



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1186/2024

In the matter between:

MPUMALANGA SOCIETY OF ADVOCATES

APPELLANT

and

JUDICIAL SERVICE COMMISSION

FIRST RESPONDENT

**PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

SECOND RESPONDENT

JOHANNES HENDRIKUS ROELOFSE

THIRD RESPONDENT

Neutral citation: *Mpumalanga Society of Advocates v Judicial Service
Commission and Others* (1186/2024) [2026] ZASCA 99
(7 July 2026)

Coram: ZONDI DP and MOCUMIE, MAKGOKA JJA and NORMAN and
MAMOSEBO AJJA

Heard: 16 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and by release to SAFLII. The date and time for the hand-down of the judgment is deemed to be 7 July 2026 at 11h00.

Summary: Judicial Service Commission – recommendation of a candidate for judicial appointment, unaware of adverse comments against the candidate and the candidate’s negative financial affairs – recommendation declared unconstitutional, unlawful, invalid and set aside – matter remitted to the JSC.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg
(Sutherland DJP sitting as court of first instance):

- 1 The appeal is upheld with no order as to costs.
- 2 The order of the Gauteng Division of the High Court, Johannesburg, is set aside and replaced with the following:
 - ‘1 The decision of the first respondent on 21 October 2021 to recommend the third respondent for appointment as a judge of the Mpumalanga Division of the High Court is declared unlawful, invalid and unconstitutional.
 - 2 The decision of the first respondent to recommend to the second respondent to appoint the third respondent as a judge is reviewed and set aside.
 - 3 The matter is remitted to the first respondent to reconsider the third respondent’s candidature for judicial appointment.
 - 4 Each party shall pay its own costs.’

JUDGMENT

Makgoka JA (Zondi DP and Mocumie JA and Norman and Mamosebo AJJA concurring):

[1] This is an appeal against an order of the Gauteng Division of the High Court, Johannesburg (the High Court). The High Court dismissed an application by the appellant, the Mpumalanga Society of Advocates (the MSA), to set aside the decision of the first respondent, the Judicial Service Commission (the JSC), to recommend the third respondent, Mr Johannes Hendrikus Roelofse, for appointment as a judge. The appeal is with the leave of the High Court.

[2] Although the JSC initially opposed the application, it later withdrew its opposition and filed a notice to abide and an ‘explanatory’ affidavit. The second respondent, the President of the Republic of South Africa (the President), deferred acting on the JSC’s recommendation pending the determination of the review application. In this Court, neither the JSC, the President, nor WDT Attorneys (WDT), the amicus curiae in the High Court, participated in the appeal. The appeal is opposed only by the third respondent, Mr Roelofse. For convenience, I refer to him as the respondent.

[3] The MSA is a voluntary professional body and an affiliate member of the General Council of the Bar of South Africa. The JSC, established in terms of s 178 of the Constitution, is mandated to advise the national government on matters relating to the judiciary or the administration of justice. Its functions include interviewing candidates for judicial vacancies and recommending suitable candidates to the President. In terms of s 174(6) of the Constitution, the President is responsible for appointing, among others, judges of the High Court, on the advice of the JSC.

Factual background

[4] The respondent has been a practising advocate since 2003. He was a member of the Pretoria Bar until 2016, when he became a founding member of the MSA upon the establishment and proclamation of the Mpumalanga Division of the High Court (the Mpumalanga Division). From 2018 onwards, the respondent served as an acting judge in the Mpumalanga Division. When judicial vacancies were advertised for that division in 2019, the respondent accepted nomination for permanent appointment as a judge and was shortlisted for an interview. There were no adverse comments about him. He was not recommended for appointment after the interview.

[5] In December 2019, the respondent again accepted nomination for appointment and was shortlisted. On 19 March 2020, the MSA submitted comments to the JSC regarding the respondent and objected to his appointment. In summary, the MSA's objection rested on three grounds. The first was that the respondent was not in good standing with the MSA. This was because he owed rental fees (referred to in advocates' parlance as 'Bar fees') for more than two years. Under the MSA's standing resolution, members in this position would not receive letters of good standing from the MSA.

