

REPUBLIC OF SOUTH AFRICA

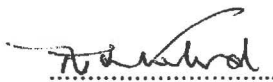


**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case NO: 43482/2021

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

2022/05/05
DATE


SIGNATURE

In the matter between:

MANDLAKAYISE JOHN HLOPHE

Applicant

and

JUDICIAL SERVICE COMMISSION

First Respondent

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

Second Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Third Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Fourth Respondent

JUSTICE DIKGANG MOSENEKE

Fifth Respondent

JUSTICE JENNIFER YVONNE MOKGORO

Sixth Respondent

**JUSTICE CATHERINE MARY
ELIZABETH O'REGAN**

Seventh Respondent

JUSTICE ALBERT LOUIS SACHS

Eighth Respondent

JUISTICE JOHANN VAN DER WESTHUIZEN

Ninth Respondent

JUSTICE ZAKERIA MOHAMMED YACOOB

Tenth Respondent

FREEDOM UNDER LAW

Eleventh Respondent

and

BLACK LAWYERS ASSOCIATION ("BLA")

Amicus Curiae

This judgment has been delivered by uploading to CaseLines on 5 May 2022 which date is deemed the date of delivery.

JUDGMENT

THE COURT (LEDWABA AJP, SUTHERLAND DJP AND VICTOR J)

INTRODUCTION

The issues

- [1] This is a review application brought by Hlophe JP to set aside the decision of the Judicial Service Commission (JSC), taken on 25 August 2021, in which it resolved, by a majority of 8-4, that he had committed gross misconduct. The consequence of such a decision is that Hlophe JP must be referred to Parliament to be subjected to a motion to impeach him.

- [2] The complaints of irregularity relied upon by Hlophe JP fall into two main categories. The first category is about alleged procedural deficiencies which afflicted the JSC when it considered and decided the matter. The second category is concerned with the decision *per se*. These categories are addressed discretely in Part A and Part B of the judgment. In addition, Hlophe JP brought an application that the matter be referred to the National Assembly, which is addressed in Part C.

Background

- [3] This matter is the most recent chapter in a saga reaching back to 2008. The course of events has been related in several judgments and do not bear more repetition than absolutely necessary. The details of this saga are recorded in several reported cases, inter alia, *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others*¹ (hereafter cited frequently and referred to simply as the *FUL case*), and also *Hlophe v Premier, Western Cape; Hlophe v Freedom Under Law and Others*,² and *Nkabinde & Another v Judicial Service Commission and Others*.³
- [4] In 2008, Hlophe JP visited two judges of the Constitutional Court - Jafta AJ, as he then was, and Nkabinde J. They were members of the Court hearing several related cases concerning Mr Jacob Zuma, at the time not yet elected President of the Republic of South Africa. The details of the conversations are addressed hereafter. The gravamen of the controversy that arose from those conversations was that Hlophe JP brought up the Zuma cases and expressed views about the issues that arose, allegedly suggesting an outcome favourable to Mr Zuma. When the fact of these discussions was shared with the rest of the judges, it led to a complaint that Hlophe JP had improperly tried to influence the outcome of the cases in favour of Mr Zuma and had thereby committed gross misconduct.

¹ [2011] ZASCA 59; 2011 (3) SA 549 (SCA).

² [2012] ZACC 4; 2012 (6) SA 13 (CC); 2012 (6) BCLR 567 (CC).

³ [2016] ZACC 25; 2017 (3) SA 119 (CC); 2016 (11) BCLR 1429 (CC).

- [5] A formal complaint to the JSC was thereafter laid by the judges of the Constitutional Court. The rationale for such a drastic step was explained in a statement by Langa CJ to the JSC, as follows:

“The reason for the complaint by all Judges

53. In terms of section 167(2) of the Constitution, a matter before the Constitutional Court must be heard by at least eight judges. The Constitutional Court has recognised that there is an obligation upon members of the court to sit in matters unless disqualified or unable to do so for a material reason (*President of the Republic of South Africa and others v SA Rugby Football Union and others* 1994 (4) SA 147 (CC) at para 46).
54. The attempt to influence Nkabinde J and Jafta AJ in the manner described above –
 - (a) was calculated to have an impact not only on the individual decisions of the Judges concerned but on the capacity of the Constitutional Court as a whole to adjudicate in a manner that ensures its independence, impartiality, dignity, accessibility and effectiveness as required by section 165(5) of the Constitution;
 - (b) constituted a breach of section 165(3) of the Constitution which prohibits any person or organ of state from interfering with the functioning of the courts.
55. In *President of the Republic of South Africa and others v SA Rugby Football Union and others* ... the Constitutional Court had to consider an application for recusal against five members of the Court. The Court noted that if one member of the court is disqualified from sitting in a case, the court is ‘under a duty to say so, and to take such steps as may be necessary to ensure that the disqualified member does not participate in the adjudication of the case’ (at para 31). The Court noted that if one disqualified Judge decides to sit in a matter, that ‘could fatally contaminate the ultimate decision of the court, and the other members may well have a duty to refuse to sit with that judge’ (at para 32).
56. It follows that every member of the Constitutional Court not only has a direct and substantial interest in any improper attempts to influence the decision-making process required of any member of the Constitutional Court, but a duty to ensure that all Judges who sit in a matter are qualified to do so. It is in the light of these obligations and the seriousness with which the Judges of the Court viewed the conduct of Hlophe JP that the Judges of the Court (including Moseneke DCJ and Sachs J) unanimously made the complaint to the JSC.”

- [6] Thereafter there followed a series of events, probably unique in the history of any judiciary, stretching over a period of 12 years. The JSC in 2009 resolved not to enquire into the allegations. That decision was set aside in a review by the *FUL case* and the JSC was directed to conduct an enquiry. Several more litigious forays ensued. Eventually, in 2021, the JSC ultimately conducted the enquiry and pronounced its decision that the conduct of Hlophe JP in those conversations constituted gross misconduct. That decision is the subject matter of this review application.

PART A:

THE CHALLENGES TO THE VALIDITY OF THE JSC'S COMPOSITION WHEN THE MATTER WAS CONSIDERED.

- [7] Hlophe JP relies inter alia on the composition of the JSC as a basis for setting aside its decision that he committed gross misconduct. As submitted in oral argument, the question of composition is a jurisdictional issue - if composition is not proper, then the decision made by the JSC is null and void. Indeed, the principle has been established that when a decision is taken by an improperly constituted JSC, or by invalid vote, the decision can be set aside.⁴
- [8] This outcome is subject to the common law principle that this principle may be overridden on grounds of practical necessity. For instance, where a decision has to be made and not all members are present, it is accepted at common law that the general principle be sacrificed to practical necessity. The maxim *lex non cogit ad impossibilia* (the law does not compel the impossible) also finds application. In our constitutional era there is also a Rule of Law consideration.

⁴ *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province* [2011] ZASCA 53; 2011 (3) SA 538 (SCA) (*Premier (SCA)*).

- [9] The case of Hlophe JP relies on three distinct sets of allegations; first, that Mbha JA was improperly present as a member of the JSC; second, that Khampepe ADCJ was improperly present as a member of the JSC; and third, that these two judges and Mlambo JP and Mbha JA were conflicted and ought not to have been present as members of the JSC and moreover, the Premier of the Western Cape Province, Mr Alan Winde, ought not to have been present as a member of the JSC.

The role of Mbha JA in the JSC proceedings

- [10] It is undisputed that Mbha JA, a senior judge of Appeal and also a Head of Court as President of the Electoral Court took the place of President of the SCA, Maya P or her Alternate, the Deputy President of the SCA, Petse DP, who were both conflicted on account of their personal friendships with Hlophe JP. It was submitted on behalf of Hlophe JP that Mbha JA was not entitled to take the place of either the President or Deputy President of the SCA. The issue for determination on the composition of the JSC requirement must be explored so as to determine whether the absences of the President and Deputy President of the SCA, and the presence instead of Mbha JA, conflicts with the constitutionally required profile of the JSC such that the decision of the JSC is rendered invalid.

The relevant legislative provisions

- [11] The JSC was established by section 178 of the Constitution, which sets out, inter alia, the required composition of the JSC. The section, in relevant part, reads as follows:

- “(1) There is a Judicial Service Commission consisting of—
- (a) the Chief Justice, who presides at meetings of the Commission;
 - (b) the President of the Supreme Court of Appeal;
 - (c) one Judge President designated by the Judges President;
 - (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

- (e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
- (f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
- (g) one teacher of law designated by teachers of law at South African universities;
- (h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
- (i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
- (j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
- (k) when considering matters relating to a specific High Court, the Judge President of the Court and the Premier of the province concerned, or an alternate designated by each of them.

...

- (4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.
- (5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1)(h) and (i).
- (6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.
- (7) If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.
- (8) The President and the persons who appoint, nominate or designate the members of the Commission in terms of subsection (1)(c), (e), (f) and (g), may, in the same manner appoint, nominate or designate an alternate for each of those members, to serve on the Commission whenever the member concerned is temporarily unable to do so by reason of his or her incapacity or absence from the Republic or for any other sufficient reason."

[12] The relevant provision of the Judicial Service Commission Act 9 of 1994 (the JSC Act) established to govern the duties of the JSC, is section 2, which provides:

“Acting Chairperson and vacancies

- (1) When the Chairperson is for any reason unavailable to serve on the Commission or perform any function or exercise any power, the Deputy Chief Justice, as his or her alternate, shall act as chairperson.
- (2) If neither the Chief Justice nor the Deputy Chief Justice is available to preside at a meeting of the Commission, the members present at the meeting must designate one of the members holding office in terms of section 178(1)(b) or (c) of the Constitution as acting chairperson for the duration of the absence.”

Proper interpretation of section 178

[13] As set out above, section 178(7) provides that in circumstances where the Chief Justice or the President of the Supreme Court of Appeal is “temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the Supreme Court of Appeal, as the case may be, acts as his or her alternate on the Commission.” However, nowhere in this section is there a provision which addresses a situation in which the Deputy President of the SCA is unable to serve. The question whether the President or Deputy President can designate their membership to an alternate, in this case to Mbha JA, therefore falls to be determined by interpreting the provision. We are of the view that through an exercise of constitutional interpretation, an alternate such as Mbha JA, can form part of the coram of the JSC in the absence of the Deputy President.

Rules of statutory interpretation

[14] The rules guiding statutory interpretation are a useful place to start – they also inform constitutional interpretation. The starting point is always to consider the plain,

ordinary, grammatical meaning of the words in question. However, the *locus classicus* on legal interpretation, *Endumeni*, explains that we must go further:

“... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”⁵

[15] The import of this is that a solely literal approach to legal interpretation has been emphatically rejected. We are enjoined to consider context, language and purpose together and it must not be used in a mechanical fashion. As was held in *Capitec*:

“... It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined...”⁶

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18.

⁶ *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investment 194 (Pty) Ltd and Others* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) (*Capitec*) at para 25.

[16] The rules of statutory interpretation, which have now crystallised, demonstrate that a purely textual approach has been jettisoned. It is axiomatic that the interpretation of legislation must follow a purposive approach.

“In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question . . . in legal interpretation, the ordinary understanding of words should serve as a vital constraint on the interpretive exercise, unless this interpretation would result in an absurdity. As this Court has previously noted in *Cool Ideas*, this principle has three broad riders, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity... ”⁷

[17] Thus, statutory interpretation is a “unitary” exercise to be approached holistically - simultaneously considering the text, context and purpose. A consideration of the entire constitutional architecture is necessary in this interpretive exercise. As stated by the author Fareed Moosa, interpretation is a legal craft which entails giving a meaning and applying juridical logic.⁸ With the adoption of the Constitution and the principles set out in *Endumeni* there is a move away from a purely textual to contextual interpretation. These are the principles that must be adopted to ensure that the end result upholds the Rule of Law.

[18] Furthermore, we know that when interpreting a provision, courts must seek to ensure that the relevant provision is operable and can be given force and effect. In this regard, it was maintained in *H Hess v The State* that: “[w]here the meaning of a section in a law is uncertain or ambiguous it is the duty of the Court to consider the law as a

⁷ *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 47, relying on *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

⁸ J Moosa, Fareed. "Understanding the “Spirit, Purport and Objects” of South Africa’s Bill of Rights." *J Forensic Leg Investig Sci* 4 (2018): 022 DOI 10.24966/FLIS-733X/100022.

whole, and compare the various sections with each other and with the preamble, and give such meaning to the particular section under consideration that it may, if possible, have force and effect”.⁹

- [19] It is trite, however, that the interpretation must not be unduly strained. It should also not be an exercise of “divination”. As stated in *Chisuse*, “the purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute. This means that if no reasonable interpretation may be given to the statute at hand, then courts are required to declare the statute unconstitutional and invalid.”¹⁰

Rules of constitutional interpretation

- [20] So, what is the proper approach when interpreting a constitutional provision like section 178? Whilst the words used in a constitutional provision are a good place to start, as with interpreting legislation, they are not the end of the story. Lord Wilberforce, in 1980, encouraged a generous approach to constitutional interpretation, saying that:

“... A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and the usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument. . . .”¹¹

⁹ *H Hess v The State* (1985) 2 Off Rep 112 at 117, as cited in *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 77.

¹⁰ *Chisuse* above n 7 at para 52.

¹¹ Privy Council in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 (PC) at 328-9, as cited in *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA) at para 14.

