

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

Case No: 32193/2021

In the matter between:

LEGOABE WILLIE SERITI

FIRST APPLICANT

HENDRIK 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

FILING SHEET

DOCUMENT: APPLICANT'S REPLYING AFFIDAVIT TO THE FIRST
RESPONDENT'S ANSWERING AFFIDAVIT

ROLL: UNKNOWN

FILED BY:

(SGD) B J NKWINIKA

MALULEKE SERITI MAKUME MATLALA INC.

APPLICANTS' ATTORNEYS

LEMBEDE TAMBO PITJE CHAMBERS

905 STANZA BOPAPE & ORIENT STREETS

ARCADIA

PRETORIA

TEL NO. 087 232 1799

E-MAIL: nkwinika@msmminc.co.za

REF: MR NKWINIKA/LH/S253

TO: THE REGISTRAR OF THE HIGH COURT
PRETORIA

AND
TO:

POWER SINGH INCORPORATED
FOURTH AND FIFTH RESPONDENTS' ATTORNEYS
20 BAKER STREET
JOHANNESBURG
TEL NO. (011) 268 6881
FAX NO. 086 614 5818
E-MAIL: tara@powersingh.africa
REF: PSIOS-202112
C/O LOUIS DU PLESSIS
GILFILLAN DU PLESSIS INC.
1ST FLOOR, LHR BUILDING
357 VISAGIE STREET
PRETORIA
TEL NO.(012) 320 2943 EXT 237
FAX NO. (012) 320 6852
REF: COR/LOU/W45

GILFILLAN DU PLESSIS INC.
1st FLOOR, LHR BUILDING
357 VISAGIE STREET
PRETORIA
0002

RECEIVED COPY HEREOF ON THIS
.....31..... DAY OFMARCH..... 2022.

AND
TO:

THE STATE ATTORNEY – JOHANNESBURG
FIRST, SECOND AND THIRD RESPONDENTS' ATTORNEYS
10TH FLOOR, NORTH STATE BUILDING
95 ALBERTINA SISULU STREET
KRUIS STREET
JOHANNESBURG
REF: MR J VAN SCHALKWYK
REF NO. 2485/21/P45/mm/Z82
TEL NO. (011) 330 7600
FAX NO. 086 642 0970
E-MAIL: JohVanschalkwyk@justice.gov.za
E-MAIL: Mmotsoko@justice.gov.za
C/o STATE ATTORNEY – PRETORIA
GROUND FLOOR
SALU BUILDING
167 THABO SEHUME STREET
PRIVATE BAG X91
PRETORIA
REF: MR J VAN SCHALKWYK
REF NO.: 2485/21/P45/mm/Z82
TEL NO. (012) 309 1630
FAX NO: 086 640 19
ENQ: J VAN SCHALKWYK : 2039/21/Z88
E-MAIL: JohVanschalkwyk@justice.gov.za
E-MAIL: Mmotsoko@justice.gov.za



RECEIVED COPY HEREOF ON THIS
..... DAY OF 2022

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

CASE NO: 32193/2021

In the matter between:

LEGOABE WILLIE SERITI

First Applicant

HENDRIK MMOLLI THEKISO MUSI

Second Applicant

and

JUDICIAL SERVICE COMMISSION

First Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Third Respondent

APPLICANT'S REPLYING AFFIDAVIT

A handwritten signature in black ink, appearing to be 'L. S. Seriti', is located in the bottom right corner of the page.

I, the undersigned,

HENDRICK MMOLLI THEKISO MUSI

do hereby declare under oath as follows:

1. I am an adult male retired judge, and I am the Second Applicant in this matter. I depose this affidavit on behalf of myself and the First Applicant.
2. The facts in this affidavit are within my personal knowledge, unless the contrary appears otherwise and are to the best of my belief both true and correct. Where I make legal submissions, I do so on the advice of our legal representatives, which I accept as correct.
3. I have read the answering affidavit deposed to by Sello Chiloane on behalf of the Judicial Service Commission ("the JSC").
4. The purpose of this replying affidavit is to address the contents of the answering affidavit.
5. I need to point out that the first respondent's affidavit is way out of time. There is no accompanying application for condonation.

