

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/55663

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES

2.OF INTEREST TO OTHER JUDGES: YES

3.REVISED: NO

DATE: 26 AUGUST 2024

SUTHERLAND DJP

THE MPUMALANGA SOCIETY OF ADVOCATES

APPLICANT

WDT ATTORNEYS

AMICUS CURIAE

v

THE JUDICIAL SERVICE COMMISSION

FIRST RESPONDENT

THE PRESIDENT OF THE REPUBLIC

SECOND RESPONDENT

JOHANNES HENDRIKUS ROELOFSE

THIRD RESPONDENT

This Judgment has been delivered by uploading to the digital data case of the High Court of South Africa, Gauteng Division, Johannesburg on 26 August 2024 at 14h00 and by email to the parties.

JUDGMENT

THE ORDER

- (1) The application is dismissed.
 - (2) The recommendation of the first respondent that the third respondent be appointed as a Judge of the Mpumalanga Division of the High Court of South Africa is confirmed.
 - (3) There is no order as to costs.
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SUTHERLAND DJP:

Introduction

[1] On 8 October 2021, the first respondent, the Judicial Service Commission (JSC) interviewed the third respondent, Adv J H Roelofse as a candidate (hereafter called the candidate) for appointment to a vacant judgeship in the Mpumalanga Division of the High Court of South Africa. The candidate was recommended for appointment by a vote of 18 to 3.

[2] The applicant, the Society of Advocates of Mpumalanga (the Society) thereupon brought an application to review the recommendation. The relief sought as formulated in the notice of motion states:

- (1) 'That the decision of the [JSC] to recommend [the candidate] for appointment as a judge ... be declared unlawful, invalid and unconstitutional'
- (2) 'That the decision of the [JSC] ... is reviewed and set aside'.
- (3) 'That the matter be remitted or alternatively, it be declared that;
 - '(i) [the candidate] is not a fit and proper person to be appointed as a judge ...
 - (ii) [the candidate's] appointment as a judge is in conflict with section 1(c) of the Constitution read with section 174 of the Constitution.'

[3] The second respondent, the President of the Republic, undertook to await the outcome of the review application and thus deferred acting on the recommendation. The JSC also abides the judgment of court but nevertheless filed an 'explanatory' affidavit giving a bland narrative of the events.

[4] WDT Attorneys (WDT) entered the case having sought, in 2023, to join as an amicus curiae. The application to join was acquiesced in by the candidate and the other parties and on that basis WDT was joined unopposed. The status of WDT as a genuine amicus curiae, or as an interested party, is controversial and is addressed discretely elsewhere in this judgment.

[5] This matter was heard on 6 August 2024, almost three years after the recommendation.

[6] The Society and WDT both seek the same form of relief: i.e., that the recommendation be reviewed and set aside and remitted to the JSC.

[7] The argument relied upon to set aside the JSC recommendation is that the recommendation is irrational, although the ground of 'irrationality' is not articulated in the notice of motion.

[8] The papers traversed a wide range of criticisms. However, the crucial issues as ventilated in the hearing which the Society and WDT relied upon to justify the review can be succinctly described thus:

8.1. Did the October sitting of the JSC err by not considering the Society's adverse written comments submitted after the publicly announced deadline for comment, which despite being late, ought to have been categorised as

'serious' (touching on the candidate's alleged lack of integrity in his personal financial behaviour and his allegedly unjudicial temperament and his alleged inadequacy of legal knowledge) and by reason of that categorisation been received for consideration?

- 8.2. Did the candidate on 30 June 2021, when he signed the prescribed application forms for consideration as a candidate for judicial office, answer appropriately (i.e. truthfully and ethically) this question:

'Q: Are there any circumstances financial or otherwise known to you which may cause you embarrassment in undertaking the office of judge?

A: (Answer) yes or no.

The candidate answered: No.

The candidate added:

'Note:

In this regard I disclose to the JSC that I owe a debt to the [Society] for Bar fees which was settled as set out in email correspondence attached hereto as Q7.3. Proof of Payment is attached Q7.4'¹

- 8.3. Did the candidate at the time he applied for judicial office culpably fail to disclose that he had a debt owed to a school which his children had attended, which debt was in arrear for three years at the time of the application?
- 8.4. Did the candidate during the October JSC 2021 interview culpably mislead the JSC by failing to ensure that JSC was fully informed concerning the status of the debt of R241,852.72 owed by the candidate to the Society for arrear bar subscriptions, in that he failed to expressly mention that a sum of R20,000 of that debt remained outstanding at that moment, which payment was subject to an agreed payment plan to satisfy the debt, and in respect of which plan, he was compliant.

[9] Other grounds mentioned in the papers were not pursued in the hearing; e.g., the so-called Le Roux affair, and the contention that seeking a clearance certificate from the LPC rather than the Society founded an inference of impropriety. In my view, they were correctly abandoned.²

¹ The attachments Q7.3 and Q7.4 were not included in the Rule 53 Record prepared and filed by the JSC.

