

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 32193/21

In the matter between:

LEGOABE WILLIE SERITI

First Applicant

HENDRICK MMOLLI THEKISO MUSI

Second Applicant

and

THE JUDICIAL SERVICE COMMISSION

First Respondent

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Second Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

OPEN SECRETS NPC

Fourth Respondent

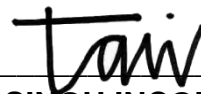
SHADOW WORLD INVESTIGATIONS

Fifth Respondent

FILING SHEET

KINDLY TAKE NOTICE THAT that the Fourth and Fifth Respondents hereby file heads of argument.

SIGNED at JOHANNESBURG on 18 JULY 2022.



POWER SINGH INCORPORATED

Attorneys for the Fourth and
Fifth Respondents

20 Baker Street, Rosebank

JOHANNESBURG, 2196
Tel: +27 11 268 6881
Fax: +27 86 614 5818
Email: tara@powersingh.africa
tina@powersingh.africa
Ref: PSIOS-202112
C/O Louis du Plessis
Gilfillan Du Plessis Inc.
1st Floor, LHR Building
357 Visagie Street
PRETORIA, 0002
Tel: +27 12 320 2943 ext 237
Fax: +27 12 320 6852
Ref: COR/LOU/W45

TO: THE REGISTRAR
High Court of South Africa
Gauteng Division
PRETORIA

AND TO: MALULEKE SERITI MAKUME MATLALA INC.
Attorneys for the Applicants
Lembede Tambo Pitje Chambers
905 Stanza Bopape Street, Cnr Orient Street
Arcadia
PRETORIA,
0001
Tel: +27 87 232 1799
Email: nkwinika@msmminc.co.za; msmm@msmminc.co.za;
lindh@msmminc.co.za
Ref: MR NKWINKA/LH CS253/S243

AND TO: THE STATE ATTORNEY
Attorneys for the First, Second and Third Respondents
C/O State Attorney
J Van Schalkwyk
10th Floor, North State Building
95 Albertina Sisulu Street, Cnr. Kruis Street
JOHANNESBURG
Tel: +27 11 33 7600
Email: JohVanSchalkwyk@justice.gov.za; Mmotsoko@justice.gov.za
Ref: 2458/21/P45/mm

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 32193/21

In the matter between:

LEGOABE WILLIE SERITI First Applicant

HENDRICK MMOLLI THEKISO MUSI Second Applicant

and

THE JUDICIAL SERVICE COMMISSION First Respondent

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT** Second Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Third Respondent

OPEN SECRETS NPC Fourth Respondent

SHADOW WORLD INVESTIGATIONS Fifth Respondent

FOURTH AND FIFTH RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. In 2011 President Jacob Zuma appointed a Commission of Inquiry to investigate the military weapons acquisition programme (the Strategic Defence Procurement Package) which was undertaken by the government between 1997 and 1999 (“**Commission**”).

2. The Applicants were the members of that Commission.
3. The Report of the Commission was taken on review. On 21 August 2019 a Full Bench of this Court, consisting of three Judge Presidents, set aside the Report of the Commission. The Court was highly critical of the conduct of the Commission. It set aside the Report on the basis that the Commission failed to operate according to the requirements of legality and rationality.¹
4. The Applicants took no steps in response to that judgment.
5. The Fourth and Fifth Respondents then lodged a complaint with the Judicial Service Commission (“**JSC**”) about the conduct of the Applicants.
6. In response to that complaint, the Chair of the JSC instituted proceedings through the processes of the JSC. The Applicants then launched this application. They also, belatedly, sought leave to appeal against the decision of the Full Bench. That application for leave to appeal will be heard on 3 August 2022.
7. The Judicial Service Commission Act 1994 (“**JSC Act**”) expressly provides that judges who have been discharged from active service in terms of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001 (“**Judges’ Remuneration Act**”) are subject to its provisions relating to judicial conduct and misconduct.

