IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO.: 32193/2021

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 & CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
OPEN SECRETS NPC	Fourth Respondent
SHADOW WORLD INVESTIGATIONS	Fifth Respondent

FIRST RESPONDENT'S HEADS OF ARGUMENT

LG NKOSI-THOMAS SC

PJ DANIELL

CHAMBERS, SANDTON

31 AUGUST 2022

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A. INTRODUCTION

1 At the core of this application lies an attempt to absolve the Applicants, being judges discharged from active service, from their constitutional obligation of accountability. [1]

2 The Applicants face charges of gross misconduct arising from conduct that occurred before they were discharged from active service. The Applicants feel aggrieved that their alleged misconduct forms the subject of a disciplinary process after they have been discharged from active service.

3 The attempt at absolution comes about through the contention:

3.1 That since the Applicants have been discharged from active service, they should not have been included in the definition of the word "**judges**" as it occurs in section 7(g) of the Judicial Service Commission Act 9 of 1994 ("**the JSC Act**"); and

3.2 That to the extent that the said definition "**includes a judge who has been discharged from active service in terms of [the Judges Remuneration and Conditions of Employment Act 47 of 2001]**" it should be declared inconsistent with sections 176 and 177 of the Constitution read with section 1 of the Judges' Remuneration

[1] Section 1 (d) states accountability, openness, and responsiveness as certain of the values upon which our democratic state is founded.

and Conditions of Employment Act, 47 of 2001 (**"Judges' Remuneration Act"**).[2]

4 The crucial defect in this application is the failure to locate it within the scheme of applicable constitutional principles, namely, the separation of powers doctrine and the independence of the judiciary.

5 Indeed, the interpretative exercise that the Applicants are calling upon this Honourable Court to undertake can only be so undertaken through the prism of the above constitutional principles.

6 Accordingly, the scheme of these written submissions is as follows:

6.1 First, we set out the applicable constitutional framework against which the interpretative exercise is to be undertaken;

6.2 Second, we embark on the interpretation of section 7(g) of the JSC Act ("**the impugned provision**"); and

6.3 Third, we make concluding submissions.

B. THE APPLICABLE CONSTITUTIONAL FRAMEWORK

7 It is trite that the judiciary is an independent pillar of the state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially.

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[2] NOM pg. 001-1 to 001-05.

8 Under the doctrine of separation of powers, it stands on an equal footing with the executive and the legislative pillars of the state.[3]

The Independence of the Judiciary

9 The independence of the judiciary is a distinctive feature of a constitutional democracy. The test for independence is whether the judiciary "**from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence."** [4]

10 Although the Van Rooyen judgment was concerned with the impartiality and independence of a specific judge, we respectfully submit that it is instructive on the general institutional and structural guidelines that are required to be in place to ensure the independence of the judiciary.

11 The structural safeguards for the independence of the judiciary are:

11.1 Security of tenure for judges;

11.2 Financial security for judges; and

11.3 Institutional independence of the judiciary as a whole.

12 This case implicates these core safeguards to the independence of our judiciary.

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[3] S V Mamabolo 2001(3)SA 409 (CC) at [16].

[4] S and Others v Van Rooyen and Others 20002(5)SA 246 at [32].

Security of Tenure of Judges

13 In regard to the security of tenure safeguard, section 176(2) of the Constitution provides that judges such as the Applicants "**… hold office until they are discharged from active service in terms of an Act of Parliament.**"

14 Thus, judges such as the Applicants could not be dismissed by either the President as the head of the Executive or by the Legislature save in accordance with a very stringiest process set out in the JSC Act being the Act of Parliament referred to in section 176(2) of the Constitution.

15 Section 176, accordingly, entrenches the security of tenure requirement of the independence of the judiciary analysis.

Financial Security of Judges

16 There is a further consideration which is germane to these proceedings.

17 That is financial security. In order to immunise the judiciary from the potential whims of the Executive and the Legislature, section 176(3) entrenches financial security of the judiciary in the following terms: "**The salaries, allowances and benefits of judges may not be reduced.**"

18 It is because of the above that judges such as the Applicants continue to draw, *inter alia*, a salary regardless of whether or not they are in active service or have been discharged therefrom.

