



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 2724/2022

In the matter between:

JULIUS SELLO MALEMA

Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY N.O.

First respondent

**THE CHAIRPERSON OF THE NATIONAL COUNCIL
OF PROVINCES N.O.**

Second respondent

MOJI LYDIA MOSHODI MP N.O.

Third respondent

BEKIZWE SIMON NKOSI MP N.O.

Fourth respondent

JUDGMENT DELIVERED ON 21 MAY 2025

THE COURT:

Introduction

1. Does a member of Parliament leave his obligations under Parliament's code of ethics by the door (like a discarded jacket) when he goes off on business other than parliamentary work?
2. This is an application¹ for the judicial review and setting aside of a decision taken by the respondents ("Parliament") in considering whether to discipline the applicant – a member of Parliament - under the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members ("the Code"). Counsel confirmed in the course of oral argument that the relief was sought both under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), and on the basis of the principle of legality.
3. Two fundamental questions arise from these proceedings.²
4. The first question is whether it is competent for the National Assembly ("NA") which, in terms of the Constitution, designates six persons from amongst its members to serve on the Judicial Services Commission ("JSC"), to investigate, discipline, and sanction such members by virtue of their conduct while serving on the JSC. This arises specifically in the context of members of Parliament ("MPs") who continue to hold the position of MPs while serving on the JSC.
5. If the first question is answered in the affirmative, the second question is whether in so acting in the present case, the NA committed a reviewable irregularity in its adoption of a report titled "*Report of Joint Committee on Ethics and Members' Interests on Complaint against Honourable JS Malema, MP*".
6. The parties hold directly opposing views on each of these questions. This matter therefore raises constitutional issues pertaining to the measure of accountability that may be demanded from MPs who serve on the JSC, and the role of the NA in ensuring that those whom it designates to the JSC conduct themselves in a

¹ The application was launched in two parts: Part A sought an urgent interim interdict, and Part B sought the review relief that is the subject of this judgment.

² In the answering papers the respondents took a non-joinder point, which was abandoned during argument. Nothing more needs to be said about it.

lawful and credible manner.

7. We proceed to set out the relevant legislative framework which underlies these issues. The facts will be dealt with thereafter, and the grounds of review assessed within the particular factual and legal context.

The relevant legislative framework

8. Item 1 of the Code defines the “*public interest*” as “*an outcome which affects any right of the public, public finances or the public good*”.
9. Item 2.1 of the Code describes the purpose and scope of the Code as providing “*a framework of reference for Members of Parliament when discharging their duties and responsibilities*”. It “*outlines the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding proprietary, integrity and ethical values of their conduct.*” The Code aims, in terms of Item 2.3 thereof, “*to create public trust and confidence in public representatives and to protect the integrity of Parliament*”.
10. The Code defines a “*conflict of interest*” as “*a situation in which a member contrary to the obligation and duty to act for the benefit of the public exploits the relationship for personal or pecuniary benefit*”.
11. The members to which the Code apply are simply defined as “*a member of the Assembly or Permanent Council Member*”.
12. The standards of ethical conduct expected of members are cast in broad language in Item 4.1 of the Code:³

“*Members must:*

4.1.1 *abide by the principles, rules and obligations of this Code;*

4.1.2 *by virtue of the oath or affirmation of allegiance taken by all elected*

³ Emphasis added.

members, uphold the law;

4.1.3 act on all occasions in accordance with the public trust placed in them;

4.1.4 discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests;

4.1.5 maintain public confidence and trust in the integrity of Parliament and thereby engender the respect and confidence that society needs to have in Parliament as a representative institution; and

4.1.6 in the performance of their duties and responsibilities, be committed to the eradication of all forms of discrimination.”

13. A member of Parliament breaches the Code if he or she contravenes, *inter alia*, clause 4.1 of the Code.⁴ Item 10.1.1.3 provides that a member breaches the Code if such member “*contravenes clauses 4.1, 5.1, 6.1, 6.2, 6.3, 7.1, 8.1, and 9.19.4 and 9.19.5 of this Code ...*”
14. There is no express provision in the Code that limits its application to specific instances, such as where MPs are engaged in parliamentary work. For present purposes, therefore, the Code itself does not state that it does not apply to MPs when they are dealing with matters falling outside of their particular duties as MPs, such as where they are sitting as commissioners on the JSC.
15. Whether such an exclusion must be inferred depends on the proper interpretation of the provisions of the Code within the relevant constitutional framework. The principles underlying the interpretation of documents as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵ are by now trite. In the more particularised context of statutory interpretation, the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and another*⁶ articulated these principles as follows:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would

⁴ See Item 10.1.1.3 of the Code.

⁵ 2012 (4) SA 593 (SCA) para 18.

⁶ 2014 (4) SA 474 (CC) para 28.

result in an absurdity. There are three important interrelated riders to this general principle, 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. This proviso to the general principle is closely related to the purposive approach referred to in (a)."*

16. Whilst the Code is not a statute, it is a public policy document of considerable importance, and we are bound to consider it within this now established framework.
17. We agree with the submission by counsel for Parliament that there are two fundamental constitutional principles that loom large in these proceedings.
18. The first principle is that no person or organ of state may interfere with the functioning of the courts: *"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".*⁷ Section 165 of the Constitution confirms that the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law.
19. The second principle is that Parliament is bound by section 195(1), read with section 195(2), of the Constitution in respect of the "basic values" of (amongst others) a high standard of professional ethics,⁸ the provision of services impartially, fairly, equitably, and without bias,⁹ and the value of accountability transparency.¹⁰
20. Reverting to these proceedings specifically, one of the spheres in which MPs

⁷ Section 165(4) of the Constitution.