¹ *Corruption Watch and Another v Arms Procurement Commission and Others* 2020 (2) SA 165 (GP).

8. In this application, the Applicants contend that because they have retired from active service, they cannot be held accountable by the JSC for their conduct while they were still on active service. The proposition is a startling one. It amounts to this: it is that any judge who is alleged to have committed serious misconduct while on active service can escape the consequences by the simple expedient of retiring from active service.
9. This would self-evidently fly in the face of the foundational value of accountability in our Constitution.² As Langa CJ expressed it:³
- “accountability is a central value of our Constitution. This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable.”
10. It would require the clearest language in the Constitution or the relevant statutory provisions in order to justify a conclusion that this is what the law provides. There is no such language at all. The Constitution and the statutes say no such thing. They point clearly in the opposite direction.

THE APPLICANTS’ MAIN CASE

11. The Applicants’ main case can be summarised as follows:

² Section 1(d).

³ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another* 2007 (1) SA 343 (CC) para 89.

- 11.1. Section 176 of the Constitution⁴ deals with the term of office of judges. It provides that judges such as the Applicants hold office until they are discharged from active service in terms of an Act of Parliament. It provides further that the salaries, allowances, and benefits of judges may not be reduced.⁵
- 11.2. The Act of Parliament contemplated in section 176(2) of the Constitution is the Judges' Remuneration Act. It states when a judge retires from that office.
- 11.3. The JSC Act impermissibly broadens the meaning of "judge" by including the phrase "which includes a Judge who has been discharged from active service in terms of that Act [the Judges Remuneration Act]".⁶
- 11.4. The JSC Act thus impermissibly addresses a matter which is dealt with in the Judges' Remuneration Act, mainly the definition of "Judge". This is in breach of the Constitution, because it is the Judges' Remuneration Act which is authorised by the Constitution to determine the term of office of judges, and not the JSC Act.
12. We submit that this argument is without foundation, for the following four reasons.

⁴ Which the Applicants say is "*Supremely important*": Applicants' heads of argument, para 10.

⁵ Sections 176(2) and (3).

⁶ Section 1, JSC Act.

First reason: The definition of “judge” in the JSC Act is the same as the definition in the Judges’ Remuneration Act

13. Remarkably, the Applicants’ argument completely ignores the definition of “*judge*” in the Judges’ Remuneration Act.
14. The Judges’ Remuneration Act states that “*judge*” means a person “*holding the office*” of specified judicial positions, “*and includes any person who, at or since the fixed date,⁷ held*” one of the specified judicial offices.
15. The Applicants’ argument therefore falls flat at the first hurdle. For practical purposes, the Judges’ Remuneration Act and the JSC Act have the same definition of “*judge*”: both include a judge who has retired from active service and has ceased to hold office.
16. The very foundation of the Applicants’ case therefore falls away.
17. It is with respect difficult to understand how the Applicants can contend that

“what the National Act of Parliament tells us under section 1 of the Judges’ Remuneration Act is that a judge is one who is in active service and further someone who performs as a judge in a permanent capacity.”⁸

⁷ 1 April 1989: section 1, Judges’ Remuneration Act.

⁸ Applicants’ heads of argument para 22.3.

18. That is exactly wrong. Section 1 of the Judges' Remuneration Act states in terms that it includes someone who previously held that office – in other words, a judge who is no longer on active service.

Second reason: The JSC Act in any event does not deal with a matter referred to in section 176(2) of the Constitution

19. Section 176(2) provides that a judge holds office until discharged from active service in terms of an Act of Parliament.
20. The JSC Act does not deal with when a judge holds office, or when a judge is discharged from active service.
21. The JSC Act therefore in any event does not deal with a matter referred to in section 176(2) of the Constitution. It also does not deal with any other matter referred to in section 176 of the Constitution.
22. It is correct that the Judges' Remuneration Act deals with the matters referred to in section 176(2). The JSC Act does not purport to deal with those matters.