[6] The MSA asserted that, being aware that he would not obtain a letter of good standing from the MSA, the respondent circumvented this requirement by seeking one from the Provincial Legal Practice Council (the local LPC). The MSA stated that the respondent ought to have disclosed this in his application but failed to do so. The MSA contended that this bordered on dishonesty, thereby calling into question the respondent's suitability for judicial appointment.

[7] The second ground was that the respondent lacked knowledge of the law. This was based on a review of some of his judgments and his interactions with legal practitioners in court. The MSA also questioned the respondent's commitment to constitutional values. The third ground was that the respondent lacked the necessary judicial temperament. The MSA complained that the respondent often interrupted counsel during oral submissions, engaged in disruptive, abrasive behaviour, and was not open to persuasion. According to the MSA, the respondent's conduct was unbecoming of a judicial officer.

[8] On 31 March 2020, the MSA charged the respondent with three counts of misconduct, all arising from his debt to the MSA for Bar fees. In respect of the first charge, it was alleged that, in connivance with his wife, the MSA's bookkeeper at the time, the respondent had fraudulently attempted to cede some

of his invoices in favour of the MSA without the latter's consent. The attempted cession would have resulted in the respondent being credited with R124 409 in lieu of his outstanding fees. This would have created the impression that the respondent had paid that amount to the MSA, thereby reducing his indebtedness.

[9] The MSA alleged that, when the respondent acted as described above, he knew or ought reasonably to have known that the MSA had instructed its attorneys to recover the debt from him. Accordingly, the purported cession was intended or calculated to fraudulently relieve the respondent of his indebtedness to the MSA. The charge sheet further alleged that the respondent had intentionally and fraudulently shifted the risk of his unpaid invoices or claims to the MSA.

[10] The second charge alleged that in his questionnaire for judicial appointment in December 2019, the respondent failed to disclose to the JSC that his outstanding debt of R241,852.72 in respect of Bar fees had been handed over to attorneys for collection and that a letter of demand had already been issued to him. The respondent stated that there were no circumstances known to him, including financial matters, that might cause him embarrassment in undertaking the office of a judge.

[11] In the third charge, the MSA alleged that the respondent, in his application for judicial appointment, failed to disclose that he was not in good standing with the MSA. Consequently, he could not obtain the required letter of good standing from the MSA, the professional body to which he belonged. Instead, he obtained a letter from the local LPC. On 4 April 2021, after being served with the charge sheet, the respondent tendered his resignation from the MSA, with immediate effect.

The April 2021 interview

[12] The respondent brought these charges to the JSC's attention before the interviews. The JSC's 2020 autumn interviews did not take place in April as usual, due to the COVID-19 lockdown, but were held a year later, in April 2021. During the respondent's interview, a few questions were put to him arising from the charges. The Judge President of the Mpumalanga Division (the Judge President) raised these allegations with the respondent, and a few other members of the JSC questioned him about them. Commissioner Magwanishe expressed concern to the respondent about recommending him while 'serious allegations' were pending against him. Commissioner Sigogo asked the respondent to explain his statement that he had never been charged with the complaints levelled against him, in light of the MSA's charge sheet. The respondent explained that: (a) the charge sheet was issued by the chairperson of the MSA, and that it was not the Bar Council's decision to charge him; and (b) he had resigned from the MSA because he could no longer afford the Bar fees. Because of his resignation, the charge sheet was not acted upon.

[13] The respondent attributed the MSA charge sheet to the Walele communal dispute case, which he was presiding over when the charges were brought against him. He stated that the charges were orchestrated by the chairperson of the MSA, Adv Mokhare SC, who represented the applicants in that case, against whom he had granted an ex parte interim order in camera. The applicants asserted that the respondent and the Judge President had colluded to make an order in favour of their opponents, without their knowledge. This stemmed from a statement in the respondent's judgment that he had heard the application for an Anton Pillar order 'in camera in accordance with the Judge President's directive'.