² The Le Roux affair was about an aggrieved litigant's complaint against the candidate which was never established and in respect of which the Society itself had already exonerated the candidate. The Clearance certificate affair

The Relevant Facts

[10] The candidate has been a practicing advocate since 2003, for most of that time, as a member of the Pretoria Bar. When the Mpumalanga Division of the High Court was established in 2016, he among others, was instrumental in founding the Mpumalanga Society of Advocates. The new Division required judges. From 2018 onwards the candidate served several terms back-to-back as an acting judge. This is a decision which to the knowledge of all practicing advocates is dangerous. Such a diversion from regular practice has the logical and commonplace effect of interrupting the momentum of practice. The candidate's practice withered away with concomitant adverse financial implications well-illustrated in the events which followed.

[11] The candidate first applied to the JSC for a vacant judgeship in 2019. In the JSC interviews of 6 August 2019 he was not recommended. The Society did not comment adversely on the candidate in that round of interviews.

[12] On 10 December 2019, the candidate applied again to the JSC. As a result of the Covid pandemic and the Lockdown regime, JSC interviews were much delayed as with so much else at that time. The JSC convened eventually in April 2021. In the meantime, on 19 March 2020, the Society had submitted adverse comments to the JSC.

[13] At the April 2021 sitting of the JSC the candidate was not recommended.

[14] Later, in June 2021 when a call was again made for applications to fill vacant judgeships in the Mpumalanga Division, the candidate applied for the third time. His application and standard questionnaire are dated 30 June 2021.

[15] On 12 August 2021 the JSC publicly invited comment about the shortlisted candidates. A deadline was set at 13 September 2021. The invitation to comment

was a view initially expressed by the Society that the candidate had deceitfully sought a clearance from unprofessional conduct from the LPC only, and had mischievously avoided seeking the clearance from the society of which he was a member at the relevant time, because of claims by the Society that he had misconducted himself in relation to his arrear bar fees and would have thus been refused a clearance certificate. The candidate's rebuttal was that he took the view that since the advent of the LPC it was the sole and appropriate regulatory body to issue certificate of good conduct.

included this statement: 'No comments received after the closing date will be considered'.

[16] The JSC during the April 2021 interviews had addressed the process of calling for and receiving comment on candidates. The April interviews had been marred by the unedifying spectacle of candidates being ambushed by adverse comment. The members of the Commission had their attention drawn to the unsatisfactory consequences of such a tactic by the then President of SCA, Maya P. The consensus of the JSC was that a strict deadline for comment had to be set and that no further comment would be received if submitted after the deadline, subject to one caveat. The caveat was that if the 'late' comment raised a 'serious' issue it would indeed be received and considered.³ Thus when the call for comment for the October 2021 interviews was made, the statement, cited above, was added to the notice that comments had to be in timeously submitted. In the hearing of this case, it was made plain that there was no criticism of this policy choice by the JSC and that it formed no part of the attack on the decision of the JSC. The focus of the attack was, rather, that the Society's comments satisfied the threshold of 'seriousness' and on the terms stipulated by the norms endorsed by the JSC the late comments ought to have been received and considered.

[17] The Society's comments were submitted on 22 September 2021, nine days late. A request to condone the late submission was included. It is common cause that the Commissioners empanelled in the October 2021 interviews were never alerted to the existence of the Society's late submission containing adverse comments.⁴

[18] The Society's comments to the April 2021 sitting of the JSC, it is common cause, were substantially the same as the adverse comments the Society submitted to the JSC for the interview in October 2021.

³ From the bar, Counsel for the JSC informed the court that notwithstanding the elapse of three years and four months since this decision was taken, and in respect of which a committee was to have drawn up a formal guide on the issue, nothing had yet been done.

⁴ Independently of the factor that the comments missed the deadline, it was explained by the JSC that an official responsible for managing the flow of comments overlooked the document and noticed it only after the interviews had been concluded. These circumstances however are inconsequential given the outcome of the case.

[19] The material portion of the Society's initial comments, dated 19 March 2020, which were made available to the commissioners in the October sitting, were thus:

144. Whether the candidate is not a fit and proper person to be appointed as a judge of the High Court for the following reasons:

- 144.1.1 He is not a member in good standing of the Mpumalanga Society of Advocates. This fact ought to have been disclosed by the candidate in his application. His failure to disclose this fact borders on dishonesty thus putting into question his suitability for judicial appointment;
- 144.1.2 The candidate was previously a member of the Bar Council and Treasurer of the Mpumalanga Society of Advocates. He had to be removed from both positions because he was in arrears in Bar fees and chambers rental by in excess of two years and to date he is still in arrears in excess of two years. His chamber had to be taken away from him, and to date he does not have a chamber although his membership of the Bar has not been terminated. As a former member of the Bar Council, the candidate was aware of the resolution taken by the Bar Council that members owing more than 3 months Bar fees are not in good standing and will thus not receive letters of good standing from the Bar.
- 144.1.3 Aware of this resolution, and faced with the predicament that he is not in good standing with the Bar, he elected not to approach the Bar for a letter of good standing, instead, he approached the Provincial LPC which does not know his standing with the Bar, for a letter of good standing.
- 144.1.4 This conduct borders on dishonesty and completely unacceptable from a person who aspires to be appointed to the bench. We became aware for the first time when we were reviewing his application that he has obtained a letter of good standing from the LPC, without disclosing to the LPC that he is not in good standing with the Bar. It is also worrisome that the LPC gave him a letter of good standing without first checking with the Bar in which he is a member. The Bar will, in the light of this revelation of his purported letter of good standing, be taking disciplinary steps against him. His appointment to the bench will put the judiciary into disrepute. The candidate is invited to withdraw his application.