⁸ Section 195(1)(a) of the Constitution.

⁹ Section 195(1)(d).

¹⁰ Section 195(1)(f) and (g).

may become involved by virtue of their office, and which falls outside of pure parliamentary work. is the selection of judges to the high and appellate courts in South Africa via the JSC. The JSC is not an ordinary portfolio committee of Parliament, but an entity established by the Constitution.¹¹

21. The composition of the JSC is prescribed by section 178 of the Constitution. More particularly, section 178(1)(h) of the Constitution provides that the JSC consists, *inter alia*, of “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”. In the present matter, the applicant was one of the opposition party members designated by the NA under section 178(1)(h) to serve on the JSC for the purposes of its hearing during April 2021.¹²
22. As we have indicated, section 165(4) of the Constitution obliges all organs of state to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.¹³ The authority of courts and obedience of their orders is the very foundation of a constitutional order founded under the rule of law. It depends on public trust and respect for the courts. The NA is an organ of state as contemplated by paragraph (b)(i) of the definition in section 239 of the Constitution.¹⁴ It thus carries the responsibility to assist and protect the courts, and not to take steps which will undermine their independence, impartiality, dignity, accessibility, and effectiveness.
23. As to the criteria to be considered when designating an MP to the JSC, the Court was of the view that the “*overarching purpose of the JSC’s composition is to safeguard judicial independence and to ensure public confidence in the*

¹¹ *Democratic Alliance v Hlophe and others* 2025 (1) SA 169 (WCC) para 64.

¹² The NA’s decision to designate six of its members to the JSC amounts to administrative action under PAJA: *Democratic Alliance v Hlophe supra* para 57.

¹³ *Democratic Alliance v Hlophe supra* para 61.

¹⁴ Section 239: ...“**organ of state**” means-

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution-

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer;...”

*appointment process of judges.*¹⁵

24. The Constitutional Court has previously held¹⁶ that, “[s]ince courts play a crucial role in our constitutional democracy, without doubt the JSC’s function of recommending appointments to the senior judiciary is of singular importance. Bearing in mind the importance of this function, I do not think it unreasonable to expect that those that bear the responsibility of nominating, designating or electing individuals for membership of the JSC will take their responsibility seriously and identify people who are suitably qualified for the position”.
25. How, then, do these principles come to play in the present matter?

The factual background

26. The facts underlying this application are essentially common cause. It all started with an urgent application instituted against the Economic Freedom Fighters (“EFF”) in the Gauteng Local Division, Johannesburg.

Manuel v Economic Freedom Fighters and others

27. In a judgment¹⁷ delivered on 30 May 2019 by Matojane J, it was ordered as follows:
- “1. The allegations made about the applicant, Trevor Andrew Manuel, in the statement titled ‘The EFF Rejects SARS Commissioner Interview Process’ dated 27 March 2019, are defamatory and false.
 2. It is declared that the respondents’ unlawful publication of the statement was, and continues to be, unlawful.
 3. The respondents are ordered to remove the statement, within 24 hours, from all their media platforms, including the first and third respondents’ Twitter accounts.

¹⁵ *Democratic Alliance v Hlophe supra* para 63.

¹⁶ *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) para 37. Emphasis supplied.

¹⁷ *Manuel v Economic Freedom Fighters and others* 2019 (5) SA 210 (GJ) at 230F-231A.

4. *The respondents are ordered, within 24 hours, to publish a notice on all their media platforms, on which the statement had been published, in which they unconditionally retract and apologise for the allegations made about the applicant in the statement.*
 5. *The respondents are interdicted from publishing any statement that says or implies that the applicant is engaged in corruption and nepotism in the selection of the commissioner of the South African Revenue Service.*
 6. *The respondents are ordered jointly and severally to pay damages of R500 000 to the applicant.*
 7. *The respondents are ordered jointly and severally to pay the applicant's costs on an attorney and client scale.”*
28. The Supreme Court of Appeal (“SCA”) subsequently considered an application for leave to appeal against the High Court’s order. On 17 December 2020¹⁸ it refused leave on the majority of the grounds advanced. The SCA did, however, grant leave in respect of the award of damages on motion. This was because established procedure in claims for unliquidated damages was that they be brought by action. Any development of that procedure to allow such claim to be brought on motion had been inadequately motivated, and the ramifications of any such development required careful consideration.¹⁹ As to the alternative relief sought - referral of the *quantum* of damages to oral evidence - such was appropriate in the circumstance of the limited material in the affidavits going to *quantum*, and the High Court's brief reasoning thereon.²⁰ As the issue of retraction and apology was inextricably entwined with the question of damages, it was appropriate that that issue too be referred to oral evidence.²¹

The JSC meeting of 15 April 2021

29. The applicant was a member of the JSC when it sat on 15 April 2021 to interview,

¹⁸ The judgment of the SCA is reported as *Economic Freedom Fighters and others v Manuel* 2021 (3) SA 425 (SCA).