INTRODUCTORY OBSERVATIONS

6. Before I deal with the specific allegations in the affidavit, I wish to point out that the first respondent misunderstands the real essence of the application.



7. The misconception under which the first respondent labours is that we brought this application in order to avoid being held accountable for our conduct while we were judges in active service. They allege that we resent being held accountable and our conduct being subjected to scrutiny by our judicial peers, under a statutory scheme established to regulate complaints against judges. We are not at all averse to being held accountable for our actions, to the extent that we may have committed any judicial misconduct. We have answered fully to the details of the complaints made against us and we are confident that these complaints have no merit.
8. The misconception by the first respondent is that we seek to indefinitely delay the enquiry into our conduct, and that we are pursuing litigation to make sure that we never face scrutiny by the Judicial Conduct Committee and the JSC. Nothing could be further from the truth.
9. The definition of judge in the Judicial Service Commission Act is indeed unconstitutional, and this is so, irrespective of the complaints against us.
10. It is our contention that sections 176 and 177 of the Constitution, read together, do contain the definition of "judge", for they describe a judge as someone who holds the office of judge and that can only mean a judge in active service. A judge who has been discharged from active service and who no longer holds such office, is not a judge as defined in the Constitution.

A handwritten signature in black ink, appearing to be 'J. M. M. S. S.', located in the bottom right corner of the page.

11. In terms of Section 2 of the Constitution, the Constitution is the supreme law of the Republic: law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
12. The Judicial Service Commission Act, 9 of 1994 (“the JSC Act”), must, like any other law, be consistent with the Constitution.
13. The JSC Act defines a judge to mean any Constitutional Court judge or a judge referred to in Section 1 of the Judges’ Remuneration and Conditions of Employment Act, 2001 (“the Remuneration Act”), which includes a judge who has been discharged from active service in terms of that Act, as well as any person holding the office of judge in a court of similar status to a High Court, as contemplated in Section 166 of the Constitution and, except for the purpose of Section 11, includes any Constitutional Court judge or judge performing judicial duties in an acting capacity.
14. The impugned provision relates to the widening of the definition of a judge in the JSC Act to include a judge who has been discharged from active service. This it does, without a constitutional amendment which meets a two-third majority threshold required for a constitutional amendment.
15. In stark contrast to the definition of judge in the JSC Act, the definition of judge in the Remuneration Act does not *“include a judge who has been discharged from active service”*.

A handwritten signature in black ink, followed by the date '2019/05/29' written below it.

16. Section 177(1)(a) of the Constitution deals with the removal of a judge and most importantly provides that a judge may be “*removed from office*” if the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.
17. In terms of Section 178(4) the JSC’s powers and functions are assigned to it in the Constitution and the national legislation.
18. Section 176 of the Constitution provides for terms of office and remuneration of Constitutional Court and other judges. Section 176(2) provides that other judges hold office until they are discharged from active service in terms of an Act of Parliament.
19. We no longer hold the office of judge as we have been discharged from active service.
20. Once discharged from office, a judge no longer holds that office. The JSC Act has no application to a person who no longer holds office of judge as contemplated in Sections 176(1) and 176(2) of the Constitution.
21. I shall now deal with the allegations in the answering affidavit *ad seriatim*.

Ad paragraph 4

22. Save to point out that the charges were only initiated after we were discharged from active service, I admit the remainder of the allegations in this paragraph.

A handwritten signature in black ink, appearing to be 'J. M. M. M.', located at the bottom right of the page.

Ad paragraph 5

23. We deny the suggestion that we resent to be held accountable. We are simply asserting our constitutional right to challenge the JSC Act to the extent that it conflicts with the Constitution. Like any citizen we have the constitutional right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.

Ad paragraph 6

24. I deny that we have procured an indefinite postponement of the investigation into our conduct and that the aim of this litigation is to make sure that we never face scrutiny of the Judicial Conduct Committee and JSC for our alleged gross misconduct. Nothing could be further from the truth.