144

145 The candidate's knowledge of the law, including constitutional law

- 145.1 The candidate does not have a proper knowledge of the law as reflected in his judgments and the manner in which he engages practitioners in Court on issues of law. His understanding of constitutional law is completely lacking.

146 The candidate's commitment to the values of the Constitution

- 146.1 One of the judgments by the candidate where the SCA granted leave to appeal, *Gift Siboniso Mnisi & 2 Others v Barberton Mines* SCA case no MM 2495/19 raises serious concerns.
- 146.2 The matter is sub judice. However, from the judgment, the understanding of the law particularly constitutional law by the candidate leaves much to be desired.

147 The candidate's knowledge of the law, including constitutional law

The candidate's knowledge of the law and constitutional law is lacking.

148 Whether any of his judgments have been overturned on appeal

- 148.1 In his application, the candidate indicates that four of his judgments been taken on appeal, one of which was overturned by the SCA, but did not give much detail, further the SCA case number was not given.
- 148.2 We were able to find the case and the full citation of *Malherbe v S* (1182/2018) [2019] ZA SCA 169 (29 November 2019). In this matter the appellant had been convicted based on an invalid search warrant in terms of section 21 (1) (a) of the criminal procedure act 51 of 1977. A magistrate's court had convicted the appellant despite the fact that a search warrant had been issued without information under oath as required. The candidate and his brother Mudau J upheld the magistrates court decision.
- 148.3 The SCA held that the appellant did not have a fair trial because his fair trial rights in terms of section 35 of the constitution had been breached. This judgement confirms the candidate's lack of constitutional law understanding and how to apply the constitutional principles to the facts.

149 Judgments upheld on appeal

In his application form, the candidate mentions one judgement upheld an appeal by the SCA but does not give much detail and the citation of the SCA case number. The reviewer was unable to find the SCA case. It seems the matter was heard in Chambers as it was an application for special leave.

150 The extent and breadth of the candidate's judicial experience

150.1 The candidate has worked as a prosecutor from 1998 to 1993 and practiced as an advocate for the past 16 years. He joined the Bar as a member of the Pretoria Society of Advocates in 2008 after serving pupillage there and subsequently joined the Mpumalanga Society of Advocates in 2016 of which he is still a member.

150.2 He started acting as a judge in 2018 on short stints and acted long durations three times. He is often invited by the Judge-President to act for reasons not clear to us given his superficial understanding of the law and abrasive conduct in Court.

151 The candidate's fairness and impartiality

The candidate is not impartial and his conduct in Court does not display fairness.

152 The candidate's independent mindedness

The candidate is not independent.

153 The candidate's ability to conduct court proceedings

The candidate lacks experience in the conduct of the Court proceedings. On many occasions he prevents counsel from making submissions by interrupting and disruptive behavior and refuses to be persuaded. The candidate is abrasive and disruptive, a conduct uncalled for in a judicial officer.

154 The candidate's reputation for integrity and ethical behaviour

The candidate does not have a good reputation and his ethical behavior is questionable.

155 The candidate's judicial temperament

The applicant lacks judicial temperament and has been observed in many occasions improperly addressing counsel and seeking to demonstrate that he knows the law more than counsel, when in fact exposing his lack of knowledge of the law.

156 The candidate's commitment to human rights, and experience with regard to the values and needs of the community

The candidate has shown a commitment to legal training, particularly pupils at the Bar. However, the candidate has not presented information that indicates that he is involved in

community projects and in projects aimed at advancing human rights.

157 The candidate's potential

The candidate does not have the potential of becoming a judge. It is unclear why he is continuously invited by the Judge-President to act, when he lacks all the attributes of a judicial officer.

158 The message that the candidate's appointment would send to the community at large

His appointment will be shockingly inappropriate. It will put the judiciary into disrepute and undermine the integrity of the judicial system.

[20] Notable about the allegations of poor character is that they are all bald opinions.

[21] The Society's charge sheet, dated 31 March 2020, which was initially available to the JSC in April, and thus, again in October, alleged the following:

'....

