IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 32193/21

In the matter between:

LEGOABE WILLIE SERITI N.O.	First Applicant
HENDRIK MMOLLI THEKISO MUSI N.O.	Second Applicant

and

THE JUDICIAL SERVICE COMMISSION	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
OPEN SECRETS NPC	Fourth Respondent
SHADOW WORLD INVESTIGATIONS	Fifth Respondent

APPLICANTS' REBUTTAL TO FIRST RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT

"*Some of the people not sufficiently acquainted with the execution of judicial functions, may tend to think that judges are not accountable for their decisions. Nothing is further from the truth. Judges are expected to justify every decision they take: they must give full reasons therefor. Surely that is being accountable; not only to the litigants, but to the public at large*."

Soller v Honourable State President of the RSA & others [2006] JOL 17425 (T) at para 15

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A. INTRODUCTION AND OVERVIEW

1. On 18 October 2022, the parties' legal representatives attended a case management meeting with Deputy Judge President Sutherland. At the case management meeting, the first and second respondents' senior counsel indicated that due to her recent involvement in the matter, supplementary heads of argument may be required. The Applicants senior counsel indicated an intention to respond should supplementary heads be filed. On 31 October 2022, the first and second respondents, attorney of record addressed correspondence to Deputy Judge President Sutherland requesting an indulgence of three weeks to research trends and case law from international precedents in order to file supplementary heads of argument. The Deputy Judge President granted the request on the premise that such extension did not prejudice the other parties preparation for the hearing set down on 14 March 2023. The first and second respondents failed to file their supplementary heads of argument on 21 November 2022.

2. On 21 December 2022, the Applicants attorney of record addressed correspondence to the first and second respondents enquiring whether the supplementary heads of argument had been abandoned and advising that the failure to file such timeously was prejudicial as the Applicants intended to

respond to the supplementary heads of argument. No response was forthcoming.

3. On 9 February 2023, the Applicants attorney of record, again addressed correspondence to the first and second respondents requesting an update for purposes of delivering the index and joint practice note. On 10 February 2023, the Fourth and Fifth Respondents addressed correspondence to the first and second respondents enquiring whether the first and second respondents intend to file supplementary heads of argument in light of the imminent hearing date. On 14 February 2023, the first and second respondents undertook and subsequently filed their supplementary heads on 24 February 2023.

4. The purpose of these heads of argument is to rebut the allegations in the first and second respondents' supplementary heads of argument, but in addition, serve to refute the serious allegations made against the Applicants and clarify the deliberate misconstruction of this application. We refer to the First, fourth and Fifth respondents as "the respondents" save where the context requires otherwise. To the extent that it is required to refer to the merits of the case or to respond to those parts of the respondents' main heads, we do so within this context.

5. Ultimately, what this court is called to determine is whether a judge discharged from active service is subject to the disciplinary procedures contemplated in the Judicial Service Commission Act 9 of 1994 ("the JSC Act"). The short answer is no. In what follows we demonstrate that the JSC Act impermissibly broadens the definition of "judge" contained in the Judges Remuneration and Conditions of Employment Act 47 of 2001 ("the Judges Remuneration Act") so as to include judges "discharged from active service" in breach of section 176(2) of the Constitution.

6. We structure the reasons underpinning our submissions why section 7(g) of the JSC Act offends the Judges Remuneration Act and section 176(2) of the Constitution as follows:

6.1 First, we demonstrate the misguided nature of the respondents contention that application is a disguised attempt to avoid accountability under the JSC Act.[1] We do so with reference to the judgment in the application for leave to appeal in Corruption Watch and Another v Arms Procurement Commission and Others[2] that the

[1] Fourth and Fifth respondents HOA paras 36-44; First Respondents main HOA paras 48 & 71.3; supplementary HOA at paras 48, 61.2-61.6