25. We have provided detailed responses to the allegations of misconduct to the Judicial Conduct Committee and are convinced that, in the ultimate, we will prevail. However, in the meantime we have every constitutional right as citizens of the country to challenge any law which we feel does not accord with the Constitution. We do not at all seek to walk scot-free with no one ever knowing whether we indeed engaged in serious misconduct. Our answer to the allegations of misconduct speaks for themselves and we have dealt in detail with the allegations. Any suggestion that we want to receive generous financial benefits from the public purse for the rest of our lives, while escaping accountability is far from the truth.

A handwritten signature in black ink, appearing to be 'J. M. M. M.', located at the bottom right of the page.

Ad paragraph 7

26. I admit the allegations in this paragraph.

Ad paragraph 8

27. The case is not meritless. The challenge is not that Sections 176 and Section 177 of the Constitution preclude the definition of “judge” in Section 7(1)(g) of the Remuneration Act, but of the JSC Act. We do not challenge any of the provisions of the Remunerations Act, but Section 7(1)(g) of the JSC Act. The deponent should not be Seriti, but Hendrik Mmolli Thekiso Musi, the Second Appoicant.

28. Our case is that if a Tribunal were to find us guilty of gross misconduct, it may recommend our removal from office, which would require Parliament to initiate impeachment proceedings set out in Section 177(1)(b) of the Constitution. All that is not competent because we are not in office as contemplated in Section 177 of the Constitution. It would serve no purpose to seek to discharge us from service.

29. Even a reprimand, short of removal from office is an admonishment not to do the same thing again, when a judge is no longer in office.

Ad paragraph 9

30. All that we are saying is that the definition of “judge” in the JSC Act is unconstitutional. In terms of Section 176 of the Constitution, a judge is someone

A handwritten signature in black ink, appearing to be 'J. M. M. Thekiso Musi', with the date '2015-09' written below it.

who holds office as such until he or she is discharged from active service in terms of an Act of Parliament.

31. The Constitution is silent on the matter of judicial discipline in respect of conduct that does not warrant removal from office.

Ad paragraph 10

32. I deny the allegations in this paragraph.

33. The crux of our case is that that the Constitution defines a judge as someone who has not been discharged from active service and that no legislation can competently broaden a provision of the Constitution without a constitutional amendment brought in terms of section 74(3) of the Constitution.

34. Section 1 of the JSC Act cannot and has not amended the Constitution with the requisite two thirds majority and that is why we say that the JSC Act is unconstitutional to the extent that it seeks to broaden the definition of judge in the Constitution. We maintain the position that a judge is only someone who has not been discharged from active service. The first respondent and I have been discharged from active service.

35. No Act of parliament can broaden the definition of a judge as contemplated in the Constitution.

36. By the first respondent's own admission the impugned provision broadens the definition of judge as contemplated in the Constitution by including one who has

A handwritten signature in black ink, appearing to be 'F. de S.' with a flourish above it.

been discharged from active service, without following the amendment provision of the Constitution. Parliament is not competent in a constitutional state to do that without the Constitution being amended with the requisite majority.

Ad paragraphs 12, 13 and 14

37. Save to state that Judge Legodi served the Commission for at least a year, the remainder of the allegations in these paragraphs are admitted.

Ad paragraphs 15, 16 and 17

38. We have lodged an application for leave to appeal against the judgment.

Ad paragraph 18

39. The fact that we continue to receive salaries in terms of the Remuneration Act does not mean that we are judges as contemplated in Section 176 of the Constitution. Section 176(2) specifically provides that other judges hold office until they are discharged from active service in terms of the Act of Parliament. We therefore no longer hold the office of judges.

Ad paragraphs 19 and 20

40. I admit the allegations in these paragraphs.

41. We have provided a comprehensive answer to the complaint.

Ad paragraphs 21, 22 and 23

A handwritten signature in black ink, appearing to be 'S. Legodi', is located in the bottom right corner of the page.

42. We admit the contents of these paragraphs.

Ad paragraph 24

43. We do not seek to run away from accountability. All we say is that the definition of judge in Section 7(1)(g) of the JSC Act is unconstitutional. If we are correct, then the consequences will follow.