[14] The applicants in that matter accused the respondent, together with the Judge President, of serious and grave misconduct. They contended that the

respondent had failed to act independently and impartially and had been unduly influenced by the Judge President to hear and grant an interim interdict in camera. The applicants' application for leave to appeal against the respondent's order was ultimately dismissed by the Constitutional Court in *Mkhatshwa v Mkhatshwa* (*Mkhatshwa*).¹ The Court also summarily rejected the applicants' allegations of inappropriate conduct by the respondent and the Judge President, deeming them baseless and frivolous. Accordingly, the Constitutional Court awarded punitive costs against the applicants. It also criticised their legal representatives for failing to advise the applicants not to persist with what the Court considered to be frivolous allegations.²

[15] Commissioner Sigogo asked the respondent to explain why he sought a letter of good standing from the LPC rather than from the MSA, given that he knew he was not in good standing with the latter body. The respondent explained that, under the law, the LPC was the regulatory body for legal practitioners, and that there was nothing improper in his seeking a letter of good standing from it rather than from the MSA. Minister Lamola put it to the respondent that resigning from the MSA after he was charged could create an impression 'of someone who was running away'. The respondent disagreed with that proposition. After interviewing the respondent, the JSC did not recommend him.

The October 2021 interview

[16] The respondent again accepted nomination for judicial appointment in June 2021 for one of the two vacant positions in the Mpumalanga Division. On 12 August 2021, the JSC issued a public statement announcing the names of the shortlisted candidates for the various courts. The respondent was among those

¹ *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15; 2021 (5) SA 447 (CC); 2021 (10) BCLR 1182 (CC).

² The Constitutional Court's judgment was delivered on 18 June 2021, two months after the respondent's interview.

shortlisted for an interview, scheduled for 8 October 2021. The JSC further invited comments on the shortlisted candidates to be submitted by 13 September 2021.

[17] The statement indicated that comments received after the closing date would not be considered. This was a result of the JSC's decision on 22 April 2021, prompted by late adverse comments on candidates, some of which were made on the eve of the interviews. The JSC decided to adhere strictly to the deadline for comments and that comments submitted after the deadline would not be considered unless they raised a 'serious' complaint arising after the closing date.

[18] On 22 September 2021, about eight days after the 13 September 2021 deadline, the MSA emailed its comments on the respondent to the then JSC secretary, Mr Sello Chiloane. The comments were accompanied by a condonation application for the late submission. In its comments, the MSA repeated its assertions from April 2021, including those regarding the respondent's temperament, and objected to the respondent's appointment.

[19] It is common cause that the MSA's comments were never brought to the attention of the JSC commissioners. In its affidavit, the JSC explained how this came about. Because Mr Chiloane was busy preparing for the interviews, he only saw the MSA's comments 'a few days after [the email] was sent.' All comments received before the cut-off date were sent to the JSC members between 20 and 24 September 2021. The JSC affidavit further explained that the MSA's comments were not sent to the JSC members because they were received after the deadline and did not relate to a serious incident that occurred after the deadline.

[20] However, there is no confirmatory affidavit from Mr Chiloane in this regard. Thus, the JSC's unconfirmed explanation for why the MSA's comments

were not before the JSC commissioners is hearsay. In any event, it was not for the JSC secretariat to decide that the MSA's comments were not to be made available to the JSC commissioners. At the very least, the Acting Chief Justice should have been alerted to the MSA's late comments.

[21] Be that as it may, unaware of the MSA's objections, the JSC interviewed the respondent on 8 October 2021. The respondent answered questions from the Acting Chief Justice, the Judge President, Judge President Mlambo, commissioners Nyambi, Notyesi, Matolo-Dlepu, Nyambi, Madonsela SC and Cane SC. Most of the questions were uneventful, but the respondent's engagement with commissioners Madonsela SC and Cane SC stood out. This is how Madonsela SC's engagement with the respondent proceeded:

‘COMMISSIONER MADONSELA: On the last occasion when you were here the Mpumalanga Society of Advocates had raised an issue that you were . . . as it were, *suspectus de fuga*.

MR ROELOFSE: Jah. That . . . [intervenes]

COMMISSIONER MADONSELA: In the sense that they were complaining that you had not paid Bar fees for a long time. And they were looking for them, then you . . . when they were trying to discipline you on that, then you resigned with an outstanding debt still not paid to them. Has . . . [intervenes]

MR ROELOFSE: Its now paid. It was during the same time that the . . . [intervenes]

COMMISSIONER MADONSELA: Are you answering the same question that I've asked?