[2] Corruption Watch and Another v Arms Procurement Commission and Others (81368/2016) [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP); 2020 (2) SACR 315 (GP) (21 August 2019)

attack on this application as a means by which the Applicants seek to avoid accountability for alleged wilful misconduct or gross negligence, is gratuitous. On the contrary, we make reference to the leave to appeal judgment, where the court specifically pointed out that the review judgment setting aside the Arms Commission Report, is not evidence of conduct establishing wilful misconduct or gross negligence as alleged by the fourth and fifth respondents in their complaint to the Judicial Complaints Committee ("JCC");

6.2 Second, we correct the deliberate obfuscation and misconstruction of this application. We clarify the dichotomy in the interpretation of "judge" in order to refute the contention that the definition of "*Judge*" in section 1 of Judges Remuneration Act includes any person "*holding*" or "*who, at or since the fixed date held the office of…*" includes judges discharged from active service.[3] The JSC Act does not deal with section 176(2) of the Constitution and is not inconsistent with Judges Remuneration Act;[4]

6.3 Third, we analyse the concept of a "*Judge for life*" to address the first

[3] Fourth and Fifth respondents HOA paras 13-18
[4] Fourth and Fifth respondents HOA paras 19-35; First Respondents main HOA paras 41-58;

respondent's contention that this entails acceptance of salary which in turn equates to eligibility to preside necessitating JSC jurisdiction over both judges in active service as well as those discharged from active service in order to preserve institutional independence;[5]

6.4 Fourth, we discuss the unlawful Polish judicial disciplinary process which has been found to contravene the laws of the European Union. Poland is the only international jurisdiction which disciplines retired judges)[6] but the first respondent is of the view that the failure of all other jurisdictions to do same, results in untenable unaccountability.[7] Consequently, we demonstrate that the Polish judicial disciplinary process has resulted in the subversion of the rule of law by subjecting judges discharged from active service to disciplinary processes on the basis of judgments or reports delivered whilst in performance of active judicial service. In this regard, we refer to the plethora of international jurisdictions akin and alike to our law, which do not subject judges discharged from active service to disciplinary procedures; and

[5] First Respondents main HOA paras 16-25 and supplementary HOA para 61.7-69
[6] First Respondents supplementary HOA paras 7-9
[7] First Respondents supplementary HOA paras 46-70

6.5 Lastly, we address the question of costs.

B. ACCOUNTABIILITY: JUDGMENT IN LEAVE TO APPEAL

7. The initial judgment in Corruption Watch and Another v Arms Procurement Commission and Others[8] is the fulcrum of the fourth and fifth respondents complaint in terms of section 14 of the Judicial Service Commission Act 9 of 1994 ("the JSC Act").[9]

8. The first applicant was the erstwhile Chairperson of the Commission. The second applicant was the former co-commissioner. Together, the first and second applicants presided over the Commission ("the Applicants"). The Applicants were cited *nomine officio* in their capacity as Commissioners in the court *a quo*.

9. The fourth and fifth respondents allege that the court when setting aside the Arms Commission Report, held that the Applicants failed *inter alia* to conduct

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8 Corruption Watch and Another v Arms Procurement Commission and Others (81368/2016) [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP); 2020 (2) SACR 315 (GP) (21 August 2019)

9 Open Secrets Complaint to Judicial Conduct Committee: 11 August 2020; JCC requested Applicants submissions in June 2021, matter postponed sine die.

a meaningful investigation and these findings constitute *prima facie* evidence of wilful misconduct or gross negligence.[10]

10. In the leave to appeal judgment,[11] the court per Mlambo JP, Davis JP and Leeuw JP specifically disavowed casting aspersions on the Applicants:

"[16] It was not part of the review application to consider judicial misconduct nor the kind of gross incompetence which would justify an impeachment of a judge as envisaged in s 177 of the Constitution. Were this submission to be correct, judges who have their judgments robustly criticised and overturned by higher courts would fall within the scope of s 177 of the Constitution. The JSC is required to apply a totally different test to assess whether on the facts which are placed before it, the conduct of the applicants falls within the scope of s 177. In short, if this judgment were employed by the JSC as a basis for impeachment without the articulation of a different test and an application thereof to the facts of this case, the JSC would have failed in its constitutional duty."[12]