Whereas, in your capacity as member of the Society you are alleged to have committed certain act of misconduct which may lead to your expulsion from the Society if you are found guilty of the misconduct. Now therefore you are charged with the following acts of misconduct/unethical acts of misconduct:

Charge 1 Fraudulent cession / attempted fraud

1. On 26 March 2020 I obtained information that you have attempted to unlawfully cede some of your invoices in favour of the Mpumalanga Society of Advocates (*'Society'*). In doing so, you unlawfully and with the intent to defraud the Society, instructed or requested the Bar Administrator, Mrs Yolanda Roelofse, who is your wife, to credit you with an amount of R124,409.40 in lieu of your outstanding fees.
2. Acting as aforesaid, Mrs Roelofse, credited your outstanding accounts with the said amount of R124,409.40 on 10 March 2020 and thereby creating an impression that you have paid to the Society that amount of money.
3. Your conduct is fraudulent in that:

- 3.1 You attempted to cede your unpaid invoices or claims to your instructing attorneys, and thereby becoming a cedent. The Society, in turn, purportedly became a cessionary;
 - 3.2 When purporting to cede your invoices or claims in favour of the Society as cessionary, you deliberately failed to discuss and obtain consent from the Society in order to determine whether the Society was prepared to follow up with your instructing attorneys for payment of the invoices or claims;
 - 3.3 When you were credited with the said amount of R124,409.40 neither you nor your instructing attorneys had made any payment of the said amount to the Society, and therefore fraudulently obtained the credit for fees that were not paid;
 - 3.4 You intentionally and fraudulently passed on the risk of your unpaid invoices or claims to the Society;
 - 3.5 You had no intention of reimbursing the Society in your full indebtedness, being a total of R241,853.72; and
 - 3.6 When you acted in the manner described above, you knew or ought reasonably to have known that the Society had handed over your debt to its debt collecting attorneys for recovery. Accordingly, your purported cession was calculated or intended to fraudulently relieve you of your indebtedness in the amount of R124,409.40 from the Society.
4. In consequence of your conduct, the Society has decided to level the abovementioned charges of misconduct of fraud against you

Charge 2 Unethical conduct - uttering false or misleading information to the Judicial Services Commission

5. During December 2019, you submitted an application to the Judicial Service Commission (JSC) for one of the three vacant Judicial positions that were advertised for the Mpumalanga Division of the High Court by submitting among others a completed "questionnaire for the candidate for Judicial appointment".
6. In section 4 of the questionnaire, under 'GENERAL', you were asked the

following question: "(1) Are there any circumstances, financial or otherwise, known to you which may cause you embarrassment in undertaking the office of a Judge?" Your response was "No".

7. You were further asked: "(4) is there any other relevant matter which you should bring to the attention of the Commission?" Your response was "No".
8. While providing answers to the above questions, you failed to disclose to the JSC that the Society has handed over your outstanding debt of R241,852.72 to attorneys for collection and that a letter of demand had already been issued to you. Your responses to the above two questions were intended to mislead the JSC because:
 - 8.1 You knew that you were not a member in good standing of the Society;
 - 8.2 Your account was in arrears with an amount of R241,852.72 in outstanding Bar fees to the Society.
 - 8.3 As a result of the astronomical outstanding Bar fees, the Society removed you from the chambers that you had previously occupied;
 - 8.4 You were disqualified from serving in the Bar Council due to your enormous debt to the Society.
9. As a result, your conduct renders you guilty of intentional and dishonest misrepresentation to the JSC.

Charge 3 Non-disclosure of material information

10. When submitting your application for judicial appointment, you were required *inter alia* to obtain a letter of good standing from the professional body to which you are a member.
11. You were aware, when you compiled and submitted your application for judicial appointment that you were not a member in good standing with the Society, hence you subverted the issue by requesting the statutory Provincial Legal Practice Council, of which you are a member, to provide you with a letter of good standing.
12. Despite the fact that you are still a member of the Society, you decided not to approach the Chairperson of the Society for a letter of good standing. Instead, you elected to approach the statutory body that regulates all legal practitioners, in Mpumalanga Province in particular, which was in no position to know your standing with the Society to issue a letter of good standing to

you.

13. Further, when you obtained the letter of good standing from the LPC, you failed to disclose to the statutory body that you were indebted to the Society in the amount mentioned above.
14. Your conduct is not only unethical but amounts to dishonesty in that you intentionally failed to make a full disclosure to the LPC and the JSC that you are not a member in good standing with the Society, and that such conduct led to you losing your chamber that you were allocated in the building that is housing the Society.
15. Your conduct resulted in the LPC issuing you with a letter of good standing, while you are in truth and in fact not a member in good standing with the Society.
16. As a result, your behaviour renders you guilty of unethical and dishonest misconduct due to your intentional omission of true facts. Accordingly, your actions amount to fraudulent misrepresentation and, if found guilty, punishable by expulsion from the Society.

General

17. You are hereby informed that a copy of this charge sheet shall be circulated to the LPC, both the provincial and national offices, the General Council of the Bar (*the GCB*) and to the JSC as we hold the view that your fraudulent actions deserve an investigation which may lead to even more serious consequences from the statutory bodies and your voluntary association in the form of the GCB.