¹⁹ *Economic Freedom Fighters v Manuel supra* paras 27, 92, 108, 111, and 113.

²⁰ *Economic Freedom Fighters v Manuel supra* paras 114, 116, and 119.

²¹ At para 130.

amongst others, Justice Matojane, who was applying for a position in the SCA. At the time that the JSC meeting was underway, there was a pending application before the Constitutional Court in relation to the SCA's order. The Chief Justice at the time (who sits on the Constitutional Court) was chairing the JSC meeting on the day.

30. The impugned exchange between the applicant and Justice Matojane on 15 April 2021 was reported as follows on News24:²²

“A 'reluctant' Julius Malema, a member of the Judicial Service Commission , on Wednesday questioned Supreme Court of Appeal (SCA) judge candidate Elias Matojane over his decision to award Trevor Manuel R500 000 in damages in a defamation case against the EFF.

Matojane, in 2019, found against the EFF, ruling that the party pay the former finance minister R500 000 for claiming he oversaw a "corrupt" process to appoint South African Revenue Service commissioner, Edward Kieswetter.

The EFF took the case to the SCA, which referred the determination of the possible sanction to another court. There now has to be a trial to decide the award.

Manuel took the case to the Constitutional Court and wants the cost order reinstated. Malema, who is also the leader of the EFF, admitted he was 'reluctant ' to ask the question because he was an interested party in the matter.

Malema said: The quantum was referred back to oral evidence. How did you arrive at the conclusion that it was appropriate for you to award R500 000 without any of the parties leading any oral evidence?

“I know that Manuel is now appealing to the Supreme Court. but the SCA has referred that matter back to you and said there must be oral evidence led - so that whatever figure you arrive at

is on the basis of that oral evidence."

Matojane, who is applying for a seat on the SCA, answered: "Mark Twain said nothing spoils a good story than the arrival of an eyewitness. This matter is pending before the Constitutional Court and I don't think the chief justice [Mogoeng Mogoeng] is interested in my musings, so my simple answer to you, Mr Malema, is that I cannot second-guess the decision that is going to be made by the Constitutional Court.

"The matter is now out of my hands. I have said what I had to say and, if the SCA has upheld me, we don't know what the chief justice is going to say. I am constrained to be seen as second-guessing what the decision of the Constitutional Court might be."

Malema responded: "Fair enough."

31. That was the end of the exchange.

The complaint, and the Ethics Committee's findings

32. On 19 May 2021 Mr P. Naidoo, the executive secretary of the Council for the Advancement of the South African Constitution ("CASAC") lodged a complaint²³ about the applicant to Parliament's Joint Committee on Ethics and Members' Interests ("the Ethics Committee"). There were three elements to the complaint, namely (a) statements made by the applicant at a press conference on 30 March 2021 concerning the Zondo Commission; (b) comments made by the applicant during an interview of Justice Pillay in the JSC; and (c) relevant to the present case, the comments made by the applicant in the course of interviewing Justice Matojane in the JSC. In this regard, CASAC complained that the applicant "*obviously [had] a vested interest in undermining Judge Matojane by seeking to cast doubt on the ruling and implying some improper motive on the part of the judge*".

²³ Under Item 10.2.2.2 of the Code: "Any person or body may submit a complaint to the office of the Registrar concerning a breach of the Code, as contemplated in clause 10.1 of the Code by a Member. The Complaint may be in the form of a sworn affidavit or an affirmation stating the facts upon which the Complaint is based."

33. On 20 May 2021 Parliament's Acting Registrar²⁴ advised the applicant of the complaint and afforded him an opportunity to respond to it within 7 working days.²⁵ The applicant reacted on the same day: *"He is talking rubbish. That's my official response."*
34. The Ethics Committee convened a meeting on 30 August 2021 at which a video clip of the JSC interview of 15 April 2021, with the exchange between Justice Matojane and the applicant, was shown. After deliberation, the Ethics Committee accepted a draft report tabled by the Acting Registrar. In the draft report, the Acting Registrar recommended a finding that the applicant had breached Item 10.1.1.3, read with Items 4.1.3 and 4.1.4, of the Code,²⁶ as he had not acted in accordance with the public trust placed in him as a representative of the NA on the JSC when he asked a question to Justice Matojane concerning a judgment that related to the political party to which he was affiliated.²⁷ The draft report recommended that it be found that the applicant had not placed the public interest above his own when he asked questions that related to a court matter in which he was personally involved.
35. We have indicated earlier that CASAC's complaint to Parliament comprised three elements. The Committee ultimately found that the comments made by the applicant in respect of the Zondo Commission fell *"within the realm of politics as politicians express different sentiments on the Zondo Commission"*. The Committee found further that the questions in relation to Justice Pillay were in the interests of the public. These two elements of the complaint were therefore dismissed.
36. The engagement with Justice Matojane stood, however, on a different footing. The Committee found that the applicant's comments to Justice Matojane in this respect constituted a breach of Item 10.1.1.3, read with Item 4.1 (in particular, Items 4.1.3 and 4.1.4) of the Code. The Committee Report put the issue as

²⁴ From the Office of the Registrar of Members' Interests.

²⁵ Under Item 10.2.2.6 of the Code.

²⁶ Quoted above.