11. In this light, the bold and unsubstantiated allegations that this application is

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10 Open Secrets Complaint to Judicial Conduct Committee: 11 August 2020 para 194 and 194.1

11 Seriti N.O. and Another v Corruption Watch and Others (81368/2016) [2022] ZAGPPHC 643 (31 August 2022) at para 16

12 Seriti N.O. and Another v Corruption Watch and Others supra at para 16

brought to avoid accountability, is nothing short of a brazen attempt to vilify the Applicants. It punctuates the point that the complaint to the JCC is not about wilful misconduct or gross negligence. Instead, it is a desperate attempt to scapegoat the Applicants based on a report delivered whilst in active judicial service. It is a subversion of the principle of judicial immunity by interpretive vacuity.

12. As pointed out earlier, those in active service as well as those discharged from active service (the latter whilst in active service) account through their judgments and reasons for their judgments. The JSC is concerned with the discipline of judges alleged to have committed a misconduct. The contention advanced by the respondents is that judges who are not guilty of any misconduct and therefore not subjected to JSC processes, are not accountable. This is plainly wrong. All judges are accountable to litigants and the public at large. The function of the JSC is to discipline misconduct not to extol accountability.

13. For completeness, we mention that whilst much has been made of the Applicants decision to abide in the review application, it is worthwhile to note that the Applicants were cited *nomine officio* for formal purposes only. The Namibian High court when dealing with a similar situation in ***Tjirare v***

The Chairperson of the Electoral Commission of Namibia[13] held:

"[129] We are of the considered view that in maintaining its impartiality and independence, the Commission is in no different position than that of a judicial officer when his or her decision is challenged on review. It is not advisable that a judicial officer should join issue with those who happen to be challenging his or her decision and file opposing affidavits to defend his or her decision. In such a situation, we are of the view that like a judicial officer, in order to maintain its impartiality and independence, the Commission should simply abide by the decision of the Court." [emphasis added]

14. In reaching this conclusion, the court in ***Tjirare supra*** endorsed the views expressed in ***Esau v Director-General of Anti-Corruption Commission***[14] which involved the conduct of judicial officers as "*apposite and of equal application to the conduct of the Commission in general"*. The court added that:

"[35] It is necessary, whilst still on this issue, to deal, albeit briefly, with the issue of the Magistrates who were cited and did file their answering affidavits. It must be mentioned that in the light of the authority cited above, it was ill-advised for them to have done so, considering that they were cited for formal purposes only. No allegations of bias, malice, fraud or such like epithet, were made by the applicants."[15]

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[13] Tjirare v The Chairperson of the Electoral Commission of Namibia (EC 2/2020) [2020] NAHCMD 283 (13 July 2020)

[14] Esau v Director-General of Anti-Corruption Commission [2020] NAHCMD 59 (20 February 2020)

[15] Tjirare v The Chairperson of the Electoral Commission of Namibia supra at para 130-131

15. We submit that judicial immunity does not operate arbitrarily to protect a judge whilst in active service, sitting on the Bench but expose that same judge whilst appointed to a commission of inquiry, to a complaint in terms of section 14 of the JSC Act, after discharge from active service. We demonstrate sound, rational reasons for this conclusion by analysing the cogency of the respondents opposition.

C. MISCONSTRUED INTERPRETATION OF DEFINITION OF JUDGE

16. Section 176(2) of the Constitution states that "*Other judges hold office until they are discharged from active service in terms of an Act of Parliament.*"[16] The Judges Remuneration and Conditions of Employment Act 47 of 2001 (Judges Remuneration Act) gives effect to section 176 of the Constitution and provides for discharge from active service. The Merriam Webster dictionary defines "*discharge*" as meaning "*to set aside or dismiss; the act of removing an obligation or liability; release from service or duty.*"[17]

17. The fallacy of the argument of a "judge for life" that judges are obliged to

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[16] Section 176(2) of the Constitution states that "Other judges hold office until they are discharged from active service in terms of an Act of Parliament."