W. R. Mokhare SC

Chairperson Mpumalanga Society of Advocates 31 March 2020'

[22] The candidate in his affidavit states that these allegations were shared with Legodi JP, the LPC and the JSC. Among the grievances of the Society is the belief that the LPC did not investigate these issues. The LPC was not cited in the application and has not filed an affidavit.

[23] It follows that even were the adverse comments properly to be categorised 'serious' within the meaning the JSC sought to employ the term, the JSC was indeed

aware of the allegations in October 2021. Moreover, the October sitting of JSC, as did the April sitting of the JSC, expressly addressed the Bar fees debt issue.

[24] The consequence thereof is that, on the facts, there is nothing to be made of the late submission *per se* nor that the 'October version' was not given to the commissioners.

[25] The attack by the Society on the JSC decision thereupon shifted to focus on the exchange between Commissioner Madonsela and the candidate in the October 2021 interview. It was evident that Adv Madonsela was offended by an earlier remark by the candidate that because he was a white person his appointment to the Mpumalanga Bench, at that time composed only of black people, would serve the cause of transformation. Adv Madonsela addressed questions to the candidate prefaced by referring to him having alleged to have been a fugitive from justice, an exaggerated allusion to the Society's allegation that he resigned to avoid facing discipline for non-payment. The exchange between the two persons was then further marred by Adv Madonsela contriving umbrage at being interrupted by the candidate when posing a question when the candidate too quickly began to answer. The candidate answered the question about the current status of the Bar fees debt thus:

'Its now paid. Its now paid. It was during the same time[interrupted by Adv Madonsela who terminated his interrogation in a huff]

[26] This is the utterance upon which the Society's argument rests. The proposition is that he failed to alert the JSC to the fact that there was still R20,000 of the debt outstanding. The contention is meritless on its own terms. On the common cause facts, the outstanding R20,000 was not yet due. The candidate was not at the time of the utterance in default, nor is it so alleged. Moreover, objectively the answer was cut off and the amplification of the answer did not occur. The candidate says that but for the interruption he would have gone further to describe the full factual position. That statement cannot be rebutted, nor on the probabilities is it implausible because, objectively, there could have been no reason to conceal the fact of a payment owed, but yet due. Therefore, in context, it is specious to allege an unethical non-disclosure.

[27] In sum, the facts show convincingly that on this issue, not only was the JSC aware of the material facts and allegations, but that the JSC expressly addressed them as it saw fit. As a result, the JSC cannot be said to have not applied its mind to these issues.

[28] The second leg of the Society's criticisms as contained in the comments cited above relate to what may be usefully described as the candidate's 'professional character'.

28.1 The JSC was informed of the society's poor opinion of the candidate. Notably, the comments, as already noted, consisted of generalised condemnation in which opinions were stated but were bereft of any real narrative substantiation.

28.2 It is appropriate to be realistic about character references in any context of life. Too often a person is disparaged, sincerely, by critics who experience difficulty in backing up their opinions with concrete facts. In the context of the role fulfilled by the JSC in the critically important process of evaluating a judicial appointment, it may be cogently argued that adverse perspectives ought not to be jettisoned merely because the critique is thin on the facts. However, nor could adverse commentary be taken at face value. Preferably, in the matter of a candidate's character, a wide conspectus of opinion ought to be sought.

28.3 Such a wide spectrum of opinion was indeed available to the JSC. In this regard, the Society's image of the candidate was an outlier. Support for his appointment was expressed by several formations of the organised profession: ie the BLA, (some of whose members would, logically, also be members of the Society), NADEL, the GCB, the law Society and the LPC. Also, the JSC had the benefit of the perspective of Legodi JP, the head of the Mpumalanga Division, who had worked closely with the candidate during periods when the candidate served as an acting judge, and who expressed a positive perspective.

[29] Also, before the JSC was the Constitutional Court decision in *Mkhatshwa v Makhatshwa*⁵ which served before the JSC because the case included aspersions against the candidate in his role as acting judge and against Legodi JP. The counsel arguing the presence of misconduct by the candidate and of Legodi JP was Adv Mokhare SC. The Constitutional court described as scurrilous and defamatory the allegations made against Legodi JP and against the candidate, censuring Adv Mokhare SC, among others and exonerating the candidate and Legodi JP.

[30] Moreover, the JSC discussed at length the candidate's disposition and temperament after the interview. Plainly, the JSC applied its mind to this aspect of the candidate's fitness to serve as a judge.

The WDT intervention

[31] The review application was issued on 25 November 2021. The JSC only served a notice of opposition on 22 January 2022, but on 1 November 2023, a year later, changed its mind and gave notice that it would abide the decision of the court. A record had been filed on 22 January 2022. Further papers were filed by the parties thereafter.

[32] Also, the candidate sought to achieve a rapprochement with the Society and to this end he met with the chair of the Society's council, Adv Mokhare SC. It seemed that the Society was agreeable to withdraw its review case. Then the Society performed a volte face when WDT attorneys announced its discovery of a judgment against the candidate.