19 To underscore the financial independence of judges, their salary is not included in the allocation of revenue to any government department but is paid directly to the State Revenue Fund.[5]

20 May we interpose at this stage and point out that the Applicants have not tendered the return of all salaries, allowances and benefits received by them whilst discharged from active service.

21 That must mean then that they accept that they continue to be "**judges**" as contemplated in section 176(3) of the Constitution, hence they gladly accept such payments.

22 It boggles the mind, therefore, as to at what point exactly do they cease to be "**judges**".

23 The answer must ineluctably be - at the point of accountability as envisaged in section 1(d) of the Constitution. That is disingenuous, with respect.

24 If the Applicants are seriously contending that they are not judges by virtue of their discharge from active service, the logical conclusion of that argument is that they should surrender all their post-discharge benefits and

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[5] Ss 2 (6) and 14 the Judges' Remuneration Act.

go and seek employment. They did not do so, and neither could they, because they continue to hold the title of judges whose services (non-active) continue being eligible for enlisting by the State such as to preside over Commissions of Enquiry.

25 Accordingly, the Applicants are still judges albeit discharged from active service.

Institutional Independence of the Judiciary

26 The institutional independence implicates matters such as the appointment, discipline, and removal of judges.

27 Section 174(6) of the Constitution is a key provision in regard to the appointment of judges. It provides that the President must appoint the judges of all other courts on the advice of the Judicial Service Commission.

28 Section 177 of the Constitution provides for circumstances under which a judge may be removed from office.

29 Both the appointment and removal procedures are stringent and anything but arbitrary.

30 This is a further key safeguard to the independence of the judiciary.

The Bangalore Principles of Judicial Conduct

31 The above architecture accords with the Bangalore Principles of Judicial Conduct.[6]

32 At paragraph 26 on page 41 mention is made of security of tenure, financial security, and institutional independence as the hallmarks of the independence of the judiciary as the bedrock of the separation of powers doctrine.

33 Hence the judge for life common law rule is part of our law.[7]

34 The Applicants have not invited this court to develop this rule of common law so as to bring it in line with their interpretation of section 176.

35 The Applicants are, accordingly, bound thereby.

36 In any event, this Court is enjoined to prefer an interpretation that is in line with the Constitution as opposed to that which is at odds with it.

37 In all the circumstances, we respectfully submit that this Court should interpret the impugned provision in line with the above.

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[6] The Bangalore Principles of Judicial Conduct 2002, available at https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf

[7] SALJ, Malcolm Wallis; and Freedom Under Law v Motata [2021] ZAGPPHC 14 para 22.

C. THE PROPER INTERPRETATION OF THE IMPUGNED PROVISION

38 Broadly speaking, according to the Applicants:

38.1 The definition of "**judge**" prescribed in the JSC Act is not only vague and contradictory, but also irrational and unconstitutional for being inconsistent with sections 176 and 177 of the Constitution, read with section 1 of the Judges' Remuneration Act.

38.2 Sections 176 and 177 of the Constitution, (read with section 1 of the Judges' Remuneration Act) provide a definition for the term "j**udg**e", which does not extend to judges no longer in active service. To sustain this proposition the Applicants state that the JSC Act (which is a national statute), impermissibly broadens/ widens the meaning of the provisions in the Constitution and is therefore *ultra vires*.[8]

38.3 They are liable for impeachment in the event that they are found guilty of gross misconduct; and there can be no rational, realisable purpose to impeach a retired judge.[9]

38.4 The principles advanced by the JSC regarding judicial accountability are misplaced since "*judges account through the reasons for their orders and the judgments they make*". In this regard, so the argument goes: the Applicants discharged their accountability

[8] Applicants' HOA pg. 23-13 to 23-14 par 22 – 24.

[9] FA pg. 01-21 to 01-22 par 51 – 53; Applicants' HOA pg. 23-14 par 22.5.

obligation when they proffered their reasons in their report under the rubric of the Seriti Commission.[10]

39 Before we turn to deal with each of the above propositions, we propose to upfront deal with the inherent misconception upon which the entire application is based.