²⁷ The finding was made under item 10.1.1.3 of the Code.

follows:

“The Committee noted that the member entered a question to Judge Matojane that related to an award of R500 000 against the EFF in favour of Mr Manuel in a case in which the Supreme Court of Appeal ordered oral evidence to be led.

The Committee held the view that the Member engaged in a matter that concerned his and his political party directly. The matter was before a court of law. The Committee further held the view that the Member placed himself in a position of conflict in respect of the comments that he made toward Judge Matojane as he represents the National Assembly on the Judicial Services Commission and should not have used the platform for his personal interests.

FINDING

The Committee found that the member breached item 10.1.1.3 of the Code read with item 4.1 (i.e., items 4.1.3 and 4.1.4).”

37. The applicant was informed of the Ethics Committee’s finding on 9 September 2021, and he was invited to provide written representations on an appropriate sanction by 7 October 2021.
38. On 4 October 2021 the applicant's attorneys of record responded by requesting various documents and information relating to the complaint and the manner in which it had been processed by the Ethics Committee. The Committee responded on 7 October 2021, and indicated too that the applicant's deadline for submission of written representations on sanction would be extended to 13 October 2021.
39. The applicant's representations were submitted on 14 October 2021. The applicant contended that no sanction should be imposed against him in respect of the complaint as such sanction would be in contravention of his constitutionally protected rights. In the alternative, he contended that *“should the Committee proceed to impose a sanction, such sanction should be the least punitive measure, commensurate with this Committee's appreciation of the need to protect MPs freedom of speech.”*

40. Notably, in the applicant's representations it was expressly stated that the question to Justice Matojane had been asked by the applicant *"in his capacity as a member of the National Assembly on the JSC, and the question asked was the view of the Supreme Court of Appeal"*. We return to this aspect later in this judgment.
41. On 22 November 2021 the Ethics Committee adopted the following recommendation in respect of sanction:²⁸
- "That the Member enter an apology in the House by specifically apologizing to Judge Matojane, and the Judicial Services Commission for his question to Judge Matojane during the interview process that related to the quantum of R500 000 damages."*
42. The Ethics Committee's report and recommendations served before the NA on 7 December 2021. The report and recommendations were adopted, with 193 members of the NA in favour, 64 members abstaining, and 34 members voting against. The Speaker has explained, on behalf of Parliament in the answering papers in these proceedings, the reasons for the NA's agreement with the Ethics Committee's stance.
43. The first reason was the fact that the EFF (of which the applicant is a member) was a party to the litigation before Justice Matojane and the SCA.
44. Second, the question that the applicant asked Justice Matojane was: *"How did you arrive at the conclusion that it was appropriate for you to award R500 000 without any of the parties leading any oral evidence?"*. Justice Matojane had however already addressed the reasons for his order – he had done so in his judgment. There was accordingly no legitimate purpose to be served by the applicant asking this question after judgment had been given and in

²⁸ Under item 10.7.7.2 of the Code: *"... in the event of the Committee finding that a Member is guilty of contravening clauses 10.1.1.3 or 10.1.2 of this Code, the Committee shall not impose any of the above sanction[s], but shall recommend any greater sanction it deems appropriate to the House, and the House shall decide on the appropriate sanction to be imposed after consideration of the recommendation of the Committee."*

circumstances where the SCA had already determined the appeal.

45. Third, the applicant was aware that a further appeal was pending in the Constitutional Court, and that the Chief Justice would be one of the judges hearing the appeal.
46. Fourth, the applicant himself acknowledged his "*reluctance*" to pose the question because, as he explained, "*somehow I am involved*". The applicant therefore said that he would deal with the question at "*a high level*". This notwithstanding, the applicant ventured into a very specific question concerning Justice Matojane's reasoning.
47. Fifth, given the absence of any legitimate basis for the question posed by the applicant, and given that it concerned litigation in which the EFF was a litigant, the purpose of the question was undeniably to cause public embarrassment to Justice Matojane, and to utilize an extra curial platform for an interrogatory in respect of a judgment in which the EFF was party. This was done in circumstances where the other party to the pending litigation did not serve on the JSC, and had no such opportunity to engage Justice Matojane on his judgment.
48. On these facts, the NA's view was that the applicant had used his role as a member of Parliament on the JSC to interrogate a sitting judge on a matter where he had ruled against the EFF. According to Parliament, it is significant that the applicant did not question Justice Matojane on aspects of his judgment which were confirmed by the SCA. The applicant thus put his own interest (and that of his party) above the public interest, and failed to act in accordance with the public trust placed in him.
49. On 26 January 2022, therefore, the Speaker addressed correspondence to the applicant, advising him of the adoption of the report and recommendations. The adoption of the report meant that the House agreed to impose the following sanction on the applicant:

“That the Member enter an apology in the House by specifically apologizing to Judge Matojane and the Judicial Services Commission for his question to Judge Matojane during the interview process that related to the quantum of the R 500 000 damages.”

50. In keeping with the sanction agreed to by the House, the applicant was requested to take steps by no later than 28 February 2022 to ensure compliance with the decision.
51. On 15 February 2022, the applicant launched these proceedings, seeking (in Part A of the notice of motion) an order interdicting and suspending the implementation of the Committee’s report pending the finalization of the review relief sought in Part B of the notice of motion. On 25 February 2022 the interdict was granted,²⁹ suspending the implementation of the sanction pending the outcome of the review application.

