THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20857/2014

In the matter between:

BAAITSE ELIZABETH NKABINDE	**FIRST APPELLANT**
CHRISTOPHER NYAOLE JAFTA	**SECOND APPELLANT**

and

THE JUDICIAL SERVICE COMMISSION	**FIRST RESPONDENT**
PRESIDENT OF THE JUDICIAL CONDUCT TRIBUNAL	**SECOND RESPONDENT**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**
XOLISILE KHANYILE NO	**FOURTH RESPONDENT**

Neutral Citation: *Nkabinde v The Judicial Service Commission* (20857/2014) [2016] ZASCA 12 (10 March 2016).

Coram: Navsa ADP, Lewis, Leach, Pillay and Swain JJA

Heard: 15 February 2016

Delivered: 10 March 2016

Summary: Complaint against judge lodged with the Judicial Service Commission (JSC) in 2008, and investigated in terms of procedure for alleged judicial misconduct applicable at that time – investigation and outcome set aside by court order, and inquiry begun de novo in 2011, by which time a new procedure was applicable in terms of amendments to the Judicial Service Commission Act 9 of 1994 (JSCA) – JSC following new procedure and establishing a Judicial Conduct Tribunal – whether the new procedure impermissibly retrospectively applied – no substantive rights affected – application of new procedure sensible, fair and just – not impermissible – whether s 24 of the JSCA, by permitting a prosecutor to be involved in the collection and leading of evidence before the Tribunal is in breach of the doctrine of the separation of powers and unconstitutional and affects judicial independence – prosecutor not part of the executive, and independence guaranteed by s 179 of the Constitution – Tribunal hearing conducted in an inquisitorial manner – prosecutor not involved in making of decision by Tribunal or JSC – doctrine of the separation of powers not infringed and judicial independence not threatened – s 24 of the JSCA accordingly not unconstitutional.

ORDER

On appeal from: The Gauteng Local Division of the High Court, Johannesburg (Mayat J, Claassen and Kgomo JJ sitting as court of first instance).

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. The costs order in relation to the application for leave to appeal in the court below is set aside.

JUDGMENT

Navsa ADP (Lewis, Leach, Pillay & Swain JJA concurring):

Introduction

[1] In his well-known book *Judges*, David Pannick refers to a statement made in 1952 by Justice Jackson of the United States Supreme Court, that 'men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance and other weaknesses to which human flesh is heir'. In *The Modern Judiciary: Challenges, Stresses and Strains*,[1] Sir Fred Phillips, after acknowledging that the statement is as true now as it was then, goes on to consider a pronouncement by Lord Hailsham that judicial officers sometimes develop 'judges' disease', the symptoms of which are 'pomposity, irritability, talkativeness, proneness to *obiter dicta'.* The present case is concerned principally with whether steps taken in relation to a contemplated inquiry into judicial impropriety were legitimate. However, the alleged conduct at the centre of the dispute is not of the lesser kind of sin to which we as judges, with our human foibles, to which Phillips refers, are sometimes prone. It touches upon something much more foundational to the judicial institution in a constitutional democracy, namely, integrity.[2]

The issues

[2] This appeal is about the legality of steps taken by the JSC following on a complaint lodged by 11 Justices of our Constitutional Court with the first respondent, the Judicial Service Commission (JSC), established by s 178(1) of the Constitution and further regulated by The Judicial Service Commission Act 9 of 1994 (the JSCA). The essence of the complaint is that the Judge President of the Western Cape Division of the High Court, Cape Town, Justice John Hlophe, approached the appellants, two Justices of the Constitutional Court, in an attempt to influence that court's pending judgment in a number of related cases. The Judge President is not a party to these

[1] Sir Fred Phillips *The Modern Judiciary: Challenges, Stresses and Strains* (2010) at 19.
[2] In biblical terms, it is the juxtaposition of the venial as against the mortal.

proceedings, nor was he involved in the proceedings leading up to this appeal. I shall, however, in fairness to him, in due course, advert to his official response to the JSC.