[33] WDT had, so it said, fortuitously, stumbled upon a civil judgment against the candidate for R31,099.50. The judgment had been granted in the Magistrate's Court on 31 May 2021 in favour of Laerskool Nelspruit. The sum represented arrear school fees for the years 2018, 2019 and 2020. The summons had been issued in November 2020. The return of service was on 7 April 2021 and records that at 10h55 it was placed at the outer door at an address in Mbombela, alleged to be the home address of candidate. There is no information on record to inform the court about whether the

⁵ [2021] ZACC 15, dated 18 June 2021. See esp para [10]–[13]. The gravamen of the controversy was a direction by Legodi JP to hear a matter in camera before the candidate. The accusation was that undue influence has been exercised.

choice of service address was a *domicilium citandi* or not. Given the character of the plaintiff, it is not the obvious inference to draw that parents would contract with the school inclusive of a *domicilium*.

[34] On 24 August 2023, almost two years after the appointment process had been stalled, WDT attorneys filed an application, *qua amicus curiae* in order to ventilate its discovery of the judgment and to contend that the candidate wilfully failed to make appropriate disclosure of these facts to the JSC. The joinder was not opposed by the candidate for the pragmatic reason that he wished to expedite an end to the saga.

[35] The candidate deposed to an affidavit in which he declared that he only became aware of the civil judgment on 1 February 2023 when told of it by his bank. Upon further investigation it transpired that service had been effected on an old address and the summons had not been received by him. An agreement was reached with the school to pay off the sum of R25,000 in instalments. Subsequently, this judgment was rescinded on 30 March 2023 after the School acknowledged on 7 March 2023 that the debt had been paid in full.

[36] As to the existence of the debt *per se*, the candidate explained that he had reached an arrangement with the former Principal of the school to be accommodated in respect of the debts. The rationale was that he was suffering financially straitened circumstances during the years the fees had fallen due. However, he had during that same period acted as a legal representative for the school at reduced fees, and later, had acted *pro bono*, in certain matters. This was a factor in shaping an understanding that he would be accommodated until his financial position was relieved by a permanent judicial appointment whereupon he would pay the sum due. The circumstances giving rise to his financial difficulties was explained by the consequences of dwindling and dissipated legal practice in the wake of his spells as an acting judge. This, axiomatically, was also part and parcel of the explanation for the debt to the Society for Bar fees; ie the lack of cash-flow to pay practice overheads. This account by the candidate is not rebutted.

[37] WDT, unable to rebut the explanation that the candidate was ignorant of the judgment at the time that he made the declaration in his application, shifted the focus of its attack against the candidate. The thesis for his unfitness for judicial office then

became the notion that he ought to have disclosed to the JSC that he was in arrears with his debt to the school because it was a potential 'embarrassment' within the meaning contemplated by the questionnaire. The contention was that for a debt to be in arrears to a school constituted a matter of concern to the 'community' as there would be a poor impression created of a person who was delinquent in paying school fees occupying the position of a judge. Ostensibly, the implication is that the persons who had intimate knowledge of the school finances would think ill of the candidate and perhaps gossip to the rest of the parent community that the candidate was a defaulter.

[38] This thesis advanced by WDT grapples unsuccessfully to engage all the facts. Unless there is a foundation to brand the candidate's explanation false – which is not the case advanced by WDT - the premise for a deliberate non-disclosure of a material fact required to be disclosed to the JSC is absent. He alleges that he laboured under the understanding that the due date for payment had been deferred until he was able to pay. Upon that factual premise; i.e., a debt which was not yet due, non-disclosure cannot attract opprobrium. Accordingly, an ethical mis-step is not demonstrated. Moreover, the reason for the initial non-payment timeously is explained: i.e., he was hard-up, not a recalcitrant debtor evading his obligations.

[39] As a result, the criticism of the candidate on this ground is ill founded.

The Rationality Argument

[40] The case advanced on behalf of the Society and of WDT is said by each to be premised on the JSC's decision to recommend the candidate being an irrational act.

[41] The font of the norm of rationality is *Pharmaceutical Manufacturers association of South Africa: in re Ex Parte President of RSA*.⁶ At para [85] to [86] it was held that:

'[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public

⁶ 2000 (2) SA 647 (CC)

power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise, a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.'

[42] The application of the norm of rationality in our law of review requires an enquiry into whether or not a disconnect exists between the purpose for which the decision is made and the choice of decision itself. In *Democratic Alliance v President of the RSA*⁷ at para [32] it was held:

'The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional.'

[43] Can it be argued the JSC was irrational to recommend the candidate for a judgeship? In my view the contention of irrationality cannot be sustained.

'Financial conduct'

43.1. The traverse of the facts shows that the *allegations* about a lack of integrity regarding the Bar fees issue were before the JSC and the JSC applied its mind thereto. Objectively, therefore, a complaint that the JSC irrationally refused to receive the adverse submissions evaporates on the facts: any case built on procedural irrationality fails.

43.2. Moreover, the JSC applied its mind not only to those allegations but to the candidate's explanations too. Plainly, the JSC concluded that did not regard

⁷ 2013 (1) SA 248 (CC)

the Bar fees issue as a reason that demonstrated unsuitability for judicial office. Why might that conclusion be irrational? The candidate was plainly experiencing financial difficulties and said so himself. That fact objectively, is not a reason why he is unsuitable for judicial office.