The grounds of review advanced by the applicant

52. The applicant seeks two substantive orders at this stage. The first is an order reviewing, declaring as unlawful, and setting aside the Committee Report. The second is an order reviewing, declaring as unlawful, and setting aside the NA's adoption of the Committee’s report on 7 December 2021.
53. The applicant identifies three decisions as the subject of the challenge, namely the Committee’s finding that the applicant had acted in breach of the Code, the Committee’s sanction, and the NA’s adoption of the Committee’s report. Scrutiny of the papers reveals, however, that all of the grounds of review essentially relate to the finding. The applicant’s stance is that, if this Court reviews and set aside the finding, the sanction and adoption automatically falls to be reviewed and set aside. The converse is, of course, then also true: if none of the grounds of review relating to the finding succeed, it follows that no reviewable irregularity has been demonstrated in relation to the sanction or the adoption. Counsel confirmed at

²⁹ Reasons for the order were delivered on 20 April 2022.

the hearing of the application that this approach may be followed.

54. This manner of considering a review challenge raised in relation to different decisions is obviously not appropriate in all cases, but it does work in the present case because of the nature of the review grounds raised by the applicant. The five grounds of review upon which the applicant relies are the following:
 - 54.1. The finding was made under an error of law because the Committee and the NA were of the view that the applicant “*represented*” the NA on the JSC, whereas he had in fact been “*designated*” by the NA to the JSC. In oral argument this was the ground of review upon which particular emphasis was placed.
 - 54.2. The finding was *ultra vires* the Committee's powers, particularly in that the Committee usurped the JSC's own powers of discipline and control.
 - 54.3. The Committee disregarded relevant facts and circumstances when making the finding, more particularly the fact that when the applicant asked the impugned question, “*there was no conceivable basis on which he could have gained a personal benefit*”.
 - 54.4. The finding is unconstitutional because the applicant was effectively sanctioned for having exercised his right to free speech.
 - 54.5. Lastly, at the time when the Committee made the finding it was of the view that the presence of the Chief Justice on the JSC panel meant that the JSC was a court of law. It therefore, according to the applicant, took an irrelevant consideration into account.
55. The recurring thread throughout the applicant's argument of these grounds of review is that the Code did not apply to the applicant while he was engaged in the activities of a commissioner on the JSC. The Committee should therefore have found, from the outset, that the applicant's conduct could not be investigated and sanctioned under the Code.

56. We – the Court - put our cards on the table at this juncture, because it simplifies the discussion of these review grounds. The key question in this application is whether the Code applies to MPs except when they serve on the JSC. In our view, the answer to this question must be “no”.
57. This is clear from a proper interpretation of the extracts of the Code to which we have already referred, in particular the purpose and scope of the Code. It is clear, too, from the broad statement of the standards of ethical conduct imposed on members, and the fact that, in terms of clause 10.1.1.3. of the Code, an MP breaches the Code if he or she contravenes (amongst others) clause 4.1. All indications in the Code are that the Code applies to MPs irrespective of where their conduct takes place or in what other capacity it occurs. Clause 4.1.3, for example, applies on “*all occasions*”, and clause 4.1.4 requires a discharge of obligations in terms of the Constitution to Parliament “*and the public at large*”. This is indicative of the Code having a wider rather than narrower ambit of application. The legal framework within which MPs operate therefore allows for the NA to investigate, discipline and sanction MPs, in whichever capacity they operate. That this is the case follows from the plain language of the Code, as well as upon a contextual and purposive interpretation thereof.³⁰
58. It follows that in the absence of any indication that the Code ceases to apply to MPs when they serve on the JSC, the Committee and the NA derive their powers to investigate, rule on, and sanction the applicant from the Code. They were, in fact, obliged to do so under the Code.
59. We consider the applicant’s grounds of review in this context.

The first ground of review: error of law

³⁰ See *Kubaya v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) para 18: “*It is well established that statutes must be interpreted with due regard to their purpose and within their context. . . . legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.*”

60. As indicated, section 178(1) of the Constitution provides for the composition of the JSC. It requires (in terms of section 178(1)(h)) that the NA “*designate*” to the JSC six persons from among its members, at least three of whom must be members of opposition parties represented in the NA.
61. The Committee remarks as follows in its report: “... *the question cannot be protected under the constitutional mandate of the Member in his role as a representative of the NA on the JSC. The Member serves on the JSC as a representative of the NA and should not have entered a question that relates to a case which concerns him personally. He serves on the JSC to further the interest of the public and not in his private interest.* “
62. The applicant seeks to emphasise the difference in meaning between the concepts of “*represent*” and “*designate*” to establish this ground of review. He argues that the Committee’s and the NA’s reference to the applicant as representing the NA at the JSC is an incorrect foundational premise. The applicant is designated to the JSC by the NA, but does not represent it. As such, when the applicant acts in his capacity as a JSC commissioner, he is not performing any of his parliamentary duties, and does not act as an agent of Parliament in representing it. He wears a different hat, so to speak.
63. According to the applicant, he can therefore not be subject to the disciplinary standards imposed on him by the Code, which only applies to his conduct when he is engaged in his parliamentary duties.
64. This argument has no merit, and it is not necessary to undertake an extensive exercise in the interpretation of section 178(1) to decide the issue. The purpose of section 178(1) is simply to cater for the composition of the JSC, and to identify the pool of persons from which commissioners may be drawn. It does not seek to regulate or interfere with any of the powers or obligations that may intrinsically attach to the members of that pool by virtue of their positions – in the present matter, as MPs.