[21] Similarly, Dickson J, in *R v Big M Drug Mart Ltd* said, with reference to the Canadian Charter of Rights –

“The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection.”¹²

[22] Indeed, as with statutory interpretation, the correct approach to constitutional interpretation is a purposive approach. In *S v Mhlungu*, the Constitutional Court stressed that constitutional jurisprudence has “developed to give to constitutional interpretation a purposive and generous focus” in order to avoid “the austerity of tabulated legalism”.¹³ In the *First Certification Judgment*, the Constitutional Court maintained that constitutional provisions “must be applied purposively and teleologically” and “must not be interpreted with technical rigidity. They are broad constitutional strokes on the canvas of constitution making in the future.”¹⁴ The Court went on to state that “[a]ll 34 CPs [constitutional provisions] must be read holistically with an integrated approach. No CP must be read in isolation from the other CPs which give it meaning and context.”¹⁵ And this purposive approach has been confirmed in multiple cases since.

¹² *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321, 395-6 as cited in *S v Zuma* above n 11 at para 15.

¹³ *S v Mhlungu and Others (Mhlungu)* [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) at para 8. The phrase “the austerity of tabulated legalism” was used by Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* above n 11 at 328H.

¹⁴ *Certification of the Constitution of the Republic of South Africa, 1996 (First Certification Judgment)* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at paras 34 and 36.

¹⁵ *Id* at para 37.

[23] For example, in *New Nation*, the Constitutional Court stated that the first step to constitutional interpretation is to read the particular section in its historical context. Secondly, the language employed in the section “must be accorded a generous and purposive meaning to give every citizen the fullest protection afforded by the section”.¹⁶ And, in addition, the particular section must be read in the context of other provisions of the Constitution having regard to the scheme of the Constitution as a whole document.¹⁷ The importance of this will become apparent below, but what this suggests is that when considering the present matter, we are entitled and enjoined to interpret section 178 as it applies to this matter, within the scheme of the Constitution as a whole and taking into account the aims and objectives of the JSC. We ought to interpret the provision liberally and purposively to avoid importing narrow legalism if, of course, the language and context of the section reasonably permits such a course.

[24] Of course, even a Constitution is a legal instrument, the language of which must be respected. For example, in *S v Mhlungu*, the Constitutional Court rejected the literal approach to constitutional interpretation of the right to a fair trial which would have created legal absurdities. The Court emphasised that the words of a section under interpretation must still be reasonably capable of an alternative construction before departing from them can be justified.¹⁸ The question is thus whether an alternative interpretation is reasonably possible within the language and context of the provision, even if we reject a strictly literal approach to interpretation.

[25] If we depart from the provision too much, we risk doing violence to the language of the constitutional provision, which of course must be avoided. The Court’s task, after all, is to interpret a written instrument, not conduct an exercise of divination. As the Constitutional Court stated in *New Nation*, we cannot simply ignore how the section

¹⁶ *New Nation Movement NPC and Others v President of the Republic of South Africa and Others (New Nation)* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) at paras 141 and 144.

¹⁷ *Id* at para 146.

¹⁸ *Mhlungu* above n 13 at para 15.

was actually drafted and replace it with words we would wish to see, for “[o]ur jurisprudence places a premium on fidelity to the language chosen by the framers of our Constitution”.¹⁹ Accordingly, in interpreting section 178, the Court is required to ensure a coherent, reasonable and defensible interpretation. It is with all of the above in mind, that we now turn to an interpretation of section 178 as it applies to this matter.

Interpretation of section 178 read with section 2 of the JSC Act

[26] What all of the above demonstrates is that “we must prefer a generous construction over a merely textual or legalistic one”²⁰ when interpreting section 178, so long as we avoid a construction which might do damage to the section. In addition, one cannot interpret section 178 in isolation. As counsel for the JSC correctly submitted, section 178 must be read within the scheme of the Constitution as a whole. This means interpreting section 178 with consideration to other sections, including: section 1(c), which emphasises the supremacy of the Constitution and the rule of law; section 2, which stipulates that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid; section 165, which confers judicial authority on the courts and provides that their functioning cannot be interfered with; section 172, which enables courts to provide wide remedial powers where necessary; and section 177, which provides for the removal of Judges.

[27] When we read section 178 within the broader scheme of the Constitution, there is a series of interlocking provisions designed to protect judicial independence and to protect the Judiciary from internal and external threats. The JSC was established, and its composition determined, by section 178, with the aim of regulating judicial affairs and ensuring the integrity of the Judiciary. Thus, to read section 178 restrictively would be to stifle the intention behind this broader constitutional scheme. To read it

¹⁹ *New Nation* above n 16 at para 164.

²⁰ *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199(CC); 2007 (10) BCLR 1027 (CC) at para 53.

restrictively with the effect that a decision cannot be made by the JSC on the question of whether a judge has committed gross misconduct because of a deviation from the default composition requirements, would fly in the face of the need to address infractions into the integrity of judicial independence. Reading section 178(7) purposively, in such a way that provides for delegated alternates to sit on the JSC, in the event the President or the Deputy President of the SCA are unavailable, is the most suitable way of giving meaning to the purpose for which the JSC was established.

- [28] This approach is fortified by the provisions of the Constitution itself. Section 178(4) provides that the JSC has the powers and functions assigned to it in the Constitution and National Legislation. Importantly section 178(6) provides that the JSC may determine its own procedure, but the decision must be supported by the majority of its members. Section 180 of the Constitution in relevant part 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) ...” (own emphasis added)

- [29] Section 180 is emblematic of the flexibility available within the Constitution when dealing with complaints about judicial officers. One could even argue that just because the Constitution does not make provision for an alternate SCA Judge to represent the SCA in the place of the President or Deputy President, it does not mean that it is prohibited. Of course, it could be argued that because section 178(7) makes express provision for delegation from the Chief Justice to the Deputy Chief Justice and from the President of the SCA to the Deputy President of the SCA, but no further delegation, it is, therefore, possible that had the drafters of the Constitution intended

for the Deputies to delegate to another, a provision to that effect would have been expressly included.

[30] On the other hand, because section 178(7) provides authority for “delegation” in the first place, it is not unimaginable that section 178(7) could be stretched further to cover the present instance, without doing damage to the scheme governing composition. The point is this: the idea of delegation is clearly not repugnant to section 178. In the *First Certification Judgment*, the Constitutional Court stated that “the appointment of acting judges . . . to fill temporary vacancies which occur between meetings of the JSC, or when Judges go on long leave, are ill or are appointed to preside over a commission. . . are necessary to ensure that the work of the courts is not disrupted by temporary vacancies or the temporary absence or disability of particular Judges”.²¹ The Court, essentially, recognised that the appointment of persons to temporarily be vested with judicial authority as Acting Judges, in place of permanent judges who were unavailable, did not compromise the independence of the Judiciary, but rather, sustained the seamless functioning of the courts. To extend section 178(7) to permit for further delegation is a sensible construction of section 178, read in its entirety within the scheme of the Constitution. “The intention of the legislature in determining the composition of the JSC when considering matters . . . must be seen in the light of section 178(1) as a whole”²² and with regard to the Constitutional context. Accordingly, it is not unthinkable that section 178(7) could be extended.

[31] It was argued on behalf of Hlophe JP that the composition requirements for the JSC are clear and that neither the Constitution nor the JSC Act make provision for substitution in the event that the President and Deputy President are unavailable - the

²¹ *First Certification Judgment* above n 14 at para 127.

²² *Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission and Others (Premier WCC)* [2010] ZAWHC 80; 2010 (8) BCLR 823 (WCC) at para 9.

law does not allow for them to delegate to an alternate such as Mbha JA. Accordingly, it was submitted that Mbha JA was not lawfully able to sit on the JSC. Firstly, we hasten to point out that although the section indeed does not expressly provide for such a situation, the law does not expressly bar substitution nor does its silence on this point inherently mean that in the event of the President and Deputy President's absence, the JSC's work is to be automatically suspended.

[32] It is true that section 178 was crafted with obvious care. As noted in *Premier (WCC)*:

“... [I]t is clear to me that the JSC has been constructed in a structured and careful manner.

... The Constitution gives its considered attention to persons who sit on the JSC when it is called upon to determine, *inter alia*, matters relating to judicial misconduct.”²³

And in *JSC v Cape Bar (SCA)*, the SCA stated that:

“I believe it is clear from section 178 of the Constitution that the JSC has been created in a structured and careful manner.”²⁴

[33] Although both these cases find that the list of office bearers composing the JSC is carefully structured, there is no peremptory language used in the section. It is simply a list and not a peremptory list. The preamble to Section 178 provides “[t]here is a Judicial Service Commission consisting of ...”. The word “is” does not denote peremptory language. In *Allpay Froneman J* remarked that the old mechanical approach to mandatory and directory provisions has been discarded.²⁵ The authors Hoexter and Penfold, *Administrative Law in South Africa*, also argue that this flexibility is fairly well established. Various factors must be taken into account in

²³ Id at paras 9 and 16.

²⁴ *Judicial Service Commission and Another v Cape Bar Council and Another (JSC v Cape Bar (SCA))* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) at para 35.

²⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (Allpay)* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR (1) (CC) at para 30.

interpreting procedural jurisdictional facts to determine whether the provision is mandatory or directory. And that is precisely what we are doing here.

[34] Section 178 does not expressly state that if the President or the Deputy President of the SCA is unavailable the alternate may be appointed, but, on the other hand, it is not expressly excluded. That is not the end of the enquiry. A purposive interpretation of section 178 must also include the import of the relevant national legislation, ie, the JSC Act. We do not simply ignore the fact that its drafters, in their wisdom, took time to delineate a list of office-bearers to attend JSC meetings. And, generally speaking, “whatever the boundaries of a purposive interpretation may be, the court has no power to depart from the clearly expressed intention of the Constitution because it thinks that the Constitution should have said and meant something else.”²⁶ A purposive approach would also take into account the absence of peremptory language.

[35] Thus, we do not lightly ignore the section’s composition requirements. A full complement, as reflected in the list, ought normally to attend meetings. Indeed, this is given a jurisprudential footing in *Schierhout*, in which the general rule was put thus:

“When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can only be one adjudication, and that must be the adjudication of the entire body.”²⁷

[36] It is true that *Schierhout* stated that if a statute prescribes specific office-bearers to attend meetings and does not prescribe a coram, it is presumed that all of those persons should attend.²⁸ It is clear that it is upon this rule that the entire case on composition by Hlophe JP rests. However, this principle is not as clear-cut as suggested, nor is it as simple as it appears at first blush. The Western Cape High Court

²⁶ *Premier WCC* above n 22 at para 10.

²⁷ *Schierhout v Union Government (Minister of Justice)* 1919 AD 30 at 44.

²⁸ *Id.*

in *Premier (WCC)*, specifically acknowledging the *Schierhout* rule, clarified that that rule is not absolute, and proceedings need not be regarded as a nullity if there are sound reasons for non-attendance of a member.²⁹ In that case, the Premier of the Western Cape sought to impugn a decision of the JSC on the basis that its full complement was not in attendance during the proceedings and the decision-making process. When the JSC took its decision, it did not comply with the provisions of section 178(1)(k) of the Constitution which provides for the Premier to be a member of the JSC when considering matters relating to the High Court of her province. It is common cause that she was not part of the JSC when it met to consider the complaint of judicial misconduct against the Judge President of the Western Cape High Court and took its decision. And, according to the Premier, the proceedings were thus, a nullity. The Court reached its finding that the meeting of the JSC was not properly constituted in the absence of the Premier or her designated alternate on the basis that her absence *was not satisfactorily* explained by sound reasons.

[37] The case of *JSC v Cape Bar (SCA)*, similarly dealt with the question of composition and whether, because neither the President nor the Deputy President of the SCA attended a meeting of the JSC, the JSC was not properly constituted with the consequence that its decisions were unconstitutional, unlawful and invalid.³⁰ The JSC in that case, found that it would be impractical to insist that every meeting must be attended by every member or his or her alternate and that a full complement of the JSC is not necessary for the validity of its decisions.³¹ The SCA again qualified the *Schierhout* principle, emphasising that this rule is not absolute. The Court made reference to what was said in *New Clicks*, namely that:

“... [T]his is not an immutable rule and the question whether the Legislature intended to visit the decisions of a body established by a particular statute with invalidity, unless it was taken by all the

²⁹ *Premier WCC* above n 22 at para 17.

³⁰ *JSC v Cape Bar (SCA)* above n 24 at para 5.

³¹ *Id* at para 28.

members of the body jointly, is always dependent on an interpretation of the particular empowering statute. ...”³²

In *New Clicks*, Chaskalson CJ concluded that a proper interpretation of the empowering legislation in that case did not warrant the inference of invalidity.

[38] The SCA however, in *JSC v Cape Bar (SCA)*, considered itself bound by its judgment in *Premier (SCA)*, saying that “[i]t follows that, if the JSC cannot take a valid decision in the absence of either the Premier or her alternate, the position can be no different with regard to the absence of both the President of this court and his deputy.”³³ However, like in *Premier (SCA)*, the SCA held that it was because of the lack of justification for the absence of the President of the SCA and his Deputy, that the JSC was not properly constituted at its meeting and that its decisions at that meeting were therefore, invalid.³⁴

[39] What emerges, then, from these cases is the inference that proceedings will not be regarded as a nullity if there are justifiable reasons for an absence or exclusion of a member entitled to sit. The “justification” qualification was crucial to the findings in respect of composition. Therefore, it would be a mischaracterisation of those cases to say that they are analogous to the present matter or that they provide authority for the position advanced on Behalf of Hlophe JP in the present case. It would be a mischaracterisation of those cases to say that they dictate that generally, in the absence of the President and Deputy President of the SCA, the proceedings of and decisions taken by the JSC were invalid. Those cases turned on the absence of a justification for non-compliance with the composition requirements. They are,

³² Id at para 29 citing *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (New Clicks)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

³³ *JSC v Cape Bar (SCA)* above n 24 at para 30.