43.3. The school debt issue was not before the JSC. Nor could it conceivably have been put to the JSC. Axiomatically the JSC could not apply its mind to it. As already addressed the complaint about culpable non-disclosure in this regard is ill-founded. The question arises, objectively, were the JSC to have known of the fact, is it likely that the JSC would not have made the recommendation. On the totality of the facts on record, in my view, the JSC decision would not have been upset by the revelation.

43.4. The topic of a potential judge's financial stability is not a peripheral aspect of the evaluation of suitability for office. Self-evidently, a judge whose finances are wobbly presents a risk of falling foul of undue influence related to solving his money troubles. In this case, the cause of the candidate's cash flow problems were divulged and explained. There is no rebuttal of his version. Could it be argued that the JSC was irrational in being satisfied with the explanations given by the candidate? In the circumstances presented, in my view that conclusion cannot be reached on the 'financial conduct' leg of the case.

'Professional character'

43.5. Allusion is made in the Society's argument to the voting in which three commissioners voted against the candidate. Why the three commissioners did so is revealed in the transcript of the JSC deliberations: i.e., they thought his temperament to be unsuitable. The 18 other commissioners thought that his temperament did not compromise his suitability. These are value judgments. Can it be argued that the majority decision to recommend was substantively irrational?

43.6. The fact that the recommendation was by a majority vote does not per se render the decision rational. The enquiry must be whether on the facts known

to the commissioners. no rational person could support the recommendation. The JSC had the perspective of, among others, the Judge President of the Mpumalanga Division who asserted that the candidate's disposition was not typically belligerent and that he was a diligent and productive member of the Bench. The absence of formal complaints to the LPC was a relevant factor and, moreover, his extended periods as an acting judge afforded plentiful opportunities for engagement with the legal profession to yield complaints, had certain encounters with the legal profession caused grievances serious enough to warrant lodging complaints. The support of the BLA, NADEL, the GCB and the Law Society and of the judges on the JSC were likewise proper inputs to weigh along with the adverse criticisms proffered by the Society.

[44] The JSC guidelines on the selection of judges, para 15, imposes on the JSC the obligation to determine whether a person is fit and proper by means of:

' ... a holistic assessment of a candidate's suitability for appointment to the bench, with reference to a broad and cumulative reading of multiple factors which will include integrity, knowledge, scholarship, experience, dignity humility, courtesy, judgment, wisdom, independence, character, courage, forensic skill, capacity for articulation, diligence, energy and industry. Character includes considerations such as whether a candidate is honest, truthful, trustworthy and whether they keep their word.'

[45] This is what the JSC did, examining the warts along with the virtues of the candidate. There is no case on the grounds of irrationality to be made out. This outcome can be contrasted with the decision of the JSC in respect of the saga of Judge Motata. In *Freedom under Law v Judicial Service Commission*, the SCA set aside a decision of the JSC not to refer Judge Motata to Parliament to be impeached. FUL had sought the review of the JSC on the grounds that it was irrational, unreasonable and unlawful.⁸ In essence that judgment found that the majority on the JSC had misconstrued the facts and analysed them incorrectly leading to untenable outcome.

[46] The review application must accordingly be dismissed.

⁸ [2023] ZASCA 103 (22 June 2023)

The costs question

[47] Both the society and WDT contend that they ought to enjoy the protection against a costs order on the *Biotech* principle. That rule states that in a case implicating a constitutional principle a party should not be burdened by an adverse costs-order merely because it was unsuccessful when it acts in the public interest.⁹ The candidate, on the other hand, contends that there should be an attorney and client costs order in his favour because both the Society and WDT have been self-interestedly malicious and spiteful in bringing the application.

[48] The Society was, regardless of any gratuitous animus towards the candidate, under a moral and professional obligation consistent with its role as a voluntary association of practicing advocates to comment positively or negatively on every person who seeks a judgeship in its jurisdiction. This the Society has done in this case. The society, thereupon, actuated by its grievance that the JSC did not agree with its view, brought the review application. As has been shown in the analysis above, the Society's virulent criticism of the JSC's recommendation is without merit.

[49] The financial misconduct theme as advanced has withered on the vine. It is perhaps appropriate to record in this regard, an observation about what seems to be a common practice by Societies of Advocates; i.e. a glib elision of the duties of advocates in the conduct of the practice of law and the duties of advocates as members of a society of advocates. What constitutes appropriate 'professional conduct' is subject matter that a Bar Council shares with the LPC. 'Membership misconduct' is distinct from 'professional conduct' where it falls into categories of behaviour that are extraneous to the practice of law per se, but concerned with membership relationships in the narrow sense. Collegial behaviour in terms of the conventions observed within a society of advocates is a primary example. A further example is the honouring of debts to the society. In my view the financial relationship between member and Society ought not to be confused with 'professional conduct' in the senses described here. On such a premise, the requirement by the JSC for a

⁹ *Biotech Trust v Registrar, Genetic Resources & Others* 2009(6) SA 232 (CC) at paras [26] and [53] to [59]

clearance that a legal practitioner was in good standing would not necessarily include a failure to be up to date with Bar fees owed to a society.¹⁰

[50] As alluded to already, there is no substantiation of the truly 'professional misconduct' grounds: i.e. the society expressed opinions which were in competition with contrary opinions. Seeking a review was ill-conceived on such thin grounds.

