act demonstrate that this legislation is the product of extensive collaboration between the Minister and the JSC. The JSC Act is not the work of Parliament acting on its own. On the contrary it is the initiative of the Minister as a member of the executive branch. As such it is the sort of legislation for which *Helen Suzman Foundation* says joinder of Parliament is dispensable.

[16] In finding that the joinder of Parliament was not necessary for the reasons that I do I must also find against the applicant on its main challenge. If Parliament did not initiate the JSC Act then it cannot have unilaterally usurped the powers and functions of the JSC. Consequently I find that Parliament did not breach ss 177 and 178 of the Constitution by initiating the JSC Act. Whether promulgation of the impugned sections are invalid for some other reason remains to be determined.

[17] The first point *in limine* is dismissed.

[18] Turning to the second point *in limine*, the respondents relied on *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & others* 2005 (3) SA 280 (CC) paras 33-37 in which the Constitutional Court had to consider the need for facts to determine the proportionality of the limitation on the right of prisoners in s 19(3) of the Constitution to vote. Facts were required in that case in order for the court to balance means and ends to determine justification for the limitation. That case is distinguishable from this one as this is not about interpreting and applying s 36 of the Bill of Rights.

[19] However, the court acknowledged in *NICRO* that 'the paucity of the justification evidence and argument does not necessarily result in invalidity of the impugned provision. . . .'[7] In any case '[c]ontext is all important and sufficient material should always be placed before a court dealing with such matters to enable

[7] *Minister of Home Affairs v NICRO* para 101.

it to weigh up and evaluate the competing values and interests in their proper context.'[8] What is 'sufficient material' depends on the context.

[20] The second case which the respondents relied on was *Radebe & others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A), in which the appellants unsuccessfully resisted ejectment. They relied on certain regulations to assert a right to occupy, contending that the regulations had abolished the vindicatory right of an owner. The court found that this was a conclusion of law not a statement of fact. Without establishing as a primary fact that he was the holder of a permit to occupy, the appellant could not rely on the regulations. Nevertheless the Appellate Division proceeded to determine the conclusion of law as a 'secondary fact'.[9]

[21] Neither of these cases bars absolutely the determination of questions of law and interpretation in the absence of a factual predicate. *Ex Parte Chairperson of The Constitutional Assembly: In Re Certification of The Constitution of the Republic of South Africa,* 1996 1996 (4) SA 744 (CC), the 'certification judgment' was litigation 'to pronounce whether or not the Court certifies that all the provisions of South Africa's proposed new constitution comply with certain principles.' *Nkabinde & another v Judicial Service Commission & others* 2016 (4) SA 1 (SCA) was a similar challenge as this case but it concerned the constitutionality of s 24 of the JSC Act. The Supreme Court of Appeal determined the constitutional question raised.

[22] Turning to foreign law, in *Gratton v. Canadian Judicial Council*, [1994] 2 FCR 769, 1994 CanLII 3495 (FC), Justice Gratton of the Ontario Court of Justice, Canada sought a declaration that certain provisions of the Judges Act violated Canada's Constitution Act, 1867. The Canadian Judicial Council had established an Inquiry Committee to conduct an investigation into the allegation that the judge may have become incapacitated by reason

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[8] *Minister of Home Affairs v NICRO* para 37.
[9] Above at 794B-D.

of infirmity. Even though the Inquiry Committee heard no evidence regarding the judge's time off from work for some four years due to severe illness, the Federal Court determined the constitutional challenge, which involved statutory and constitutional interpretation, in the context of the supervening principles of the independence of the judiciary, public interest and accountability.

[23] In my view when the law concerned is the Constitution, refusing to adjudicate questions of interpretation could chill litigation in a nascent democracy to the point of prematurely denying access to justice and frustrating the development of jurisprudence. Furthermore, the applicant claims standing in terms of s 38 of the Constitution in his Replying Affidavit. As the respondents correctly submit, this claim should have been pleaded in his Founding Affidavit, especially in so far as he seeks to act not only in his own interest. However, I accept that proceedings by or against a judge implicating the constitutional values of the separation of powers, independence of the judiciary, accountability and transparency are in the public interest.

[24] The fact sufficient to justify a determination of the questions of law is that the applicant has been summoned to an enquiry about his conduct that could lead to his impeachment. This is sufficient for the court to adjudicate the constitutional validity of the provisions relevant only to his impeachment. His attack on sections of the JSC Act that do not relate to impeachment, including ss 15, 17 and 18 are academic. He is allowed to raise the constitutionality of the the JSC Act only in so far as it relates to him in fact.

[25] In the circumstances the second point *in limine* succeeds partially. I find that:

a) the order sought to declare invalid ss 15, 17 and 18 of the JSC Act, i.e. provisions unrelated to his impeachment proceedings, have no factual predicate and the applicant has no standing to contest their validity.
b) Accordingly, the declarator in respect of ss 15, 17 and 18 is refused.
c) The second point *in limine* is dismissed in respect of ss 8-10, 14, 16,19-23 and 25-33 of the JSC Act, i.e. provisions relating to his impeachment proceedings.

General principles

[26] The applicant's challenge is not to the validity of provisions of the Constitution but to their interpretation and application. The Constitutional Court has pronounced extensively on this topic and no more need be said here.[10] Our appellate courts have also pronounced extensively on the core values underlying an open and democratic society. Hence another encomium of these values is dispensable. However, a few observations about the principles and values of separation of powers, judicial independence, accountability, responsiveness and openness are worth recalling from the perspective of the relationship of the three arms of government, the status of the judiciary and consequently, the office of a judge.

[27] The separation of powers, which has its genesis in Constitutional Principle VI, empowers each arm of the State - the legislature, executive and judiciary - to exercise appropriate checks and balances generally and particularly on each other. But the separation of powers is not synonymous with unmitigated departmentalism in which the three arms of government have independent and decisive authority to interpret the

[10] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others: In Re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) paras 22-24; *Van Rooyen & others v The State & others (General Council of the Bar Of South Africa Intervening)* 2002 (5) SA 246 (CC) paras 87-88; *Justice Alliance of South Africa v President of The Republic Of South Africa & others* 2011 (5) SA 388 (CC) paras 29-37, 72 and 75.