³⁴ Id at para 36.

therefore, as was submitted on behalf of the JSC, wholly distinguishable from the case with which we are seized.

[40] Why? Because in this case, we are furnished with reasonable and adequate justifications for the absences of Maya P and Petse DP. The justifications of Maya P and Petse DP were uncontested; both Judges explained their absence on account of their personal relationships with Hlophe JP. Hlophe JP himself seems to have embraced the proposition that Maya P and Petse DP were conflicted. On the basis of the above cases then, their justified absences do not render the proceedings a nullity. There were valid reasons for their non-attendance. They were not unjustifiably excluded nor were they unjustifiably absent. In the light of all of this, there was a reasonable justification for their replacement by Mbha JA to represent the SCA. On this score, we must point out that the argument on behalf of Hlophe JP has elided this nuance and attempted to harness the cases in his favour. However, on a proper reading, those cases in fact support the position advanced on behalf of the JSC.

[41] The case of *JSC v Cape Bar (SCA)* is important for two other reasons. First, the SCA expressly stated that “barring situations which would warrant invocation of the principle expressed by the maxim *lex non cogit ad impossibilia*, section 178(1)(b) read with section 178(7) requires the presence of the Chief Justice and the President of [the SCA], or their designated alternates, for the valid composition of the JSC.”³⁵ By invoking the common law maxim – “the law cannot require the performance of the impossible” – the SCA accepted a clear qualification to the general composition requirements. This, of course, makes logical sense: everyone needs to be present unless that would be to require the impossible. In that event, and in order to ensure the proper functioning of the JSC, there must be an exception to the general rule. It is for this reason, and on this authority, that we cannot accept the submissions on behalf

³⁵ *JSC v Cape Bar (SCA)* above n 24 at para 27.

of Hlophe JP; the Constitution simply cannot require us to be bound by a narrow interpretation of section 178 if that interpretation would lead to absurdity or require the performance of the impossible.

[42] Secondly, the SCA in *JSC v Cape Bar (SCA)* stated that:

“Section 2(2), so counsel’s argument went, is an acknowledgement by the legislature that meetings of the JSC can be validly held and decisions validly taken in the absence of both the Chief Justice and his deputy. The correctness of that conclusion cannot be gainsaid. It obviously presupposes that where both the Chief Justice and his deputy are unavailable, the meeting of the JSC must go on. Furthermore, I have no difficulty with the next logical step in counsel’s argument, that the same must hold true for the President of this court and his deputy. If both of them are unavailable, the JSC can still validly meet.”³⁶

[43] What is implied here is that the JSC can continue to meet notwithstanding the absence of a full complement. We agree. Because the drafters recognised the possibility of proceeding without the Chief Justice or the Deputy Chief Justice, it follows that the same can hold true for the president or Deputy President of the SCA. The SCA made no bones of stating that the “meeting must go on” and all that is required is a reasonable justification, in that case, for a member’s exclusion. Again, this accords with logic and common sense.

[44] There is further insight to be drawn from the JSC Act itself. Section 2(1) of the JSC Act provides that if the Chief Justice is not present, then the Deputy Chief Justice steps into the position of Chairperson as his or her alternate. Section 2(2) then provides that in the event that neither the Chief Justice nor the Deputy Chief Justice is available to preside at a meeting of the Commission, the members present at the meeting must designate one of the members to act as Chairperson. Why does section 2 make provision for these “alternative” situations, one must ask? The answer is clear -

³⁶ Id at para 32.

to ensure the seamless functioning of the JSC and to ensure that the JSC is not paralysed by the absence of a Chairperson. It would make no logical sense if the legislative scheme, which makes provision for an alternate not only to take the place of the Chief Justice and Deputy Chief Justice but also to occupy the significant position of Chairperson, in the same breath required the JSC proceedings to be paralysed in the event that the two senior-most Judges of the SCA cannot attend, merely because there is no express provision for an alternate to attend in their place. If an alternate can stand in for the Chief Justice and Deputy Chief Justice in the role of Chairperson, then the propriety of an alternate standing in for the President and Deputy President of the SCA is readily apparent.

[45] The selection of Mbha JA as an alternate to the President or Deputy President of the SCA was based on his membership of the SCA, his seniority in that court and, moreover, on the fact that he was also a head of court, being the President of the Electoral Court. According to argument advanced on behalf of Hlophe JP, the fact that Mbha JA is a head of court is insufficient to entitle him to attend, ie, the fact remains that he was still not the President or the Deputy President. However, we know from a plain reading of the scheme of section 178(1) that the purpose of having prescribed a detailed list of members who must be present for JSC meetings is to ensure diverse representation. This objective is confirmed in *JSC v Cape Bar (SCA)* where the SCA stated that “[i]ts composition obviously sought to ensure that persons from diverse political, social and cultural backgrounds, representing varying interest groups, would participate in its deliberations.”³⁷

[46] It is, therefore, not irrelevant that Mbha JA was a senior member of the SCA and a head of court. He was an appropriate alternate for SCA representation. To ensure representation of the second highest court on the JSC is not insignificant. His

³⁷ Id at para 35.

selection was entirely justifiable and reasonable. As counsel for the JSC submitted, nothing untoward transpired as a result of his presence. Whilst it is true that the composition of the JSC did not reflect exactly that which the Constitution listed, in our view, the JSC was still properly composed. It would be absurd indeed if this variation in composition led to a setting aside of the decision - it would be to put form over substance. What section 178 clearly sought to achieve was diverse representation from across the judicial landscape. That is what was sought to be achieved by the delegation of the SCA seat on the JSC to Mbha JA.

- [47] It is noteworthy that the substance of section 178 is premised on the recognition that the JSC must enjoy credibility. Moreover, credibility with a nation whose social order is that of a constitutional democracy. The model chosen for the composition of the institution is predicated on drawing persons from discrete sources or interests, ie the President's designates and the Minister of Justice *ex officio*, the Premier of the relevant province, the Judiciary, the legal profession, and legal academia.
- [48] When choosing judges, the JSC acts as the selection panel of the nation. When disciplining judges, the JSC serves as the jury of the nation. Significantly, when performing the disciplinary function, the political element is reduced by the omission of the representatives of the two houses of Parliament. As is provided elsewhere, in section 177, the National Assembly is charged with the responsibility to decide whether to remove a judge from office, upon a finding by the JSC that gross misconduct has been perpetrated by that judge.
- [49] In its disciplinary role, axiomatically an adjudicative process, the JSC's public credibility is sustained by the dominance of professional lawyers rather than politicians. The JSC is vested with the authority to make authoritative pronouncements on the ethical standards of judges, derived from norms emanating, ultimately, from section 165 of the Constitution.

[50] In summary on this point, if the JSC is to choose persons who can enjoy public credibility as fit for purpose as judges and to discipline judges for their failure to adhere to the norms of the judicial role, the JSC had to be constructed to meet democratic norms so that it could make a claim for its own public credibility in a democratic society. Its representative character is therefore an essential component of its structure, and moreover, of its mode of functioning. Mbha JA in his role on the day was truly representative. This is a deliberate dimension of the design of the JSC and therefore, representativity is an inherent characteristic of the JSC.

[51] Furthermore, it was necessary for Mbha JA to attend the JSC meeting for if he had not, the JSC would have been inquorate and would not have been able to form the relevant majority. The fear of absence of coram is a logical and justifiable consideration. Seeking to achieve coram enabled the JSC to continue to discharge its important functions.

[52] And that goes to our next point: the need to avoid paralysis of the JSC. We are enjoined by the rules of interpretation not to interpret section 178 in such a way that results in the paralysis of the JSC if a reasonable alternative construction is possible.

[53] According to the argument presented on behalf of Hlophe JP, “to look for a solution where the legislation does not provide for substitution is unthinkable”. It was submitted that such an approach would be to put pragmatism first and to ignore the statutory requirements. As we see it, it would be unthinkable to interpret section 178 without considering context and pragmatism. If we conclude that Mbha JA was not entitled to form part of the JSC, then we arrive at an absurd situation in which a Judge, whose integrity or ethics is impugned, in this case Hlophe JP, would forever be immunised where the President and Deputy President of the SCA cannot sit for whatever reason, including in circumstances where they are close friends. If this

situation is accepted, the work of the JSC would be easily stymied. As we know from the rules of interpretation, an interpretation should lead us away from absurdity, not towards it.

[54] In *S v Mhlungu*, the Constitutional Court, in conducting an exercise in constitutional interpretation noted that a literal interpretation created “a number of formidable difficulties” leading to “some very unjust, perhaps even absurd, consequences”.³⁸ Noting the outrageous consequences, the Court refused to accept that this is what the Constitution intended for “[i]t seems to negate the very spirit and tenor of the Constitution...”.³⁹ Accordingly, in that case, the Court held that Courts must strive to avoid such results if at all permissible within the language and context of the provision, interpreted with regard to the objectives of the Constitution.

[55] The JSC, as stipulated by the Constitutional Court in the *First Certification Judgment*, plays a “pivotal” role in the appointment and removal of Judges.⁴⁰ And, “there is no dispute that the issues relating to the composition and processes of the JSC are constitutional matters of import.”⁴¹

[56] Regard has to be had to the need to ensure the consistent functioning of the Judiciary. Matters of gross misconduct on the part of a Judge and subsequent questions of impeachment lie at the heart of the integrity of our judicial system. According to the Western Cape High Court in *Premier WCC*, section 178 “and those [provisions] related to it should be interpreted so as to avoid as far as possible placing the independence of the courts in jeopardy.”⁴² The SCA in *Premier (SCA)*, confirmed that among the powers and functions assigned to the JSC by the Constitution are the

³⁸ *Mhlungu* above n 13 at paras 3-4.

³⁹ *Id* at para 8.

⁴⁰ *First Certification Judgment* above n 14 at para 120.

⁴¹ *Hlophe v Premier of the Western Cape Province; Hlophe v Freedom Under Law and Others* above n 2 at para 27.

⁴² *Premier WCC* above n 22 at para 15.

duties to determine the competency of a Judge, to determine if there is gross misconduct and to furnish advice to the President on the suspension or impeachment of a Judge.⁴³ Accordingly, it cannot be disputed that the JSC discharges important constitutional functions, which must be facilitated and not stunted. Thus, to accept that the JSC is paralysed solely because it cannot meet its composition requirements, is a position that is impossible to defend. In the absence of Mbha JA, the JSC would be paralysed and unable to make a determination on this matter. It is unimaginable that the Constitution would expect absolute adherence to formalism in circumstances where it causes such paralysis. After all, the Constitution itself is the source of the JSC's mandate to ensure the integrity of the Judiciary.

[57] According to the argument advanced on behalf of Hlophe JP, we must blindly accept a rigid interpretation of the section and ignore the absurd consequences that it would lead to. That is not what the law on constitutional interpretation indicates we should do. In *S v Mhlungu*, Mahomed J, writing for the majority, stated that “I am not persuaded that a proper reading of the Constitution compels me to accept these distressingly anomalous consequences of the literal approach.”⁴⁴ We can do no better than echo these words. The consequences of the rigid approach the applicant advances would be wholly unacceptable.

[58] The need to avoid paralysis finds authority in our law. Interestingly, in the case of *AmaBhungane*, Madlanga J, for the majority, invoked the maxim *ut res magis valeat quam pereat* as “a useful tool of interpretation”.⁴⁵ This maxim means that “the thing may avail (or be valid) rather than perish”.⁴⁶ A less literal meaning is that an instrument must be interpreted such that it is given some meaning rather than rendered

⁴³ *Premier (SCA)* above n 4 at para 7.

⁴⁴ *Mhlungu* above n 13 at paras 46.

⁴⁵ *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) (*AmaBhungane*) at para 77.

⁴⁶ Claassen's Dictionary of Legal Words and Phrases.

nugatory. Without going into details of that case, it suffices to say that relying on this maxim, Madlanga J stated that “rather than render RICA virtually inoperable as a result of a perceived lack of power to designate, an interpretation that finds a power to designate a Judge in section 1, read with the other provisions I have referred to, commends itself.”⁴⁷ He goes on to find that:

“As the role of the designated Judge is key to RICA surveillance, the lack of the power to designate hollows the Act out and leaves it bereft of meaningful operability. . .

Faced with that ominous terminal reality, I can conceive of no compelling reason for not concluding that the power to designate is implied. . . Considering section 1 with the structure and purpose of RICA as a whole, this seems the only viable interpretation. The only argument against this that I can think of is purely the lack of express provision in the substantive provisions of RICA conferring the power to designate. Surely, that cannot of necessity be dispositive of the question.”⁴⁸ (own emphasis added)

[59] Madlanga J, in that case, also referenced the writings of Professor Hoexter who – albeit in the context of necessary ancillary powers – argues that “there is a very strong argument in favour of implying a power if the main purpose of the statute cannot be achieved without it”.⁴⁹ The main purpose of the law governing the JSC – section 178 and the JSC Act – is to empower its members to enable the JSC to carry out its functions. If we interpret section 178 restrictively such that the President and Deputy President of the SCA cannot be represented by a delegate of the SCA, we disable the JSC.