[17] 'Discharge" Merriam Webster's Collegiate dictionary http://www.merriam-webster.com/dictionary/discharge. Accessed Feb. 2023

provide active service insofar as the definition of "*Judge*" in section 1 of Judges Remuneration Act includes any person "*holding*" or "*who, at or since the fixed date held the office of…"* is palpable when regard is had to the provisions in the Judges Remuneration Act for discharge from active service:

17.1 One: Section 3(2)(a) discharge from active service at 70 years after completing 10 years active service or more with an annual salary and increments where granted in terms of section 5(1)(a)[18] and a tax-free gratuity in terms of section 6, subject to the proviso in section 7(1)(a)(i) read with section 7(3) of the Judges Remuneration Act of being available to perform active service obligations until 75 years for three months a year, or incur penalties in the form of a two percent reduction in salary for failure to "*perform the minimum period of service*"[19] Section 3(2)(a) also provides for discharge from active service after 70 years subject to completion of 10 years active service or the attainment of 75 years ("discharged at 70 years with annual salary increments and three months active service until 75 years").

17.2 Judges who are discharged from active service in terms of section

[18] Health v President of the Republic of South Africa [2018] JOL 39378 (WCC) at para 11 and footnote 5

[19] Setion 7(3) Judges Remuneration Act

3(2)(a), hold office and have judicial powers when they are required to perform active service for three months per annum, until attaining 75 years. We accept that judges discharged at 70 years with annual salary increments and three months active service obligations until 75 years are within the ambit of the JSC disciplinary process.

17.3 On attaining 75 years, after discharge from active service in terms of section 3(2)(a) the judge may voluntarily perform active services but in terms of section 7(1)(a)(ii), is not under any obligation to do so, nor subject to any penalties if he declines. This judge despite having "held the office" is discharged from active service in terms of section 176(2) of the Constitution and is clearly not within the ambit of the JSC disciplinary process ("discharged from active service at 75 years").

17.4 In terms of section 4(4) a judge who has attained the age of 75 years who served less than fifteen years active service before reaching the age of 75 must be discharged from active service "*as a judge*" and may voluntarily perform active services but in terms of section 7(1)(a)(ii), is not under any obligation to do so, nor subject to any penalties if he declines. This judge despite having "held the office" of a judge is discharged from active service at 75 years in terms of section 176(2)

of the Constitution and is clearly not within the ambit of the JSC disciplinary process.

17.5 Two: Section 3(2)(b): discharge on request in terms of section 3(2)(b) read with section 11(2) of the Judges Remuneration Act which provides that a judge who has served fifteen or more years on the Bench and attained the age of 65 years who informs the Minister in writing that he no longer wishes to perform active service, shall be discharged from active service with an annual salary but without annual salary increments as section 5(1)(a) is specifically excluded. Section 7(1)(a) also exempts a judge discharged on request from the three month active service obligation.

17.6 Judges who are discharged on request in terms of section 11(2) read with section 3(2)(b), do not hold office or have any powers, and in terms of section 7(1)(a) are exempt from active service obligations. This judge despite having "held the office" is discharged from active service in terms of section 176(2) of the Constitution and is clearly not within the ambit of the JSC disciplinary process ("discharged from active service on request with fixed salary and no active service performance obligations.").

17.7 Three: Section 3(2)(c) Discharge discharge from active service due to infirmity in terms of section 3(2)(c) with an annual salary and increments where granted in terms of section 5(1)(a),[20] a tax-free gratuity in terms of section 6 and exemption in terms of section 7(1)(a) from the three month active service obligation

17.8 Judges who are discharged on infirmity in terms of section 3(2)(c), do not hold office or have any powers, and in terms of section 7(1)(a) are exempt from active service obligations. This judge despite having "held the office" is discharged from active service in terms of section 176(2) of the Constitution and is clearly not within the ambit of the JSC disciplinary process ("discharged from active service on infirmity with annual salary increments, no active service obligations).