[3] At the outset it is necessary to emphasise that this case is not about whether the complaint is justified, but, as already alluded to, the legitimacy of steps taken by the JSC, pursuant to the complaint being lodged. It entails a consideration of two decisions: First, the decision by the JSC, to hold a preliminary inquiry and, second, to constitute a tribunal to hear and adjudicate the complaint. The appellants also challenge the constitutionality of s 24(1) of the JSCA, in terms of which a member of the National Prosecuting Authority (NPA) may assist a tribunal, established in terms of the JSCA, by collecting and leading evidence. In this regard, the principal submission appears to be that the involvement in the inquiry of a member of the NPA is an improper delegation of power to 'a member of the Executive' and that it impermissibly involves a non-member of the JSC in the adjudication of the conduct of a judge. Furthermore, it was contended that s 24(1) is in breach of two fundamental principles, namely the doctrine of the separation of powers and the independence of the Judiciary.

[4] Considering the principal actors in this litigation and the nature of the complaint, it is a case of national significance.

Judicial ethos

[5] For a proper appreciation of the background culminating in the present appeal, including the parties' respective positions, and to convey why continuing delay in the finalisation of this matter that had its genesis in 2008 can only redound to the discredit of the judiciary, it is necessary, right at the beginning, to remind ourselves of the place of a judge and the proper image of the judiciary in a constitutional democracy. The following fairly lengthy extract from a decision of the Canadian Supreme Court[3] which, although relating to the position of a judge in Canada, is equally applicable to our country and well worth noting:

[3] *Judge Therrien v Minister of Justice and Attorney General of Quebec; Attorney General for Ontario, Attorney General for New Brunswick, Office des droits de détenus and Association des services de réhabilitation sociale du Québec, interveners* 2001 SCC 35; 84 CRR (2d) 1.

‘108. The judicial function is absolutely unique. Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies . . . . Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

109. If we then look beyond the jurist to whom we assign responsibility for resolving conflicts between parties, judges also play a fundamental role in the eyes of the external observer of the judicial system. The judge is the pillar of our entire justice system, and of the rights and freedoms which that system is designed to promote and protect. Thus, to the public, judges not only swear by taking their oath to serve the ideals of Justice and Truth on which the rule of law in Canada and the foundations of our democracy are built, but they are asked to embody them . . . .

110. Accordingly, the personal qualities, conduct and image that a judge projects affect those of the judicial system as a whole and, therefore, the confidence that the public places in it. Maintaining confidence on the part of the public in its justice system ensures its effectiveness and proper functioning. But beyond that, public confidence promotes the general welfare and social peace by maintaining the rule of law. In a paper written for its members, the Canadian Judicial Council explains:

“Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.”’ (References omitted.)

The background

[6] The litigation culminating in this appeal was launched in the Gauteng Local Division of the High Court, Johannesburg, by the two appellants, Justices Baaitse

Elizabeth Nkabinde and Christopher Nyaole Jafta who, as will become apparent, are material witnesses in relation to the complaint. The particulars of their objections to the decision by the JSC to hold a preliminary inquiry and thereafter to constitute a tribunal are dealt with later in this judgment. The complaint was lodged in 2008, more than seven years ago. The detailed background to the appeal, including the reasons for the long delay in finalising the inquiry into the complaint, is set out hereafter.

[7] In exploring the background, an appropriate starting point is the statement in support of the complaint lodged with the JSC, the only body empowered to receive and deal with complaints concerning the conduct of judges. The statement dated 17 June 2008 was penned by the then Chief Justice, Pius Nkonzo Langa, who has since passed away. It was made in Justice Langa's capacity as Chief Justice and head of the Constitutional Court and commenced with an assertion that it was made pursuant to a complaint lodged on 30 May 2008 by 11 Justices of the Constitutional Court. The following portion of the first paragraph is significant:

'This is a consolidated statement made on behalf of all the judges of the Court containing the key information relevant to the complaint. My colleagues Moseneke DCJ, Jafta AJ, Mokgoro J, Nkabinde J and O'Regan J have made confirming statements insofar as the contents of this statement relate to them. The other judges of the Court are willing to make confirmatory statements as well, should the Commission so require.'

