


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: 32193/2021

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
<u>2023/04/14.</u>	
DATE	SIGNATURE

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

JUDGMENT

This judgment has been delivered by being uploaded to the CaseLines profile on 14 April at 10h00 and communicated to the parties by email.

Sutherland DJP

Introduction

[1] The origins of the controversy in this case lie in the role played by the two applicants as the commissioners in a commission of enquiry into the allegations of improprieties in the procurement of arms for the Defence Force in the period 1997-1999. Their conduct whilst on the commission was criticised. The findings of the commission were taken on review and set aside by the Gauteng Division of the High Court.¹ That decision was not thereafter challenged. However, the fourth and fifth respondents lodged a complaint with the Judicial Service Commission (JSC) about the conduct of the two applicants, who were serving judges at the time of the commission's work, but had both retired by the time of the review application. The JSC decided to institute proceedings in terms of its disciplinary apparatus.

[2] The disciplinary apparatus of the JSC is provided for in the Judicial Service Commission Act 9 of 1994 (JSC Act). In chapter 2 of the JSC Act, headed "Oversight over Judicial Conduct and Accountability of Judicial Officers", provision is made for the lodging of complaints against judges in section 14, and further provisions are made about the procedures for investigating the complaints. In section 7(1)(g) a "judge" is defined thus:

"[A]ny Constitutional Court judge or judge referred to in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), 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 purposes of section 11, includes any Constitutional Court judge or judge performing judicial duties in an acting capacity." (Emphasis added.)

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

[3] Accordingly, the JSC in terms of this definition of a judge, claims jurisdiction over the two applicants *qua* retired judges, both having been discharged from active service. The critical question posed to this Court is whether or not that provision is unconstitutional by reason of its alleged inconsistency with the provisions of the Constitution. The applicants contend that section 7(1)(g) of the JSC Act is inconsistent with section 176 of the Constitution. Section 176 provides:

“Terms of office and remuneration.—

- (1) A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.
- (2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.
- (3) The salaries, allowances and benefits of judges may not be reduced.”

[4] In consequence of a comparison between these two texts, the thesis advanced on behalf of the applicants is articulated thus, in the heads of argument:

“The crisp constitutional issue for adjudication in this matter is whether a national statute can permissibly broaden or widen the meaning of provisions in the Constitution and remain constitutionally compliant.”

Accordingly, the sole question before this Court is therefore whether or not section 7(1)(g) is unconstitutional. The sole ground upon which that section is challenged is that it is inconsistent with section 176 of the Constitution.

The relevant law about judges and the JSC

[5] Chapter 8 of the Constitution provides for “Courts and Administration of Justice”. The several sections address what courts are established and their powers. The sections also refer to judges of these courts. There is no express definition of a judge.

[6] Section 174 sets criteria for the selection and appointment of judges. Section 177 provides for the removal of a judge from office. Section 176, alone,

addresses “Terms of office and remuneration”. The concept of “office” and its duration is central to the debate in this case.

- [7] Section 2 provides for the supremacy of the Constitution. Sections 43 and 44 provide for the legislative authority of Parliament. Section 180, in particular, provides:

“Other matters concerning administration of justice.—National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including—

- a)
- b) procedures for dealing with complaints about judicial officers; and
- c)”

- [8] Section 176(2) and section 180 must be read together. The purpose of section 176(2) is to prescribe the duration of the term of office of a judge, other than a judge of the Constitutional Court, which endures from date of appointment and expires upon a “discharge from active service” in terms of a statute. The two applicants fall into this category of persons.