[60] It bears mention, tangentially, on this question of delegation that an exceptional substitution of this nature was made by Hlophe JP himself. In terms of section 178(1) (k) the JP of the WCC is a designated member of the JSC for a decision

⁴⁷ *AmaBhungane* above n 45 at para 77.

⁴⁸ *Id* at paras 78-79.

⁴⁹ Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2012) at 45.

involving the Western Cape Division of the High Court. But, of course, because the JP was the very judge from the WCC whose conduct was at issue, he could not participate. Hlophe JP designated an alternate, Samela J, from the ranks of the WCC judges to serve in his stead. Whether he ought to have done so himself, given his compromised position, and rather left it to be decided by the next senior judge in the Division is not an issue before us, and no decision is required on it. Moreover, the substitution was not the subject matter of an objection in the JSC when Samela J presented himself, as the alternate of the WCC Judge President, to participate in the making of the decision. No less importantly, no objection was raised to the person of Samela J *per se* as suitable to serve as such an alternate.

[61] Two potential questions arise in relation to designation by the DP of the SCA to designate Mbha JA as an alternate - the power of the DP to select Mbha JA, and the suitability of Mbha JA.

[62] As to the first question, for the reasons set out above, Petse DP had the implied power to designate any member of the SCA to serve in his stead. As to the second question, as a fact, Mbha JA was not randomly selected. as alluded to earlier, Mbha JA is, in his own right, a Head of Court because he is the President of the Electoral Court and as such, a very senior member of the Judiciary leadership. In applying one's mind to a suitable further alternate to serve in the place of the President and DP of the SCA, this selection seems to be wholly apt.

[63] Furthermore, where adopting a strict approach to composition results in the body being hamstrung, the requirements may be departed from. There is authority for this in *New Clicks*.⁵⁰ There, counsel for *New Clicks* relied on the *Schierhout* principle to contend that the impugned procedure did not meet the procedural fairness

⁵⁰ *New Clicks* above n 32.

requirements of PAJA because all members of the Pricing Committee had not attended the oral presentations as they should have done. In that case, the Constitutional Court rejected the rigidity of the *Schierhout* rule, turning instead, to what Corbett JA had said in *S v Naudé*:

“There is no doubt that a commission, particularly where it consists of a substantial number of persons, may operate without every member participating personally in every activity. Were it otherwise, a commission would be hamstrung from the start.”⁵¹

[64] The Court said that in each case what will be required will depend on the interpretation of the empowering legislation that prescribes how the relevant Commission should function.⁵² As stated by Hoexter and Penfold, the *Schierhout* principle has been treated flexibly for many years.⁵³ These writers also argue that even if the language is mandatory, if indeed section 178 is so, then the degree of compliance must ultimately depend on the proper construction of the statutory provision in question.

[65] We should also take note of the nature and character of the applicant’s case before us. The position, as advanced on behalf of Hlophe JP, *de facto*, means that he cannot be investigated because, in the absence of the President and Deputy President, the complement of the JSC would be left wanting. He is relying on a particularly narrow interpretation of section 178, not to preserve the integrity of the literal meaning of the Constitution, but to ensure his own immunity. On the interpretation favoured by Hlophe JP, it would be possible for him to shut down the entire JSC by merely contaminating the section 178(1)(a) and (b) members and then claiming that nobody is empowered to act in their stead. What then? The applicant’s submissions take us nowhere and elide this possible disastrous consequence.

⁵¹ Id at paras 170-171, citing *S v Naudé* 1975 (1) SA 681 (A) at 704H.

⁵² *New Clicks* above n 32 at para 171.

⁵³ Hoexter & Penfold *Administrative Law in South Africa* (Juta, Cape Town 2021) at 66.

[66] The JSC process is not a game of chess poised at checkmate stage. Such a perspective would constitute both an abuse of court process and a monumental waste of scarce judicial resources. Let us not lose sight of the fact that this aspect of the case before us is not an attempt by the applicant to advance a legitimate defence to the charge of gross misconduct against him. This part of his case rests on a procedural issue and his contention is that a litigant is entitled to take every point available to fight the adversary. Of course, improper procedure or inadequate composition of the JSC are not negligible issues. However, if we accept a rigid interpretation of section 178, we come to an absurdity - a Judge who has been found guilty by the Tribunal of committing serious breaches of the Constitution, including interfering with the functioning of the courts in flagrant contradiction of section 165, is untouchable. A reasonable and a more flexible interpretation of section 178, namely, that which we have advanced above, is capable of avoiding such a situation of absurdity and must be preferred.

[67] It cannot be gainsaid that of course, all members of the JSC as listed in the Constitution ought to be at a meeting in which a decision is made to impeach a Judge. However, we cannot accept that in the absence of listed members, the JSC, foundational to the proper functioning of our Judiciary, can be paralysed. As put by the SCA in *Premier (SCA)*:

“I pause to remark that it would indeed be a sorry day for our constitutional democracy were serious allegations of judicial misconduct to be swept under the carpet. . . The public interest demands that the allegations be properly investigated. . . .”⁵⁴

[68] On the basis of the above interpretative exercise of section 178, it is reasonable and appropriate to conclude that the section, properly interpreted, permits for the

⁵⁴ *Premier (SCA)* above n 4 at para 25.

delegation by the President and Deputy President of the SCA to Mbha JA, to attend the JSC as an alternate representative of that Court.

Conclusion on the composition point about the role of Mbha JA

[69] It is clear therefore that (i) the absences of the President and Deputy President of the SCA were justified; (ii) the presence of Mbha JA as a senior Judge of the SCA was justified; (iii) a proper interpretation of section 178 of the Constitution requires that it be read purposively and pragmatically, within the scheme of the Constitution as a whole, and in the light of the relevant case law; and (iv) the JSC must enjoy credibility with the nation because of its constitutional role. As a result, there is no impropriety in the selection of Mbha JA by Petse DP to serve as a further alternate in the JSC on behalf of the DP.

[70] The conclusion reached is that the composition of the JSC was constitutionally sound and the decision of the JSC stands. The submissions on behalf of Hlophe JP are unsustainable.

The role of Khampepe J in the proceedings of the JSC

[71] The applicant argues that Justice Khampepe's role at the meeting of 25 August 2021 was fatally defective based on the composition principle. It is argued that she did not have constitutional standing to participate in the meeting and the JSC was not properly constituted as required by section 178(5) of the Constitution. The applicant contends that it was unclear whether Khampepe J was chairing the meeting of 25 August 2021 as the Acting Chief Justice or the Acting Deputy Chief Justice. This is incorrect. It is clear from the record and the memorandum by the President of the Republic, that Justice Khampepe was the appointed Acting Deputy Chief Justice for the day of 25 August 2021. It is argued on behalf of Hlophe JP that she was unlawfully appointed as the acting chairperson since section 2(2) of the JSC Act

provides that if neither the Chief Justice nor the Deputy Chief Justice is available to preside at a meeting of the Commission, the members present at the meeting must designate one of the members holding office in terms of section 178(1)(b) or (c) of the Constitution as acting chairperson for the duration of the absence. That step was unnecessary since Justice Khampepe was appointed acting Deputy Chief Justice for that day.

[72] Prior to the date of the decision of 25 August 2022, Khampepe J had been appointed to serve as an Acting Chief Justice from 1 May 2021 to 30 June 2021.

Former Chief Justice Mogoeng took long leave from 1 May 2021 to October 2021. The Argument advanced on behalf of Hlophe JP has factored the incorrect date into the allegations in relation to the absence of former Chief Justice Mogoeng. Whilst the former Chief Justice was on long leave, Deputy Chief Justice Zondo thus automatically assumed the responsibility of Acting Chief Justice. In terms of section 4(2) of the Superior Courts Act 10 of 2013:

“The Deputy Chief Justice must—

- (a) exercise such powers or perform such functions of the Chief Justice in terms of this or any other law as the Chief Justice may assign to him or her; and
- (b) in the absence of the Chief Justice, or if the office of Chief Justice is vacant, exercise the powers or perform the functions of the Chief Justice, as Acting Chief Justice.”

[73] Because of the duties and responsibilities of the Acting Chief Justice Zondo at the State Capture Commission, the President of the Republic, on advice of the Minister of Justice and Correctional Services, and in concurrence with the Acting Chief Justice, recommended that Khampepe J be appointed as Acting Chief Justice with effect from 1 May 2021 and 30 June 2021. Zondo ACJ was entitled to give this advice in accordance with his statutory role as Acting Chief Justice. Thereafter because her acting stint had come to an end and because her presence was necessary on 25 August 2021, the President of the Republic properly appointed her as the Acting Deputy

Chief Justice for the day. The minute by the President of the Republic, No 238/2021, reflects her appointment as the Acting Deputy Chief Justice for 25 August 2021. It was signed by him and also signed by the Minister of Justice. This was, accordingly, procedurally correct, and Khampepe J validly acted as Deputy Chief Justice. Khampepe J chaired the JSC meeting on 4 June 2021 to consider the Report of the Judicial Conduct Tribunal. The decision on the report was deferred on 4 June 2021 to a date in July 2021, a date which was outside Khampepe J's acting period as Chief Justice. The July 2021 date was not utilised for the continuation of the JSC deliberations.

- [74] The chronology further shows that Deputy Chief Justice Zondo could, after 1 July 2021, assume the role of Acting Chief Justice as his duties at the State Capture Commission were such that he could return to his duties as Acting Chief Justice in the absence of former Chief Justice Mogoeng. The date of 25 August 2021 was set for the continuation of the JSC hearing. Acting Chief Justice Zondo could in the circumstances take the necessary decision to set in motion Khampepe J's appointment as Acting Deputy Chief Justice. A view was taken that since Khampepe J was seized of the matter she be appointed as Acting Deputy Chief Justice to complete the task. In any event Acting Chief Justice Zondo would remain conflicted by reason of his role as mediator in the matter at an earlier time. The Minister of Justice wrote to the President of the Republic recommending that Khampepe J be appointed as the Acting Deputy Chief Justice for the hearing as she had chaired the previous discussions and this was with the concurrence of the Acting Chief Justice Zondo. As reflected in the President's minute, he appointed Khampepe J in terms of section 175(1) of the Constitution. Although she referred to herself as acting Chief Justice in response to a question during the meeting, this does not detract from her formal and proper appointment as acting Deputy Chief Justice on the day.

[75] In our view, her continuation in the chair was constitutionally correct on the basis of the statutory grounds and formal process referred to. In addition, none of the Commissioners present at the meeting objected to her being in the chair. It was unnecessary to invoke section 2(2) of the JSC Act as Khampepe J was the properly appointed Acting Deputy Chief Justice. The Supreme Court of Appeal in *JSC v Cape Bar Council* confirmed that section 2 of the JSC Act is irrelevant to the composition of the JSC Act. Brand JA writing for the majority explained as follows:

“As I see it, unavailability must broadly bear the same meaning as ‘temporarily unable to serve’ in s 178(7) of the Constitution. If both the Chief Justice and his deputy are unavailable – in the sense that they are unable to attend – the meeting must go on. Thus understood, I believe s 2(2) amounts to little more than an invocation of the principles expressed by the maxim *lex non cogit ad impossibilia*. As I see it, this interpretation is supported by the fact that the primary aim of s 2(2) is clearly not to determine the composition of the JSC. ...”⁵⁵

[76] On behalf of Freedom Under Law, it was submitted that in terms of section 48 of the Superior Courts Act an appointment of an Acting Judge continues for any period during which he or she is necessarily engaged in the disposal of proceedings in which they participated as a judge, and which has not been disposed of at the end of the acting period. This principle also finds application here. It follows therefore that she was seized of the matter until its completion including 25 August 2021.

[77] On the basis of the proper interpretation of the relevant statutory provisions and their proper application to the facts surrounding Khampepe J’s appointment to the meeting of 25 August 2021, it follows that Khampepe J’s appointment was constitutionally compliant.

⁵⁵ *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA); 2012 (11) BCLR 1239 (SCA) at para 33.

Allegations of conflicts of interest on the part of Khampepe ADCJ, Mbha JA, Mlambo JP and Premier Winde

[78] The case of Hlophe JP asserts that on the basis of a conflict of interest, Khampepe J, Mbha JA, Mlambo JP and Mr Alan Winde, the Premier of the Western Cape, were automatically disqualified from participating in the JSC meeting.

Mlambo JP

[79] In relation to Mlambo JP, the complaint is that he had formed part of the Bench whilst acting in the SCA in the case of *Langa and Others v Hlophe*.⁵⁶ In that case the decision of the High Court was overturned by the SCA on the basis that it was not unlawful for a Constitutional Court Judge to report Hlophe JP to the JSC. Mlambo JP, at the commencement of the meeting of 25 August 2021, raised the issue of a possible conflict of interest but stated unequivocally that he did not regard himself as conflicted. He regarded himself as sufficiently independent and therefore it was unnecessary to recuse himself. No one challenged his stated position.

[80] The Constitutional Court in *Masuku* described the test as follows:

“The test for recusal is objective and constitutes an assessment of whether a reasonable litigant in possession of all the relevant facts would have a reasonable apprehension that the Judge is biased and unable to bring an impartial mind to bear on the issues in dispute. The application of the test requires both that the apprehension of bias be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds. This test must, thus, be applied to the true facts on which the recusal application is based.”⁵⁷

[81] In *SARFU* the Constitutional Court made it clear that:

⁵⁶ [2009] ZASCA 36; 2009 (8) BCLR 823 (SCA).