[8] The statement was in response to a request for further particulars by the JSC. The following extract from para 2 of the statement, particularly from the perspective of the appellants, is important:[4]

'On 12 June 2008, two of the judges, Jafta AJ and Nkabinde J, lodged a statement with the JSC placing on record, among other things, that they were not willing to make any statement to the JSC, were not at liberty to discuss the contents of their discussion with the Chief Justice and Deputy Chief Justice but that they would not object to their disclosing the contents of those discussions to the JSC. The other judges of the Court had no knowledge that Jafta AJ and Nkabinde J had taken this position.'

[4] The appellants' unwillingness to make individual statements and be individual complainants is a constant refrain in the appellants' founding affidavit in the present matter.

[9] The relevant part of para 3 of the statement reads as follows:

'At the outset, I confirm that the complaint having been collectively lodged by the judges of the Court *is being pursued by them*. Those judges are myself, Moseneke DCJ, Jafta AJ, Kroon AJ (Jafta AJ and Kroon AJ acted as judges of the Constitutional Court for the period 15 February 2008 till 31 May 2008), Madala J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J (O'Regan J acted as ADCJ for the period 15 February to 31 May 2008 and is sometimes referred to as O'Regan ADCJ in this statement), Skweyiya J, Van der Westhuizen J and Yacoob J. The basis of that complaint is set out in this statement, and confirmed in the attached statements by Moseneke DCJ, Jafta AJ, Mokgoro J, Nkabinde J and O'Regan J.' (My emphasis.)

[10] It is necessary to record, as the statement does, that on 10 June 2008, Judge President Hlophe laid a counter-complaint with the JSC against the judges of the Constitutional Court. The basis of that counter-complaint was that the Justices of the Constitutional Court had violated his constitutional rights, including his rights to dignity, privacy and equality, by publishing a media release about their decision to lodge the complaint.[5]

[11] In paragraph 5 of the statement, Langa CJ explained that during March 2008 the Constitutional Court heard argument in the following matters:

'5.1 Thint (Pty) Limited v National Director of Public Prosecutions & others (CCT89/07);

5.2 J G Zuma & another v National Director of Public Prosecutions & others (CCT91/07);

5.3 Thint Holdings (South Africa) (Pty) Limited & another v National Director of Public Prosecutions (CCT90/07); and

5.4 J G Zuma v National Director of Public Prosecutions (CCT92/07).'

(These cases are referred to collectively as the Zuma/Thint cases.[6])

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[5] For details of the counter-complaint see the decision of this court in *Langa CJ & others v Hlophe* [2009] ZASCA 36; 2009 (4) SA 382 (SCA).

[6] The outcomes – the judgments – in these matters are now reported as:
Thint (Pty) Ltd v National Director of Public Prosecutions & others, Zuma v National Director of Public Prosecutions & others [2008] ZACC 13; 2009 (1) SA 1 (CC); and
Thint Holdings (Southern Africa) (Pty) Ltd & another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions [2008] ZACC 14 ; 2009 (1) SA 141 (CC).

[12] The judicial panel which heard the Zuma/Thint matters comprised Langa CJ, O'Regan ADCJ, Ngcobo J, Madala J, Mokgoro J, Skweyiya J, Van der Westhuizen, Yacoob J, Nkabinde J, Jafta AJ and Kroon AJ. Both Moseneke DCJ and Sachs J were on long leave and their places were filled by Jafta and Kroon AJJ.