40 That misconception is that upon being discharged from active service, a judge such as the Applicants ceases to be a judge.

41 That can simply not be.

41.1 Firstly, the text of section 176 of the Constitution contemplates two classes of judges, namely, those in active service and those who have been discharged from active service.

41.1.1 Section 176(3), in particular, makes that clear. It says that salaries of judges (in active service or otherwise) "**may not be reduced**."

41.1.2 Based upon the above, the Applicants continue to draw a salary as explained above.

41.1.3 The word "**judge**" as employed in the text of the Constitution contemplates all judges in active service or otherwise.

41.1.4 The above, ultimately, buttresses the independence of the judiciary through security of tenure and financial security.

[10] Applicants' HOA pg. pg.23-14 par 23.

41.1.5 Accordingly, the judge for life principle is being given effect to.

41.2 Secondly, the Judges' Remuneration Act, similarly and consistently with the Constitution, contemplates two classes of judges, namely, those in active service and those that have been discharged from active service.

41.2.1 In this regard, the Judges' Remuneration Act carefully defines and distinguishes "**active service**" from "**service**" throughout.

41.2.2 "**Active service**" applies to a judge who holds office in a permanent capacity and "**service**" relates to a judge who has been discharged from permanent service;

41.2.3 It carefully gives an exposition of the conditions of service in regard to both classes of judges.

41.2.4 The above, ultimately, buttresses the independence of the judiciary through security of tenure and financial security.

41.2.5 Accordingly, the judge for life principle is being given effect to.

41.3 Finally, the JSC Act cements the institutional independence of the judiciary.

41.3.1 We have made the submission, above, that one of the pillars of judicial independence is institutional independence.

41.3.2 In like manner, the JSC Act, as an instrument to foster institutional independence, has in view two broad classes of judges, namely those in active service and those that have been so discharged. The impugned provision makes that plain.

41.3.3 It simply defies all logic for the Applicants to submit to the security of tenure leg of judicial independence, financial security leg of judicial independence and then to refuse to submit to the institutional leg thereof simply because they are potentially exposed to an impeachment.

41.3.4 The Applicants are either judges or not. They cannot be allowed to nit-pick those aspects that are favourable to the exclusion of the not-so favourable. Simply put, they should not be allowed to approbate and reprobate, being precisely what is at play here.

41.3.5 Since the Applicants are judges for life, they continue to be under the censure of the JSC Act.

42 We now turn to deal with the propositions maintained by the Applicants in no particular order.

The constitutionality challenge

43 The rules of statutory interpretation, which have now crystallised, demonstrate that a purely textual approach has been jettisoned. It is axiomatic that the interpretation of legislation must follow a purposive approach hence we set out the constitutional landscape above.

44 A consideration of the entire constitutional architecture is necessary in this interpretive exercise. With the adoption of the Constitution and the principles set out in **Endumeni**[11] there is a move away from a purely textual to contextual interpretation. These are the principles that must be adopted to ensure that the end result upholds the rule of law.

45 What the above demonstrates is that "**we must prefer a generous construction over a merely textual or legalistic one**"[12] when interpreting sections 176 and 177, so long as we avoid a construction which might do damage to the sections.

46 In addition, one cannot interpret the sections in isolation. Sections 176 and 177 must be read within the scheme of the Constitution as a whole. This means that one has to also have regard to the following:

46.1 section 1(c), which emphasises the supremacy of the Constitution and the rule of law;

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[11] Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012)

[12] Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199(CC); 2007 (10) BCLR 1027 (CC) at para 53.

46.2 section 2, which stipulates that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid;

46.3 section 165, which confers judicial authority on the courts and provides that their functioning cannot be interfered with; and importantly,

46.4 section 180, which states that national legislation may provide for any matter concerning the administration of justice not dealt with in the Constitution – including the procedures for dealing with complaints about judicial officers.[13]

47 The approach adopted by the Applicants is defeated by the provisions of the Constitution itself.

47.1 Section 176 of the Constitution does no more than state the terms of active service for judges of the Constitutional Court and other courts. It also prescribes that judges' salaries shall not be reduced.