⁵⁷ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5 at para 64.

“A judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such Judge might be biased, acts in a manner inconsistent with section 34 of the Constitution, and in breach of the requirements of section 165(2) and the prescribed oath of office.”⁵⁸

[82] Hlophe JP does not detail the facts on which the presumption of impartiality of Mlambo JP must be assessed. Hlophe JP bears the onus on that. In *SARFU*, the Constitutional Court explained that “[i]t follows . . . that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant.”⁵⁹

[83] The Constitutional Court expanded further:

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehended that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.”⁶⁰

[84] Hlophe JP does not identify the objective facts why Mlambo JP’s participation in the case of *Langa* constituted a conflict of interest. Hlophe JP does not explain whether the material issues in *Langa* are so intertwined with the hearing of 25 August 2021

⁵⁸ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (judgment of recusal application) (*SARFU*) [1999] ZACC 9; 1999 (4) SA 147; 1999 (7) BCLR 725 at para 30.

⁵⁹ *Id* at para 48.

⁶⁰ *Id*.

that it rendered it necessary for Mlambo JP to have recused himself. Article 13 of the Code of Judicial Conduct provides that a judge does *not* have to recuse himself or herself on insubstantial grounds. It is incumbent on Hlophe JP to show, on the correct facts, that Mlambo JP was not impartial. He has failed to do so.

- [85] Hlophe JP raises a further irregularity concerning Mlambo JP's presence at the meeting on the basis that he was not the most senior Judge President. The accepted convention and rule is that the most senior Judge President must sit on the JSC. The most senior Judge President in the country is Hlophe JP himself. Self-evidently, Hlophe JP could not sit as a member of the JSC on his own case. In addition, Mlambo JP was elected by the other Judges President to sit. Mlambo JP was accordingly not disqualified to sit in the hearing.

Premier Winde

- [86] In relation to Premier Winde, the Premier of the Western Cape, the applicant submits that because Premier Winde serves as a member of the Democratic Alliance (DA), he is bound by the DA's views and policies. Hlophe JP claims that the DA has a negative animus towards him and therefore this gives rise to the conflict of interest of Premier Winde.
- [87] Section 178(1)(h) provides that "persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly." Mr Winde was a member of the opposition party and was the Premier of the Western Cape Province. His presence was permissible and in accordance with Section 178.

Khampepe ADCJ and Mbha JA

[88] The case of Hlophe JP, furthermore, alleges that Khampepe ADCJ and Mbha JA are conflicted. Mbha JA and Khampepe ADCJ co-authored a judgment where the Constitutional Court found that it could not entertain a matter in which their colleagues were involved. Again, Hlophe JP fails to set out the facts from that judgment which would render the two judges lacking impartiality in the taking of the decision by the JSC on 25 August 2021.

Conclusion on the contention of conflicts of interest

[89] Accordingly, Hlophe JP's assertion that Khampepe ADCJ, Mbha JA, Mlambo JP, and Premier Winde were conflicted cannot be sustained.

PART B:

IS THE DECISION TO FIND HLOPHE JP GUILTY OF GROSS MISCONDUCT VITIATED BY REVIEWABLE IRREGULARITIES?

[90] The decision of the JSC to find Hlophe JP guilty of gross misconduct is subject to review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).⁶¹ As to the test for review, regard must be had to the leading authorities.

[91] Schutz JA in *Pretoria Portland Cement Co Ltd & Another v Competition Commission & Others* said:

“Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality...”⁶²

⁶¹ See the *FUL* case above n 1 at para 50. See also *Premier (SCA)* above n 4 at para 23. See also Hoexter and Penfold above n 53 at 345 and the High Court decisions cited there.

⁶² [2002] ZASCA 63; 2003 (2) SA 385 (SCA) at para 35.

[92] *In Bo-Kaap Civic and Ratepayers Association and Others v City of Cape Town and Others*, Navsa JA held that:

“... [I]t is apposite to consider what judicial review entails. In Endicott *Administrative Law* at 328 the following appears:

‘All public authorities ought to make the best possible decisions (and Parliament can be presumed to intend that they should do so). But that does not mean that the judges have jurisdiction to hold that a decision was *ultra vires* on the ground that it was not the best decision that could have been made.’

Wade and Forsyth *Administrative Law* state the following:

‘The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is ‘right or wrong?’ On review the question is “lawful or unlawful?”

...

Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not.’

Laws J in *R v Somerset County Council, Ex parte Fewings and others* [1995] 1 All ER 513 (QB) at 515d-g stated:

‘Although judicial review is an area of the law which is increasingly, and rightly, exposed to a great deal of media publicity, one of its most important characteristics is not, I think, generally very clearly understood. It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, ‘Is this decision right or wrong?’ Far less does the judge ask himself whether he would himself have arrived at the decision in question. It is, however, of great

importance that this should be understood, especially where the subject matter of the case excites fierce controversy, the clash of wholly irreconcilable but deeply held views, and acrimonious, but principled, debate. In such a case, it is essential that those who espouse either side of the argument should understand beyond any possibility of doubt that the task of the court, and the judgment at which it arrives, have nothing to do with the question, 'Which view is the better one?' Otherwise, justice would not be seen to be done: those who support the losing party might believe that the judge has decided the case as he has because he agrees with their opponents. That would be very damaging to the imperative of public confidence in an impartial court. The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did."⁶³

[93] What a court is required to do to divine reasonableness of a decision was made plain by O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*:

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."⁶⁴

What is Hlophe JP's case on review?

[94] The attacks on the decision of the JSC that concluded that Hlophe JP was guilty of gross misconduct range widely. At the outset of the analysis, two general observations about these attacks are appropriate. First, several of the complaints are not review

⁶³ [2020] ZASCA 15; [2020] 2 ALL SA 330 (SCA) at paras 70-72.

⁶⁴ [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 45.

grounds at all, but rather, they are claims that a disappointed litigant might offer in an appeal, for example, that the decision is against the weight of the evidence. Such grievances do not warrant attention by this court. Second, the grounds relied upon that are either obviously or arguably proper review grounds require analysis in two respects to determine their cogency. These grounds must, first, be proven to exist in fact, and second, where that proof is shown, they must demonstrate irrationality or unreasonableness or a trespass beyond the powers vested in the JSC.

[95] In the amended notice of motion, Hlophe JP seeks relief against what is alleged to be the ‘unconstitutional and invalid’ decisions of the JSC. Reference is made to section 327 of the Constitution which requires obligations in terms of the Constitution to be complied with diligently and expeditiously. Precisely which obligations the JSC allegedly fell foul of is not expressed in the prayer. Further reference in the prayers is made to sections 19 and 20 of the JSC Act, which provisions describe the function and powers of the Tribunal and of the JSC upon it receiving a report from the tribunal.⁶⁵ What breach of these sections supposedly occurred is not stated.

⁶⁵ Sections 19 and 20 of the JSC Act state as follows:

“19 Commission to request appointment of Tribunal

- (1) Whenever it appears to the Commission-
 - (a) on account of a recommendation by the Committee in terms of section 16 (4) (b) or 18 (4) (a) (iii), (b) (iii) or (c) (iii); or
 - (b) on any other grounds, that there are reasonable grounds to suspect that a judge-
 - (i) is suffering from an incapacity;
 - (ii) is grossly incompetent; or
 - (iii) is guilty of gross misconduct,
 as contemplated in section 177 (1) (a) of the Constitution, the Commission must request the Chief Justice to appoint a Tribunal in terms of section 21.
- (2) The Commission must in writing state the allegations, including any other relevant information, in respect of which the Tribunal must investigate and report.
- (3) The Commission must, unless it is acting on a recommendation referred to in section 16 (4) (b) or 18 (4) (a) (iii), (b) (iii) or (c) (iii), before it requests the appointment of a Tribunal, inform the respondent, and, if applicable, the complainant, that it is considering to make that request and invite the respondent, and, if applicable, the complainant, to comment in writing on the fact that the Commission is considering to so request.
- (4) Whenever the Commission requests the appointment of a Tribunal in terms of subsection (1), the Commission must forthwith in writing-
 - (a) inform the President that it has so requested; and
 - (b) advise the President as to-

[96] In the founding affidavit, the grounds of review relied upon are tabulated. The allegations are premised on the application of PAJA. The JSC is alleged to have violated the principle of legality and also having failed to comply with section 6(2) of PAJA in several respects. Again, no concrete detail is identified, the sections are merely cited mechanically:

“6(2)(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

...

6(2)(e) (iii) irrelevant considerations were taken into account or relevant considerations were not considered

...

6(2)(e) (vi) the findings are arbitrary or capricious

-
- (i) the desirability of suspending the respondent in terms of section 177 (3) of the Constitution; and
 - (ii) if applicable, any conditions that should be applicable in respect of such suspension.

20 Commission to consider report and make findings

- (1) The Commission must consider the report of a Tribunal at a meeting [d]etermined by the Chairperson, and the Commission must inform the respondent and, if applicable, the complainant, in writing-
 - (a) of the time and place of the meeting; and
 - (b) that he or she may submit written representations within a specified period for consideration by the Commission.
- (2) At the meeting referred to in subsection (1) the Commission must consider-
 - (a) the report concerned; and
 - (b) any representations submitted in terms of subsection (1) (b).
- (3) After consideration of a report and any applicable representations in terms of subsection (2), the Commission must make a finding as to whether the respondent-
 - (a) is suffering from an incapacity;
 - (b) is grossly incompetent; or
 - (c) is guilty of gross misconduct.
- (4) If the Commission finds that the respondent is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct, the Commission must submit that finding, together with the reasons therefore and a copy of the report, including any relevant material, of the Tribunal, to the Speaker of the National Assembly.
- (5) If the Commission, after consideration of a report and any applicable representations in terms of subsection (2) finds that the respondent-
 - (a) is not grossly incompetent, but that there is sufficient cause for the respondent to attend a specific training or counselling course or be subjected to any other appropriate corrective measure, the Commission may make a finding that the respondent must attend such a course or be subjected to such measure; or
 - (b) is guilty of a degree of misconduct not amounting to gross misconduct, the Commission may, subject to section 17 (9), impose any one or a combination of the remedial steps referred to in section 17 (8)
- (6) The Commission must in writing inform the respondent in respect of whom a finding referred to in subsection (4) or (5) is made, and, if applicable, the complainant, of that finding and the reasons therefore.”

- 6(2)(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
- 6(2)(i) action which is otherwise unconstitutional or unlawful.”

[97] In the supplementary founding affidavit, filed after sight of the Rule 53 record, a further articulation of grounds of review was expressed. These are that the JSC:

- 97.1 acted *ultra vires*;
- 97.2 lacked impartiality;
- 97.3 did not afford a procedurally fair process causing an unfair result;
- 97.4 wrongly dismissed the proposition that *mens rea* was required to make a finding of gross misconduct and wrongly applied a strict liability test; and
- 97.5 failed to adjudicate in accordance with ‘established constitutional norms and standards’.

[98] These generalised expressions do little to illuminate exactly what the Tribunal and the JSC did or omitted to do which is alleged to be improper. The founding affidavit and supplementary founding affidavit need to be winnowed to extract the substance of the grievances relied upon. In pursuit of coherence, our treatment of the several arguments is under several thematic heads.

Did the Tribunal or the JSC exceed their powers?

[99] The task of the JSC is plain from sections 165, 177 and 178 of the Constitution, and from chapters 2 and 3 of the JSC Act. Once a complaint is lodged of a nature so serious to contemplate acts amounting to gross misconduct, the matter must be referred to a Tribunal. In terms of section 19 of the JSC Act, the Tribunal must conduct an enquiry and make a finding which it must report to the JSC. In this case,

these steps were taken in the wake of the order of the court in the *FUL case*. That Court, after having criticised the JSC for its stance, in 2008, in evading an enquiry into the allegations of attempting to improperly influence judges of the Constitutional Court on a pending judgment, on the flawed premise that cross-examination would serve no purpose, then held:

“I find the reasoning surprising. Courts frequently have to decide where the truth lies between two conflicting versions. They often do so where there is only the word of one witness against another, and neither of the witnesses concedes the version of the other. Civil cases are decided on a balance of probabilities, but where there is a dispute of fact it is rarely possible to do so without subjecting the parties to cross-examination, and without allowing them to test what are alleged to be probabilities in the other party's favour. A court may of course after cross-examination still be unable to decide where the truth lies. That possibility does not entitle a court to decide the matter without allowing cross-examination, and it does not entitle the JSC to do so.

As stated above, in terms of s 165(4) of the Constitution, organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts, and in terms of s 177(1) a judge cannot be removed from office for having made himself guilty of misconduct, unless the JSC has found him guilty of misconduct. It follows that there is a duty on the JSC to investigate allegations of misconduct that may threaten the independence, impartiality, dignity, accessibility and effectiveness of the courts.”⁶⁶
(own emphasis added)

[100]What was then undertaken by the Tribunal was wholly lawful and consistent with what that that order contemplated. The relevant portion of the terms of reference to the tribunal stated:

“Terms of reference

3. The Tribunal is appointed to investigate and report on the complaint lodged with the Judicial Service Commission (Commission) on 30 May 2008 by the Justices of the Constitutional Court (complainants) against Judge President M J Hlophe (respondent). The essence of the complaint is that the respondent approached Justices B E Nkabinde and C N

⁶⁶ *FUL case* above n 1 at paras 48-49.