65. To “*designate*” means to name or appoint someone to a position, whereas “*represent*” refers to acting on someone’s behalf. This distinction however is of no moment on the facts of this matter. This is because, although the applicant is designated by the NA to serve on the JSC, he remains an MP. He serves on the JSC by virtue of being a member of the NA. As such, the duties imposed on the applicant by the Code continue to find application while he serves on the JSC, even though he acts independently while there. The effect of the NA's enforcement of the Code against the applicant was not to direct the applicant as to who he should be supporting on the JSC, but rather that he should adhere to the rules of engagement as set out in the Code.
66. In any event, neither the Committee’s nor the NA's decision is based on any assumption that, because the applicant is elected to the JSC by the NA, he serves on the JSC by way of a mandate-style appointment. He was not expected to “*represent*” Parliament’s views on the JSC. The Speaker confirms, in the answering affidavit delivered on Parliament’s behalf, that the issue of a mandate-style appointment (or any other appointment apart from a simple designation under section 178(1) of the Constitution) had no bearing on the NA's decision (or the Committee's decision).
67. That the underlying and essential theme of his position as MP was not lost on the applicant becomes clear when regard is had to what the applicant himself had to say (in his representations to the Committee for the purposes of sanction) regarding the capacity in which he served on the JSC in his representations to the Committee for purposes of sanction.
68. He contended that the line of questioning complained of by CASAC was done in accordance with his parliamentary mandate, “*as Parliament's representative on the Judicial Services Commission*”. The posing of the question was an exercise of an MP’s – particularly an opposition MP’s – freedom of speech. When the applicant questioned Justice Matojane; he did not do so in his personal capacity, with a view to advancing his own personal agenda, but, instead, “*the question was asked by the member in his capacity as the representative of the National Assembly on the JSC, and the question asked was the view of the Supreme*

Court of Appeal". Thus, "... as the JCEMI [the Committee] alluded to, the Member is a representative of the National Assembly on the JSC, therefore section 58 of the Constitution guarantees him the right to freedom of speech, and immunizes him from any punishment for anything said in the pursuance of his political and constitutional role".

69. The applicant thus contended, in his representations, that the failure of the Committee to recognize this, would result in it assailing the applicant's right as MP to fulfil his parliamentary mandate. In the representations, the applicant did not regard himself as having worn any hat at the JSC other than that of an MP.
70. We return to the fact that the relevant question is not whether the applicant represents Parliament as an institution on the JSC, but rather whether the NA was entitled to enforce the Code against the applicant.
71. We have already indicated that, in our view, and on a proper interpretation of the Code, the ethical duties of MPs in terms of the Code do not exclude the conduct of MPs outside of Parliament. On the contrary, all indications in the Code are that the Code applies to all MPs irrespective of where their conduct takes place or in what other capacity it occurs.
72. In conclusion on this ground of review: the applicant is not subject to the Code by virtue of the Committee (and the NA) having noted that he is a representative of the NA on the JSC. The applicant is subject to the Code because, on its plain wording, it applies to him. This is so because he remains an MP while he serves on the JSC.

The second ground of review: the finding was ultra vires the Committee's powers

73. The applicant argues, in advancing his second ground of review, that the Committee made the finding against him in terms of the Code when, "*in fact, the complaint is against him in his position as a Commissioner of the JSC.*"
74. The problem with this scenario, so the applicant submits, is that the Committee

made the finding despite not having the power to do so. In making the finding, the Committee usurped³¹ the role of the JSC, as it was the JSC that was the appropriately placed body to deal with the applicant's impugned conduct. This is because the JSC, in terms of section 178(6) of the Constitution, is entitled to determine its own procedures, which includes disciplinary procedures that it might wish to enforce against a JSC commissioner. The JSC, in turn, does not have the power to enforce the Code against the applicant.

75. According to the applicant, the Committee's approach deprived him of an opportunity to challenge any findings against him on all fronts within the context of where the offensive conduct is said to have occurred, which was the JSC. By targeting the applicant through the enforcement of the Code, Parliament has made the matter political.
76. If one accepts, as we do, that the Code continued to apply to the applicant despite (and during the exercise of) his role on the JSC, this ground of review clearly does not withstand scrutiny. In fact, the underlying premise of this ground of review, namely that the complaint was made against the applicant in his position as a commissioner of the JSC, is wrong.
77. CASAC expressly lodged its complaint against the applicant given his position as an MP, designated by the NA to serve as a commissioner on the JSC. In CASAC's words:

"This affidavit is lodged with the Registrar of Members' Interests in support of a complaint in terms of section 10.2.2.2 of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council members ('Code'). The complaint is brought against the conduct of Mr Julius Sello Malema MP of the Economic Freedom Fighters, a member of the National Assembly ('Assembly').