Third reason: If the JSC Act did deal with a matter referred to in section 176(2) of the Constitution, that would not render it invalid

23. The Constitution does not specify that it is the Judges' Remuneration Act, or that it is only the Judges' Remuneration Act, that may deal with the matter in section 176(2).

24. Assuming (for the sake of the present argument) that the JSC Act did deal with that matter, that would not render the relevant provisions of the JSC Act inconsistent with the Constitution. There is nothing in the Constitution which says that it is only the Judges' Remuneration Act that may determine when a judge holds office.
25. There is no reason why Parliament could not validly enact a further Act, which deals further with that matter. If that further Act was inconsistent with the Judges' Remuneration Act, that would not render the further Act invalid. Where two statutes deal with the same matter, the courts will first attempt to find a reasonable construction which reconciles them. If that attempt at reconciliation fails, then the later Act will be taken to have impliedly repealed the earlier Act to the extent of its inconsistency.
26. That has been our law for more than a hundred years:

“There are many illustrations in the books of the repeal by implication of earlier statutes by later ones, for subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. Such an implied repeal will arise wherever the contents and operation of a later Act are repugnant to or cannot be harmonized with those of an earlier one [...]”⁹

27. The later Act would, of course, be invalid if it were inconsistent with the Constitution. But the Applicants are not able to point to anything in the JSC Act

⁹ *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397; cited with approval in *Minister of Justice and Constitutional Development and others v Southern Africa Litigation Centre and Others* 2016 (3) SA 317 (SCA) para 118.

which is inconsistent with the Constitution. They can point only to section 176(2), which provides that judges hold office “*until they are discharged from active service in terms of an Act of Parliament*”. The JSC Act is an Act of Parliament.

28. The Constitution does not say that the salaries, allowances and benefits of judges are to be determined by an Act of Parliament. But if it did so, that too would not prohibit Parliament from enacting successive Acts of Parliament which deal with that matter.
29. The assertion that the JSC Act is inconsistent with the Judges’ Remuneration Act would therefore, if correct, be of no consequence. It would not lead to invalidity of the JSC Act. If it were inconsistent with the Judges’ Remuneration Act, it would trump that Act, to the extent of that inconsistency. The Constitution does not prohibit this.

Fourth reason: The JSC Act does not deal with the same matter as the Judges’ Remuneration Act

30. The JSC is established in terms of section 178 of the Constitution.
31. Section 180 of the Constitution provides that:

“National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including – (b) procedures for dealing with complaints about judicial officers”.

32. The long title of the JSC Act provides that its purposes include:

“to establish the Judicial Conduct Committee to receive and deal with complaints about judges; to provide for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct which judges must adhere to; ... to provide for procedures for dealing with complaints about judges; to provide for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges; [...]”.

33. The Preamble to the JSC Act records that:

“... 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”.

34. The JSC Act defines “*judge*” for the purpose of the matters with which it deals. It does not purport to define “*judge*” in every statutory context. If its definition differed materially from that in the Judges’ Remuneration Act, this would be of no consequence as it defines the term “*judge*” only for the purposes of the matters dealt with by the JSC Act. If the definitions differed:

34.1. The definition in the Judges’ Remuneration Act would apply to matters dealt with in that Act; and

34.2. The definition in the JSC Act would apply to matters dealt with in the JSC Act.

35. As it happens, however, the definition in the JSC Act is consistent with that in the Judges' Remuneration Act.

IRRATIONALITY

Impeachment

36. The Applicants also contend that including retired judges within the ambit of the JSC accountability procedures is irrational, because a judge who has retired cannot be impeached.
37. This is not an original argument. Former President Trump raised it in the context of an attempt to impeach him for alleged crimes and misdemeanours committed while he was President.
38. This argument, while no doubt interesting to some, is entirely academic at this point. The Applicants have not been found guilty of any serious misconduct. The Chief Justice has required that the procedures established by the JSC Act, in accordance with the requirements of the Constitution are to be followed to determine whether that was the case. The JSC will have to consider and decide the following questions:
- 38.1. Were the Applicants guilty of serious misconduct? If so,
- 38.2. What sanctions are permissible (including whether impeachment is permissible); and

38.3. What sanction or sanctions should be imposed?

39. These are matters possibly for another day. The Applicants cannot now ask a court to decide that the JSC Act may not apply to retired judges, because:

39.1. they may be found guilty of serious misconduct (which they deny);

39.2. the JSC may find that a sanction of impeachment is permissible; and

39.3. the JSC may find such a sanction should be imposed.