Jafta of the Constitutional Court and attempted to improperly influence their decision in four matters that were pending before the Constitutional Court, namely *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* (CCT 89/07), *JG Zuma and Another v National Director of Public Prosecutions and Others* (CCT 91 /07), *Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public Prosecutions* (CCT90/07) and *JG Zuma v National Director of Public Prosecutions* (CCT 92/07).

4. The Commission, following a recommendation made by the Judicial Conduct Committee, expressed the view that there were reasonable grounds to suspect that the respondent's alleged attempt to influence, improperly, the two Justices of the Constitutional Court to decide matters that were pending before the Constitutional Court in favour of any of the litigants may render him guilty of gross misconduct.
5. The Tribunal shall investigate, make findings and report on:
 - 5.1 whether the respondent attempted to influence, improperly, Justices B E Nkabinde and C N Jafta -of the Constitutional Court to decide matters that were pending before the Constitutional Court in favour of any of the litigants; and
 - 5.2 If so, whether the respondent is guilty of gross misconduct as contemplated in section 177 of the Constitution."

[101]The report of the Tribunal was thereafter laid before the JSC. No challenge to the report was made prior to the JSC taking its decision in respect of the report. It is probable that, in law, the tribunal *per se* makes no decision which is itself subject to a review, having regard to the role it plays as the ferret of the JSC and because its findings are self-evidently not binding on the JSC.

[102]The Tribunal made several findings. The first was a finding on certain disputed allegations of fact. It preferred the versions of Jafta J and Nkabinde J to that of Hlophe JP, where their versions differed. The tribunal also criticised, as disingenuous, the claim by Hlophe JP that a material distinction could be drawn between his admission that were he to have delivered a judgment that went on appeal, he would never have discussed it with a judge hearing the appeal, from the episode in which he endeavoured to discuss the Zuma matters with Jafta J and Nkabinde J.

The second decision it made was a conclusion that the evidence, which it had accepted, demonstrated that the allegations of fact against Hlophe JP were proven. Third, it concluded that the proven facts showed gross misconduct by Hlophe JP. In regard to the inference of gross misconduct, from those facts, the Tribunal was in any event bound by the *FUL case* which recognised that such conduct, if proven, constituted gross misconduct; thus, once the Tribunal had found the alleged facts were proven, it could hardly have found otherwise without contradicting a judgment of the Court.

[103]The JSC, in terms of section 20 of the JSC Act, was obliged to consider the report from the Tribunal. It did not do so as an appellate body. The Tribunal is *de facto* an extension of the JSC apparatus and the scheme of the JSC model is that the JSC must consider the report and reach its own conclusions. In considering the report, the members of the JSC were divided. The majority and minority in the JSC both tabled extensive reasons for their respective views to which, as the transcript of the proceedings shows, the members applied their minds in debate. The jury having voted, the JSC resolved 8-4 to adopt the Tribunal's findings that Hlophe JP was guilty of gross misconduct.

[104]These steps that were taken and decisions which were made are all plainly within the power of the Tribunal and of the JSC. In our view, the Tribunal and the JSC acted as they were lawfully required to do, without exceeding their statutory powers. The allegation of an *ultra vires* decision is unsustainable.

Did the Tribunal follow an unfair procedure?

Audi alterem partem

[105]There is no cogent dispute that at every step of the process from the initial accusation until the final consideration by the JSC of the Tribunal's report, Hlophe JP was

afforded an opportunity to present his perspective. *Audi alterem partem* was wholly satisfied. It is however alleged that the procedure was unfair in other respects.

The ‘charges’ of gross misconduct

[106]The first complaint is that no proper ‘charge sheet’ was put to Hlophe JP and, worse, the charges were, later, improperly amended. The prescribed Notice to Hlophe JP was indeed amended. A reading of the changes brought about show that they were self-evidently formulaic and benign and did not alter the substance of what was alleged. The initial formulation was that Hlophe JP tried to: “... improperly influence their [Jafta J and Nkabinde J] decision in matters that were pending at the Constitutional Court...”. The reformulation read that Hlophe JP tried to: “improperly interfere or influence their decision in matters that were pending at the constitutional Court (contrary to the provisions of section 165(2) and (30 of the Constitution)”.

[107]The Tribunal concluded that a ‘charge sheet,’ in the formal and usual sense of that label, was not required by the procedure prescribed by the JSC Act. This conclusion does not contradict the law. Section 19(2) of the JSC Act requires that: “[t]he Commission must in writing state the allegations including any other relevant information, in respect of which the Tribunal must investigate and report.” Rule 4 of the Rules to regulate the conduct of Tribunals, requires simply that a notice be served on the judge accused of misconduct “which notice must contain the facts which are alleged...”.⁶⁷

[108]The Tribunal found that the changes were immaterial and caused no prejudice to Hlophe JP. The JSC adopted the same view. There is no inference of irrationality or

⁶⁷ Judicial Service Commission Act: Rules Made in Terms of Section 25(1) of the Act, to Regulate Procedures Before Judicial Conduct Tribunals, GN R864, GG 35802, 18 October 2012.

unreasonableness that could be drawn from these circumstances and the conclusion that they reached.

Comparisons with criminal proceedings

[109]The case presented for Hlophe JP persisted with comparisons between the Tribunal and JSC hearings on one hand, and criminal proceedings on the other. The JSC found the comparison to be inapposite for an enquiry into alleged unethical conduct by a body such as the JSC, which conducts an inquisitorial process in terms of the JSC Act. No inference of irrationality can be drawn from that conclusion, having regard to the statutory framework applicable.

The preference of the JSC for the evidence of Jafta J and Nkabinde J to that of Hlophe JP

[110]The complaint that the evidence of Jafta J and Nkabinde J was wrongly preferred to that of Hlophe JP, where they differed, is a classic appeal ground. It offers no purchase for a review. The Tribunal carried out a fact-finding exercise. Witnesses testified and were cross-examined. There were disputes of fact in the evidence. It is in the very nature of the mandate to the Tribunal that it was required to make credibility findings and evaluate all the evidence tendered. There can be no irregularity in doing just that. Even if there is a plausible basis for finding differently, that would not support a claim of reviewable irregularity. The argument advanced does not go beyond claiming the version of Hlophe JP should have been accepted. Moreover, reasons were given by the Tribunal and by the JSC. These reasons evince no premise of arbitrariness, irrationality or unreasonableness.

The conclusion of the JSC that the proven facts constituted gross misconduct: What were the proven facts?

[111]The critical evidence was the following:

- 111.1. The Zuma cases had been heard and the judges were engaged in preparing the judgment. One of issues in the cases was the propriety of a police raid on Zuma's attorneys' offices to procure documentation and whether this violated Legal Privilege.
- 111.2. Hlophe JP initiated meetings with two of the sitting judges during this period of preparation.
- 111.3. Jafta J was an old acquaintance of Hlophe JP, and at the time, an acting judge in the Constitutional Court. He was appointed permanently thereafter.
- 111.4. Nkabinde J was a virtual stranger to Hlophe JP.
- 111.5. The two judges were the most junior judges on the panel of the Constitutional Court hearing the Zuma matters.
- 111.6. Hlophe JP brought up the Zuma cases and the legal issues which arose therein with each of them.
- 111.7. Hlophe JP opined to Jafta J that the SCA was wrong on the question of privilege, a critical issue in the Zuma cases, and the error of the SCA had to be corrected by the Constitutional Court because it was very important.
- 111.8. To Jafta J, Hlophe JP said in this context, in isiZulu, '*sesithembele kinina*' – 'you are our last hope'.
- 111.9. Jafta J was uncomfortable about this discussion because the notion of an outsider-judge broaching the substance of a pending judgment with a member of the panel hearing a case was foreign to his experience. He was alive to the effect that such a conversation, from a source outside the panel, might have in exerting an influence on his thinking about how to decide the matter. His negative reaction to the discussion was such that when Nkabinde J mentioned casually that Hlophe JP had phoned her to set up a meeting with her to discuss

‘privilege’ he alerted her and cautioned her that Hlophe JP might bring up the Zuma Cases.

- 111.10. To Nkabinde J, over the phone, Hlophe JP had said, in relation to setting up the meeting, that he had ‘a mandate’, an allusion left hanging with mystery as to what, and from whom, but when the remark is married to other remarks made in the subsequent conversation arouse suspicion as to a partisan intent; ie, at their meeting, Hlophe JP alluded to his political connections and the influence he had as adviser to unnamed political figures. (Hlophe JP admitted referring to a ‘mandate’ but proffered that it related to a matter wholly unrelated to the conversation later held and furthermore denied the boast about influence with political figures.)
- 111.11. Hlophe JP said, in this context, that the people in the Constitutional Court needed to ‘remember our history’.
- 111.12. Hlophe JP disclosed that he supposedly knew that when Mr Zuma ascended to the presidency, jobs were going to be lost and added that he knew the names of folk implicated in the notorious Arms Procurement scandal.
- 111.13. Hlophe JP said that Mr Zuma had been the victim of persecution just as he, Hlophe JP, had been persecuted.
- 111.14. Nkabinde J (forewarned by Jafta J) rebuked Hlophe JP for mentioning the case of Zuma and stopped the discussion. The meeting then ended.
- 111.15. Nkabinde J understood the drift of the conversation to be calculated to influence her approach to the case to favour Mr Zuma’s cause.

[112]The JSC did not, on these facts, accept that Hlophe JP:

- 112.1. had no intention to influence the judges; and
- 112.2. was ignorant of an axiomatic norm of ethical behaviour among judges restricting their discussions about pending judgments.

[113]The Tribunal and the JSC were obliged to evaluate what this conduct demonstrated.

Both concluded, on this evidence, that there was an attempt to interfere with the courts, as contemplated by section 165(3) of the Constitution, by way of influencing the two judges to lean in favour of a litigant, perhaps out of some sense of solidarity, and that the conduct was, on the probabilities, premeditated. The JSC expressed itself thus:

“The Misconduct

60. On his own version, it is clear that Judge President Hlophe did not express abstract, academic views about the law of privilege. He said that the SCA got the Law wrong and in the meeting with Justice Nkabinde, there was no case against Mr Zuma. In that context, he urged them both to decide the case correctly. We agree with the Tribunal that to decide the case “correctly, where Judge President Hlophe’s view was that the SCA got the law wrong, could only mean overturning the SCA and thus finding in favour of Mr Zuma. That is consistent with his admitted suggestion that Mr Zuma was being persecuted. It also means that in saying “sesithembele kinina” Judge President Hlophe conveyed his hope that the Constitutional Court, as the apex Court, would correct the errors committed by the SCA. That is how Justice Jafta understood the phrase and how a reasonable observer would have understood it.
61. Viewed objectively, Judge President Hlophe’s conduct was in breach of the requisite objective standard, as now codified in Article 11. We, therefore, align ourselves with the Tribunal’s finding that Judge President Hlophe had to have conducted himself in accordance with that standard and failed to do so.
62. In the circumstances, we accept that the Tribunal was correct in concluding that Judge President Hlophe’s conduct constituted an attempt improperly to influence the two judges concerned; to threaten and interfere with the independence, impartiality, dignity and effectiveness of the Constitutional Court and breached the principle that no outsider-be it government, pressure group, individual or even another judge conducts his or her case and makes his or her decision.
63. It accordingly follows, in our finding, that Judge President Hlophe’s conduct falls short of the standard required of a Judge. It must follow from the above finding that Judge President Hlophe has committed an act of misconduct.

64. What remains for our consideration is the question whether it can be said, on a conspectus of all the evidence, that the misconduct so committed amounts to “gross misconduct” in terms of section 177(a) of the Constitution.”

Is the conclusion that, on these facts, Hlophe JP committed gross misconduct, irrational or unreasonable?

[114]How is gross misconduct to be determined? That is the JSC’s responsibility. It is not the responsibility of the JSC to decide whether Hlophe J should be removed from office, that role belongs to the National Assembly. The National Assembly does not revisit the JSC’s finding of gross misconduct; that is a given.

[115]However, as removal from office is a competent consequence of being guilty of gross misconduct, that consequence is pertinent to the meaning to be attributed to ‘gross misconduct.’ The point of departure must be section 177(1) (a) of the Constitution:

“A judge may be removed from office only if-

- (a) The Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; ...”

[116]Any allusion to ‘gross misconduct’ can only be gross misconduct as contemplated by this section. It is neither appropriate nor necessary to explore, philosophically or conceptually, what the phrase ‘gross misconduct’ could mean in any broader context. Nor is it helpful, as we were invited, to attempt to draw inspiration from the use of that phrase from the realm of Labour Relations regulation. What constitutes ‘gross misconduct’ must be understood in the context of the whole of section 177(1)(a). When the other two expressly mentioned grounds for removal are taken into account, it seems incontrovertible that what is contemplated is conduct that renders the judge unfit for a judicial role.

[117] A misdirected line of argument was advanced by the amicus that sought to engage with the notion of a ‘threshold of misconduct’ having to be established and, in that context, posit that it was proper that there be a presumption of judicial integrity that had to be displaced in order to make a finding of gross misconduct. This thinking is flawed. First, the notion that a judge should be shielded by such a presumption when examining an allegation of an ethical breach is plainly wrong. Persons who assume the office of judge must work assiduously to manifest good character by demonstrating integrity in the detail of their life and their work, not be granted a free pass. The origin of this flaw in the thinking seems to be the notion of importing the procedural requirements for a recusal by a judge. In such an instance, a litigant who alleges bias or a conflict of interest by a judge in a hearing, bears an onus to adduce proof of such grounds. This approach is inapposite to the appropriate way to recognise gross misconduct for the purpose of section 177(1)(a). Secondly, the tool of a “threshold of misconduct”, which intrinsically requires a hierarchy of sin, is mechanical. As such, it is dysfunctional to the purpose of section 177(1)(a). What is required is a fact-specific enquiry in the round into all the relevant events, upon which foundation a finding of fact can be made which is then subjected to a qualitative assessment as to whether a person, who behaved in the proven manner, is fit for purpose in a judicial role. In the last phase, self-evidently a value judgment is made. It is the function of the JSC to make such value judgments.