[13] Paragraph 8 of the statement explained the nature of the Zuma/Thint cases as follows:

'[They] concerned, *inter alia*, the lawfulness of certain searches and seizures undertaken in terms of section 29 of the National Prosecuting Authority Act 32 of 1998 and the lawfulness of the issue of a letter of request to the authorities in Mauritius in terms of the International Co-operation in Criminal Matters Act 75 of 1996. Both the searches and seizures and the issue of the letter of request related to the criminal investigation concerning, amongst others, Mr J.G. Zuma, Thint Holdings (Southern Africa) (Pty) Ltd and Thint (Pty) Ltd. Judgment in the Zuma/Thint cases has been reserved.'

[14] Paragraphs 9 to 15 contain, in concise form, the material facts on which the complaint is based:

'9. Towards the end of March 2008, and after argument in the Zuma/Thint cases had been heard –

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

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

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

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

(a) Hlophe JP visited the chambers of Nkabinde J at the Constitutional Court as agreed;

(b) without invitation, Hlophe JP initiated a conversation with Nkabinde about the Zuma/Thint cases that had been heard by the Court; and

(c) in the course of that conversation, Hlophe JP sought improperly to persuade Nkabinde J to decide the Zuma/Thint cases in a manner favourable to Mr J G Zuma.

11. The approach by Hlophe JP to both Jafta AJ and Nkabinde J was then made known to Mokgoro J by Nkabinde J when the court term commenced in May 2008. Nkabinde J

invited Mokgoro J to her chambers saying that she needed some advice on a certain matter.

12. Nkabinde J told Mokgoro J in confidence that both she and Jafta AJ had been approached by Hlophe JP. She said that she had been informed by Jafta AJ of the improper approach by Hlophe JP to him prior to her being approached by Hlophe JP and she said that Jafta AJ had warned her of what Hlophe JP might say.

13. Nkabinde J then said that she had been approached by Hlophe JP in her chambers towards the end of April. She told Mokgoro J that Hlophe JP had commenced the conversation enquiring from her "Which Nkabinde are you?" Nkabinde J told him where she originated from, whereupon Hlophe JP then said that he had always thought she was from one of the Zulu-speaking Nkabinde families. She told him that she had been married to a "Nkabinde" and that after their divorce she had retained the surname.

14. Nkabinde J then said that Hlophe JP had told her "he had a mandate". He then told her that the privilege issues in the Zuma/Thint cases had to be decided "properly". Nkabinde J was concerned because she had been writing a post-hearing note on the aspect of privilege. Both Mokgoro J and Nkabinde J wondered how Hlophe JP had become aware of the fact that Nkabinde J had been writing on that aspect.

15. Hlophe JP told Nkabinde J that he had connections with the national intelligence. He also said that some people were going to lose their positions after the elections. Hlophe JP also said that he had out-grown the Cape High Court, that he was going to make himself available for appointment at the Constitutional Court and that Jafta AJ should also make himself available for appointment to the Constitutional Court.'

[15] According to the statement, Mokgoro J had advised Nkabinde J to report the matter to Langa CJ and/or Moseneke DCJ. It appears that Mokgoro J went on to state that the matter would affect the integrity of the judiciary and, if not attended to, would place it in peril. Mokgoro J discussed the matter with O'Regan J who, at that time, was Acting Deputy Chief Justice. They agreed that Nkabinde J should be encouraged to report the matter to either Langa CJ or Moseneke DCJ. O'Regan ADCJ informed Moseneke DCJ about what she had been told by Mokgoro J and Nkabinde J, in turn, informed Langa CJ about what had occurred. It is necessary to repeat that the statement recognised that Nkabinde J repeatedly expressed an unwillingness to furnish an individual statement regarding the matter.