Constitution where its own power is concerned. Nor does judicial independence mean unbridled judicial supremacy.[11]

[28] Instead, constitutional interpretation is deliberative and dialogical, with each arm conversing with the other(s) and the polity to ensure not only 'accountability, responsiveness and openness', but also, quite simply, that society functions optimally.[12] The interaction is dialectical, at times tense and agonistic,[13] and at other times cooperative and consensual.[14] In this context judicial independence and supremacy are crucial in maintaining the separation of powers. The separation of powers assigns to the courts their 'absolutely unique'[15] function 'as the independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution. . . .'[16] But the courts do not have a monopoly on the 'correct' constitutional interpretation.[17] For genuine dialogue, the legislature and executive must also be effective and assertive interpreters of the Constitution.[18] Judicial supremacy, for the sake of judicial finality, is vital for enforcement of the rule

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[11] R C Post& R B Siegel "Popular Constitutionalism, Departmentalism, and Judicial Supremacy" (2004). Faculty Scholarship Series. Paper 178 1031. http://digitalcommons.law.yale.edu/fss_papers/178; D W Tyler 'Clarifying Departmentalism: How the Framers' Vision of Judicial and Presidential Review Makes the Case for Deductive Judicial Supremacy' (2009) 50 *William & Mary Law Review* 2215 ; D E Johnsen "Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?" (year) http://www.law.duke.edu/journals/lcp. (accessed15/12/2016).

[12] Constitutional Principle VI; P W Hogg & A A Bushell 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 . *Osgoode Hall Law Journal* 75 at 78; M C Dorf 'Legal Indeterminacy and Institutional Design' (2003) 78 *NYU Law Review* 875; Post & Siegelat ; B Friedman 'The Importance of Being Positive: The Nature and Function of Judicial Review' (2004) 72 *University of Cincinnati Law Review* 1257; C Bateup 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' (2006) 71 *Brooklyn Law Review* http://brooklynworks.brooklaw.edu/blr/vol71/iss3/1

[13] JFD Brand 'Courts, socio-economic rights and transformative politics' Stellenbosch University http://scholar.sun.ac.za.

[14] Post & Siegelat 1029.

[15] *Nkabinde & another v Judicial Service Commission & others* 2016 (4) SA 1 (SCA) para 5 citing *Therrien (Re)* 2001 SCC 35 (84 CRR (2d) 1) para 108.

[16] *South African Association of Personal Injury Lawyers v Heath & others* 2001 (1) SA 883 (CC) para 26.

[17] C P Manfredi & J B Kelly 'Six Degrees of Dialogue: A Response to Hogg and Bushell'(1999) 37 *Osgoode Hall Law Journal* 513 at 523.

[18] Manfredi & Kelly at 524.

of law.[19] Configured thus, the separation of powers elevates judges to being 'the pillar of our entire justice system'.[20]

[29] Judicial independence is a safeguard for judges to do their work without fear, favour or prejudice; equally it is assurance for the public that their cases will in form and substance be determined thus.[21] Institutional independence in the administration of the judiciary, security of tenure, which are the issues in this case, and financial security, cumulatively contribute to the perception and reality of judicial independence. Whilst these issues guarantee 'benefits of the judged', for judges they are merely safeguards against undue influence.[22] Holding the office of a judge is a public duty of exceptional importance to democracy itself.

The Constitutional Scheme

[30] The dialogical nature of our Constitution is self-evident from the way it governs the removal of a judge from office. At the outset, s 177 compels collaboration between the three principal actors: the JSC, the National Assembly and the President. Their participation in the decision to remove is sequential. First, the JSC must find that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct. This foundational step of establishing good cause for the removal is assigned to the JSC as the governing and oversight body of judges. Only then can the National Assembly justifiably call for that judge to be removed by resolution that must be adopted with a supporting vote of at least two thirds of the members. Upon the adoption of that resolution, the President must remove that judge from office. The President has little if any discretion but to remove the judge; a failure to do so after the judiciary and the legislature have decided that the judge should be removed could be perceived by the public

[19] Post & Siegel at 1029.
[20] *Nkabinde v Judicial Service Commission* para 5.
[21] Compare *Gratton v. Canadian Judicial Council.*
[22] Compare *Gratton v. Canadian Judicial Council*, see also Provincial Court Judges Assn. (Manitoba) v Manitoba (Minister of Justice) (1997) 46 CRR. (2d) 1 at 118 cited by E Cameron in 'Judicial Independence- a substantive component?'

as irrational, unjustified or as a special favour or benefit to that judge. The Constitutional Court struck down s 8(a) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 (Remuneration Act) as an unconstitutional delegation of the powers in s 176(1) of the Constitution. It refused to allow the President to usurp the powers vested in Parliament to extend the tenure of a Chief Justice lest it 'operate as a favour that may influence those judges. . . .'[23]

[31] In executing their constitutional mandates all the actors must protect and preserve 'the precious institutional attribute of impartiality and the public confidence' implicit in s 177(1) and (2).[24] Hence constitutional interpretation is more than merely parsing the words.[25]

[32] Participation by the three arms of government in judicial governance begins with the establishment of the JSC in terms of s 178 of the Constitution. Of the twenty-five members of the JSC, at least eight are lawyers, ten represent the national and provincial legislatures and five represent the executive. When the JSC considers matters specific to a High Court, the Judge President of that Court and the Premier of the province join the JSC.[26] Demonstrably asserting the separation of powers and judicial independence, the Chief Justice flanked by two heads of court presides over the JSC.[27]

[33] Collaboration between the judiciary and the legislature continues in s 178(4) whilst securing constitutional safeguards for the independence of the judiciary. Section 178(4) provides:

> 'The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.'

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[23] *Justice Alliance of South Africa v President of The Republic of South Africa* para 75.
[24] *Justice Alliance of South Africa v President of The Republic of South Africa* para 75.
[25] *Justice Alliance of South Africa v President of The Republic of South Africa* para 72.
[26] S 178(1)(k) of the Constitution.
[27] S 178(1)(a)-(c) of the Constitution.