[118] Section 177(1)(a), moreover, does not stand alone. Section 165 of the Constitution bears on the enquiry in this case:

“Judicial authority

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.

- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. ...” (emphasis added)

[119]The clear function of Section 165(3) is to secure the reality of judicial institutional independence and to secure the individual judge’s independence or autonomy.⁶⁸ The mischief which is forbidden is described as ‘interference’. An argument was advanced that this provision ought not to be understood as including ‘attempted interference’. The implication of this contention is that only effective interference is proscribed. This is incorrect. Purposively interpreted, the function of the section is to protect the courts from improper behaviour, and, in order to give effect to that value choice, a broader rather than a narrower scope should be attributed to the activity against which protection is sanctioned by the section. An attempted interference is no less an interference than an effective disruption or manipulation. Moreover, the notion that the formulation of an allegation as ‘undue influence’ is materially distinguishable from ‘interference’ or ‘attempted interference’ is a semantic egg-dance. Such a distinction carries no weight in the context of the purpose to be served by section 165(3). Plainly, what is required is that persons with opinions about how cases might be treated must keep their distance from judges seized with such cases.

[120]In the *FUL* case, the court examined section 165(3) and section 177(1):

⁶⁸ In *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 59, in the course of considering section 165 of the Constitution, the court held that judicial independence is “foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law”. See also *Van Rooyen & Others v the State and Others (GCB intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 17; and *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) at paras 34-35.

“Any attempt by an outsider to improperly influence a pending judgment of a court constitutes a threat to the independence, impartiality, dignity and effectiveness of that court. In the present case the allegation is that Hlophe JP attempted to improperly influence the Constitutional Court's pending judgment in one or more cases. The JSC had already, when it decided to conduct the interviews with the judges, decided that, if Hlophe JP had indeed attempted to do so, he would have made himself guilty of gross misconduct which, *prima facie*, may justify his removal from office. Moreover, it based its decision dismissing the complaint on an acceptance that Hlophe JP probably said what he is alleged to have said. In these circumstances the decision by the JSC to dismiss the complaint, on the basis of a procedure inappropriate for the final determination of the complaint, and on the basis that cross-examination would not take the matter any further, constituted an abdication of its constitutional duty to investigate the complaint properly. The dismissal of the complaint was therefore unlawful. In addition, the JSC's decision to dismiss the complaint constituted administrative action and is reviewable in terms of s6(2)(h) of PAJA for being unreasonable, in that there was no reasonable basis for it.”⁶⁹

[121]The allegations against Hlophe JP fall squarely within the scope of Article 11(3) of the South African Code of Judicial Conduct, and Note 11(ii) in particular, which provisions read thus:

“11(3) Formal deliberations as well as private consultations and debates among judges are and must remain confidential.

...

Note 11(ii): Private consultations and debates between judges are necessary for the judiciary to perform its functions. However, these occasions may not be used to influence a judge as to how a particular case should be decided.”

[122]The Tribunal expressed the substance of this rule in different words, but true to its import:

“No judge is entitled to discuss a pending case with another judge who has reserved judgment unless the latter initiates such discussion and seeks the other’s views. This prohibition is not limited to the facts or the merits only, but extends to legal principles or jurisprudence in such a case.”

⁶⁹ *FUL case* above n 1 at para 50.

[123]The contention was advanced that the injunction against undue influence in Article 11 of the SA Code of Judicial Conduct, saw the light of day after the conduct alleged had occurred and that it could, therefore, not be invoked. This line of argument was married to the submission that Hlophe JP was ignorant of such a rule and by implication, could not be expected to know of it. This is an argument that embraces an important implication, seemingly unappreciated at the time it was presented, namely, if it is true that Hlophe JP was, as a fact, ignorant of the rule, it might offer an explanation why he breached it. The true issue, however, is that the ‘rule’ – perhaps it is better to identify it as an aspect of a norm, which is articulated as a rule - is intrinsic to the judicial function and self-evident to judges of integrity. In any event, the argument that no reference could be made to the rule because of supposed retrospectivity was rejected in *Motata v Minister of Justice and Constitutional Development*⁷⁰ and accordingly it was not open to the Tribunal to decide otherwise.

[124]Moreover, at least since 2000 such norms already had native South African roots. At that time, Harms JA convened a task team of judges to frame the *Guidelines for Judges of South Africa*, which were published in the South African Law Journal.⁷¹ *The Guidelines* among other injunctions, stipulated, in para A1, that, “... [a] judge should also take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts”.⁷²

[125]The *Bangalore Principles of Judicial Conduct* and the official commentary thereon, published in 2002, well before the events of 2008, capture and systematise the collective ethical consciousness of judiciaries around the world.⁷³ What is stipulated there is especially instructive for this controversy:

⁷⁰ *Motata v Minister of Justice and Constitutional Development and Others* [2012] ZAGPPHC 196 at para 14.

⁷¹ Harms “Proposals for a mechanism for dealing with complaints against judges, and a code of ethics for judges” (2000) SALJ 377.

⁷² *Id* at 406.

⁷³ *The Bangalore Principles of Judicial Conduct* 2002, available at <https://www.undoc.org>.

“Value 1: Independence

...

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.”⁷⁴

The application of this norm or ‘Value’ in the phraseology used in the *Bangalore Principles* is further delineated:

- “1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.
- 1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.
- 1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.
- 1.4 In performing judicial duties, a judge shall be **independent of judicial colleagues** in respect of decisions which the judge is obliged to make independently.
- 1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.
- 1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.”⁷⁵ (emphasis added)

[126] These injunctions must of course be read holistically. The stipulation in Note 11(ii) of the South African Code of Judicial Conduct cannot be distinguished from the substance of these provisions. Moreover, the further commentary on the Bangalore Principles reinforces that proposition.

⁷⁴ Id at p 3.

⁷⁵ Id.

[127]The Commentary on Value 1.1 states as follows:

“Outside influences must not colour judgment

Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences. It is essential to judicial independence and to maintaining the public’s confidence in the justice system that the executive, the legislature and the judge do not create a perception that the judge’s decisions could be coloured by such influences. The variety of influences to which a judge may be subjected are infinite. The judge’s duty is to apply the law as he or she understands it, on the basis of his or her assessment of the facts, without fear or favour and without regard to whether the final decision is likely to be popular or not. For example, responding to a submission that South African society did not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment, the President of the Constitutional Court of South Africa said:

The question before us, however, is not what the majority of South Africans believe a proper sentence should be. It is whether the Constitution allows the sentence. Public opinion may have some relevance to the inquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication . . . The Court cannot allow itself to be diverted from its duty to act as the independent arbiter of the Constitution by making choices on the basis that they will find favour with the public. [S v. Makwanyane, Constitutional Court of South Africa, 1995 (3) SA 391, per Chaskalson, CJ]

A judge must act irrespective of popular acclaim or criticism

A case may excite public controversy with extensive media publicity, and the judge may find himself or herself in what may be described as the eye of the storm. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity. A judge must have no regard for whether the laws to be applied, or the litigants before the court, are popular or unpopular with the public, the media, government officials, or the judge’s own friends or family. A judge must not be swayed by partisan interests, public clamour, or fear of criticism. Judicial independence encompasses independence from all forms of outside influence.

Any attempt to influence a judgment must be rejected

All attempts to influence a court must be made publicly in a court room, and only by litigants or their advocates. A judge may occasionally be subjected to efforts by others outside the court to influence his or her decisions in matters pending before the court. Whether the source be ministerial, political, official, journalistic, family or other, all such efforts must be firmly rejected. These threats to judicial independence may sometimes take the form of subtle attempts to influence how a judge should approach a certain case or to curry favour with the judge in some way. Any such extraneous attempt, direct or indirect, to influence the judge, must be rejected. In some cases, particularly if the attempts are repeated in the face of rejection, the judge should report the attempts to the proper authorities. A judge must not allow family, social or political relationships to influence any judicial decision.

Determining what constitutes undue influence

It may be difficult to determine what constitutes undue influence. In striking an appropriate balance between, for example, the need to protect the judicial process against distortion and pressure, whether from political, press or other sources, and the interests of open discussion of matters of public interest in public life and in a free press, a judge must accept that he or she is a public figure and that he or she must not have a disposition that is either too susceptible or too fragile. Criticism of public office holders is common in a democracy. Within limits fixed by law, judges should not expect immunity from criticism of their decisions, reasons, and conduct of a case.”⁷⁶ (emphasis added)

[128]The Commentary on Value 1.4 states this:

“A judge must be independent of other judges

The task of judging implies a measure of autonomy which involves the judge’s conscience alone. Therefore, judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges. Although a judge may sometimes find it helpful to “pick the brain” of a colleague on a hypothetical basis, judicial decision-making is the responsibility of the individual judge, including each judge sitting in a collegiate appellate court.”⁷⁷ (emphasis added)

⁷⁶ *Commentary on the Bangalore Principles of Judicial Conduct*, United Nations Office on Drugs and Crime (September 2007), available at <https://www.undoc.org>, at p 44, paras 27-30.

⁷⁷ *Id* at p 51, para 39.

[129]In this context, an important observation about how influence can be insidiously exercised by a judge is made by Cynthia Gray, the Director of the American Judicature Society's Center for Judicial Ethics, addressing the American experience.⁷⁸

"The appearance of impropriety standard is necessary and justified even if the code is viewed only from a disciplinary perspective. Although in most judicial discipline cases, a judge is charged with violating a specific canon such as the prohibition on ex parte communications, there are cases based on findings of an appearance of a violation. Most appearance cases fall into several categories.

A. Use of Influence: Winks and Nods

Invoking the judicial office to cajole or bully a favor is a classic example of judicial misconduct, giving rise to numerous judicial discipline cases. If the pressure is express and the favor is granted, the improper use of the prestige of office and the violation of the code of judicial conduct are obvious.

More subtle, less bald-faced but still manifest attempts to gain an improper advantage from the judicial office are captured by the appearance of impropriety standard and represent the largest number of cases finding an appearance of impropriety. This application of the appearance standard reflects the reasonable person's understanding that much of human communication is unspoken, between-the-lines, with winks and nods, and depends on what goes without saying. Gratuitous references to the judicial office, for example, have been held to impliedly but obviously and inappropriately invoke the prestige of the office even absent an express request for favorable treatment."

Was the Freedom of Expression of Hlophe JP, guaranteed under section 16 of the Constitution, violated by the finding of gross misconduct?⁷⁹

⁷⁸ Gray "Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility" (2005) 28 UALR Law Review 63 at 67-68.

⁷⁹ Section 16 of the Constitution:

Freedom of expression

- (1) Everyone has the right to freedom of expression, which includes-
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and

[130]The contention that section 16 freedom of expression rights arise at all is misconceived. There is no room to prevaricate about the role of a judge requiring the imposition of several ethical restraints to which the general public are not bound. Though everyone is at liberty to think what they like, judges are bound to conduct themselves at all times in a manner that protects and promotes the integrity of the legal process. In that context, it is not open to a judge in a private conversation to blurt out his preferences, biases or opinions to a fellow judge who, to his knowledge, is preparing a judgment on those very issues about which he has a firm view. Every ethical judge would expect the same restraint from other colleagues.

[131]Section 165 (3) of the Constitution is not capable of contradiction by section 16 upon any proper and purposive interpretation.

Did the JSC neglect pertinent considerations?

The 2009 JSC decision

[132]A frequent refrain in argument on behalf of Hlophe JP was that the 2021 JSC decision inexplicably contrasted with the 2009 JSC decision. The 2009 JSC decision was set aside by the court in the *FUL* case. Therefore, in law, no 2009 decision exists. The complaint is thus utterly meritless. Were regard is had to it by the JSC in 2021, it would indeed have committed an error. In any event, the 2009 decision of the JSC was, in effect, a decision not to investigate and decide the issue, hardly meat for a comparison.

-
- (d) academic freedom and freedom of scientific research.
 - (2) The right in subsection (1) does not extend to-
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The 2021 JSC Minority's view

[133] Allusions were made to the views expressed in the minority position tabled in the JSC by way of a criticism of the majority view. Axiomatically, the majority view prevailed and became the decision of the JSC. There is no 'dissenting judgment' as is the case in a court of law. The minority view is akin to a motion tabled and lost. It has no standing.

What significance is there to the reluctance of Jafta J and Nkabinde J to being 'complainants'?

[134] Much emphasis in argument on behalf of Hlophe JP was given to the attempts of Jafta J and Nkabinde J to distance themselves from being regarded as 'complainants' as being relevant to the integrity of the allegations of misconduct. However, the argument about the reluctance of Jafta J and Nkabinde J being in an adversary position, *vis a vis* Hlophe JP, is misconceived because this point contributes nothing to any issue of relevance; it is sterile. Their version of what transpired is what is relevant, not their personal preferences about their role.