17.9 Four: Section 3(2)(d) discharge from active service on resignation in terms of section 3(2)(d) read with section 11(1) of the Judges Remuneration Act. Discharge from active service on resignation precludes payment of any benefits that such judge would otherwise be entitled when the judge is discharged from active service. Judges

[20] Health v President of the Republic of South Africa [2018] JOL 39378 (WCC) at para 11 and footnote 5

who resign and are discharged from active service, do not hold office or have any powers, and do not perform any service. On resignation, the judge is discharged from active service in terms of section 176(2) of the Constitution.

17.10 On resignation, a judge does not hold office or have any powers and is released from any obligation to perform active services. This judge despite having "held the office" is discharged from active service in terms of section 176(2) of the Constitution and is clearly not within the ambit of the JSC disciplinary process ("discharged from active service on resignation").

17.11 In this regard, we refer to Judge Ismail Hussain who resigned on the eve of the JSC meeting at which he would have had to account for conduct relating to an arbitration in which he presided after assumption of office as a judge. The JSC did not pursue the complaint against Judge Ismail Hussain who "*held the office*' because the judge was discharged from office in terms of section 176(2) of the Constitution and was clearly not within the ambit of the JSC disciplinary process. Similarly, the JSC did not pursue the complaint against Judge Mabel Jansen, who "*held the office*' and was discharged

from active service on resignation because the judge was discharged from office in terms of section 176(2) of the Constitution and was clearly not within the ambit of the JSC disciplinary process.

18. Bearing this in mind, it is evident that the definition of "*Judge*" in section 1 which *"includes any person who, at or since the fixed date held the office of…"* does not cater for judges who cannot be compelled to serve and who have ceased to hold office in terms of section 176(2) of the Constitution having been:

18.1 discharged from active service at 75 years;

18.2 discharged from active service on request with fixed salary and no active service performance obligations;

18.3 discharged from active service on infirmity with annual salary increments and no active service obligations; and

18.4 discharged from active service on resignation with no salary and no active service performance obligations.

19. The first respondent's contention that it "*would be ill-advised to establish a precedent that would allow a judge…to escape punishment for [ethics violations] by resigning from office*"[21] fails to take cognizance of the existing precedent that the JSC considers resignation a vitiation of their disciplinary jurisdiction. This approach adopted by the JSC, we submit, is correct.

D. SECTION 7(G) OF JSC ACT IS UNCONSTITUTIONAL

20. Our guide is simple. Our jurisprudence is informed by the rule of law which as a "*foundational value of our constitutional democracy*", requires that where laws confer wide administrative or discretionary powers, the exercise of which may limit fundamental rights, the laws must provide guidance as to the manner in which the powers are to be exercised.[22] Laws that are unduly vague and unclear to those to whom they apply violate the rule of law and are unconstitutional. So too are laws that confer discretionary powers on officials, the exercise of which may limit fundamental rights, yet fail to provide guidance to those officials as to the manner in which their powers

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[21] First Respondents supplementary HOA para 61.7 with footnote reference citing Backal, 600 NE 2d 1104, 1107 (NY 1995)

[22] Dawood and Another v Minister of Home Affairs and Others [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 54; Janse van Rensburg and Another v Minister of Trade and Industry and Another [2000] ZACC 18; 2001 (1) SA 29 (CC); 2000 (11) BCLR 1235 (CC) at para 25.

are to be exercised.

21. Whether the Constitution authorises the submission of a judge to a disciplinary process in terms of the JSC Act rests on two legs:

    21.1 If the judge is discharged without active service obligations, then in terms of section 176(2) of the Constitution, such judge is discharged from active service. This is the end of the matter.

    21.2 If the judge is discharged subject to active service obligations, then in terms of section 177 of the Constitution, such judge may be discharged from active service if the JSC finds incapacity, gross incompetence or gross misconduct.

22. Parliament, when passing section 7(1)(g) of the JSC Act was not acting under the correct constitutional provision. There is no valid law without valid authority. It matters not that under a different provision it is able to use that power. The definition under the JSC Act which includes judges discharged from active service, is wrong because it has nothing to do with the section 177, section 178 and section 180 of the Constitution powers as cited in the

preamble of the JSC Act regulating how the judiciary functions. This is the purview of the Judges Remuneration Act.