[34] The JSC derives its powers not only from the Constitution but also from national legislation. As a framework to secure our most important, non-negotiable and unchangeable values, except by overcoming the onerous provisions of s 74, the Constitution does not identify all the powers and functions of the JSC. The Constitution shares this responsibility with the legislature. Hence the Constitution prescribes the substantive reasons for removing a judge and limits them to three.[28] Yet there are other less serious causes for regulating judicial conduct and performance. Predictably therefore none of these are specified in the Constitution.

[35] In s 178(5) both collaboration and independence are balanced on the one hand by enabling the JSC to 'advise the national government on any matter relating to the judiciary or the administration of justice', and on the other hand by precluding members of the legislatures when the JSC 'considers any matter except the appointment of a judge'.[29]

[36] Another issue not specified in the Constitution emerges from s 178(6) which provides:

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

[37] Precisely what its procedures should be when it investigates and determines substantive causes for removing a judge, and for dealing with complaints that result in the removal of a judge or those that do not do so, are not specified in the Constitution. Furthermore, members of the legislatures are absent from the JSC when it advises the national government on any matter relating to the judiciary or the administration of justice; they constitute the JSC only when it considers the appointment of a judge.[30]

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[28] S 177(1) of the Constitution.
[29] S 178(5) of the Constitution.
[30] S 178(5) of the Constitution.

[38] This arrangement secures the separation of powers and preserves the supremacy and independence of the judiciary, especially as members of the National Assembly participating in the JSC will have an opportunity to vote on the removal in their legislature in due course. To secure substantial consensus a majority of members of the JSC must support its decisions.[31] It also acknowledges the importance of securing participation and (hopefully) acquiescence of the members of the legislature and executive in choosing judges who would have the power to prevail over their decisions. Securing commitment of (potential) litigants in the choice of their dispute resolver is a hallmark of a good dispute resolution system design. It generates acceptance and improves compliance with the adjudicator's decisions, thus minimising resistance to enforcement. In a transformative constitutional democracy in which the judiciary has to reimagine its expansive jurisdiction and remedial functions,[32] the value of consensus about the choice of judges cannot be overstated.

[39] In due course the legislature would have to vote on the removal of a judge. If it has to do so without having had a say in the procedures determined by the JSC acting on its own, the legislature might first need convincing of the fairness of the JSC's procedures. One way of avoiding conflict would be for the three arms to predetermine the removal procedure. National legislation, which is the usual and most effective way of democratically accomplishing consensus about rules is enabled in s 178(6) (discussed further below).

[40] Provision for national legislation is catered for in s 180 thus:

> 'Other matters concerning administration of justice
>
> National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including-

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[31] S 178(6) of the Constitution.

[32] Susan Sturm 'Resolving The Remedial Dilemma: Strategies Of Judicial Intervention In Prisons' 138 U. Pa. L. Rev. 805 1989-1990; A Normative Theory Of Public Law Remedies Susan P. Sturm Geo. L.J. 1355 1990-1991.

a. training programmes for judicial officers;
b. procedures for dealing with complaints about judicial officers; and
c. the participation of people other than judicial officers in court decisions.'

[41] Section 180 gives the JSC the option of calling for national legislation on issues affecting the administration of justice and that are not dealt with in the Constitution. Clearly training programmes for judicial officers and the participation of people other than judicial officers in court decisions are not expressly mentioned elsewhere in the Constitution. Neither are specific procedures for dealing with complaints about judicial officers. Listed as it is with two other exclusions the complaints procedure is unambiguously and emphatically excluded from the Constitution.

[42] The Constitution must be read as a whole and its provisions must be interpreted in harmony with one another.[33] Not only must one strive to interpret the provisions of ss 177, 178 and 180 consistently with one another, but also with other provisions in the Constitution. Other provisions that come to mind include the values of a sovereign democracy in s 1 and the supremacy of the Constitution in s 2. Additionally, the supremacy of the Constitution is fortified over Parliament's legislative power in s 43[34] and over the judiciary in s 165 of the Constitution.

[43] Section 165 secures the independence of the courts 'subject only to the Constitution and the law' rendering its decisions binding on 'all persons to whom and organs of state to which it applies'.[35] It is not enough for organs of State to desist from interfering with the functioning of the courts. The vesting of the judicial authority in the courts also imposes a duty

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[33] *Justice Alliance of South Africa v President of The Republic Of South Africa* para 37; *United Democratic Movement v President of The Republic of South Africa & others (African Christian Democratic Party & others Intervening; Institute For Democracy In South Africa & another As Amici Curiae) (No 2)* 2003 (1) SA 495 (CC) para 12.
[34] *Executive Council, Western Cape Legislature, & others v President of The Republic of South Africa & others* 1995 (4) SA 877 (CC) para 62.
[35] *Justice Alliance of South Africa v President of The Republic of South Africa* para 34.

on them to assist to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. Such assistance is fortified 'through legislative and other measures'. The JSC as the 'governing body' of judges is primarily the institution overseeing the judiciary. The other arms of government are constitutionally bound to ensure that the JSC is able to function optimally.

[44] The power of the JSC to determine its own procedures is necessarily broad because it is a constitutional provision and as such is a framework for governance.[36] Furthermore the functions that the JSC performs and may in future perform are not only wide and varied, but also not entirely foreseeable. Currently its procedures are not limited to determining complaints against judges and selecting judges for appointment.

[45] In the circumstances s 178(6) must be interpreted consistently with ss 177(1), 178(4), 180(b), s 165 and other provisions that guide interpretation, such as s 233 of the Constitution, which requires courts to draw guidance from international law.[37] How the application of these provisions will evolve in a nascent democracy requires the flexibility and responsiveness that legislation and not constitutions offer.

Application of the Constitution to the complaints procedures against judges

[46] Conceivably, the constitutional provisions above generate at least two possible models for judicial governance that remain faithful to constitutional interpretation. The first model is that which the JSC determines as its own procedure for inquiring into the conduct, capacity and competence of a judge to the exclusion of the legislature and the executive. In this model only the JSC or a subcommittee of it is involved in the inquiry. Only after the JSC determines the issue does it report to the legislature and the executive. This model seeks to give effect to s 178(6) without any regard to s 178(4)

[36] See for example in relation to the expression of the constitutional powers of the legislative authority in wide terms *Executive Council, Western Cape Legislature v President of The Republic of South Africa* para 51.