- [9] The regulation of the discharge from active service contemplated in section 176 (2) is dealt with in the Judges’ Remuneration and Conditions of Employment Act 47 of 2001 (JRCS Act). The definitions of “judge”; “active service”; and “service” provided for therein are central to the debate: Section 1 provides:

‘In this Act, unless the context indicates otherwise—

“active service’ means any service performed as a Constitutional Court judge or judge in a permanent capacity, irrespective of whether or not such service was performed prior to or after the date of commencement of this Act, and includes any continuous period—

- (a) of longer than 29 days of such service in an acting capacity prior to assuming office as a Constitutional Court judge or judge in a permanent capacity if such service was performed before the date of commencement of this Act; and
- (b) of such service in an acting capacity prior to assuming office as a Constitutional Court judge or judge in a permanent capacity if such service was performed after the date of commencement of this Act.

...
'judge' means any person holding the office of—

- (a) President or Deputy President of the Supreme Court of Appeal;
- (b) judge of the Supreme Court of Appeal;
- (c) Judge President or Deputy Judge President of any High Court; or
- (d) judge of any High Court,

and includes any person who, at or since the fixed date, held the office of—

- (i) Chief Justice of South Africa or Deputy Chief Justice;
- (ii) judge of the Appellate Division of the Supreme Court of South Africa or of the Supreme Court of Appeal;
- (iii) Judge President or Deputy Judge President of any provincial or local division of the Supreme Court of South Africa or of any High Court;
- (iv) judge of any provincial or local division of the Supreme Court of South Africa or of any High Court; or
- (v) judge of any court of a homeland referred to in Item 16 of Schedule 6 to the Constitution, read with Item 1 thereof.

...
'service' means—

- (a) service as a judge of the Supreme Court of Appeal or a High Court as contemplated in the Supreme Court Act, 1959 (Act 59 of 1959), in the same or a higher office held by the judge concerned on discharge from active service, or, with the approval of the judge concerned, service in a lower office;
- (b) service as a chairperson or a member of a commission as contemplated in the Commissions Act, 1947 (Act 8 of 1947);
- (c) service as a chairperson or a member of a body or institution established by or under any law; or
- (d) any other service which the Minister may request him or her to perform.”
(Emphasis added.)

[10] Sections 3 to 8 of the JRCS Act provide, in detail, the circumstances which trigger a discharge from active service and the financial and other consequences of such an event.

“3. Discharge of Constitutional Court judges and judges from active service. —

- (1) ...

- (2) A judge who holds office in a permanent capacity—
- (a) shall, subject to the provisions of section 4 (4), be discharged from active service as a judge on the date on which he or she attains the age of 70 years, if he or she has on that date completed a period of active service of not less than 10 years, or, if he or she has on that date not yet completed a period of 10 years' active service, on the date immediately following the day on which he or she completes a period of 10 years' active service;
 - (b) who has already attained the age of 65 years and has performed active service for a period of 15 years, and who informs the Minister in writing that he or she no longer wishes to perform active service, shall be discharged by the President from active service as a judge;
 - (c) may at any time be discharged by the President from active service as a judge if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties; or
 - (d) may at any time on his or her request and with the approval of the President be discharged from active service as a judge if there is any reason which the President deems sufficient.

4. Continuation of active service by Constitutional Court judges and judges.—

- (1) A Constitutional Court judge whose 12-year term of office as a Constitutional Court judge expires before he or she has completed 15 years' active service must, subject to subsection (2), continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years' active service, whereupon he or she must be discharged from active service as a Constitutional Court judge.
- (2) A Constitutional Court judge who, on attaining the age of 70 years, has not yet completed 15 years' active service, must continue to perform active service as a Constitutional Court judge to the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged from active service as a Constitutional Court judge.
- (3)(a) A Constitutional Court judge who is discharged from active service in terms of section 3 (1) or subsection (1) or (2) and who is also a judge contemplated in section 174 (5) of the Constitution, may continue to perform active service as a judge in the court in which he or she held office as such immediately before he or she was appointed as a Constitutional Court judge if—