47.2 In addition, section 177 of the Constitution does no more than prescribe the circumstances in which a judge may be removed from office and the procedure for doing so. In our submission, sections 176 and 177 have in view the two broad classes of judges as we stated elsewhere in these submissions. Accordingly, the sections themselves, quite apart from the impugned provision, reach the Applicants.

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[13] The JSC Act is the legislation contemplated in this respect.

47.3 The Applicants' reliance on sections 176 and 177 to contest the definition of "judge" in section 7(1)(g) of the JSC Act is, therefore, misplaced.

47.4 When we read section 176 and 177 within the broader scheme of the Constitution, there is a series of interlocking provisions designed to protect judicial independence and to protect the judiciary from internal and external threats. Thus, to read sections 176 and 177 restrictively (and incorrectly) would be to stifle the intention behind this broader Constitutional scheme. To read the provisions restrictively (and incorrectly) with the effect that a decision cannot be made by the JCC on the question of whether a judge has committed gross misconduct because he or she is no longer in active service, would fly in the face of the need to address infractions into the integrity of judicial independence. Reading provisions purposively, and in conjunction with the relevant provisions of the Constitution, as well as the Judges' Remuneration Act, in such a way that provides for the JCC Code to be applicable to retired judges, is the most suitable way of giving meaning to the purpose for which the JSC was established.

48 Self-evidently, the Applicants' interpretation of sections 176 and 177 of the Constitution is aimed at ensuring their personal interest of immunity from the accountability constitutional obligation.

49 That interpretation will, undeniably, yield a constitutional absurdity that a judge who behaves in a manner ‘unbecoming’ of a judge in flagrant contradiction of section 165 would continue to draw a salary from the people of South Africa, offer a service such as presiding in Commissions of Enquiry and yet be beyond censure under the JSC Act. The proposition needed to be made only to be rejected.

50 It is trite that court should prefer an interpretation that is consistent with the Constitution as opposed to the one clearly at odds with it.

51 We respectfully submit that properly construed:

51.1 Section 176 and 177 of the Constitution include judges discharged from active service in their reach;

51.2 Section 7(g) of the JSC Act is consistent with the above; and

51.3 The Judges’ Remuneration Act is consistent with the Constitution.

The vagueness challenge

52 The Applicants contend that the provisions of section 7(1)(g) of the JSC Act are vague.

53 There is high threshold for the Applicants to pass before a provision of a statute will be held to be unconstitutionally vague. When construing any

legal instrument, a court must try and avoid a finding that a provision is too "vague".[14]

54 As Ngcobo J held in **Affordable Medicines Trust and Others v Minister of Health and Another**:[15]

> *"The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly."*[16]

55 In **R v Nova Scotia Pharmaceutical Society,** the court held that:[17]

> *"Indeed . . . laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other… A very detailed enactment would not provide the required flexibility, and it might furthermore obscure*

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14 Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC)at par 23. See also S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat [1999] ZACC 8; 1999 (4) SA 623 (CC);1999 (7) BCLR 771 (CC) at par 84.

15 [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108.

16 Id at par 108.

17 R v Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606-10 CRR (2d) 34.

> *its purposes behind a veil of detailed provisions. The modern state intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one."*[18]

56 The Applicants have dismally failed to proffer constitutionally cogent reasons for the proposition that section 7(1)(g) of the JSC Act is vague.

The Applicants understand precisely what section 7(1)(g) prescribes, namely, that the definition of judge includes judges discharged from active service.

The contradiction challenge

57 Allied to the vagueness challenge appears to be the contention that there is an inherent "contradiction" in section 7(1)(g) of the JSC Act.

[18] Id. Also quoted in Affordable Medicines Trust at par 108.

58 In their founding affidavit, the Applicants state that **"*to state that a judge is one referred to in section 1 of the Judges' Remuneration Act (meaning permanent judge) includes a judge who has been discharged from active service is a contradiction in terms…*"** This complaint is flawed.

58.1 Firstly, at a factual level, there is simply no contradiction. Two classes of judges are in contemplation at every turn for the reasons that we have stated above.

