



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Nkabinde v The Judicial Service Commission (20857/2014) [2016] ZASCA 12 (10 March 2016)

MEDIA STATEMENT

Today, the Supreme Court of Appeal (SCA) dismissed an appeal by the appellants, against an order of the Gauteng Local Division, Johannesburg. Accordingly, the SCA refused to set aside as unlawful certain steps taken by the Judicial Service Commission (JSC) in investigating a complaint of judicial misconduct against Justice Hlophe, Judge President of the Western Cape Division of the High Court, Cape Town, and also refused to declare s 24 of the Judicial Service Commission Act 9 of 1994 (JSCA) unconstitutional.

The issues before the SCA were as follows: (i) whether the JSC had impermissibly retrospectively applied a procedure that was not in place at the time when the complaint was laid; (ii) whether, if the new procedure was applicable, the complaint had been validly laid; and (iii) whether the new procedure violated the principle of the separation of powers and was unconstitutional to the extent that it made provision for a prosecutor to assist the appointed Judicial Conduct Tribunal (Tribunal) at the hearing of the complaint.

The facts of the matter are as follows. In 2008, a complaint was laid by eleven members of the Constitutional Court (including the appellants) against Justice Hlophe. The basis of the complaint was that he had allegedly approached the appellants, Justice Nkabinde and Justice Jafta (who was an Acting Judge at the time), and sought to improperly influence their decisions in a number of matters which concerned the lawfulness of searches and seizures conducted in a criminal investigation into, amongst others, Mr (now President) J G Zuma, Thint Holdings (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd.

At the time that the complaint was lodged, the procedure for investigating and resolving complaints of judicial misconduct was regulated by certain Rules established by the JSC, pursuant to its powers as provided for in s 178(6) of the Constitution (the old Rules). However, the investigation and hearing of the complaint ran into numerous obstacles, and various decisions by the JSC were set aside in a number of court decisions. Eventually, in 2012, following a change in the composition of its membership and another unfavourable court ruling, the JSC resolved that the investigation be started afresh. However, by that time a new procedure had been put in place, as a result of amendments to the JSCA. The JSC accordingly proceeded in terms of the new procedure.

The first argument raised by the appellants was that this amounted to an impermissible retrospective application of the new procedure, as they had laid the complaint while the old Rules had been in force. The SCA rejected this argument on the basis that the appellants were unable to demonstrate that any substantive rights had been affected. It had previously been accepted by the SCA, in a prior judgment related to this matter, that the inquiry should start afresh.

The appellants' second argument was that, if the new procedure did apply, then the complaint was invalid as it had not been made under oath, as is required by the new procedure. The SCA refused to uphold this argument as (unlike in the case of the first argument) the consequence of this would in fact be an infringement of the substantive rights of the parties. In addition, and in any event, the requirements of the new procedure had been substantially complied with in that, *inter alia*, the complainants had confirmed the complaint and the facts giving rise to it by way of affidavit and oral evidence.

The appellants' third argument was that the new procedure was unconstitutional in that it breached the principle of the separation of powers. The basis of this argument was that the Tribunal, which would hear the evidence relating to the complaint, was empowered in terms of s 24 of the JSCA to appoint a prosecutor to be involved in the collection and leading of evidence. The SCA held that a prosecutor is not a part of the executive, and his or her independence is guaranteed by s 179 of the Constitution. In addition, the Tribunal hearings are conducted in an inquisitorial manner, and the prosecutor is not involved in the making of the decision of the Tribunal. And finally, the Tribunal decision is merely a precursor to the ultimate decision regarding the complaint, which is made by the JSC itself. Accordingly, the involvement of a prosecutor does not render the section unconstitutional.

The SCA concluded by noting that this case had tarnished the judicial image, and that each of the protagonists, including the JSC had contributed to the more than seven year delay in finalising the matter. The SCA noted that '[t]here should be a concerted effort and determination on the part of everyone concerned for the matter finally to be put to rest. It should be dealt with and finalised with all deliberate speed, with due regard to the rights of all concerned.'

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