23. Our interpretation is given credence when regard is had to section 13 of the JSC Act dealing with "Disclosure of registrable interests" which specifically acknowledges in section 13(6) that the "*regulations may determine different criteria for judges in active service* *<u>and judges who had been discharged from active service…</u>*" This distinction flies in the face of the interpretation relied upon by the respondents in opposition to this application.

24. It is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate if lawful.[23] The Constitution in principle requires that all Government action comply with the Constitution and the rule of law principle requires that all Government action must comply with the law, including the Constitution.[24]

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23 Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999(1) SA 374 (CC) [1998] 12 BCLR 1458; [1998] ZACC 17 at par [58]; State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018(2) SA 33 (CC) at p 36, par 38

24 State Information Technology Agency SOC Ltd supra quoting from the Supreme Court of Canada case in The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada

25. The principle of legality is an incident of the rule of law, a founding value for Constitution.[25] Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on the following values, *inter alia* supremacy of the Constitution and the rule of law.[26]

26. The court in ***State Information Technology Agency SOC Ltd*** held as follows:

> *"What we glean from this is that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself. In short, it is invalid. That is a consequence of what section 2 of the Constitution stipulates. Relating all this to the matter before us, the award of the DoD agreement was an exercise of public power. The principle of legality may thus be a vehicle for its review. The question is: Did the award conform to legal prescripts? If it did, that is the end of the matter. If it did not, it may be reviewed and possibly set aside under legality review."*[27]

27. It is in the interests of justice that this Court declare the definition of "Judge"

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25 Pharmaceutical Manufacturers Association of SA and Another; In re: Ex parte President of the Republic of South Africa and Others 2000(2) SA 674 (CC); 2000(3) BCLR 241; [2000] ZACC1 in par [17]

26 Section 1(c)

27 State Information Technology Agency SOC Ltd at par [40]

which includes judges discharged from active service in terms of section 7(g) of the JSC Act, be declared unconstitutional and invalid insofar as it is inconsistent with sections 176 and 177 of the Constitution read with section 1 of the Judges Renumeration Act.

E. MISGUIDED CONCEPT: "*JUDGE FOR LIFE*"

28. South African judges do not hold office for life. This is colloquial language without any legal content and a misnomer. The concept of a "*judge for life*" is borrowed article III §1 of the United States constitution which provides that "*Judges, both of the supreme and inferior courts, shall hold their offices during good behaviour….*" There is no similar provision in our Constitution.

29. This concept is best clarified by reference to the interpretation provided by the United States court in Martello v. Superior Court, 202 Cal. 400, 406 (Cal. 1927):

"*As was said in Deupree v. Payne,197 Cal. 529 [241 P. 869], and supported by an ample array of cases decided by this court, ". . . it is well settled that there is no vested right in an incumbent to an office, nor any property right therein paramount to the public interest." It must follow that the judge of a court*

specially created for public convenience holds his office by no firmer tenure nor has he any greater rights than one who is inducted into office by the usual and ordinary methods provided by law. (Graziani v. Denny,174 Cal. 176 [162 P. 397].)"

30. The first respondent relies on Freedom Under Law v Motata[28] as authority for endorsement of this concept. We point out that Mlambo J distinguishes "*judges who retire but who continue to feature in judicial functions and activities*"[29] by pointing out that:

"*Retired Judges who are called to act from time to time or to finalize part heard matters fall within the ambit of the above-mentioned administration, in that the head of that Court retains supervisory authority over retired Judges especially when assigning work to them and everything related to those functions. It is the responsibility of that head of Court to also ensure that the necessary administrative resources are availed to that retired Judge. This illustrates that despite being retired these Judges continue to play a role in the*

[28] Freedom Under Law v Motata (33227/2020) [2021] ZAGPPHC 14 (28 January 2021)
[29] Freedom Under Law v Motata supra at para 23

judiciary i.e., in rendering judicial functions."[30]

31. Mlambo J in Freedom Under Law v Motata supra further notes that:

"*I hold the view that properly considered, the word "service" in this section must include Judges who are retired but who continue to either perform Judicial functions when called upon to do so by the Minister in line with (d) or have been appointed to perform other functions as provided in the section in other capacities*."[31]

32. The concept of an "*appointment for a lifetime*"[32] in Freedom Under Law v Motata supra is clearly limited to judges discharged from active service who continue to engage in active service. It clearly does not include judges discharged from active service after 75 years who do not engage in active service, judges who are infirm or judges who have resigned.