[16] On 28 May 2008 a meeting was convened, attended by Langa CJ, Moseneke DCJ, Nkabinde J and Jafta AJ. The latter two judges were asked to recount what had occurred. The statement contains a detailed account of what was expressed by them. In order to appreciate the seriousness with which the Chief Justice and his Deputy viewed the matter, without venturing into issues such as context and before setting out Hlophe JP's version of events as presented to the JSC, it is necessary to repeat paragraphs 24 to 32 which referred, in greater detail, to the alleged interaction between Hlophe JP and Nkabinde J:

'24. Hlophe JP then turned to discuss the Zuma/Thint cases; and said they were important cases for the future of Mr Zuma. He said that the issue of privilege was an important aspect of the case for the prosecution. If the point raised by Mr Zuma's counsel were to be sustained there would be no case against Mr Zuma. Nkabinde J expressed concern to Langa CJ and Moseneke DCJ that she had composed a post-hearing note on the specific issue of privilege and proposed a preliminary conclusion on it. (Post-hearing notes are circulated amongst judges as a precursor to deliberations amongst judges). She was also puzzled as to why Hlophe JP had selected the issue of privilege for discussion and wondered how he could have known that she had written on this issue. She was concerned as to how Hlophe JP had obtained this information about the Zuma/Thint cases.

25. Nkabinde J continued by saying that Hlophe JP had told her that he had a mandate to act as he was doing. He stated that he was politically well-connected; and connected to members of national intelligence. The implication was that he was well informed about what was happening at the Court. Hlophe JP added that there was no real case against Mr Zuma and that it was therefore important to hold in his favour. Upon being asked by Nkabinde J what "besigheid" it was of his to discuss the case, Hlophe JP said that Mr Zuma was being "persecuted" as he (Hlophe JP) had been persecuted. Beyond that Nkabinde J reported that Hlophe JP had made other claims that she referred to as "hogwash". Nkabinde J made it clear that she had told Hlophe JP that he is not a member of the Court to talk about the case and that even if he were a member, he would still not be entitled to discuss the case unless he had sat in the case.

26. Nkabinde J stated to Langa CJ and Moseneke DCJ that she had told Hlophe JP that he should not interfere with the workings of the Court; and that Hlophe JP's approach did not influence her.

27. Nkabinde J also told Langa CJ and Moseneke DCJ that after the visit by Hlophe JP she had wrestled with what she should do about the visit for some time. She then decided to speak to Mokgoro J to seek advice, which she did in early May just after the court term commenced.'

The statement goes on to provide Jafta AJ's recounting of his interaction with Hlophe JP:

'28. After Nkabinde J had provided her account to Langa CJ and Moseneke DCJ, it was the turn of Jafta AJ. He began by asking whether the meeting was an official or unofficial one. Moseneke DCJ responded that it may have both official and unofficial consequences. He confirmed that Langa CJ and he were acting in their capacity as Chief Justice and Deputy Chief Justice. Jafta AJ then went on to say that he had known Hlophe JP for many years; that they had been colleagues and friends. He said that he did not want to breach a confidence but that he could confirm in general terms what Nkabinde J had said.

29. He stated that in March 2008, after the Zuma/Thint cases had been heard, Hlophe JP had come to his chambers and held a conversation with him. He divided his account of his conversation with Hlophe JP into two parts. The first part he was willing to relate; the second he said he had been told in confidence and refused to relate it. He related the first part of the meeting by saying that Hlophe JP had said that the case against Mr Zuma should be looked at properly or words to a similar effect and added words to the effect that you are our last hope ("Sesithembele kinina").

30. In response to a question, Jafta AJ stated that he gained the impression that Hlophe JP wished for a particular result in the matter. Jafta AJ explained that he gained this impression because Hlophe JP mentioned that Mr Zuma was being "persecuted" just as he (Hlophe JP) has been persecuted. Jafta AJ told Langa CJ and Moseneke DCJ that, particularly after he had heard of the approach to Nkabinde J, he considered the approach to be serious and that it was part of an attempt by Hlophe JP aimed at interfering with the independent exercise of judicial discretion by judges at the Court.

31. Jafta AJ also told Langa CJ and Moseneke DCJ that he had told Hlophe JP in no uncertain terms that the Zuma/Thint cases would be properly decided on its facts and on the application of the law to them.