[37] *Justice Alliance of South Africa v President of The Republic of South Africa* para 37.

and (5). It reads s 180(b) in relation to the complaints procedure as a matter that is dealt with in s 177 and 178 (6) exclusively. This model is captured in the Judicial Service Commission Rules Governing Complaints and Inquiries in terms of s 177(1)(a) attached to the applicant's founding affidavit as Annexure NJM4 (the JSC Rules). This is the model that counsel for the applicant submitted meets with the applicant's interpretation of the Constitution and which the applicant accepts as valid. This was the model when he was convicted until the second model replaced it three years later.

[47] The second model is the statutory model espoused in the JSC Act. Counsel for the respondents submitted that ss 178(4)-(6) and 180(b) read together mandate the JSC Act. The JSC Act replaced the JSC Rules from 1 June 2010.[38]

[48] What this application is not is a challenge to the procedural propriety of promulgating the JSC Act. Furthermore, my task is not about assessing the JSC Rules model. That is no longer the law that the JSC seeks to apply. For a comparison of both instruments one may look to the first case to challenge the jurisdiction of the Tribunal.[39] Let it suffice to say that the Supreme Court of Appeal had 'difficulty in appreciating' the general objections to the inquiry being conducted in terms of 'the new statutory regime.'[40]

[49] This application singularly calls for a declarator on whether the impugned provisions of the JSC Act comply with ss 177(1), 178(6) and 180(b) of the Constitution. The primary attack on the JSC Act is that these constitutional provisions do not authorise Parliament to legislate for the JSC, but that the JSC must govern itself by adopting its own procedures.

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[38] Proc R 25, *GG* 33254, 28 May 2010.
[39] *Nkabinde v Judicial Service Commission* paras 49, 73-81.
[40] *Nkabinde v Judicial Service Commission* paras 73.

[50] Literally, the general power of the JSC in s 178(6) to determine its own procedures includes the specific power in s 180(b) to determine its own procedures for dealing with complaints about judicial officers. The *generalia specialibus non derogant* maxim: general words and rules do not derogate from special ones, applies.[41] On this interpretation, the JSC chose to issue its own procedures in the form of NJM4. Once it made this choice, s 180(b) precluded legislation to deal with complaints.

[51] However the JSC has since abandoned this choice. A literal interpretation of s 180(b) expressly authorises the JSC Act. Nowhere does the Constitution provide for procedures specifically dealing with complaints about judicial officers. Having abandoned the JSC Rules, this interpretation of s 180(b) does not conflict with s 178(6). Self-evidently by subjecting the applicant to proceedings first before the JCC and thereafter before the Tribunal, the JSC has adopted the JSC Act as 'its own procedure'. The applicant has not right to instruct the JSC on what procedure it should adopt in any proceedings, unless such procedure as it does adopt is flawed. Neither does this court have any mandate in an application for a declarator to interfere with the JSC's choice of procedures. This is not a review. Furthermore neither option is unconstitutional.

[52] Textually and contextually the Constitution authorises the JSC Act. When Parliament passes the JSC Act it exercises original jurisdiction derived from the Constitution[42] in collaboration with the JSC. The question of the JSC delegating its authority to Parliament does not arise.

International Best Practice

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[41] *Minister of Defence and Military Veterans v Motau & others* 2014 (8) BCLR 930 (CC) para 78; *Minister of Justice and Constitutional Development & others v Southern Africa Litigation Centre & others* 2016 (3) SA 317 (SCA).
[42] S 43 and 44 of the Constitution.

[53] A cursory digression into foreign jurisdictions finds support for the dialogical approach in governing the judiciary. For instance in Australia, s 72(ii) of the Commonwealth of Australia Constitution Act permits the Governor-General in Council, on an address from both Houses of Parliament in the same session, to remove a judge on the ground of 'proved misbehaviour' or incapacity.[43] Underpinning the Constitution Act with the procedural specifics is the Judicial Misbehavior and Incapacity (Parliamentary Commissions) Act 188 of 2012 that authorises the establishment of a commission to process the removal of a judge.[44]

[54] Similarly, s 99(1) of the Constitution Act, 1867 of Canada provides that the only procedure available for the removal of a federally appointed judge is by act of the Governor-General on address of both Houses of Parliament and only for 'breach of good behaviour'. Section 59 of the Judges Act, R.S.C., 1985, which bolsters the Constitution Act establishes the Canadian Judicial Council chaired by the Chief Justice of Canada and populated by other senior judges. This Council establishes an Inquiry Committee comprised of one or more designated members of the Committee and members of the Bar designated by the Minister.

[55] The United States of America has the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364 in terms of which the judicial council may after investigation refer a complaint that might lead to impeachment of a judge to the Judicial Conference of the United States. If the Judicial Conference decides impeachment is justified, it refers the proceedings to the House of Representatives for determination.[45]

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[43] https://www.legislation.gov.au/Details/C2013Q00005; see also R Ananian-Welsh and G Williams 'Judicial Independence from the Executive' (2014) ISBN:978-0-9941739-0-4.
[44] http://www.austlii.edu.au/au/legis/cth/num_act/jmaica2012596/

[45] See also M Gur-Arie and R Wheeler 'Judicial Independence in the United States: Current Issues and Relevant Background Information' in 'Guidance for Promoting Judicial Independence andImpartiality 133-147

[56] In the United Kingdom s 115 of the Constitutional Reform Act, 2005 gives the Lord Chief Justice the power to issue the Judicial Discipline (Prescribed Procedures) Regulations, 2014 dealing with judicial discipline. Section 116 prescribes a framework for the Regulations, which must provide for important functions to be performed not only by the Chief Justice but also the Lord Chancellor, who is a Cabinet Minister in charge of the Ministry of Justice.[46] Furthermore the regulations must require both officials to agree on certain issues, for instance, the exclusion of any prescribed requirement,[47] and the determination and publication of procedural rules. [48]

[57] In all jurisdictions the arrangements strive to give effect in varied ways to the universal values of separation of powers, the independence of the judiciary, accountability and transparency in a collaborative dialogue between the judiciary and the executive. These universal values enjoy greater respect and observance precisely because of the collaboration amongst all three arms of government. Exclusion of the legislature and the executive from determining and participating the complaints process, as contended for by the applicant, is the antithesis of dialogue and counterproductive to constitutional values in South Africa and other democracies.