40. The Applicants' complaint is plainly not ripe for determination. We submit that a court will not expend scarce judicial resources on this entirely hypothetical case.

The relief which the Applicants seek

41. But all of this is actually irrelevant for another reason. The Applicants do not in this application challenge the permissibility of impeachment if and when the time arises. In their Notice of Motion, they ask the Court to strike down the inclusion of retired judges in the definition of "judge" in the JSC Act. They thus challenge the application of the Judicial Code of Conduct and the procedures in the JSC Act to them at all, whether they result in impeachment or any other sanction.

42. They contend that the constitutionally-authorized procedures of the JSC Act may not be applied to them at all, no matter how badly they misconducted themselves

while they were judges, simply because they have since retired from active service.

43. It follows that to succeed in their irrationality challenge, the Applicants must show that it is irrational to apply any rules of conduct to judges who have since retired, and to have any procedures for dealing with complaints of misconduct against them. That is, with respect, a most extraordinary proposition.
44. While it is extraordinary, it is not an accident or an error. The reason why the Applicants take the broad-brush approach of seeking the deletion of the relevant part of the definition of “judge” is because they are not only anxious to avoid the risk of being impeached; they want to avoid being held accountable in any way for their misconduct.

“JUDGES ACCOUNT THROUGH THEIR REASONS IN JUDGMENTS”

45. The Applicants recognise that they cannot sustain an argument that they are entitled to be unaccountable for what they do. That flies so directly in the face of the words and the ethos of the Constitution, that (we submit) no court would countenance it.

46. So, the Applicants attempt to meet this difficulty by saying “*Judges account through the reasons for their orders and the judgments they make*”.¹⁰ That answer is entirely misplaced, for two reasons.
47. First, the Applicants are not being held to account for the correctness or otherwise of a judgment which they gave. They are being required to account for their conduct in a Commission of Inquiry.
48. Second, even if this were a case of alleged misconduct in respect of a judgment, accountability could not and would not end with the delivery of a judgment. For example:
- 48.1. A judge who is accused of judicial misconduct in having taken a bribe could not escape the demand for accountability by saying “I accounted for what I did when I gave my judgment, that is how Judges are accountable”.
- 48.2. A judge who is accused of behaving in an offensive or racist manner towards litigants or witnesses could not escape accountability by saying “I accounted for what I did in my judgment. That is how I am accountable”.
49. In both cases, the judges would be accountable for their alleged misconduct through the constitutionally-authorized JSC process.
50. The same applies to the Applicants. They cannot be heard to say: “*I accounted for my conduct in my report, that is my only accountability*”.

¹⁰ Applicants’ heads of argument: para 23.

CONCLUSION

51. For all of these reasons, we submit that this application is entirely without foundation, and should be dismissed. It is transparently an attempt to delay the day of reckoning, when the Applicants will be required to account for and justify their conduct.
52. This is not a case in which the Biowatch principle applies, at least in respect of the Fourth and Fifth Respondents. While the Applicants are challenging the validity of a statutory provision, they are not seeking to assert a constitutional right. They are seeking to promote their own private interest in not being held accountable for their conduct.
53. We submit that the application should be dismissed, and the Applicants should be ordered to pay the costs of the Fourth and Fifth Respondents, including the costs of senior counsel.

GEOFF BUDLENDER SC

Counsel for Fourth and Fifth

Respondents

Chambers

Cape Town

14 July 2022