32. Jafta AJ then stated that when he heard that Hlophe JP planned to visit Nkabinde J, he warned Nkabinde J that Hlophe JP had discussed the Zuma/Thint cases with him.
33. Jafta AJ also told Langa CJ and Moseneke DCJ that he had not planned to lodge a formal complaint about the conduct of Hlophe JP even though he considered it to have been an improper attempt to influence him. His view was that he had decisively dealt with the matter by rejecting the approach of Hlophe JP.'

[17] Paragraph 34 of the statement, although stating that Nkabinde J and Jafta AJ made it clear that in their view the approach by Hlophe JP had been improper, explained that they insisted that as far as they were concerned they had dealt with the matter by rejecting the approach and did not consider it necessary to lodge a complaint or make a statement. However, at the meeting referred to in paragraph 16, the appellants agreed that the matter should be discussed with other colleagues at the Constitutional Court. Thus, the next day, a meeting was convened at which the following judges were present:

'Langa CJ, Moseneke DCJ, O'Regan ADCJ, Jafta AJ, Kroon AJ, Madala J, Mokgoro J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J. Ngcobo J did not attend, nor did Sachs J who was in New York.'

At that meeting, the Chief Justice and his Deputy took the view that the conduct of Hlophe JP, as reported to them, 'constituted a serious attempt to influence the decision of the Court in the Zuma/Thint cases'.

[18] The following part of paragraph 37 of the statement is significant.

'It was decided *unanimously* by all judges present that the appropriate course of action, given the gravity of the matter, was to lay a complaint with the JSC against Hlophe JP. In reaching this decision, it was specifically stated that the judges who had been approached by Hlophe JP, if Hlophe JP resisted the complaint, would have to give oral evidence to the JSC in due course.' (My emphasis.)

[19] As noted above, this statement was in response to a request for further particulars by the JSC, following the lodgment of the initial complaint. Before the statement was finalised, Nkabinde J and Jafta AJ had indicated that they required legal

advice, which they subsequently received. Counsel representing the two judges acted in concert with counsel representing the other Justices of the Constitutional Court to finalise what was then in contemplation, namely, two statements: one for the appellants and one for the other Justices of the Constitutional Court.

[20] Before the collective statement of the other Justices was finalised, the appellants sent two paragraphs for inclusion therein. The suggested paragraphs found their way into the statement and form part of paragraphs 25 and 29, set out in para 15 above.

[21] On 12 June 2008 a document was delivered by hand to Moseneke DCJ and O'Regan ADCJ, which indicated that Nkabinde J and Jafta AJ did not intend to make a separate statement. Simply put, the appellants ultimately aligned themselves with the collective statement of their colleagues. The initial reluctance by the appellants to take the matter further and their hesitation, contrasted with a later commitment to a collective statement, conduces to an inevitable tension.

[22] The statement by the 11 Constitutional Court judges ended as follows:

'In conclusion, it should be noted that this complaint is based on conduct which the judges of the Court view in the most serious possible light. It constitutes a grave threat to the institution of the judiciary, and accordingly to our Constitution. *The speedy resolution of the complaint is imperative.* Should the JSC wish to have any further information or clarification of the above particulars, I will assist to the best of my ability.' (My emphasis).

[23] On 10 June 2008, Hlophe JP lodged the counter-complaint referred to above, and on 30 June 2008 he filed a response to the Constitutional Court Justices' complaint against him. The response sets out in some detail his perspective and version of what had occurred when he had interacted with the appellants on the two occasions referred to above. He adopted the attitude that the appellants had been manipulated and pressured by the Chief Justice and his Deputy and contended that there was a political motive to get rid of him at all costs. Hlophe JP stated that the media statement he had complained about showed a total disrespect for his rights, including his rights to privacy and dignity. The Judge President considered it significant that the appellants had made

it very clear that they did not intend to lay a complaint against him or to make any statement about the matter. Dealing with the series of conversations involving the appellants and the Chief Justice and his Deputy, the Judge President stated the following:

'It is clear that the process followed and actively encouraged by the Chief Justice and Deputy Chief Justice was designed to subvert the will of their colleagues and the series of conversations were an attempt to persuade them to join the two of them in their view of the matter, a view they recklessly pursued, and has brought this country's judiciary where it is today. On 12 June 2008 and despite the intense interactions between the Deputy Chief Justice and Judges Nkabinde and Jafta recorded in paragraph 47[7], a joint statement was issued by Judges Nkabinde and Jafta in which they distanced themselves from the complaint.'

