

**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

OPEN SECRETS NPC

FOURTH RESPONDENT

SHADOW WORLD INVESTIGATIONS

FIFTH RESPONDENT

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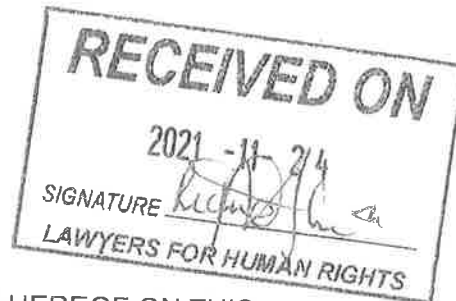
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AND TO: **THE STATE ATTORNEY – JOHANNESBURG**
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..... DAY OF 2021

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

Case Number: 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

REPLYING AFFIDAVIT

I, the undersigned



HENDRICK MMOLLI THEKISO MUSI

do hereby declare under oath and state as follows:

1. I am the Second Applicant in this matter and the facts contained in this affidavit are, save where the context indicates otherwise, within my knowledge and are true and correct.
2. It will be noted that the founding affidavit was deposed to by my colleague, Legoabe Willie Seriti; however, it was discussed with me and I fully agreed with and supported the contents thereof. As is normal practice, the First Applicant should be deposing to the replying affidavit as well but he is unable to do so because he is presently out of town attending to some pressing personal matters and he has requested me to depose to this affidavit on behalf of both of us. It is necessary that I do so in order to meet the time limit for filing this affidavit. We have telephonically exchanged views on the content and he supports what I say herein.
3. In this affidavit I will refer to the Fourth and Fifth Respondents collectively as “the Respondents”.



PRELIMINARY REMARKS

4. Before responding to the respondents' averments, I wish to address the one theme that runs through the Respondents' answering affidavit. The theme is that we launched this constitutional challenge and the separate application for leave to appeal the judgment of the High Court that set aside the report and findings of the Arms Procurement Commission (Commission), because we want to avoid accountability for our conduct as judges who presided in the Commission.
5. Respondents further allege that we want to delay the complaint proceedings they instituted against us before the Judicial Conduct Committee (JCC). I reject this contention outright because it suggests that we should not defend ourselves against the serious allegations of misconduct that the respondents have levelled against us before the JCC and which they saw fit to publicise extensively in the media, including through live television interviews.
6. The allegation that we seek to avoid accountability is denied. We are exercising our constitutional rights to approach the courts as enshrined in Section 35 of the Constitution. We have the right to have any dispute resolved by a fair public hearing before a court.
7. In any event, we have not sought to avoid dealing with the allegations against us in the JCC. We have answered in detail each and every allegation levelled



against us, and we are certainly not avoiding dealing with those allegations. However, there is an important legal principle which we believe it is in the public interest for the court to determine. That principle lies at the heart of the challenge that we have mounted, more particularly as set out in our founding papers.

8. In regard to the leave to appeal against the judgment of the High Court, on which the Respondents based their complaint against us, we are similarly within our constitutional rights to challenge that judgment. We have set out fully in the application for leave to appeal the reasons why it took us long to launch the application. We have equally demonstrated the reason why we seek leave to appeal.
9. The grounds we have raised in the leave to appeal are very important and are in the public interest. The issues raised in the appeal relate to important public interest matters, like the standard which courts should adopt to review findings of Commissions of Enquiry, such as the Commission in this matter.
10. In both the main application in this matter and in the leave to appeal, we do not act frivolously or simply for personal gain. Our answers to the complaint against us stand and we continue to stand by our defences.
11. Whether the appeal has reasonable prospects of success, is an issue which the court will rule on.

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12. I now respond *ad seriatim* to averments made in the Respondents' answering affidavit.

13. **AD PARAGRAPHS 1, 2, 3, 4, 5 AND 6**

The contents hereof are not disputed.

14. **AD PARAGRAPHS 7**

I dispute the allegations in this paragraph and state the contents of the founding affidavit.

15. **AD PARAGRAPH 8**

15.1 I deny the allegations in this paragraph. The peculiar facts in this matter is that the Fourth and Fifth Respondents waited long until we had retired from active service, before they lodged their complaint with the JSC against us.

15.2 It is important for the courts to rule on the issue that we have raised in our application regarding the definition of a judge in the JSC Act, in the context of the facts on this matter. In no way are we seeking to escape accountability, but it is important that given the facts in this matter, that the constitutional issues we have raised be ventilated in court.

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16. **AD PARAGRAPH 9**

I deny the allegations in this paragraph. We answered in detail the complaint lodged by the Respondents and subject to the determination of this matter, we are prepared to defend ourselves at the JCC.

17. **AD PARAGRAPH 10**

I note the allegations in this paragraph.

18. **AD PARAGRAPH 11 THEREOF:**

I deny that we brought this application in an attempt to put an end to the proceedings which are currently facing before the JSC and its organ, the JCC. If we had sought to escape dealing with these proceedings, we would not have made the substantive representations which we have, dealing with each and every allegation made against us.

19. **AD PARAGRAPH 12 THEREOF:**

19.1 We admit that a complaint has been lodged. However, we deny that the complaints have any merit.

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- 19.2 Without belabouring the court with the contents of the defences we have raised against the complaint, one of the points we raise is that the complaint is solely related to the merits of the findings of the Commission. The complaint relates to a dissatisfaction with the outcome of the enquiry. This, by any stretch of imagination, cannot form the subject matter of a complaint of misconduct against a judge.
- 19.3 The basis of the complaint is the findings of the High Court, which sat as a court of review. A court of review enquires in the procedural aspect relating to the decisions under review. Even a perfectly rational, well-reasoned decision, may be set aside for want of compliance with the rules of procedural fairness; failure to consider material information; considering irrelevant factors; not considering relevant factors etc. The point that the failures for which the Fourth and Fifth Respondents complained before the JCC may very well result in the setting aside of a decision in the review application challenging a decision of a decisionmaker, cannot in themselves result in judicial misconduct thus invoking the impeachment processes of the JSC Act.
- 19.4 We do not therefore seek to escape dealing with the complaints, as the Fourth and Fifth Respondents suggest.