MR ROELOFSE: Sorry?

COMMISSIONER MADONSELA: Are you putting words in my mouth?

MR ROELOFSE: No, no, no, no, no. No, I am not. You may continue. Sorry, I [intervenes]

COMMISSIONER MADONSELA: I noticed when other people were asking you a question, you answered them before they did.

MR ROELOFSE: Alright, I'll wait.

COMMISSIONER MADONSELA: You even had the nerve to tell us that it is time for you to be appointed.

MR ROELOFSE: Not me. I said it's time.

COMMISSIONER MADONSELA: Because you are white.

MR ROELOFSE: Yes.

COMMISSIONER MADONSELA: Will you please listen to the question I intend . . .
[intervenes]

MR ROELOFSE: I will.

COMMISSIONER MADONSELA: Ag man, you are even talking . . . interrupting me when I am asking.

MR ROELOFSE: I said I will. Thank you.

COMMISSIONER MADONSELA: I don't have any questions. Thank you.'

[22] Cane SC asked the respondent what his approach would be as a judge when credit providers enforce credit agreements in the High Court for debts within the magistrates' court's jurisdiction. The respondent stated that he would assume jurisdiction but award costs on the magistrates' court scale. The following exchange then ensued:

'**COMMISSIONER CANE:** You seem to be unaware of the recent authority, that in fact in an NCA context, the requirement is for the financial institution to bring the matter in the magistrates' court.

MR ROELOFSE: Yes. Yes.

COMMISSIONER CANE: You are aware of that?

MR ROELOFSE: I am . . . I will check it up.

COMMISSIONER CANE: That would then mean your initial response to me was not correct though.

MR ROELOFSE: Jah, then it was not correct.

COMMISSIONER CANE: Jah, then you can't be aware of that authority?

MR ROELOFSE: Jah. No, no. I'm saying that there was an issue over whether or not the high courts must or should adjudicate matters of the lower court, and I understood the judgment of the SCA to be that, well, the high court must. I just did not mention the issue of the NCA.'

[23] The JSC commissioners engaged in deliberations, during which some reflected in particular on the respondent's temperament following his exchange with Madonsela SC. Some commissioners regarded it as an unfortunate, isolated

incident. For example, the Judge President expressed surprise at the respondent's conduct and stated that it was uncharacteristic of him. Judge President Mlambo stated that he was not aware of any complaint against the respondent regarding his temperament. He further said that '[i]f temperament was a problem, we would have heard it because attorneys and advocates appear in his court'.

[24] Of course, Judge President Mlambo made this statement in ignorance of the fact that there was indeed a complaint from the MSA at that stage about the respondent's temperament, which was not brought to the attention of the JSC commissioners. Moreover, there was already an MSA complaint about the respondent's temperament during the April 2021 interview.

[25] Madonsela SC cautioned against the view expressed by some commissioners that the respondent could improve his temperament after appointment. He pointed out that this was likely to worsen, given that, as a judge, the respondent would have security of tenure for life. For her part, Cane SC reflected thoughtfully on the respondent's temperament:

'So there's that intemperance and lack of patience, which is really concerning to me as an advocate. We are the people who know that kind of shorthanded, dismissive way of failing to actually ensure that you grapple with something is deeply troublesome when you are in a court. But I have that hesitation about him and yet at the same time, I do emphasize it with a very heavy heart, because he's made a very significant contribution as it's been acknowledged here ...'

[26] After deliberations, the JSC, by an 18-3 vote, recommended the respondent and another candidate for judicial appointment. On 27 October 2021, the Acting Chief Justice communicated the JSC's decision and advised the President to appoint the respondent as a judge, among other candidates. On 29 October 2021, the MSA wrote to the President and the Acting Chief Justice, informing them of

its intention to commence review proceedings to challenge the JSC's recommendation that the respondent be appointed a judge.

In the High Court

[27] The MSA launched its application on 25 November 2021. It challenged the JSC's decision to recommend the respondent on the following grounds. First, that the decision was made without considering the MSA's adverse written comments on the respondent and its objection to his candidature, even though they were submitted after the deadline. The comments concerned the respondent's alleged lack of integrity in his personal financial affairs, his temperament, and his knowledge of the law. Second, that the respondent misled the JSC in his questionnaire by stating that he had settled his debt with the MSA for Bar fees.