[24] In relation to his interaction with the appellants, Hlophe JP confirmed that he and Jafta AJ had known each other for many years, as colleagues and friends. The meeting referred to in the statement by the Justices of the Constitutional Court was one that had been pre-arranged. He had been warmly received by Jafta AJ when he attended at the latter's chambers at the Constitutional Court. They exchanged pleasantries and discussed family and the judiciary. Hlophe JP only referred to the Zuma/Thint matters because the files in those cases were numerous and visible to any person walking into Jafta AJ's chambers. According to the Judge President, he expressed the view that the issue of privilege in those cases was important and had to be dealt with properly. They agreed that the issue of privilege was foundational in those matters. Hlophe JP admitted that he uttered the words 'sesithembele kinina'. This, according to Hlophe JP, was intended to convey that the issue of privilege would receive satisfactory attention and not that there should be a 'positive finding' for Zuma/Thint. Hlophe JP could not comprehend why expressing an opinion to 'an independent minded and competent judge as Jafta AJ would be interpreted as an attempt at influencing him to rule favourably'. The Judge President considered it significant that Jafta AJ did not once express the view that he had acted inappropriately.

[7] This is a reference to para 47 of the collective statement.

[25] In relation to his interaction with Nkabinde J, Hlophe JP explained that approximately two or three weeks after he had met Jafta AJ he was scheduled to attend a meeting of the Local Organising Committee of the Commonwealth Magistrates and Judges Association (the LOC). He went on to state that as the Chairperson of the LOC he was given a mandate by Chief Justice Langa to convene a conference of Judges and Magistrates in Cape Town in October. A lunch for members of the LOC had been organised at the Constitutional Court and he intended to utilise that opportunity to call on Nkabinde J at her chambers. An appointment was arranged and, as far as he was concerned, it was 'simply a courtesy call and nothing more'. As with Jafta AJ, pleasantries were exchanged and family matters discussed. The Zuma/Thint record was as prominent in Nkabinde J's chambers as they had been in Jafta AJ's. Hlophe JP remarked to Nkabinde J that those cases were probably one of the most demanding cases that the Constitutional Court was called upon to deal with, given its importance to the President of the ANC, Jacob Zuma, to the ANC, and to the country in general, since it was clear that Mr Zuma was likely to become President. According to the Judge President, Nkabinde J informed him that she was busy preparing a note on the issue of privileged communications between attorney and client. She told him that privilege was an important legal issue in the case. He agreed and stated that he 'was concerned that the majority in the Supreme Court of Appeal did not attach much weight to the issue of privilege'. Hlophe JP stated that he expressed strong views about the issue of privilege but was given no indication that Nkabinde J was uncomfortable about the discussion.

[26] In respect of the allegation that Hlophe JP had referred to a mandate in his interaction with Nkabinde J, he responded as follows:

'Justice Nkabinde asked me what I was doing in the Constitutional Court. My response was that I had been given a mandate by Chief Justice Langa to chair the LOC for the Commonwealth conference on Judges and Magistrates to be held in Cape Town. I also told her that I would be seeing him for a short time before the meeting to report on some issues. I never said that I had any connection with the national intelligence or that some people would lose their jobs after elections in which Jacob Zuma would be President. Judges enjoy secure tenure and it would be foolishness to use such a blunt threat in such circumstances. Justice Nkabinde, unlike Justice Jafta who was on an acting appointment, is a permanent Judge of the Constitutional Court. But

again it is unclear how my views expressed with no intimate knowledge of the case could influence a judge of the Constitutional Court.'