- (i) he or she indicates his or her willingness to do so in writing to the President three months before he or she is so discharged from active service; and
 - (ii) he or she still qualifies to hold office as such a judge in a permanent capacity in terms of section 3 (2) or subsection (4).
- (b) Nothing in this Act precludes a Constitutional Court judge—
- (i) who is discharged from active service in terms of section 3 (1) or subsection (1) or (2); and
 - (ii) who is not a judge contemplated in section 174 (5) of the Constitution, from being appointed to the office of judge in a court other than the Constitutional Court by the President on the advice of the Judicial Service Commission as contemplated in the Constitution, if he or she still qualifies to hold office as such a judge in a permanent capacity in terms of section 3 (2) or subsection (4).
- (c) The holding of office by a judge referred to in paragraph (a) or (b)—
- (i) interrupts that judge's discharge from active service in terms of section 3 (1) or subsection (1) or (2); and
 - (ii) suspends any salary payable in terms of section 5 to that judge pursuant to such discharge from active service.
- (d) The holding of office by a judge referred to in paragraph (a) or (b), entitles such a judge to an annual salary which—
- (i) is payable in terms of section 2; and
 - (ii) may not be less than the annual salary applicable to the highest office held as a Constitutional Court judge or a judge.
- (4) A judge who on attaining the age of 70 years has not yet completed 15 years' active service, may continue to perform active service to the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged from active service as a judge.

5 Salary payable to Constitutional Court judges and judges after discharge from active service

- (1) Subject to subsection 2, a Constitutional Court judge or a judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4 shall be paid a salary in accordance with the formula— [equation omitted] in which formula the factor—
- (a) A represents the annual salary applicable to the highest office held by the Constitutional Court judge or judge concerned in a permanent capacity

during the period of his or her active service: Provided that, subject to section 11 (3) (a) and (5) (a), the factor 'A' in the said formula must be adjusted whenever the annual salary applicable to the highest office held by the Constitutional Court judge or judge concerned during the period of his or her active service, is increased;

- (b) B represents 15; and
 - (c) C represents the period in years of active service of such Constitutional Court judge or judge.
- (2) The aggregate of the salary payable in terms of subsection (1) to a Constitutional Court judge or judge who was or is discharged from active service—
- (a) in terms of section 3 (1), 3 (2) (a), (c) or (d) or 4 (1), (2) or (4) shall not be less than 40 per cent of his or her highest annual salary during the period of his or her active service and shall not exceed such salary;
 - (b) in terms of section 3 (1) or 3 (2) and has performed active service for a period of not less than 20 years, shall be equivalent to the annual salary applicable to the highest office held by him or her in a permanent capacity during his or her period of active service;
 - (c) in terms of section 3 (2) (b), shall, subject to paragraph (b), be 80 per cent of his or her highest annual salary during the period of his or her active service, plus two per cent of that salary for every year of active service which he or she performs after attaining the age of 65 years;
 - (d) in terms of section 3 (1) (b) or (c) or 3 (2) (c) or (d) before he or she attains the age of 65 years, shall, subject to paragraph (b), be not more than 80 per cent of his or her highest annual salary during the period of his or her active service.
- (3) For the purposes of subsection (1) the period of active service in any particular office shall be calculated by the year and the month, and fractions of a month shall—
- (a) in respect of any active service performed before the date of commencement of this Act, be disregarded; and
 - (b) in respect of any active service performed after the date of commencement of this Act be taken into account.
- (4) If a Constitutional Court judge or a judge to whom a salary is payable in terms of this section dies, the payment of the salary shall cease with effect from the first day of the month following the month in which he or she died.