Ad paragraph 25

44. It is incorrect that we have failed to provide any compelling reasons why section 7(1)(g) of the JSC Act is unconstitutional or invalid. We have done so in paragraphs 49 to 50 of the founding affidavit.

Ad paragraphs 27 to 39

45. Save to dispute the contents of paragraph 29, the contents of these paragraphs are admitted.

Ad paragraph 40

46. The Code of Judicial Conduct has been made pursuant to the JSC Act. Accordingly, if it is correct that Section 7(1)(g) of the JSC Act is unconstitutional, this will cascade to the Code.

Ad paragraph 41

A handwritten signature in black ink, appearing to be 'J. M. M. M.', located in the bottom right corner of the page.

47. In the discharge of our functions as Commissioners we acted honourably and in a manner befitting judicial office.

Ad paragraph 42

48. If the definition of judge in the JSC Act is unconstitutional, then it follows that the Code will not be applicable to us.

Ad paragraphs 43 to 48

49. The provisions of the Remuneration Act quoted do not detract from the provisions of Section 176 of the Constitution in that a judge holds office until they are discharged from active service in terms of an Act of Parliament. Once discharged, they no longer hold office of judge.

Ad paragraph 49

50. The Constitution does not provide that a judge is appointed for life.

Ad paragraphs 50 and 51

51. The contents of these paragraphs are admitted.

Ad paragraph 52

52. The contents of this paragraph are denied.

Ad paragraphs 53, 55, 56, 57, 58, 59 and 60

Handwritten signature and initials in the bottom right corner of the page. The signature appears to be 'Z. K. S. 2011' with a large 'Z' and 'S' and a smaller 'K'. There are also some initials above it, possibly 'N.M.'.

53. The contents of these paragraphs are legal arguments, which will be addressed at the hearing of this matter.

Ad paragraphs 61 and 62

54. The contents of these paragraphs are admitted.

Ad paragraphs 63 and 64

55. Once discharged from office, a person is no longer a judge in terms of the Constitution. There may be a need to amend the Constitution, but that is a different matter.

Ad paragraphs 65 and 66

56. The contents of these paragraphs constitute legal argument which will be dealt with at the hearing.

Ad paragraph 67

57. The Constitution is paramount, and parliament cannot expand on the definition of a judge through the JSC Act, which is not compatible with sections 176 and 177.

Ad paragraph 68

58. The contents of this paragraph constitute legal argument, which will be dealt with. The Constitution does not say that a judge is a judge for life.

Ad paragraph 69

A handwritten signature in black ink, appearing to be 'L. M. M. M.', with a date '2018-01' written below it.

59. There is no common law or rule that a judge is a judge for life, but this is a matter of law which will be addressed in argument at the hearing of this matter.

Ad paragraph 70

60. All that the Remuneration Act does is to provide for the remuneration and conditions of employment of judges. The fact that a retired judge may be called on to perform services, does not alter the provisions of the Constitution.

Ad paragraph 71

61. If retired judges are not in active service, then they no longer hold office within the meaning of a judge as contemplated in the Constitution. The fact that the President may in some instances call upon those judges to perform certain public functions, does not mean that they occupy office as contemplated in the Constitution. Retired judges when called upon to render service are given fresh appointments for specific periods and are in the same position as acting judges.

62. By way of illustration, as a retired Judge President, if appointed to act in the High Court, I cannot be referred to as a Judge President, I will be addressed as an acting judge, and remunerated separately for that period.

Ad paragraph 72

63. The fact that a retired judge may be receiving a salary, does not mean that he or she occupies the office of judge as contemplated in the Constitution. The salary

A handwritten signature in black ink, appearing to be 'John M. G. G.', with the initials 'JMG' written to the right of the signature.

that a retired judge earns is a benefit derived from his/her employment contract as embodied in the Remuneration Act.

Ad paragraph 73

64. The contents of this paragraph are denied. We are not in this case challenging the constitutionality of the Remuneration Act, but if it is unconstitutional then so be it. We only challenge the relevant provision of the JSC Act.