The JSC Act

[58] Having found that Parliament did not initiate the JSC Act and that the Constitution itself mandates it, I also find nothing in the provisions of the JSC Act or the material before me that suggest that the JSC Act was foisted upon the judiciary. On the contrary, the Preamble to the JSC Act, which replaced the long title of its 1994 predecessor, imports ss 178(1) and (4), 177(1) and (3), and 180 of the Constitution. Reassuringly the Preamble acknowledges that:

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[46] http://www.parliament.uk/about/mps-and-lords/principal/ downloaded 25/12/16)
[47] s116(4)(a) of the Constitutional Reform Act.
[48] s117 of the Constitutional Reform Act.

> '. . .it is necessary to create an appropriate and effective balance between protecting the independence and dignity of the judiciary when considering complaints about, and the possible removal from office of, judicial officers, and the overriding principles of openness, transparency and accountability that permeate the Constitution and that are equally applicable to judicial institutions and officers.'

Furthermore, as stated above s 5 of the JSC Act emphasises that it is the JSC that determines its own procedures with the executive availing its promulgation machinery.[49]

[59] Turning to the mechanics of the JSC Act, s 8 establishes the JCC, which is headed by the Chief Justice as the Chairperson, the Deputy Chief Justice and four judges designated by the Chief Justice, in consultation with the Minister. The Chairperson receives complaints about judges.[50] The objects of the JCC are to receive, consider, deal with complaints and report to the JSC every six months.[51]

[60] If the Chief Justice, as the Chairperson of the JCC, concludes that the complaint could lead to a finding by the JSC that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, he must refer the complaint to the JCC to consider whether it should recommend to the JSC that the complaint be investigated and reported on by a Tribunal.[52]

[61] If the JSC receives a report from the JCC recommending the appointment of a Tribunal to investigate the capacity, competence or conduct of a judge[53] 'as contemplated in section 177 (1) *(a)* of the Constitution', the

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[49] S 5 of the JSC Act: 'The Minister must by notice in the *Gazette*, make known the particulars of the procedure, including subsequent amendments, which the Commission has determined in terms of section 178 (6) of the Constitution.'
[50] S 14 (1).
[51] S 10 of the JSC Act.
[52] S 16(1)(a).
[53] S 16(4)(b).

JSC must request the Chief Justice to appoint a Tribunal.[54] Thereafter, the JSC must forthwith inform the President of the request and advise him on the desirability of suspending the judge in terms of s 177(3) of the Constitution, subject to any conditions.[55]

[62] The Chief Justice must appoint a Tribunal after consulting with the head of the court in which the judge serves.[56] The Tribunal comprises of two judges, one of whom the Chief Justice designates as the Tribunal President. The third person is selected from a list maintained in terms of s 23(1).[57] Section 23(1) allows for a list of non-judicial persons to serve on a Tribunal with the approval of the Chief Justice, acting in concurrence with the Minister.[58]

[63] The President of the Tribunal may, after consulting the Minister and the National Director of Public Prosecutions, appoint a member of the National Prosecuting Authority to collect and adduce evidence at the hearing of the Tribunal.[59] The Executive Secretary of the Office of the Chief Justice arranges administrative assistance for the Tribunal.[60]

[64] The Chief Justice retains the power to make rules regulating procedures before a Tribunal.[61] The Minister must table the rules in Parliament before its publication in the Government Gazette.[62]

[65] The objects of the Tribunal are to inquire into the allegations of incapacity, gross incompetence and gross misconduct against a judge. To this end the Tribunal must collect evidence, conduct a formal hearing, make

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[54] S 19(1).
[55] S 19(4).
[56] S 21(1) and (3).
[57] S 22(1).
[58] S 23(1).
[59] S 24(1).
[60] S 24(2).
[61] S 25(1).
[62] S 25(2).

findings of fact, determine the allegations on their merits, and report its findings to the JSC. [63] The Tribunal adopts an inquisitorial approach; no onus is placed on any person to prove or disprove any fact before the Tribunal, [64] which makes its determination on a balance of probabilities.[65]

[66] The hearing must be concluded without unreasonable delay, in the interests of protecting and enhancing the dignity and effectiveness of the judiciary and the courts.[66] The judge must be served with adequate notice and be allowed legal assistance at the hearing.[67] The Tribunal may also begin or continue a hearing in the absence of the judge or his legal representative or both, if the Tribunal is certain that the judge was properly informed of the hearing.[68] The judge has all the rights of a fair hearing including the right to adduce evidence, call and cross-examine witnesses, have access to books, documents and other evidence, and to make submissions to the Tribunal.[69]

[67] The only persons entitled to attend the hearing are the judge, the complainant, other witnesses, legal representatives, the administrative assistant and any other person that the Tribunal considers should be present.[70] However, the Tribunal President may in the public interest and for purposes of transparency determine that all or any part of the hearing must be held in public.[71]

[68] Evidence must be given under oath or affirmation at the hearings of the Tribunal.[72] Any person who under oath or affirmation refuses to answer a question, knowingly provides false information to the Tribunal or willfully hinders or obstructs a Tribunal in the performance of its functions commits

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[63] S 26(1).
[64] S 26(2).
[65] S 26(3).
[66] S 27(1).
[67] S 28(1) and (2).
[68] S 28(2).
[69] S 28(3).
[70] S 29(1).
[71] S 29(3).
[72] S 31(1).

an offence and is liable to a fine or term of imprisonment. [73] The Tribunal may notify the National Director of Public Prosecution if it finds evidence that discloses the commission of an offence.[74]

[69] At the end of the hearing, the Tribunal must record its findings on the merits and on the facts, including the cogency and sufficiency of the evidence and the demeanour and credibility of any witness, report to the JSC and to the Chief Justice about the reasons for its findings, and submit a copy of the record of the hearing and all other relevant documents with its report. [75]

[70] The JSC must consider the report of the Tribunal, inform the judge and complainant of the time and place of its meeting and invite them to submit written representations.[76] If after considering the report and any representations, the JSC finds that the judge suffers from incapacity, gross incompetence or is guilty of gross misconduct[77] it must submit its findings, together with its reasons, the report of the Tribunal and any other relevant information to the Speaker of the National Assembly.[78] If it finds that the judge's competence, capacity or conduct justifies a penalty short of impeachment, it may impose other corrective measures or a combination of remedies.[79]

[71] Manifestly the JSC is anything but an appeals body. It exercises original jurisdiction; it is not bound by the findings of the Tribunal. It is free to consider new material and to exercise its own discretion, unfettered by any prior processes.