In addition to being a Member of Parliament, Mr Malema is one of the Assembly's six delegates to the Judicial Service Commission ('JSC') delegated in terms of

³¹

In oral argument counsel referred to Parliament as having "forum-shopped".

section 178(1)(h) of the Constitution of the Republic of South Africa.”

78. The Committee therefore derived its power to deal with the complaint against the applicant from clause 124 of the Joint Rules of Parliament, which stipulates that the Joint Committee on Ethics and Members Interests must implement the Code, and develop standards of ethical conduct for Assembly and Council members. The Committee must further, amongst other functions, exercise the powers reasonably assigned to the Committee in the Code and in terms of resolutions adopted in both Houses.
79. In acting under the Code, as it was entitled to do, the Committee did not usurp any of the JSC's powers. The question of whether a complainant has recourse before the JSC, or that the JSC may determine its own disciplinary process, is of no consequence to Parliament's reaction to the complaint. Parliament's reaction is underpinned by the fact that the applicant is an MP and therefore bound by the Code, even though the breach occurred while the MP was serving on another body. If there is a complaint that an MP breached the Code, this is subject to an investigation and a finding which must be implemented.
80. The NA therefore did not seek to enforce a provision of the JSC's rules against the applicant. Parliament was enforcing its own Code against an MP. The question – to which one returns time and again whichever way this application is approached - is whether the Code continued to apply to the applicant at the time of the alleged breach. We have already found that it did.
81. This ground of review must therefore fail.

The third ground of review: The Committee's disregard of relevant circumstances when making the finding

82. The applicant argues that the Committee disregarded the fact that Justice Matojane was *functus officio* when the applicant asked him the question at the JSC interview. There was thus no basis on which the applicant could have gained a personal benefit from the engagement with the judge.

83. The applicant makes much of three so-called “striking features” of the interaction between him and Justice Matojane. These are that the question was asked in broad terms and not in an adversarial way; that Justice Matojane was not drawn on the question but effectively shut it down as being inappropriate for discussion; and, lastly, the fact that the applicant did not take the matter any further after having been rebuffed.
84. None of these features, however, relate to the fundamental problem identified by the Committee, namely whether the applicant should “*have entered a question that relates to a case which concerns him personally*” at all. That is the nub of the finding. It is common cause that, as at the time that the JSC meeting was underway on 15 April 2021, there was a pending application before the Constitutional Court. The Chief Justice, who would be involved in the determination of the pending application, was chairing the JSC meeting. There is no shying away from the fact that the applicant engaged Justice Matojane in a matter in which he and the party to which he is affiliated had a personal interest, and which was the subject of an application for leave to appeal to the Constitutional Court.
85. In any event, the applicant's stance in this litigation is entirely inconsistent with the position taken before the JSC at the time, when he seemingly accepted that he should not be pursuing that line of questioning. The crux of the finding is that a commissioner should not be permitted to question a judge about a matter in which they were a litigant because, in so doing, they are placing their own interests above the public interest and are failing to act in accordance with the public trust that has been placed in them. This is all the more so when an application for leave to appeal against that decision is pending before an appellate court.
86. It is common cause that Justice Matojane was *functus officio* at the time of the JSC hearing. This does not change the applicant's position one way or the other. From the exchange between the applicant and Justice Matojane it is clear that the latter adopted the view that he had stated the necessary in his judgment, and

that the Constitutional Court would be the final arbiter. The applicant responded "*Fair enough*". There was thus, as far as the applicant himself was concerned, nothing to be tested. The applicant accepted that the judgment spoke for itself.

87. Whether the applicant derived any benefit from the question that he posed is also not a decisive factor. That is not the only mischief addressed by the Code, and was not the crux of the complaint: the applicant's transgression was that given that the EFF was a party to the litigation before Justice Matojane, the applicant violated the public trust that had been placed in him and compromised the public interest in an endeavor seemingly to advance the interests of the EFF. The question sought publicly to embarrass Justice Matojane for his ruling on the damages claim, and to attempt to interrogate him, unfairly so, in a matter that was pending before the Constitutional Court.
88. There is, in any event, a basic hurdle in the way of this ground of review. We have indicated earlier that, despite having been afforded the opportunity to make representations in respect of the finding prior to the Committee's first meeting, the applicant declined to do so. He was content with stating that the complainant was "*talking rubbish*". None of the issues raised by the applicant in these proceedings as "*relevant circumstances*" in relation to the finding were thus placed before the Committee or the NA. They were deliberately excluded from consideration by the applicant himself.
89. There is therefore no question of the respondents having "failed" to consider these circumstances so as to give rise to a viable ground of review.³²

The fourth ground of review: the finding was unconstitutional

90. The applicant argues that "*a function of the right to freedom of expression*" is that he "*must be able to exercise his mandate while serving on the JSC without any fear of repercussions for what is said.*" This is especially so, he says, where his

³² See, for example, *Ude v Minister of Home Affairs and another* 2009 (4) SA 522 (SCA) para 11; *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 6 (failure to consider relevant considerations under PAJA).

intention in doing so was to question, in an innocuous manner, a senior member of the judiciary for the purpose of their further advancement. The crux of the argument is that, in fulfilling his constitutional mandate, he asked a question that was legitimate and protected. JSC commissioners are expressly invited to ask candidates questions about, amongst others, their judicial philosophy and approach. Parliament's attempt to sanction the applicant for exercising that right to free speech in this context is a breach of the applicant's constitutional rights.