58.2 Secondly, the Applicants also seem to imply that the "contradiction" lies in several differences in the Judges' Remuneration Act and the JSC Act. The Applicants contend that the definition of "judge" in section 7(1)(g) of the JSC Act is unconstitutional to the extent that it is inconsistent with the Constitution "read with" section 1 of the Judges' Remuneration Act. The Applicants also juxtapose various provisions of the Judges' Remuneration Act and what they contend is the import of section 7(1)(g) of the JSC Act. But, constitutionally, the exercise is misconceived. It is trite that a statute does not become unconstitutional merely because it is "different" or even "inconsistent" with another statutory provision. One does not test the constitutionality of a statute by simply comparing it to another statutory provision. Therefore, the fact that the definition of "judge" in section 7(1)(g) is different to the definition set forth the Judges' Remuneration Act (which is denied) does not itself disclose any unconstitutionality.[19]

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[19] Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA)

59 For the above reasons this challenge has no merit whatsoever and must accordingly fail.

Duties of the JSC

60 Members of the public expect the highest ethical conduct of judges, and where they fall short, the public is right to expect that they be dealt with swiftly. For the JSC to fail to do so would be in blatant dereliction of its duties and would be a matter of great concern to all who care about South Africa's democracy.

61 The JSC is the body constitutionally mandated to deal with judicial misconduct and therefore sits at the centre of the process of holding judges accountable for the performance of their functions.

62 For the Applicants to assert that they have already accounted through the reasons for their findings and recommendations in their report is, with respect, a concerning misunderstanding of the basic tenets of our constitutional jurisprudence.

63 Such an abdication of responsibility by the JSC would constitute a threat to judicial independence.

64 The provisions of the JSC Act cumulatively seek to uphold the image and reputation attached to the office of a judge. They also seek to assist in

upholding the principle of respect for the law and the administration of justice.

65 If the serious allegations against the judges are found to hold water, the misconduct flouts the very foundation of the separation of powers doctrine and corrupts the very foundation of our constitutional democracy. To say that because they are no longer in active service, they are entitled to an absolution from a potential betrayal or breach of these fundamental principles of our Constitution is irrational.

The Impeachment Concern

66 The Applicants contend that they might be liable for impeachment in the event they are found guilty of gross misconduct; and there can be no rational purpose to impeach a retired judge. A judge discharged from active service continues to render a service under certain circumstances set out in the Judges' Remuneration Act. This proposition is, accordingly, misconceived.

67 The question of rationality ought to be viewed against the backdrop of the importance of the office of a judge, and the purpose of the JSC Act as set out above.

68 The Applicants pre-empt the possible outcome of the adjudication of the complaint against them. They speculate about their fate and on that basis

seek the declaration of unconstitutionality. This is not a valid basis for the Applicants to seek a declaration of unconstitutionality.

69 The JCC may, for all we know, dismiss the complaint. The application is thus manifestly premature, speculative, and impermissibly seeks an order of unconstitutionality based on an abstract and academic issue.

70 The application falls properly to be dismissed on this ground alone.

D. CONCLUSION

71 We respectfully submit that the Applicants have not made out a case for the relief they seek, and that the application falls properly to be dismissed with costs including those consequent upon the employment of two counsel.

71.1 There is no identifiable or protected constitutional right of the Applicants that has been infringed by subjecting them to misconduct proceedings relating to their alleged conduct in the performance of their duties before they were discharged from active service.[20]

71.2 Sections 176 and 177 of the Constitution, properly construed, reach judges discharged from active service in terms of section 7(1)(g) of the JSC Act.

71.3 The Applicants are not immune from constitutional injunction of accountability.

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[20] Neither the definition of judge nor the institution of the misconduct proceedings against the Applicants offend section 38 of the Constitution.

LG NKOSI-THOMAS SC

PJ DANIELL

FIRST RESPONDENT'S COUNSEL

CHAMBERS, SANDTON

31 AUGUST 2022

LIST OF AUTHORITIES

Case law

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4. Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC)

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14. Malcolm Wallis, *Judges: Servants of Justice or Civil Servants?,* 2012 129 SALJ 652

15. United Nations Office on Drugs and Crime: Commentary on the Bangalore Principles of Judicial Conduct 2002