[28] Third, that the respondent misled the JSC during the October 2021 interview by failing to disclose that R20 000 of the debt owed to the MSA was outstanding at the time, despite his compliance with the agreed payment plan. Fourth, the respondent improperly bypassed the MSA by seeking a letter of good standing from the local LPC, knowing that he would not obtain one from the MSA because he was not in good standing. The respondent opposed the MSA's application and filed an answering affidavit in support of the JSC's decision to recommend him.

[29] Subsequent to the MSA's review application, WDT applied to be admitted as *amicus curiae*. The basis of the application was that, after the JSC's decision to recommend the respondent, WDT discovered that a civil judgment had been entered against the respondent on 31 May 2021 in favour of Laerskool Nelspruit for just over R31 000. The amount was for the respondent's son's school fees for 2018, 2019, and 2020. The summons had been issued in November 2020. WDT

asserted that the respondent had failed to disclose the debt and the judgment during his candidature for the October 2021 interview.

[30] In response, the respondent stated that he had never received the summons and only became aware of it on 1 February 2023, when his bank informed him. The return of service indicated that the summons had been served by attachment to the outer door at his previous address. After becoming aware of the judgment, he reached an agreement with the school to pay R25 000 in instalments. On 30 March 2023, following the final payment, the school agreed to the rescission of the judgment.

The judgment of the High Court

[31] The High Court considered the MSA's complaints regarding the respondent's financial non-disclosure and his temperament. The financial non-disclosure complaint was two-fold. First, that the respondent had concealed from the JSC during his October 2021 interview that R20 000 of the Bar fees debt was outstanding at that stage. Second, that the respondent had failed to disclose to the JSC in his questionnaire for the October 2021 interview that there was a civil judgment against him, or, alternatively, that he had failed to disclose the debt that gave rise to the judgment. The High Court dismissed all of the MSA's complaints and accepted the respondent's explanations. Accordingly, it dismissed the MSA's application with no order as to costs. It confirmed the JSC's recommendation that the respondent be appointed as a judge of the Mpumalanga Division.

In this Court

[32] The MSA persisted in its assertion that the respondent is unfit for judicial office and, accordingly, that the JSC's decision to recommend him was irrational, on the same grounds it advanced in the High Court, namely, a lack of judicial

temperament and a failure to disclose material financial information. The respondent supported the High Court's findings.

[33] The JSC is an organ of State. Accordingly, its decision constitutes administrative action within the meaning of s 1 of the Promotion of Administrative Justice Act 2000 (the PAJA), as it exercises public power and performs a public function under the Constitution and the Judicial Service Commission Act 9 of 1994. The JSC's decision is therefore reviewable under s 6 of the PAJA.

Discussion

Judicial temperament

[34] This issue has two legs, each arising independently. The first stems from the MSA's comments on the respondent's candidature for the April 2021 interview. These were repeated in the MSA's comments on the October 2021 interview but were not brought to the attention of the JSC commissioners. The second arose from the respondent's exchange with Madonsela SC during the October 2021 interview and, to some extent, with Cane SC.

[35] With regard to the first leg, the High Court summarily dismissed the MSA's complaint that, in October 2021, the JSC interviewed the respondent without the benefit of the MSA's adverse comments and objections to the respondent's candidature. It reasoned that this did not matter because the JSC was aware of the allegations against the respondent in October 2021, as the MSA's comments merely repeated its objection from the April 2021 interview, which the JSC had considered. Thus, the High Court concluded that it would not have made any difference if the MSA's objections had been received by the JSC commissioners in respect of the October 2021 interview.

[36] The High Court misconstrued the facts. An overview of the questions posed to the respondent by the JSC commissioners during the April 2021 interview shows that none addressed the MSA's complaints about the respondent's temperament. Instead, the commissioners focused on the allegations set out in the MSA's charge sheet. We do not know whether this issue was discussed during deliberations, as the JSC did not include a transcript of the April 2021 deliberations in its record, in accordance with rule 53 of the Uniform Rules of Court. The JSC has also not addressed this issue in its explanatory affidavit. However, it is unlikely that it was discussed in the deliberations if it did not arise from the interview.