6 Gratuity payable to Constitutional Court judges and judges after discharge from active service

- (1) Subject to the provisions of subsections (2), (3) and (4), any Constitutional Court judge or judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4, shall, in addition to any salary payable to him or her in terms of section 5, be paid a gratuity which shall in respect of every office held by him or her in a permanent capacity during his or her active service be calculated in accordance with the formula— [equation omitted] in which formula the factor—
 - (a) D represents the annual salary which at the time of the discharge of such Constitutional Court judge or judge from active service was applicable to the office concerned;
 - (b) E represents the period in years of active service, but not exceeding 20 years, of such a Constitutional Court judge or judge in the office concerned.
- (2) After the completion of 15 years' active service a Constitutional Court judge or judge shall once be entitled, if he or she so requests, to be paid the gratuity (or any part thereof) which has until the date of the request accrued in accordance with the formula in subsection (1).
- (3) After the completion of 20 years' active service a Constitutional Court judge or judge shall once be entitled, if he or she so requests, to be paid the gratuity (or any portion thereof) which has until that date accrued in accordance with the formula in subsection (1), or the balance available after the exercise of the power in terms of subsection (2).
- (4) A judge referred to in section 4(4) shall once be entitled, when he or she attains the age of 70 years and has completed not less than 10 years' active service, to be paid, if he or she so requests, the gratuity (or any portion thereof) which has until the date of that request accrued in accordance with the formula in subsection (1).
- (5) The total amount of any gratuity payable in terms of this section to a Constitutional Court judge or judge shall not exceed three times his or her highest annual salary during the period of his or her active service.
- (6) For the purposes of this section the period of active service shall be calculated by the year and the month, and fractions of a month shall be taken into account.
- (7) Notwithstanding anything to the contrary contained in any other law, the gratuity payable to Constitutional Court judges or judges under this section shall not be taxable.

7 Performance of service by Constitutional Court judges and judges discharged from active service.—

- (1)(a) A Constitutional Court judge or judge who has been discharged from active service, except a Constitutional Court judge or judge who has been discharged in terms of section 3 (1) (b) or (c) or (2) (b), (c) or (d), who—
- (i) has not attained the age of 75 years must, subject to paragraph (c), be available to perform service until he or she attains the age of 75 years, for a period or periods which, in the aggregate, amount to three months a year: Provided that such a Constitutional Court judge or judge may voluntarily perform more than three months' service a year, if his or her services are so requested; or
 - (ii) has already attained the age of 75 years, may voluntarily perform further service, if his or her services are so requested, if that Constitutional Court judge's or judge's mental and physical health enable him or her to perform such service.
- (b) Service referred to in paragraph (a) of the definition of 'service' in section 1, in a permanent post on the establishment of a particular court, may, subject to paragraph (bA), only be performed if that service is requested by the Chief Justice, President of the Supreme Court of Appeal or the judge president in whose area of jurisdiction the Constitutional Court judge or judge resides or of the court to which he or she was attached when discharged from active service, or with his or her consent, any other judge president, in consultation with the Chief Justice or the judge president in question, as the case may be, and the Minister so approves, after consultation with the Judicial Service Commission.
- (bA) Service referred to in paragraph (a) of the definition of 'service' in section 1 which becomes necessary as a result of the creation of an additional temporary post on the establishment of a particular court, to deal with additional workload or backlogs which have developed, may be performed if that service is approved by the Minister after consultation with the head of the court in question, and for the period decided by the Minister, which period may not exceed three months at a time.
- (c) Service as mentioned in paragraph (b), (c) or (d) of the definition of 'service' in section 1 may be performed only with the consent of the Constitutional Court judge or judge concerned.
- (2)(a) A Constitutional Court judge or judge who performs service in terms of subsection (1), as contemplated in paragraph (a) of the definition of 'service' in section 1, shall, subject to paragraph (b) (ii), monthly be paid an additional

amount in remuneration which is equal to the amount which at that time is payable to the holder of the office which he or she holds for that period.