[51] WDT's role is exceptional. Of no little importance is that the members of the firm WDT, have an unhappy history of antagonism with the candidate.¹¹ If it is assumed that WDT inadvertently learned of the judgment, as stated by it, it would in my view, have been proper for WDT, as a firm of attorneys, to have drawn attention to it. Prima facie, on the facts then known at the moment of discovery, the notion that the candidate had concealed a material fact from the JSC was a valid inference to draw, prior to and in the absence of the candidate's explanation. Persistence with the contention after the explanation was on record is a different matter. The shift in the thesis of the case; i.e. the notion of a community scandal, evidences a grasping at straws to sustain the materiality of the accusation.

[52] It might have been a prudent step for WDT, having regard to the unhappy interpersonal history with the candidate to have simply passed on the information to the Society and done no more, or passed it onto the Law Society or to the LPC and not itself have become an antagonist in the review application. It was wholly unnecessary for it to enter the fray save to guarantee that the issue would be indeed pressed.

[53] The intervention of the Society and of WDT has deferred the conclusion of the appointment process by three years and has self-evidently aggrieved the candidate. Moreover, his reputation had been assailed mercilessly. This conduct explains his stance on a punitive costs order.

¹⁰ This observation does not extend to the LPC where non-payment of sums levied by the LPC, *qua* statutory body, constitutes unprofessional conduct. Code of Conduct, Article 3.16.

¹¹ The deponent to the affidavit on behalf of WDT and the candidate had an altercation several years ago and they two have also clashed lately in the course of practice. The early incident was occasioned when the candidate tried to use the library of the firm of attorneys of which the deponent was the senior partner, whereupon the candidate was thrown out by the deponent. Later and more recently WDT accuses the candidate of failing to recuse himself from cases in which WDT were attorneys of record at a time when the review application had included WDT as a litigant. No formal complaint was pressed in respect of these issues.

[54] Anterior to the various parties' stances and motives, however, there are however important constitutional and public interest concerns which must enjoy primacy. It cannot be gainsaid that the utmost care must be exercised in each and every judicial appointment. It is by no means obvious that the degree of rigour with which the process of the JSC has historically been conducted is good enough and, in the future, advances by the JSC to improve its methodologies to meet the demands of the constitutional project are not unlikely.

[55] One facet of the appointment process is what, in broad terms, might appropriately be classed as public participation. Therefore there is the need for the public announcement of vacancies, a public call for comment from anyone and a public interview. This process affords an opportunity for persons who have knowledge of facts which are pertinent to the suitability of a given candidate to speak up in the public interest.

[56] Experience of real life offers any number of examples that show that whistleblowers and other kinds of informants about improprieties are not universally actuated by lofty ideals, but rather by resentments and hostility. It is better to receive all adverse comments, whether well-founded or contrived, whether sincerely but wrongly thought to be relevant to the public interest, or deliberately spiteful and mean, than engage in the evaluation of a given candidate in ignorance of a fact, ostensibly trivial or arguably irrelevant, but which from time to time turns out, after all, to be pertinent indeed.

[57] For these reasons, in my view, the fact that both the Society and WDT can plausibly be accused of being motivated by factors extraneous to the advancement of the public interest should have no material bearing on the appropriate costs order.

[58] There shall be no order as to costs because the public interest is served by adverse comment and even litigation, however unmeritorious, in relation to judicial appointments.

Conclusions

[59] Accordingly, the application must be dismissed and the recommendation of the JSC to appoint the candidate be declared free of the taint of irrationality, or unlawfulness or unconstitutionality on any other basis.

THE ORDER

- (1) The application is dismissed.
- (2) The recommendation of the first respondent that the third respondent be appointed as a Judge of the Mpumalanga Division of the High Court of South Africa is confirmed.
- (3) There is no order as to costs.


ROLAND SUTHERLAND
DEPUTY JUDGE PRESIDENT
GAUTENG, JOHANNESBURG

APPEARANCES

Date of hearing	: 6 AUGUST 2024
Date of Judgment	: 26 AUGUST 2024
For the Applicant	: Adv. M. Majozi, Adv. A. Ngidi, Adv. Q Didiza instructed by Leepile Attorneys Inc.
For the Amicus Curiae	: Adv. E.J. Ferreira SC, Adv. A.M. Van Niekerk instructed by WDT Attorneys
For the First Respondent	: Adv. Z. Minty instructed by the State Attorney
For the Third Respondent	: Adv R. du Plessis SC instructed by Pieter Moolman Attorneys