[37] Similarly, in the October 2021 interviews, not a single question was put to the respondent about the MSA's complaint regarding his temperament. The upshot is that, for different reasons, the JSC has not considered the MSA's complaint regarding the respondent's temperament. For the April 2021 interview, there is no explanation on record as to why, despite the MSA raising the issue, it was not canvassed with the respondent. For the October 2021 interview, the MSA's complaint was not before the JSC commissioners.

[38] However, there is a direct link between the April and October 2021 interviews, as evidenced by the JSC's affidavit. The affidavit explains that when a candidate is interviewed for a position for which they were previously unsuccessful, a transcript of the most recent unsuccessful interview is included in the interview pack. According to the JSC, this enables JSC commissioners to familiarise themselves with what transpired during the previous interview, 'including any issues arising therefrom that may need to be raised'.

[39] Had the respondent's temperament been canvassed during the April interview, the JSC commissioners preparing for the October interview would

have noted it and, most likely, raised it with the respondent to determine whether it remained an issue. Because the JSC failed to canvass the issue in the April interview, it was no longer among the ‘issues arising’ that needed to be canvassed with the respondent during the October interview. Furthermore, because the MSA’s comments for the October interview were not placed before the JSC commissioners, the MSA’s complaint about the respondent’s temperament fell through the cracks.

[40] Despite the JSC’s failure to consider the MSA’s complaints, the respondent’s temperament was on full display during the October 2021 interview, as evidenced by his ill-tempered exchanges with Madonsela SC. The High Court brushed this aside and blamed Madonsela SC for the respondent’s conduct. The court said that Madonsela SC was offended by the respondent’s earlier remark that it was time for a white person to be appointed, given that there were no white judges in the Mpumalanga Division.

[41] The High Court also stated that the respondent’s conduct stemmed from Madonsela SC’s suggestion that the respondent was a ‘fugitive from justice’. It described this as ‘an exaggerated allusion to the [MSA’s] allegation that he resigned to avoid facing discipline for non-payment’. The court further blamed Madonsela SC ‘for contriving umbrage at being interrupted by [the respondent] when posing a question, when [the respondent] too quickly began to answer’.

[42] I do not consider the High Court’s assessment of the exchange between the respondent and Madonsela SC to be fair and even-handed. I have set out the full text of the exchange, which shows that the respondent repeatedly interrupted Madonsela SC. This aligns with the MSA’s complaint that the respondent was abrasive and disruptive in court, often interrupting counsel during submissions.

The respondent's exchange with Cane SC should also be viewed in this light, as it shows the respondent to be too quick to respond without reflection.

[43] What transpired during the interview undermines the High Court's characterisation of the MSA's complaints as consisting of 'generalised condemnation in which opinions were stated but were bereft of any real narrative substantiation'. The respondent's conduct before the JSC thus confirmed, in real time, the MSA's complaints about the respondent's temperament. In these proceedings, the respondent himself acknowledged that his conduct was less than exemplary.

[44] I mention these because when the JSC deliberated after the interview, the respondent's conduct was not properly contextualised. Had it been considered in light of the MSA's complaint about the respondent's temperament during the April 2021 interview and the persistence of that complaint at the October 2021 interview, the minds of the JSC commissioners might have been engaged differently.

Financial disclosure

[45] As regards the outstanding R20 000, the High Court held that the respondent was under no obligation to disclose it to the JSC during the interview, as the amount was not yet due and the respondent had not defaulted on his arrangement with the MSA. Furthermore, the High Court held that the respondent was interrupted in his answer to the question, and there was no reason to doubt that, but for the interruption, he would have disclosed the outstanding amount.

[46] It is unclear what the High Court meant by stating that the debt of R20 000 was not 'due'. It was an outstanding amount in respect of Bar fees, for which the respondent had arranged to pay in instalments. In his questionnaire for the judicial

appointment, completed for the October 2021 interview, the respondent stated that he would have settled the debt in full by the time of the interview. However, this did not happen. When commissioner Madonsela SC sought to question him about it, the respondent interrupted him, and the two fell out. Whatever might have happened, it remained the respondent's obligation to disclose to the JSC during that interview that his undertaking to the JSC in his questionnaire had not been kept.