33. The court in Freedom Under Law v Motata supra, cites the judgment in Soller v President of the Republic of South Africa[33] with approval. We have cited

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[30] Freedom Under Law v Motata supra at para 23
[31] Freedom Under Law v Motata supra at para 25
[32] Freedom Under Law v Motata supra at para 22
[33] Soller v President of the Republic of South Africa 2005 (3) Sa 567 (T) at para[14]

Soller supra in the preface to these heads.

F. POLISH JUDICIAL DISCIPLINARY PROCEDURE FOUND TO CONTRAVENE EU LAW

34. On 15 July 2021 the European Court of Justice (ECJ) in Luxembourg concluded in a historic judgement that the Polish disciplinary system for judges violated the EU treaties and that Polish judges have good reason to fear consequences.

35. On 18 February 2023, the European Commission referred Poland to the Court of Justice of the European Union for violations of the EU law and granted interim measures suspending the powers of the Supreme Court's Disciplinary Chamber regarding disciplinary cases concerning judges. According to the press release:[34]

"*As reflected in 2022 Rule of Law Report, serious concerns related to the independence of the Polish judiciary continue to persist. In 2019 and 2020, the Commission launched two new infringement procedures to safeguard judicial independence. Since then, the Court of Justice found that the disciplinary regime*

[34] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842

for judges in Poland is not compatible with EU law.

The Court also granted interim measures to suspend the powers of the Supreme Court's Disciplinary Chamber with regard to disciplinary cases concerning judges. In its Recovery and Resilience Plan (RRP), Poland committed to undertake reforms of the disciplinary regime regarding judges, to dismantle the Disciplinary Chamber of the Supreme Court, and to create review proceedings for judges affected by decisions of that Chamber aimed at strengthening certain aspects of the independence of the judiciary."

36. The first respondent relies on Polish jurisprudence to support their submission that all judges discharged from active service, fall within the disciplinary ambit of the JSC. The first respondent concedes, as it must, that save for Poland, no other jurisdiction of equivalent jurisprudential value, follows a similar model. The Polish judicial disciplinary process has been found to contravene EU law.

37. The abject failure of the Polish judicial disciplinary procedure demonstrates that the practical application of the Respondents interpretation, results in rulings that breach general principles of judicial autonomy, primacy and effectiveness. We submit that regard to the Polish judicial disciplinary

process is disingenuous, oozes incongruity and must be disregarded.

38. Even the first respondent's sinister and selective summary that the Applicants allegedly seek a means to avoid accountability, does not give credence to application of an obviously dysfunctional Polish judicial disciplinary procedure which has been found to violate the rule of law. The transgressions which resulted from the application of the Polish judicial disciplinary procedure, punctuates the point why the relief sought in this application, must be granted.

39. We will confine our submissions to corresponding jurisprudence akin and alike to our law – all of which do not regard judges discharged from active service, as being subject to disciplinary procedures.

40. The references in our submissions to foreign law and those referred to by the respondents illustrate one point. The discipline of judges who are either retired, resigned or otherwise not in active service is a polycentric decision by each jurisdiction. Some hold that those no longer in active service under disciplinary processes of the judiciary, whereas others do not. For this reason, the constitutionally mandated arm of government to determine this issue, is the legislature and not the judiciary. Were the courts to venture

down that road, they would offend the separation of powers doctrine which is an incident of the rule of law.