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[73] S 34.
[74] S 32.
[75] S 33.
[76] S 20(1)(a) and (b) .
[77] S 20(3).
[78] S 20(4).
[79] S 20(5).

Synthesis

[72] Having found that the Constitution anticipates the JSC Act, my focus turned to the specific provisions of the JSC Act governing the removal of a judge. From the outset the declared intention of the JSC Act is to give full effect to ss 177 and 178 of the Constitution. Although the JCC and the Tribunal are not structures established in the Constitution, their establishment in the JSC Act is the JSC's choice of process exercised in terms of s 178(6) of the Constitution, read with ss 178(4), (5) and 180(b) and s 5 of the JSC Act. The establishment of the JCC and the Tribunal are consistent with the Constitution.

[73] When assessing the validity of the JSC Act, its constitutionality must be distinguished from the functionaries who exercise power under it. The possibility of abuse of power has no bearing on the constitutionality of the JSC Act. The remedy for abuse of power does not lie in invalidating the JSC Act.[80]

[74] Notwithstanding *van Rooyen & others v The State & others (General Council of the Bar of South Africa Intervening)* the applicant insisted in his founding affidavit that only the JSC (excluding the members of the legislature and the executive), the National Assembly and the President should be involved in the removal of a judge. He relied on s 178(5) for this submission.[81] But s 178(5) does not exclude the executive from participating in any matter pertaining to the judiciary. Furthermore, neither the JCC nor the Tribunal is composed of members of the legislature or the executive. To precisely which provision of the JSC Act the applicant was targeting this criticism was unclear from his founding affidavit. In the heads of argument for the applicant his counsel accepted *van Rooyen,* disavowed his criticism made under oath and unfairly accused the respondents of missing their point. Their point was no longer that the inclusion of non-JSC members intruded on judicial independence but that the participation of 'structures

[80] *Van Rooyen v The State* para 37.
[81] Para 38 of Founding Affidavit.

outside' of the JSC in the removal of a judge conflicted with s 177 of the Constitution. But during argument counsel resurrected their inclusion of non-JSC members objection.

[75] *Van Rooyen* settled objection to the appointment of non-JSC members to the JCC and the Tribunal; it is insignificant in itself in determining the constitutionality of such a provision. What matters is that irrespective of who is appointed to these structures they must perform their duties without fear, favour, prejudice and above all, faithfully to the Constitution.

[76] Manifestly, all critical decisions pertaining to procedures that could lead to the impeachment of a judge involve the JSC and the Chief Justice, in his capacity as Chairperson of the JSC and the JCC. They have institutional authority derived from the Constitution that supersedes their personal and subjective predilections as individuals.

[77] Lawyers who participate in the process as members of the JSC, the JCC and the Tribunal are bound by their oaths of office to uphold the Constitution. The integrity of the persons involved in the processes is as highly prized as the process itself given the stature of the judiciary as a pillar of democracy. The applicant's criticism that non-JSC members are appointed to the JCC and the Tribunal is unjustified.

[78] Notwithstanding his virulent attack on the establishment of the JCC and the Tribunal the applicant did not contest the proceedings before the JCC and its decision to request the JSC to establish the Tribunal to inquire into allegations of his gross misconduct. Given his strident constitutional attack, one also anticipated a claim for some relief against the JCC process such as an order reviewing and setting aside its ensuing decision to request a Tribunal. None has been forthcoming.

[79] The participation of the Minister is confined to consultation with

a view to joint decision-making; when he serves as a member of the JSC by voting if consensus is unattainable. Maximum consensus during the process is vital for laying the foundation for the National Assembly to endorse the decision of the JSC. Such participation by the Minister is also not inconsistent with the Constitution; s 178(5) specifically allows the Minister to remain in attendance in the JSC even when members of the legislatures are excluded.

[80] Ironically, the applicant prefers the JSC Rules procedure. As the Supreme Court of Appeal pointed out in its comparative analysis the JSC Rules and the JSC Act are 'substantively the same' and that there is no is no 'fatal effect' on existing rights.'[82] Furthermore, the constitutional principle in Rule 1.2, which excludes all ten members of the legislatures serving on the JSC from presiding in impeachment proceedings, is carried forth into the JSC Act.[83] Rule 2.5 entitled the JSC to appoint a subcommittee to deal with complaints when the JSC was not in session. Likewise, the JSC Act creates the JCC for a similar purpose but with added safeguards for judicial independence. Whereas a subcommittee of the JSC might include members of the executive, the JCC is composed of six judges exclusively.[84]

[81] As stated above constitutional interpretation is not only about parsing the words. Both textual and contextual interpretations matter.[85] Contextually, the JSC Act reinforces dialogical constitutionalism. It sets objective ground rules for engagement by the three actors representing the three arms of government. A certain, predictable, consistent, transparent and accountable process fortifies the separation of powers and preserves the independence of the judiciary. Without it, the JSC would have to first persuade the other two arms that it adopted a fair procedure in deciding to

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[82] *Nkabinde v Judicial Service Commission* paras 84.
[83] *Nkabinde v Judicial Service Commission* paras 73.
[84] S 8 of the JSC Act.
[85] *Justice Alliance of South Africa v President of The Republic of South Africa* paras 44 and 57.

remove a judge and therefore they should accept its decision to remove the judge.