[135] The core issue was, in any event, not the effect of the misconduct on the two judges but the effect on the Constitutional Court as a whole. There can be no cogent quarrel with the complaint being made by the nine other judges, as Langa CJ explained in the passage from his statement cited earlier. Even if it is taken for granted that both Jafta J and Nkabinde J would have preferred that no discipline took place, it is utterly irrelevant to the gravamen of the complaint by all the other Constitutional Court judges. No purchase for a reviewable irregularity exists.

The alteration by Jafta J and Nkabinde J of their initial statements

[136]Jafta J and Nkabinde J brought about alterations to their initial written statements. It was argued on behalf of Hlophe JP that this impinged on the efficacy or reliability of their evidence. In the 2021 Tribunal hearing, it was agreed that their statements, drawn 12 years earlier, were to stand as their evidence-in-chief. This was, axiomatically, not the original purpose for which the statements had been drafted. Now they would be subjected to cross examination on the statements-cum-evidence. Exactitude was axiomatically paramount.

[137]In any event, the effects of the alterations were plainly negligible. The point of the exercise was to refine the points sought to be made. No admissions were withdrawn. No contradiction was introduced. Importantly, no objection was made at the time the changes were made.

[138]The alterations were captured and contrasted by the JSC in its reasons, cited below. The pertinent changes are juxta-positioned for easy comparison. The old paragraphs 9(c) and 10 (c) were replaced by the text described in replacement paragraphs **48 and 49**:

Old Paragraph 9:

"Towards the end of March 2008, and after argument in the Zuma / Thint cases had been heard-

9(a): without invitation, Hlophe JP visited the chambers of Jafta AJ;

9(b): again without invitation, Hlophe JP raised the matter of the Zuma / Thint cases that has been heard by the Court; and

9(c): in the course of that conversation, Hlophe JP sought improperly to persuade Jafta AJ to decide the Zuma / Thint cases in a manner favourable to Mr. JG Zuma."

Replacement paragraph 48:

“The first paragraph referred to the meeting between Hlophe JP and Jafta AJ. It was proposed by counsel for Nkabinde and Jafta AJ that the following detail be included in the statement:

“in the course of that conversation, Hlophe JP said that the case against Mr JG Zuma should be looked at properly (or words to that effect) and added, “Sesithembele kinina”, a rough translation which is: “you are our last hope”.

Old Paragraph 10:

“On 23 April 2008, Hlophe JP contacted Nkabinde J telephonically and requested to meet her on Friday 25 April 2008. On that day –

- 10(a) Hlophe JP visited the Chambers of Nkabinde J at the Constitutional Court as agreed;*
- 10(b) without invitation, Hlophe JP initiated a conversation with Nkabinde about the Thint / Zuma cases that had been heard by the court; and*
- 10(c) in the course of that conversation, Hlophe JP sought improperly to persuade Nkabinde to decide the Zuma/Thint cases in a manner favourable to Mr JG Zuma”*

Replacement paragraph 49:

“The second paragraph referred to the meeting between Hlophe JP and Nkabinde J. It was proposed by counsel for Nkabinde J and Jafta AJ that the following detail be included in the statement:

“In the course of that conversation, Hlophe JP said he wanted to talk about the question of “privilege”, which in his words formed the gravamen of the National Prosecuting Authority’s case against Mr JG Zuma. He further said the manner in which the case was to be decided was very important as there was no case against Mr Zuma without the “privileged” information and that Mr Zuma was being persecuted, just like he (Hlophe JP) had also been.”

[139]No cross-examination in the Tribunal hearing on these changes to the statements was subsequently directed to either Jafta J or Nkabinde J. Only in closing argument were objections raised about these changes. The Tribunal found that the complaint was

misconceived, stating that the substance of the change was to exchange allegations of fact for conclusions which caused no prejudice to follow. No inference of irrationality or unreasonableness can be inferred from these circumstances and the conclusions reached.

The JSC Ignored Article 11 of the SA Code of Judicial Conduct

[140]The allegation that no regard was had to Article 11 of the South African Code of Judicial Conduct is simply incorrect. Paradoxically, it was argued on behalf of Hlophe JP that as Article 11 post-dated the impugned conduct it was illegitimate to have regard to it, yet at the same time, he sought to rely upon parts of it.

Did the JSC ‘misapply’ the Bangalore Principles?

[141]Our reading of the Bangalore Principles, as cited above, and of the reasons given by the Tribunal and by the JSC do not evidence a ‘misapplication’. The conclusions drawn by the JSC in our view, as dealt with earlier, are wholly consistent with the Bangalore Principles.

Was JSC wrong not to find that *mens rea* is required for a finding of gross misconduct?

[142]Article 5(1) of the SA Code of Judicial Conduct, states that:

“A judge must always, and not only in the discharge of official duties act honourably and in a manner befitting judicial office.”

Note 5(iv) states:

“Judicial conduct is to be assessed objectively through the eyes of a reasonable person.”

These provisions are significant in relation to the contention that a specific intention had to be proven to secure a guilty verdict. The finding of the JSC that the test examines the effects of the conduct, not its intent, was neither irrational nor unreasonable. The context of judicial ethics lends itself to this construction. As with the duty upon Caesar's wife to be visibly and manifestly pure, and so be above suspicion, so is with a judge, to remain visibly and manifestly imbued with integrity and act with good judgment.

Did the JSC improperly have regard to extraneous factors?

The Defamation by Hlophe JP of the Constitutional Court Judges

[143]Allegations of impropriety by the Constitutional Court judges in lodging the complaint had been raised by Hlophe JP in 2008. The thrust of his complaint was that the judges had, *mala fide*, contrived a complaint to get rid of him and were actuated by dishonourable motives. This complaint had been referred to the JSC at that time and had been dismissed for want of any substantiation by Hlophe JP. Nonetheless Hlophe JP resurrected these complaints and persisted with them in the 2021 proceedings.

[144]This defamation of the Constitutional Court judges by Hlophe JP was alluded to by both the Tribunal and the JSC in its reasons. It is alleged by Hlophe JP that this was improper as no charge of defaming the judges by Hlophe JP was before these proceedings.

[145]The argument is misconceived on two levels:

- 145.1. First, the fact of Hlophe JP's defamation of the Constitutional Court judges was not part of the *facta probanda* for the finding that his interaction with Nkabinde J and Jafta J was gross misconduct.

145.2. Second, by raising the defamatory allegations again which were, objectively, unjustified was axiomatically improper. Accordingly, it was wholly appropriate that such hollow allegations be addressed to record their lack of foundation. It was axiomatically poor judgement and, indeed, a proof of poor character by Hlophe JP to have raised the grounds again. Moreover, a tribunal addressing the impropriety of an accused person accusing his accusers with unsubstantiated slurs is wholly appropriate and is no novelty. The proposition is well established by the decision in *Society of Advocates of South Africa (Witwatersrand Division) v Edeling*.⁸⁰

Was there evidence improperly adduced in the JSC meetings?

[146]In the discussion on the Tribunal report in the JSC, Mlambo JP and Mbha JA expressed their views about the existence of a rule of restraint commonplace within the Judiciary that one judge did not initiate discussion with another judge about a pending judgment which the latter was engaged in preparing. This attracted a complaint that these contributions to the discussion constituted the giving of evidence to the JSC and improperly so.

[147]The complaint is invalid on two levels. First, what Mlambo JP and Mbha JA said on this issue went no further than the clear evidence already given by Jafta J on this point; there was nothing novel introduced into the discussion. Second, both these members of the JSC expressed views of a nature that were precisely the views to be expected from them in a body such as the JSC, ie a body representative of the pool of expertise and experience about the ethics of lawyering in general, and of the ethics of the judicial role, in particular. The effect of their views was that their experience was

⁸⁰ 1998 (2) SA 852 (W) at 898 F-H.

consistent with that of Jafta J and inconsistent with the alleged experience of Hlophe JP. Therefore, no irregularity was evidenced thereby.

Conclusion on the review application

[148]It must therefore follow that no grounds have been shown to warrant a review of the decision of the JSC and that the application must be dismissed.

PART C:

THE APPLICATION TO REFER THE MATTER TO THE NATIONAL ASSEMBLY

[149]Hlophe JP seeks an order in his amended Notice of Motion that irrespective of the outcome of these review proceedings, this court must order the National Assembly to convene a proper and formal inquiry in accordance with its powers in section 177(1)(b) of the Constitution, for the purpose of exercising its powers about the removal of a Judge.

[150]The Speaker (the fourth respondent) opposed this relief on two grounds. First, there is no basis for such relief set out in the affidavits by Hlophe JP. Second, no proper explanation is proffered as to why such relief could be justified. These criticisms are wholly justified.

[151]Section 177 of the Constitution provides:

- “(1) A judge may be removed from office only if—
 - (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
 - (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) ...”

[152]The structure of section 177 (1)(a) plainly provides that a judge can be removed if the JSC finds that the judge is guilty of gross misconduct. That finding is a jurisdictional precondition to the National Assembly contemplating a resolution to remove a judge. The decision as to whether misconduct occurred is that of the JSC alone.

[153]Section 177(1)(b) provides that when the National Assembly resolves to remove a judge, it must be with a supporting vote of at least two thirds of its members. In terms of section 177(2), the President of the Republic must then remove the judge from office upon the adoption of such a resolution. There is no provision in section 177 for a re-hearing of the complaint by the National Assembly.

[154]The thesis advanced on behalf of Hlophe JP is without merit. Its essential thrust is that the National Assembly cannot be reduced to a rubber stamp of the JSC. This misconstrues the scheme of the Constitution which assigns *different* roles to the JSC and to the National Assembly, not *overlapping* roles. Also, neither the National Assembly nor the JSC are subordinate to one another. The JSC is vested with the power to make a decision based on the norms of judicial ethics. The National Assembly makes a political decision.

[155]The inescapable consequence of the two institutions having different decisions to make is that there is no scope for the National Assembly to enquire into whether the judge referred to it has committed gross misconduct. Contrary to the contention advanced on behalf of Hlophe JP, the National Assembly receives that finding as a fact and deliberates thereupon, not to reconsider it, but to decide what to do based on it. The arguments advanced which invoke the powers of the National Assembly to

regulate its own affairs and to conduct enquiries is wholly misconceived and does not bear on the substantive powers vested in the National Assembly at all.

[156]In support of his contention that the Court is empowered to order the National Assembly to hold a fresh enquiry, Hlophe JP asserts that the Speaker's affidavit refers to a "decision" that the National Assembly must make. He therefore contends that because the National Assembly is making a decision, it should conduct its own inquiry into whether or not he has committed gross misconduct and should be removed, otherwise it would be a rubber-stamping exercise. This argument is misdirected. When Parliament passes a resolution on the matter, it does not have to re-hear the matter. It would have sufficient documentation before it to make a decision.

[157]When considering whether a court should direct the National Assembly to conduct an enquiry, it is necessary to be mindful of the separation of powers doctrine. In any event, no case has been made out why the principle of deferral should be ignored for this far-reaching relief. There are no persuasive facts presented justifying this Court issuing such an order to the National Assembly.

[158]Accordingly, the premise of the application is fatally flawed. Prayer 10 of the amended Notice of Motion must be dismissed.

THE COSTS

[159]A finding by the JSC on gross misconduct by a judge is unprecedented. Its impact on the judge is self-evidently devastating. The review application has raised constitutional issues of importance which required elaborate traversing to elucidate

the legal position. The general principle in regard to such litigation is that the unsuccessful party should not be mulcted in costs unless deserving of censure.⁸¹

[160]As a senior Judge President, Hlophe JP should have been sensitive to the rigid north star for judges performing their duties impartially and without fear, favour or prejudice. However, taking all this into account, his litigation mission in this matter was really aimed at avoiding the far-reaching and devastating consequences to him personally, should he be impeached. This conduct cannot be labelled *male fide*.

[161]In *Biowatch* the Constitutional Court confirmed that in litigation between a private party and the State:

“If there should be a genuine, non-frivolous challenge to the constitutionality of a law *or of state conduct*, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.”⁸²

[162]In our view the appropriate costs order is that the parties pay their own costs.

THE ORDER

- [1] The application to review the decision of the Judicial Service Commission is dismissed.
- [2] The application to refer the matter to the National Assembly to re-hear the question of gross misconduct is dismissed.
- [3] Each party shall bear its own costs.

⁸¹ See *Affordable Medicines Trust & Others v Minister of Health & Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

⁸² *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 23.



The Court

for (Ledwaba AJP, Sutherland DJP and Victor J)

Heard: 14 – 16 February 2022

Judgment: 5 May 2022

For the Applicant (Judge President Hlophe):

Adv T Masuku SC, with him,
Adv T S Sidaki and Adv I Shai,

instructed by B Xulu & Partners Inc Attorneys

For the First Respondent (Judicial Service Commission):

Adv V Maleka SC and
Adv T Ngcukaitobi SC, with them.
Adv Y Ntloko and Adv M Salukazama

instructed by the State Attorney

For the Fourth Respondent (The Speaker of the National Assembly):

Adv S Budlender SC

instructed by the State Attorney

For the Sixth to Tenth Respondents (The Judges of the Constitutional Court):

Adv G Marcus SC, with him,
Adv M Mbikwa

instructed by the State Attorney

For the Eleventh Respondent (Freedom Under Law):

Adv M Du Plessis, with him
Adv T Palmer and Adv S Mohapi

instructed by Webber Wentzel

For the Amicus Curiae (The Black Lawyers Association):

Adv M Donen SC, with him
Adv Z Mapoma

instructed by KMNS Attorneys

The second and third respondents did not participate in the hearing.