G. RELEVANT INTERNATIONAL JURISPRUDENCE DOES NOT DISCIPLINE JUDGES DISCHARGED FROM ACTIVE SERVICE

41. In many legal systems there are special regulations applicable to the removal of a judge from office, resulting in the termination of the professional relationship. The termination of a professional relationship with a judge may result from sentencing a judge for a crime, or the imposition of a disciplinary penalty in the form of removal from office.

42. However, removal is superfluous when dealing with judges discharged from active service without service obligations or judges who have resigned.

43. In the United States decision of Porter v. C.I.R, 856 F.2d 1205, 1210-11 (8th Cir. 1988), the court held:

"*With that assumption it is observed that here we are dealing with the status of a superior court judge who has retired pursuant to the provisions of the statute. In order to retire he must, while in office, file his notice of retirement*

with the Secretary of State as provided by section 1 of the act. (Stats. 1937, p. 2204.) While in retirement he has the privilege of maintaining his membership in the State Bar of California. As such he is entitled to all of the privileges and immunities and is subject to the duties and obligations of an attorney at law so long as he maintains his membership in the State Bar organization. His term of office as a judge has expired, or been terminated prior thereto by his voluntary act, and the office is vacant. He may go and come in all respects as any attorney and counselor at law but he has no power as a judicial officer until the happening of a contingency, namely, his assignment and voluntary acceptance thereof as a judge of the superior court in and for a designated county by the chairman of the Judicial Council. That assignment does not prolong his term of office. It merely has the effect of vesting in him the powers of a judge of the superior court during the period specified in the assignment, as is ordinarily done in the case of an assignment by the chairman of the Judicial Council of an incumbent superior court judge from one county to another under the authority of section 1a of article VI of the Constitution. It must be taken for granted that under the proper exercise of the power of assignment a retired judge will not be continued in service indefinitely. The term of assignment is necessarily within the wise discretion of the chairman of the Judicial Council. Upon the expiration of the period of his assignment the judge resumes his prior status as a retired judge. If he desires to exercise the privileges of an attorney during his retirement and while unassigned, he would, of course, be subject to

the provisions of the State Bar Act, including the requirement of the payment of dues."

44. Similarly in Pickens v. Johnson, 42 Cal.2d 399, 407 (Cal. 1954):

"*Three, and only three, distinct methods are provided for the investment of judicial authority, to wit, by election,appointment, and assignment. Authorization by stipulation is not included in any one of the methods or systems above provided. "In construing a constitution, resort may be had to the well-recognized rule of interpretation contained in the maxim expressio unius, exclusio alterius est; therefore the expression of one thing in a constitution may necessarily involve the exclusion of other things not expressed." (5 Cal. Jur. 587.) The fact that section 72, Code of Civil Procedure, was not expressly repealed by the legislature is more consistent with the theory that it escaped the attention of the legislature rather than that it was supposed to retain legislative life.*"

45. German law also provides for a disciplinary penalty in the form of removal from office (§ 64.2 of the German Act on Judges).

46. French law provides for a sanction in the form of allowing resignation from

the function and termination of the fulfilment of duties, if a judge is not entitled to retirement (Article 45.6 of the Act on the Status of a Judge of 1958).

47. It is anomalous to subject judges discharged from active service to disciplinary processes when an employee is not subject to disciplinary procedures on resignation or retirement.

48. For reasons equally cogent, resting upon considerations of public welfare, the public can have no vested right to have a judge discharged from active service, disciplined.

H. CONCLUSION

49. Both Applicants are judges who are discharged from active service at 70 years after over twenty years of active service. As such the Applicants may be approached to render active service, <u>but they are not under any obligation to do so, nor subject to any penalties should they decline.</u>

50. A disciplinary penalty may be imposed on a judge for an offence of discipline. The catalogue of the penalties in the JSC Act do not cater for a judge discharged from active service.

51. Therefore, none of the sanctions for the alleged misconduct, if established, could make sense in the case of the Applicants.

52. We submit that the broader interest of justice will be served in granting the relief in the notice of motion.[35]

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35 South African Revenue Service v Commission for Conciliation, Mediation and Arbitration 2017(1) SA 549 (CC) at 562 – 563 A