- (b) A Constitutional Court judge or judge who performs service in terms of subsection (1) as contemplated in—
- (i) paragraphs (b) to (d) of the definition of 'service' in section 1; and
 - (ii) the proviso to subsection (1) (a) (i) or in subsection (1) (a) (ii), read with paragraph (a) of the definition of 'service' in section 1,
- shall monthly be paid such remuneration as the President may determine.
- (3) The salary of a Constitutional Court judge or judge who contrary to subsection (1) (a) (i) fails to perform the minimum period of service referred to in that subsection if so requested, shall, for every full year during which he or she so fails, be reduced by two per cent: Provided that such reduction shall, in the aggregate, not amount to more than 10 per cent of such salary.
- (4) The registrar of the Supreme Court of Appeal or a Division of the High Court or a local seat thereof where a Constitutional Court judge or judge performs service in terms of subsection (1), shall notify the Secretary-General of the Office of the Chief Justice immediately of the commencement and duration of the service.
- [Sub-s. (4) substituted by s. 12 of Act 24 of 2015 (wef 1 August 2016).]
- (5) The Secretary-General of the Office of the Chief Justice shall keep a register of all service performed by Constitutional Court judges or judges in terms of subsection (1).
- [Sub-s. (5) substituted by s. 12 of Act 24 of 2015 (wef 1 August 2016).]

8 Performance of service as Chief Justice by Chief Justice or as President of Supreme Court of Appeal by President of Supreme Court of Appeal in certain circumstances. —

- (a) A Chief Justice who becomes eligible for discharge from active service in terms of section 3 (1) (a) or 4 (1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.
- (b) A President of the Supreme Court of Appeal who becomes eligible for discharge from active service in terms of section 3 (2) (a) or 4 (4), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service

as President of the Supreme Court of Appeal for a period determined by the President, which may not extend beyond the date on which such President of the Supreme Court of Appeal attains the age of 75 years.”

[11] The JSC Act was enacted prior to the JRCS Act, but section 7 is a provision enacted in 2008 by an amendment to the JSC Act. Section 7(1)(a), defines “active service”, by reference and incorporation of the definition in the JRCS Act, cited above.

[12] Section 11 of the JSC Act refers to a prohibition against a judge holding any other office of profit or receiving payment for any service during active service and the regulation of any such acceptance of such an office after discharge.

“Judge not to hold other office of profit or receive payment for any service. —

- (1) A judge performing active service—
 - (a) may not hold or perform any other office of profit; and
 - (b) may not receive in respect of any service any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge:
Provided that such a judge may, with the written consent of the Minister acting in consultation with the Chief Justice, receive royalties for legal books written or edited by that judge.
- (2) A judge who has been discharged from active service may only with the written consent of the Minister, acting after consultation with the Chief Justice, hold or perform any other office of profit or receive in respect of any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge.
- (3)(a) Written consent as contemplated in subsection (2) may only be given if the Minister is satisfied that the granting of such consent will not-
 - (i) adversely affect the efficiency and effectiveness of the administration of justice, including the undermining of any aspect of the administration of justice, especially the civil justice system;
 - (ii) adversely affect the image or reputation of the administration of justice in the Republic;
 - (iii) in any manner undermine the legal framework which underpins the judge for life concept;

- (iv) result in any judge engaging in any activity that is in conflict with the vocation of a judge; and
- (v) bring the judiciary into disrepute or have the potential to do so.
- (b) The Minister, acting after consultation with the Chief Justice, may, by notice in the *Gazette*, issue guidelines regarding any other criteria to be applied when considering the granting of consent contemplated in subsection (2).
- (c) Written consent as contemplated in subsection (2) may be granted on the conditions, if any, that the Minister deems appropriate.
- (4) The Minister must cause the Registrar of Judges' Registrable Interests referred to in section 13 (1) to be informed of all instances where written consent as contemplated in subsections (1) and (2) has been granted.
- (5) The Minister must, once every twelve months, table a report in Parliament containing particulars, including the outcome, of every application made in terms of subsection (1) or (2), including any conditions attached to any application granted, during the period covered by the report.”
(Emphasis added.)

[13] Section 12 of the JSC Act provides for a code of conduct. The code in force includes, in Article 17, provisions regulating the conduct of judges discharged from active service.

[14] It is plain that the Constitution was not intended to be the sole source of regulation of the Judiciary. The Constitution together with national legislation forms the scheme of the regulatory model. Sections 176 and 180 make that plain.