[82] The dialogue is not only amongst the three arms of government. When it performs its functions and especially when it appoints and removes judges, the JSC exercises public power in the public interest. The public has an interest in how the JSC executes its constitutional mandate. The JSC is not a self-serving closed-shop in which the profession protects its own members. Left to determine its own procedures the JSC will have to do much more to satisfy the public interest than merely adopt its own procedures outside of a parliamentary process.

[83] Promulgation of the JSC Act would have allowed public participation in determining the procedures to be adopted, more so than the JSC Rules did. Publication of rules and procedures for governing judges promotes transparency and access to information and justice for those who wish to lodge complaints against a judge. The complainants can expect to have their disputes resolved by a Tribunal comprised of persons of impeccable integrity and competence. Legislation embodying generally objective and universally accepted rules and practices rather than internal JSC own rules is better suited for inculcating 'public confidence in the institution of the judiciary as a whole.' [86]

[84] In the circumstances I conclude that the JSC Act is not inconsistent with the Constitution.

Costs

[86] *Justice Alliance of South Africa v President of The Republic of South Africa* para 73; *Gratton v. Canadian Judicial Council*at 37-38.

[85] Both sides asked me to follow *Biowatch Trust v Registrar Genetic Resources and Others* and to direct each party to pay its own costs.[87] *Biowatch* set the following principle:

> 'The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.'[88]

[86] What does 'constitutional justice' mean in the context of the judiciary and the facts of this case? When considering complaints about, and the possible removal from office of judicial officers, the exhortation in the Preamble to the JSC Act is to balance effectively and appropriately the independence and dignity of the judiciary and 'the overriding principles of openness, transparency and accountability that permeate the Constitution and that are equally applicable to judicial institutions and officers.' Additionally s 27(1) of the JSC Act urges that hearings of the Tribunal be concluded without unreasonable delay, in the interests of protecting and enhancing the dignity and effectiveness of the judiciary and the courts.[89] Therefore constitutional justice cannot be assessed from the linear parochial perspectives of the litigants. Unambiguously in litigation in which the interests of the public are at stake constitutional justice must also embrace and promote those interests.

[87] The applicant's case is constructed entirely on the separation of powers and the first part of the Preamble cited above, namely the independence of the judiciary. He omits to mention the dignity of the judiciary and openness, transparency and accountability. Not once has the applicant said that he is committed to accounting for his conduct that resulted in his conviction and sentence for driving a motor vehicle under the influence of alcohol. In his founding affidavit he admits that he was involved in a motor vehicle accident in which he crashed into a person's wall. He acknowledges

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[87] (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).

[88] *Biowatch* para16.
[89] S 27(1).

that the complaint against him to the JSC is that he falsely denied that he was driving under the influence of alcohol. But this is only a fragment of the complaint. The complainant wrote:

> 'I expected the ...JSC to have taken judicial notice of the completely unacceptable conduct... it is the first time that a sitting judge is mentioned in a legal publication... as a convicted accused. ...this is sufficient reason why the learned judge should no longer be a judge. Added to this are his public protestations that he was not drunk, never recanted, and the finding of the trial court, confirmed on appeal, that this statement was untrue, as well as his wholly unacceptable drunken tirades.' (*sic*)

[88] The seriousness of the complaint, the conviction and sentence being admitted facts, and the implications for the image and dignity of the judiciary, should leave the applicant in no doubt about his duty to account for his conduct. Why has he not done so?

[89] Not once has he submitted that this application is his pursuit of enforcing the rule of law or the principle of legality. In these respects this application is distinguishable from *Nkabinde*[90] In that case the applicant judges emphasised their willingness to testify before the JSC but they were 'adament' that 'they were motivated by their commitment to the rule of law, of which the principle of legality was an essential component.' On appeal, those judges were absolved from the costs order imposed by the full court below.

[90] Turning to the bases of his attack on the JSC Act, *Nkabinde* is conclusive authority that the JSC Rules and the JSC Act are substantively the same.[91] The Supreme Court of Appeal dismissed the appeal on 10 March 2016. The Constitutional Court dismissed the appeal against the judgment of the Supreme Court of Appeal on 24 August 2016. The applicant launched this application on 30 June 2016. Lead counsel for the applicant in this case is the same as in *Nkabinde (SCA).* As a judge and litigant the

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[90] *Nkabinde* para 51.
[91] *Nkabinde* para 70-83.

applicant also had to be aware of the evolution of *Nkabinde* to the Constitutional Court. Yet the applicant's heads of argument do not refer to it at all.

[91] Only in replying argument did Counsel for the applicant distinguish this case from *Nkabinde*. His distinction is on the secondary point decided in *Nkabinde (SCA)* namely the validity of s 24 of the JSC Act relating to the appointment of a member of the prosecution services to adduce evidence before the Tribunal. The primary point decided by the Supreme Court of Appeal was the validity of the decisions of the JSC to refer complaints to the JCC and the Tribunal. What could possibly have been the reason for this material non-disclosure?

[92] In *Justice Alliance* the Constitutional Court reaffirmed well-known principles about the separation of powers and constitutional interpretation. Not only must all actors protect and preserve 'the precious institutional attribute of impartiality and the public confidence' implicit in s 177 (1) and (2), [92] but they must also read the Constitution as a whole and interpret its provisions in harmony with one another.[93] Although the applicant relied on that case as authority for the first principle he ignored the second principle about constitutional interpretation. Why did he ignore the second principle?

[93] Turning to the JSC Act why did the applicant not seek a declaration of invalidity of s 5 or even refer to it at all considering his stance that the Minister should not be involved in the procedures for the JSC?

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[92] *Justice Alliance Of South Africa v President Of The Republic Of South Africa And Others* 2011 (5) Sa 388 (CC) para 75.

[93] *Justice Alliance Of South Africa V President Of The Republic Of South Africa And Others* 2011 (5) Sa 388 (CC) para 37; *United Democratic Movement V President Of The Republic Of South Africa And Others (African Christian Democratic Party And Others Intervening; Institute For Democracy In South Africa And Another As Amici Curiae) (No 2)* 2003 (1) SA 495 (CC) para 12.