20. **AD PARAGRAPH 13**

We have dealt substantively with the allegations in the complaint, and they are without merit.

21. **AD PARAGRPHS 14 AND 15**

The allegations in these paragraphs are admitted. However, we emphasise that the complaints before the JSC are without any merit.

22. **AD PARAGRAPHS 16 AND 17**

The allegations in these paragraphs are admitted.

23. **AD PARAGRAPH 18**

The Respondents allege that they reluctantly accepted that the hearing should be postponed. It was a decision of the JCC to postpone the matter *sine die* pending the outcome of the application.

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24. **AD PARAGRAPH 19**

The criticism that I do not explicitly in my confirmatory affidavit state, that I supported or adopted the contentions raised by Judge Seriti is unfounded. I fully support these contentions.

25. **AD PARAGRAPH 20**

The fact that the application, if successful, will put an end to the Respondents' complaint cannot be a basis for denying us the right to launch the constitutional challenge.

26. **AD PARAGRAPHS 21, 22, 23 AND 24**

26.1 I admit the allegations in these paragraphs, to the extent that they correctly summarise our contentions.

26.2 The contentions made must be seen in the context of the facts of this matter, when a complaint is laid against us long after we had retired.

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27. **AD PARAGRAPHS 25 AND 26**

27.1 I deny the allegations in these paragraphs. We are not avoiding to deal with the proceedings before the JCC. We have adequately answered the complaints.

27.2 Save to state that I stand by our submissions that section 7(1)(g) of the JSC Act is unconstitutional and invalid, the rest of the averments herein made are matters of law and will be argued in court.

28. **AD PARAGRAPHS 27 AND 28**

The application for leave to appeal is quite substantive and deals with the pertinent issues which would need to be addressed in that kind of application, including the delay in bringing the application. That application would be decided on its own merits at the relevant point in time.

29. **AD PARAGRAPH 29**

I admit the allegations in this paragraph.



30. **AD PARAGRAPHS 30, 31, 32, 33, 34, 35 AND 36 THEREOF:**

The contentions made in these paragraphs and the general principles and propositions made are not in contention. What is in contention is whether we have made ourselves guilty of misconduct. We deny that.

31. **AD PARAGRAPHS 37 AND 38**

We stand by the contentions that we have made in the founding affidavit.

32. **AD PARAGRAPHS 40, 41, 42, 43, 44, 45, 46 AND 47**

The contentions in these paragraphs go to the legal issues which need to be determined in the light of the facts of this case. We stand by the contentions in the founding affidavit.

33. **AD PARAGRAPH 48 THEREOF:**

The allegation in this paragraph is admitted.

34. **AD PARAGRAPHS 49 AND 50**

I deny the allegations in these paragraphs.

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35. **AD PARAGRAPHS 51 TO 55**

The allegations in these paragraphs go to the very foundation of the legal arguments to be presented at court and they will be dealt with accordingly.

36. **AD PARAGRAPH 58**

Putting an end to the complaint would be a consequence of the success of the application but it is no valid basis for opposing the application. An application cannot be opposed simply because its outcome would favour the applicant.

37. **AD PARAGRAPH 60**

The contents hereof are vehemently disputed. It is naive to suggest that a litigant cannot take a lawful step to protect his interests, whether personal or financial; at any rate, a constitutional challenge of the nature involved in this case is inherently in the public interest.

38. **AD PARAGRPHS 61, 62 AND 63**

The contents of this paragraphs are noted.

39. **AD PARAGRAPH 64**

We stand by the allegations in our founding affidavit.

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40. AD PARAGRAPH 65

We stand by the allegations in our founding affidavit.

41. AD PARAGRAPHS 66, 67 AND 68

41.1 The contentions raised in these paragraphs are dealt with in the application for leave to appeal.

41.2 The Fourth and Fifth Respondents have raised the same point in the application for leave to appeal and this will be dealt with in that application.

41.3 I point out firstly that at the stage when the Government withdrew the opposition, we had already filed a notice to abide and took no further part in the proceedings, resulting in the matter proceeding unopposed. This is the context in which the First Applicant said we are not in a position to place our views before the court.


41.4 Secondly, it is correct that we had been prepared to live with the outcome of the court order in the sense that we initially saw no need to appeal it, a situation that changed when the judgment was used as a basis to haul us before the JCC, at which point we had to reconsider

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our stance. I withhold further comment on matters that are not relevant to the determination of the instant application.

42. AD PARAGRAPHS 69, 70, 71 AND 72

- 42.1 I stand by the contentions made in the founding affidavit.
- 42.2 I stand by our submission that, properly construed, the impugned provision is unconstitutional and invalid and further submit that we have made out a case for the grant of the orders sought.
- 42.3 I submit further that there was no need for the respondents to join these proceedings as Fourth and Fifth Respondents; they do this as part of what has become a personal vendetta against us.
- 42.4 I pray that the Respondents be ordered to pay the costs of suit, including the costs occasioned by the employment of two counsel.



DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at SANDTON on this the 23 day of November 2021, and that the Regulations contained in Government Notice



R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



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