The applicants' thesis

[15] The essence of the argument advanced is that the effect of section 176 of the Constitution is to exhaustively circumscribe the concept of a “judge” as an incumbent during a prescribed term of judicial office. Once “discharged” the person who was a judge thereupon ceases to be one. The consequence of this conception is that former judges, despite the courtesy title of judge, with which by custom they continue to be addressed, are simply not office-holders and *ergo*,

for that reason, are not judges within the meaning of section 176.² In other words, the standing or status of a person *qua* judge is coterminous with the period during which that judicial office was held.

[16] Based on this line of reasoning, it is further argued that because section 176 of the Constitution has defined what “judge” means in the way described above, section 176 constitutes the sole and dispositive description of who is a judge. Therefore, it must follow that section 7(1)(g) of the JSC Act cannot legitimately include retired judges as “judges” in its definition and by doing so, it commits a vain attempt to broaden the concept of judge as sanctified by the Constitution. Moreover, it is argued, the definition of “judge” in the JRCS Act, that statute allegedly being the sole Act of Parliament signified in section 176(2), is different to that of the definition in the JSC Act and thus no incompatibility with the JRCS Act is permissible either. Support for this interpretation, it is argued, can be found in the types of sanctions prescribed for delinquent judges. These sanctions, most obviously impeachment from office, are impossible or inappropriate to impose on a retired judge who no longer occupies judicial office.

[17] This thesis cannot be sustained upon a proper interpretation of the enactments, more especially section 176 and section 180 of the Constitution and the effect of those provisions in conjunction with the JRCS Act and the JSC Act.

Who is a judge?

[18] The basic flaw in the applicants’ thesis is the notion that a person can only be a judge during the term of active service or term of office. To reason in this way is to elide the status and identity of a judge with the concept of an “office-holder”.

[19] Section 176 of the Constitution does not purport to define who is a judge. The tenor of section 176 is to regulate the *duration* of office, not the *standing* of judgeship. The scheme of the chapter proceeds logically, to deal with:

² This submission, were it correct, would mean that section 11(3)(a)(iii) of the JSC Act, which expressly states the “judge for life” principle, is a direct contradiction of the Constitution.

(1) appointments in section 175; then, (2) naturally occurring vacation of office in section 176; and (3) involuntary removals from office in section 177.

[20] The test for inconsistency with the Constitution has been described by the Constitutional Court in *Ex Parte Speaker of the Kwazulu -Natal Provincial Legislature* at para [24]:³

“It is important to stress that we are here dealing with the concept of inconsistency as it is to be applied to provisions in a provincial bill of rights which fall within the provincial legislature's competence but which operate in a field also covered by Chapter 3 of the interim Constitution. For purposes of section 160 there is a different and perhaps even more fundamental type of inconsistency, namely where the provincial legislature purports to embody in its constitution, whether in its bill of rights or elsewhere, matters in respect whereof it has no power to legislate pursuant to the provisions of section 126 or any other provision of the interim Constitution. For purposes of the present enquiry as to inconsistency we are of the view that a provision in a provincial bill of rights and a corresponding provision in Chapter 3 are inconsistent when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each without disobeying either. There is no principal or practical reason why such provisions cannot operate together harmoniously in the same field.”

[21] Applying this test, it is at once apparent that the challenge to constitutionality on the grounds of inconsistency evaporates. The norm for comparison requires a logical conflict, not an extrapolation of the provisions of the Constitution, which in this case is expressly contemplated in section 180 of the Constitution.

[22] In argument, the contention that section 7(1)(g) of the JSC Act is inconsistent with the Constitution was sometimes subsumed by a contention that the Constitution *did not authorise* what was provided in section 7(1)(g). That latter notion is not compatible with the true test, which is inconsistency. The Constitution authorises Parliament to make laws that are not inconsistent with the Constitution, and, in this regard, notably in section 180, cited above, the very extrapolation is contemplated. The JSC Act is such an Act as contemplated by section 180. In principle, it is incorrect to suppose that an Act of Parliament, like a regulation made by a Minister, must have a source of authorisation in the anterior enabling Act.