[47] Regarding the judgment, the High Court correctly accepted the respondent's explanation that he was unaware of the judgment and therefore could not have disclosed it to the JSC for the October 2021 interview. However, regarding the debt itself, the court held that the respondent had no duty to disclose it, as he had agreed with the school to pay it off upon his permanent appointment. It also accepted the respondent's explanation that the debt arose from a 'dwindling and dissipated legal practice in the wake of his spells as an acting judge.' For these reasons, the High Court postulated that even if the debt had been disclosed to the JSC, it would not have dissuaded the JSC from recommending the respondent.

[48] I have difficulty with this reasoning. The respondent's after-the-fact explanation in these proceedings is of little assistance. The debt, its origin, and the repayment arrangement should have been disclosed to the JSC when the respondent completed the questionnaire for judicial appointment. Just as it occurred to the respondent to disclose his Bar fees debt to the JSC, so too was he obliged to disclose the school fees debt. Only the JSC has the right, and indeed the obligation, to weigh the impact of the debt on the respondent's overall candidature. It would do so, having regard to the explanation and other relevant factors. It is not within a court's remit to say how the JSC would have dealt with the issue had it been disclosed to it.

[49] The High Court also accepted, without more, the respondent's explanation that he faced financial difficulties due to long, continuous acting stints as a judge, which were said to have adversely affected his practice. However, there is no suggestion that the respondent acted pro bono during those periods. It can therefore be safely accepted that the respondent was paid a full judge's salary for those long periods of acting.

[50] As mentioned, the respondent had served as an acting judge since 2018. According to the judicial appointment questionnaire he completed in December 2019, his acting stints included three full terms, several weeks within terms, and the mid-year recesses in 2019. The respondent was appointed to act during the 2019/2020 recesses and the first term of 2020. It is instructive that the school fees debt arose during that period. Had he declared the debt to the JSC, the commissioners might have probed the respondent about how, on a judge's salary for those periods, he was unable to pay his child's school fees.

[51] In sum, the JSC's decision to recommend the respondent following the October 2021 interview is flawed in two respects. The first stems from its failure during the April 2021 interview to canvass the respondent's comments on the MSA's complaint about his temperament. In *Democratic Alliance v President of South Africa*,³ the Constitutional Court held that a failure to consider a relevant material factor in reaching an administrative decision can render the decision irrational if the factor not considered ought to be central to a rational, or even reasonable, final outcome.

[52] In the present case, judicial temperament is a central attribute of a judge. The JSC's failure to consider the MSA's complaint about it during either the April

³ *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) paras 36 and 39. See also *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) para 63.

or the October 2021 interviews is reviewable under s 6(2)(e)(iii) of PAJA because the JSC failed to consider a relevant factor. When the issue arose during the October 2021 interview, it was not considered in the context of the MSA's complaint; instead, it was treated as an isolated incident arising from the interview itself.

[53] The second defect is that the decision was made in ignorance of two material facts, namely: (a) the MSA's adverse comments on the respondent's candidature, which its own secretariat failed to bring to the commissioners' attention; and (b) the respondent's debt, which he failed to disclose. Each constitutes a material error of fact. In *Pepcor Retirement Fund v Financial Services Board (Pepcor)*,⁴ this Court recognised a material error of fact as a ground of review thus:

'...[I]f legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should . . . be reviewable . . .'⁵

[54] Although a decision taken in ignorance of a material fact is not one of the grounds of review specifically mentioned under s 6 of PAJA, this Court has held that this ground could well be accommodated within one or other of the listed grounds of s 6 of PAJA. In *Chairpersons' Association v Minister of Arts and Culture*, Farlam JA explained:

'In my opinion the legal position as set out in the *Pepcor* case based as it is on the principle of legality still applies under PAJA, s 6(2)(e)(iii) of which provides that administrative action

⁴ *Pepcor Retirement Fund and Another v Financial Services Board and Another* [2003] 3 All SA 21 (SCA); 2003 (6) SA 38 (SCA). See also *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* [2015] ZASCA 35; 2015 (3) SA 545 (SCA); [2015] 2 All SA 294 (SCA) para 26.