Ad paragraph 74

65. The Remuneration Act does not codify the judges for life principle.

Ad paragraph 75

66. The contents of this paragraph are admitted.

Ad paragraph 76

67. I do not understand what the First Respondent means in this paragraph.

Ad paragraph 77

68. I deny that our motive is the fear of impeachment. We are confident about the answers we have given in the complaint. We are also satisfied that the complaints have no substance. However, that is besides the point.

Ad paragraphs 77.1 and 77.2

A handwritten signature in black ink, appearing to read 'J. G. ...', with the date '2018-01' written below it.

69. The issues raised in these paragraphs constitute legal argument which will be dealt with at the hearing of this matter.

Ad paragraph 77.3 to 78

70. I note the contents of these paragraphs.

Ad paragraphs 79 and 80

71. I note the contents of these paragraphs.

Ad paragraph 81

72. This application is not legally misconceived.

Ad paragraph 82

73. I admit the contents of this paragraph.

Ad paragraph 83

74. The contents of this paragraph constitute legal argument which will be addressed at the hearing of this matter.

Ad paragraph 84

75. I deny that we are acting in our narrow personal interests. The application raises important issues of public interest.

Ad paragraphs 85 and 86

Handwritten signature and date: 20/11/18-01

76. I admit the contents of this paragraph.

Ad paragraphs 87 and 88

77. I deny that the application is geared at addressing or obviating the need to deal with the complaint against us.

Ad paragraph 89

78. I note the contents of this paragraph.

Ad paragraphs 90 and 91

79. The contents of these paragraphs do not relate to the constitutional challenge in this matter.

Ad paragraphs 92 to 93

80. The contents of these paragraphs relate to the application for leave to appeal the judgment.

Ad paragraph 94

81. The contents of this paragraph raise legal arguments which will be addressed at the hearing of this matter.

Ad paragraph 95

82. I deny that we want to wipe the potential consequences of the alleged serious misconduct. The issue about us being judges for life is a matter of argument.

A handwritten signature in black ink, appearing to be 'John G. ...', is located in the bottom right corner of the page.

Ad paragraphs 95.3, 96 and 97

83. Whatever the code of judicial conduct says does not affect the constitutionality or otherwise of the impugned provision.

Ad paragraph 98

84. I note the contents of this paragraph.

Ad paragraphs 99, 100, 101 and 102

85. The contents of these paragraphs constitute legal argument which will be addressed in due course.

Ad paragraph 103

86. I note the contents of this paragraph.

Ad paragraphs 104 to 120

87. The contents of these paragraphs constitute legal argument which will be addressed in due course.

Ad paragraph 121

88. I deny that we desire to avoid being held accountable and reiterate that the definition of judge in the JSC Act is unconstitutional.

Ad paragraph 122

A handwritten signature in black ink, appearing to be 'J. J. J.', with the date '2018-01' written below it.

89. The contents of this paragraph constitute legal argument which will be addressed in due course.

Ad paragraph 123

90. This is a public interest matter, and as applicants we should not be made to pay costs, irrespective of the outcome of the application.



DEPONENT

I certify that the deponent acknowledged that he/~~she~~ knows and understands the contents of this affidavit, which was signed and sworn before me at Hartbeespoort on this 30th day of March 2022 and that the provisions of the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, were complied with.



89. The contents of this paragraph constitute legal argument which will be addressed in due course.

Ad paragraph 123

90. This is a public interest matter, and as applicants we should not be made to pay costs, irrespective of the outcome of the application.



DEPONENT

I certify that the deponent acknowledged that he/~~she~~ knows and understands the contents of this affidavit, which was signed and sworn before me at Herthampton on this 30th day of March 2022 and that the provisions of the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, were complied with.





COMMISSIONER OF OATHS

FULL NAME : Lillian Phiri
CAPACITY : Constable
AREA : Hartbeespoortdam
FULL STREET ADDRESS: 106 Scott Street

TIRELO YA MAPUNSA A AFRIKA BORWA
COMMUNITY SERVICE CENTRE
2022-03-30
HARTBEESSPOORTDAM
SUID-AFRIKAANSE POLISIEDIENS
SOUTH AFRICAN POLICE SERVICE