³ *Ex Parte Speaker of the Kwazulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of Kwazulu-Natal* [1996] ZACC 17; 1996 (4) SA 1098 (CC); 1996 (11) BCLR 1419 (CC).

[23] Some reference was made to other jurisdictions in which a judicial officer enjoys the status of judge only for the duration that the person exercises judicial office. That is a policy choice. Such examples do not assist the task of interpreting our own laws: the very question posed to the Court is whether South African law has, in the text of the relevant enactments, chosen to hold a person who has been appointed to judicial office and has been, in the language used throughout the enactments, “discharged from active service” accountable *qua* judge thereafter. This Court is not troubled to consider the merits of the policy choice itself, but merely has to decide which policy choice our law has made.

[24] Central to the applicant’s thesis is a repudiation of the notion that a person, upon appointment as a judge, is a judge for life. The choice of making a person a judge for life is bound up with the expectations of the character of judgeship and especially the independence that a judge is required to assert in the South African context. That a judge should, for example, be free from financial anxiety is a self-evident necessity if a guarantee of independence is to be a reality. Hence, section 176(3) forbids a reduction in salary. In the JRCS Act, the definition of judge, cited above, contemplates persons who are and who were holders of judicial office. The definition plainly addresses a transitional process in which the judges who held office during the pre-constitutional era had their vested rights to post-retirement benefits preserved. Even had section 11(3)(a)(iii) not expressly asserted the concept of “judge for life”, the concept is inextricably embedded in the legislative scheme created by the enactments.

[25] The utilisation of the concept of a “discharge from active service” rather than a “termination of office” is significant nomenclature because it points to a continuing judicial identity even when performing no judicial functions. The remuneration payable after discharge is a salary, not a pension. Moreover, further service after such discharge is possible, either compulsorily or voluntarily, subject to various conditions. Only resignation severs the relationship with the Judiciary. However, the consequences of a resignation in regard to

accountability for misconduct committed whilst in active service need not be considered in this judgment.

[26] The upshot of these observations about the JRCS Act is that it plainly does contemplate a concept of a judge for life and is, in that respect, not different from the JSC Act. Neither statute is inconsistent with the Constitution.

Cautionary note

[27] Nothing whatsoever in this judgment concerns itself with the nature of or merits or demerits of the complaints against the applicants, nor with any consideration about whether the JSC's powers are or can be efficacious in relation to the applicants.

Costs

[28] Whether or not the *Biowatch* principle is applicable in this matter was raised by counsel for the fourth and fifth respondents. The nub of the issue is whether the applicants are driven by anything other than self-interest. It is correct that none of the factors enumerated in paragraphs [43] to [47] of *Biowatch*, which might justify the losing party not being liable to pay costs, are present.⁴ The interest that drives the applicants is their reputation and a decision to endeavour to prevent any enquiry at all that might result in a blemish. That is a legitimate motive but does not trigger the *Biowatch* principles. The foundations of the challenge to the jurisdiction of the JSC are weak. In the circumstances, it is appropriate that they bear the costs of opposition to the application.

The Order

(1) The application is dismissed with costs, including the costs of two counsel, where utilised.

⁴ *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para [43].

(2) It is declared that section 7(1)(g) of the JSC Act is not inconsistent with the provisions of the Constitution.



Sutherland DJP

(with whom Wepener J and Molahlehi J concur)

Heard: 14 March 2023

Delivered: 14 April 2023

For the Applicants:

Adv I Semanya SC,

With him Adv N Mayet

Instructed by Maluleke Seriti Makume
Matlala Inc.

For the First Second and Third Respondents: Adv L H Nkosi-Thomas SC,

With her, Adv P J Daniell

Instructed by the State Attorney

For the 4th and 5th Respondents:

Adv G Budlender SC,

Instructed by Power Sing Inc

C/O Gilfillan Du Plessis