THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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FREEDOM UNDER LAW v THE ACTING CHAIRPERSON: JUDICIAL SERVICE COMMISSION & OTHERS

The Supreme Court of Appeal today upheld an appeal against a judgment of the North Gauteng High Court, Pretoria in terms of which the High Court dismissed an application for the setting aside of the dismissal by the Judicial Service Commission of a complaint by thirteen judges of the Constitutional Court against Judge Hlophe the Judge President of the Western Cape High Court, Cape Town and of a counter-complaint by Hlophe JP against the judges of the Constitutional Court.

The complaint of the judges of the Constitutional Court was that Hlophe JP had approached two of the judges of the Constitutional Court and had attempted to improperly influence the court's pending judgment in the Zuma/Thint matters. Hlophe JP's counter-complaint was that the Constitutional Court judges had undermined the Constitution by making a public statement in which they sought to activate a

procedure for his removal for alleged improper conduct, before properly filing a complaint with the JSC and of having violated his rights to dignity, privacy, equality, procedural fairness and access to courts by filing their complaint even before they had heard his version of the events. He subsequently accused the constitutional court judges of having been motivated by ulterior motives.

In an earlier decision of the SCA it had been held that the filing of the complaint and the publication of the complaint by the judges of the Constitutional Court without having given Hlophe JP a hearing was not unlawful but Hlophe JP persisted with the counter-complaint on the basis that the judges had acted with an ulterior motive.

The JSC decided that in view of the conflict of fact on the papers placed before it, it was necessary to refer both the complaint and the counter-complaint to the hearing of oral evidence. After a second application by Hlophe JP for postponement of the hearing due to ill-health had been refused, the JSC proceeded to hear the oral evidence of judges of the Constitutional Court in his absence. These proceedings were however set aside on application by Hlophe JP to the South Gauteng High Court, Johannesburg.

The JSC, the composition of which had changed, reconsidered its decision to refer the disputes of fact to oral evidence. They decided that the allegations made in the complaint and counter-complaint, if established, would amount to gross-misconduct and appointed a sub-committee to investigate the complaints by conducting interviews.

Having conducted the interviews at which no cross-examination was allowed, the sub-committee recommended to the JSC that fresh deliberations in respect of the complaint and the counter-complaint be held in the light of the proceedings before them.

The JSC thereupon reconsidered the matter and dismissed the complaint as well as the counter-complaint. The complaint was dismissed for the following reasons: (a) the evidence of the two judges of the Constitutional Court, Nkabinde J and Jafta AJ, was based on an inference that Hlophe JP communicated to them that the Zuma/Thint

matters must be decided in Mr Zuma's favour; (b) on the totality of the facts and the context, it was not satisfied that that was the only inference to be drawn; (c) the evidence of Hlophe JP that he did not attempt to improperly influence the two judges to decide the cases in Mr Zuma's favour could not be rejected; and (c) to embark on a formal enquiry with cross-examination would serve no purpose. The counter-complaint was dismissed on the basis of an acceptance of the evidence of the Constitutional Court judges.

The High Court dismissed an application for the setting aside of the JSC's decision. On appeal the SCA held that (a) the procedure adopted by the JSC was inappropriate for the final determination of the complaint against Hlophe JP; (b) that the decision by the JSC to dismiss the complaint on the basis of a procedure inappropriate for the final determination of the complaint and on the basis that cross-examination would not take the matter any further constituted an abdication of the JSC's constitutional duty to investigate the complaint properly; and (c) that the dismissal of the complaint was therefore unlawful. The SCA held furthermore that the decision to dismiss the complaint constituted administrative action and was reviewable for being unreasonable in that there was no reasonable basis for it.

The SCA dismissed the appeal in so far as it related to the JSC's dismissal of the counter-complaint and held that the JSC was entitled to do so on the basis of concessions by Hlophe JP that his allegations rested solely on inferences for which he could proffer no evidence in support. In the event, so the SCA held, the JSC could not be faulted in their decision to accept the constitutional court judges' denial that they were activated by an ulterior motive.