⁵ *Pepcor* para 47.

taken because “irrelevant considerations were taken into account or relevant considerations were not considered” can be set aside on review.’⁶

[55] This was affirmed in *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd*,⁷ where Plasket AJA observed that a material error of fact could fall within s 6(2)(i) of PAJA. This is the catch-all provision that allows the development of new grounds of review by providing that administrative action may be reviewed on the basis that it is ‘otherwise unconstitutional or unlawful’.⁸ In my judgment, the JSC’s decision fits neatly within this provision.

[56] In *Pepcor*, this Court cautioned against blurring the distinction between an appeal and a review when recognising this ground of review. That does not arise here. We are not concerned with the correctness or reasonableness of the JSC’s decision to recommend the respondent but with the process. It goes without saying that complaints about the respondent’s temperament and his financial debts are factors the JSC ought to have considered but did not. How the JSC would have assessed the impact of those factors on the respondent’s candidature would have been entirely for it, and a court would not have been competent to review the decision merely because it disagreed with the JSC’s assessment of the facts.

[57] In all the circumstances, the JSC’s decision to recommend the respondent for judicial appointment is unconstitutional and invalid. It should be set aside. As for the remedy, the MSA has correctly sought remittal of the matter to the JSC for

⁶ *Chairpersons’ Association v Minister of Arts and Culture and Others* [2007] ZASCA 44; [2007] SCA 44 (RSA); 2007 (5) SA 236 (SCA); [2007] 2 All SA 582 (SCA) para 48.

⁷ *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd, Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and Others* [2011] ZASCA 202; 2012 (2) SA 16 (SCA); [2012] 2 All SA 111 (SCA). See also *Dumani v Nair and Another* [2012] ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 All SA 125 (SCA) para 30.

⁸ *Ibid* para 34.

reconsideration of the respondent's candidature. The JSC is at liberty to determine its procedure in this regard, bearing in mind the findings of this judgment.

[58] Before I conclude, I note that, during the hearing of the appeal, the MSA sought leave to introduce a judgment by a Full Court of the Mpumalanga Division in the matter of *Du Plessis and Others v Kruger & Partners and Others*,⁹ delivered on 13 January 2026. This was an appeal against the respondent's judgment. The Full Court found that the respondent had a close relationship with one of the litigants, which he failed to disclose. Because of what the court considered to be a conflict of interest, it concluded that the respondent ought to have disclosed the relationship and recused himself. The MSA sought to invoke the judgment to demonstrate that the respondent lacks the integrity to serve as a judge. I have ignored the judgment for present purposes because, important as it might be, it is not relevant to the impugned decision of the JSC. Furthermore, it is highly prejudicial to the respondent, as he was never afforded an opportunity to present his version.

Conclusion and order

[59] For the reasons canvassed above, the appeal must be allowed. The MSA has not pressed for costs. Accordingly, there will be no order for costs.

[60] The following order is made:

- 1 The appeal is upheld with no order as to costs.
- 2 The order of the Gauteng Division of the High Court, Johannesburg, is set aside and replaced with the following:

⁹ *Du Plessis and Others v Kruger and Partners Inc. and Another* (A29/2024; 4186/2021) [2026] ZAMPMBHC 1 (13 January 2026).

- ‘1 The decision of the first respondent on 21 October 2021 to recommend the third respondent for appointment as a judge of the Mpumalanga Division of the High Court is declared unlawful, invalid and unconstitutional.
- 2 The decision of the first respondent to recommend to the second respondent to appoint the third respondent as a judge is reviewed and set aside.
- 3 The matter is remitted to the first respondent to reconsider the third respondent’s candidature for judicial appointment.
- 4 Each party shall pay its own costs.’

T MAKGOKA
JUDGE OF APPEAL

Appearances:

For appellant: M Majozi (with A Ngidi and Q Didiza)

Instructed by: Leepile Attorneys Inc., Johannesburg
McIntyre van der Post, Bloemfontein

For third respondent: R du Plessis SC

Instructed by: Phatshoane Henney, Bloemfontein.