[94] Aside from the ethics of these material non-disclosures, the answers to these questions are matters implicating the applicant's accountability in a similar way as his duty to account to the Tribunal and ultimately the JSC for his criminal conduct.

[95] In my assessment the reason for the applicant avoiding *Nkabinde* is that he cannot get around the Supreme Court of Appeal's finding that the JSC Rules and the JSC Act are substantively the same.[94] Although that Court approached the comparison of the two instruments from a different angle, the result is a principled finding on a point of law. It remains our law until the Constitutional Court has occasion to deal with the question. Any hope of the Constitutional Court rescuing the situation for the applicant also fell away once it dismissed the appeal. That being the law this application had little prospects of success from the outset. The applicant cannot rationally contend that he is willing to submit to the application of the JSC Rules but not to the JSC Act when both instruments are substantively the same. As my analysis of both instruments show the provisions in the JSC Act capture constitutional principles better than the JSC Rules. Absent a factual predicate the applicant cannot show that he is actually worse off under the JSC Act than the JSC Rules. He does not advance facts that show how practically the Tribunal currently composed of two senior judges and an attorney will prejudice him.

[96] Regarding *Justice Alliance* his submission was that 'the only plausible interpretation to be given to the provisions of section 178(6) is that only the JSC may determine its own procedure and not Parliament'. This submission was based on the separation of powers principle at the expense of the principle of harmonious constitutional interpretation. As stated above it conflicts with s 178(4) in terms of which not only the Constitution but also national legislation determines the powers and functions of the JSC. Furthermore, he ignored the text of s 5 of the JSC Act that recognises 'the procedure...which the Commission has determined in terms of section 178(6) of the

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[94] *Nkabinde* para 70-83.

Constitution.' On his interpretation s 178(6) cannot exist harmoniously with other provisions of the Constitution including ss 43, 165, 177, 178 and 180. By ignoring the unambiguous text of the Constitution, several references in the JSC Act to the Constitution, especially s 5 and the principle of harmonious interpretation, what little prospects of success the applicant had after *Nkabinde* has evaporated.

[97] My analysis raises two questions that neither party has articulated:

(a) Has the applicant raised a genuine constitutional challenge? Merely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would not absolve the applicant from an adverse cost order. *Biowatch* directs that the 'issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication.'[95]

(b) Has the conduct of the applicant been 'vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court'[96] or 'manifestly inappropriate'.[97]

[98] *Biowatch* also directs that

> 'when departing from the general rule [of not awarding costs in constitutional matters[98]] a court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future.'[99]

In addition to my analysis and conclusions about the applicant's case, four

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[95] *Biowatch* para 25.
[96] *Biowatch* para 18.
[97] *Biowatch* para 24.
[98] Affordable Medicines Trust and Others v Minister of Health and Another [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at para 139 cited in *Biowatch* para 18.
[99] *Biowatch* para 25.

factors inform my response to these two questions:

[99] First: The applicant has delayed launching this application. This application is surprisingly sparse on facts. The incident giving rise to the complaint occurred on 6 January 2007. The applicant was convicted about April 2007. The complaint to the JSC was made only on 22 May 2011. The applicant has failed to disclose to the court why he did not launch these proceedings then, or when he appeared before the JCC, or in February 2013 when the JSC informed him of establishing the Tribunal, or eventually when he was summoned to appear before the Tribunal in June 2013. Neither side has taken the court into its confidence to explain the reasons for the Tribunal adjourning its enquiry indefinitely.

[100] Second: The delay is unconscionable; as such it violates s 27(1) of the JSC Act, impairs the dignity and effectiveness of the judiciary and the courts, and is against the public interest. The applicant has been on special leave since 15 April 2007. There is no indication on the papers what conditions, if any, apply to his special leave. The probabilities are that his leave is with full pay for almost ten years hence his disincentive to act expeditiously. After his fifteenth year of service he would have qualified for his tax-free gratuity amounting to double his prevailing annual salary. After age sixty-five years he could retire on pension with the leave of the Minister. Considering that the applicant has spent only five of his sixteen years as a judge in active service, these burdens on the public purse cease to be safeguards against undue interference but become a favour akin to one that the Constitutional Court eschewed in *Justice Alliance.*

[101] Third: The applicant fails to account not only for his criminally proven conduct but also his reasons for delaying this application. Furthermore, the material omissions in his submissions call for an explanation. He is no ordinary litigant. As a member of the judiciary he remains accountable for his acts and omissions.

[102] Fourth: The applicant's conduct and his failure to account have impaired the dignity of the judiciary. The perception if not the inference should be avoided that the judiciary protects its members at the expense of the public interest and the public purse, especially with the current cost-cutting constraints weighing on the judiciary.

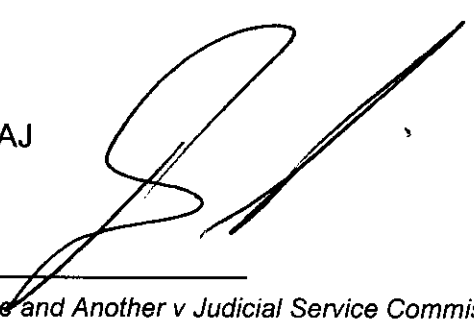
[103] I find that the applicant has not raised a genuine constitutional dispute. This application, the grounds on which it is based, and crucially his failure to account for his acts and omissions are manifestly inappropriate. Not to award costs against the applicant in these circumstances would be to devalue the essence of constitutional justice and to ignore the Preamble and s 27(1) of the JSC Act. It would result in unfairly and unjustifiably preferring the applicant at the expense of the public interest. In all the circumstances not to award costs against the applicant would be unconscionable.

[104] To paraphrase the Constitutional Court in *Nkabinde:* In conclusion, I would be failing in my duty if I did not take this opportunity to emphasise that it is in the interests of justice that the matter of the complaint against the applicant should be dealt with and concluded without any further delay. The events that gave rise to the complaint occurred in 2007. Nine years later, the matter has not been finalised. It is in the interests of justice that this matter be brought to finality. [100]

Order

[105] The application is dismissed, the applicant to pay the respondents' costs.

D Pillay AJ



[100] *Nkabinde and Another v Judicial Service Commission and Others* [2016] ZACC 25