91. The applicant remarks that, ironically, Parliament's conduct in sanctioning the applicant under the Code *prima facie* amounts to a violation of section 8 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004. Section 8 of that Act, which applies to MPs in the performance of their duties prohibits any person from improperly influencing an MP through "*fraud, intimidation, force, insult or threat of any kind, or by the offer or promise of any inducement or benefit of any kind, or by any other improper means*".
92. The applicant is of the view that this Act does not apply to him in his capacity as a JSC commissioner, but he makes the point that, just as it would be unconstitutional for Parliament to sanction the applicant pursuant to a complaint for utterances in the House (which enjoy absolute protection), Parliament cannot now through a "vanguard" disciplinary action seek improperly to influence how the applicant performs his JSC duties by trying to discipline him as an MP. We express no opinion on the applicability of the Act, as it is not before us for consideration.
93. We are, however, not in agreement with the applicant's line of argument in relation to his right to free speech.
94. The applicant's contentions again skirt the real issue. The applicant essentially argues for an untrammelled right to question candidates for judicial appointment irrespective of the subject matter of the questions, and its implications for the administration of justice and the integrity of the process. This plainly cannot be so. The processes before the JSC can never be such so as to undermine core constitutional objectives.

95. There is another reason why this ground of review must fail. This is that the applicant has not sought to impugn the restrictions, such as they are, placed upon him by the Code – his argument is that the Code does not apply to him at all in the context of his role on the JSC. Clearly, the applicant’s right to freedom of expression was in no way constrained by either the Committee or the NA in deciding upon the complaint after the event. The applicant is (as we have found) bound by the provisions of the Code, which outlines the minimum ethical standards of behaviour that South Africans expect of public representatives such as the applicant. It is therefore the Code (not Parliament) that places such limitations as there are upon the applicant, and the legality of the Code has not been attacked at all in these proceedings.
96. There is thus no merit in this ground of review.

The fifth ground of review: the Committee's consideration of irrelevant circumstances when making the finding

97. The applicant contends that, when making the finding, the Committee was of the view that the Chief Justice’s presence on the JSC panel on that day meant that the JSC was effectively a court of law.
98. There is no factual basis on record for this contention. A consideration of the Committee’s reports as well as the minutes of the meeting held on 30 August 2021, to which the applicant refers as support for its argument, clearly indicates that the Committee’s references to a “court of law” were references to the Constitutional Court, where the litigation was in fact pending. That this was the case was also explained, in no uncertain terms, in the answering affidavits delivered in these proceedings. There is no reason to reject this explanation on the papers.³³

Conclusion

³³ See *Plascon Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

99. For all of the reasons addressed above, we are of the opinion that there is no merit in any of the grounds of review.
100. It is common cause that, aside from the powers of the Committee and the NA, and the constitutionality of their action, the applicant raises no procedural irregularities in respect of the events leading up to the finding.
101. Lastly, the applicant did not raise any issue with Parliament's dismissal of CASAC's complaints against him relating to the Zondo Commission and Justice Pillay. He was content to let the process take its course in relation to these elements. The applicant cannot have it both ways. If Parliament can let him off the hook in relation to two elements of the complaint, then Parliament can discipline him in respect of the third element.

Costs

102. Is the applicant entitled to be shielded from a costs order under the so-called *Biowatch* principle?³⁴ We do not think so. In *Biowatch*³⁵ the Constitutional Court qualified the principle as follows:

“Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. ...”

103. In the present case, the applicant raised constitutional issues in pursuit of what is

³⁴ With reference to *Biowatch Trust v Registrar Genetic Resources and others* 2009 (6) SA 232 (CC) para 43.

³⁵ *Biowatch supra* para 25. See also *Bo-Kaap Civic and Ratepayers Association and others v City of Cape Town and others* [2020] 2 All SA 330 (SCA) para 86: “As has been stated by this court in *National Home Builders' Registration Council & another v Xantha Properties 18 (Pty) Ltd* [2019] ZASCA 96; 2019 (5) SA 424 (SCA) at para 26, the mere labelling of litigation as 'constitutional' is insufficient. For the *Biowatch* principle to apply the case should raise genuine, substantive, constitutional considerations. The rule does not mean risk-free asserted constitutional litigation.”

essentially a political dispute. The grounds of review were patently without merit, and the proceedings did not entail any serious constitutional challenge.

104. There is thus no reason why costs should not follow the result.³⁶ In the exercise of our discretion under Rule 67A,³⁷ we regard the issues raised in the matter as sufficiently complex to warrant counsel's fees taxed on Scale C in relation to fees incurred from 12 April 2024 onwards.

Order

105. In the circumstances, the application is dismissed, with costs, including the costs of two counsel where employed. Counsel's fees incurred from 12 April 2024 onwards are to be taxed on Scale C.

C. M. FORTUIN
Judge of the High Court

L. G. NUKU
Judge of the High Court

P. S. VAN ZYL
Acting Judge of the High Court

Appearances:

³⁶ See *Sackville West v Nourse and another* 1925 AD 516.

³⁷ See the discussion in *Wanga v Road Accident Fund* (case number 4503/2021, unreported judgment of the Western Cape High Court (per Adams AJ) delivered on 19 November 2024) paras [7]-[11].

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