[27] In relation to the allegation that Nkabinde J had been warned by Jafta AJ that Hlophe JP would pay him a visit, the Judge President said the following:

'Despite being allegedly warned by Justice Jafta, Justice Nkabinde never cancelled our scheduled meeting, never asked me not to come, but instead welcomed me and spoke with me for approximately 30-45 minutes. I cannot understand how the information that Justice Jafta is alleged to have conveyed to Justice Nkabinde would not have been sufficiently important for Justice Nkabinde to keep me out of her chambers or even meeting her for that matter.'

[28] On 5 July 2008 the JSC decided that in view of the conflict of facts on the papers placed before it, it was necessary to refer both the complaint by the Constitutional Court and the counter-complaint by the Judge President to the hearing of oral evidence, on a date to be arranged.

[29] On 1 April 2009 the JSC convened to hear oral evidence. Langa CJ, Moseneke DCJ, Mokgoro, O'Regan and Nkabinde JJ and Jafta AJ attended the hearing. Hlophe JP could not attend on account of a medical condition. The hearing was postponed and reconvened on 4 April 2009. Hlophe JP sought a further postponement on the basis that a new senior counsel was appointed and required time to prepare for the hearing. In addition, the Judge President's medical condition had not improved. Despite opposition by the appellants and the other Justices of the Constitutional Court, the matter was postponed to 7 April 2009. When the JSC reconvened on that date, Hlophe JP was still indisposed. The JSC by majority decision refused a further postponement. Hlophe JP's counsel asked to be excused on the basis that they could serve no useful purpose in the absence of their client and without instruction. The JSC proceeded with the hearing. The Constitutional Court Judges, excepting for O'Regan J, presented oral evidence and were questioned by members of the JSC. According to the appellants' founding affidavit, the questioning was based on challenges raised by Hlophe JP. On 8 April 2009 proceedings were adjourned to enable the record of proceedings to be made available to the parties for the purposes of preparing written submissions.

[30] Subsequent to the adjournment, Hlophe JP launched proceedings in the South Gauteng High Court, resulting in an order declaring the proceedings of the JSC of 7 and 8 April 2009 unlawful and void *ab initio*. It was ordered that proceedings be started *de novo*.[8]

[31] The JSC convened from 20 to 22 July 2009 to consider the complaint and the counter-complaint. On 22 July 2009 it decided that:

'(a) The complaints be considered *de novo*,

(b) in terms of rule 3(1) of the [then existing Rules], the allegations made in the complaint and counter-complaint, if established, would amount to gross misconduct; and

(c) in terms of rule 4(1) of the [then existing Rules], a sub-committee consisting of Ngoepe JP . . . , Moerane SC and Semenya SC be appointed to investigate the complaints by conducting interviews behind closed doors.'

[32] On 30 July 2009 the sub-committee commenced conducting the interviews. Langa CJ, Moseneke DJC, Hlophe JP, Nkabinde J and Jafta AJ were called to appear before the sub-committee. The appellants were questioned on some of the matters allegedly constituting disputes of fact. After the interviews were conducted, the inquiry was adjourned until 15 August 2009.

[33] On 15 August 2009 the JSC reconvened[9] and decided as follows:

'a. the evidence in respect of the complaint did not justify a finding that the Judge President was guilty of gross misconduct and that the matter was accordingly finalised;

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[8] See *Hlophe v The Judicial Service Commission & others* [2009] All SA 67 (GSJ).

[9] In *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA), the following appears in relation to the change in the composition of the JSC and the status of Mr Zuma (para 13):

'[13] On 20 July 2009 the JSC reconvened to discuss the complaint and counter-complaint. In the meantime its composition had changed. A new President, Mr Jacob Zuma, had been elected, and a new Minister of Justice had been appointed. The Minister of Justice, ex officio, became a member of the JSC, and the newly elected President Zuma, as he was entitled to do, replaced four of its members, who had been appointed by his predecessor, with four new appointees. One of the new members had previously acted as counsel for one of the complainants, and recused himself from the discussion, leaving four new members who had not previously been involved in the matter.'

b. the evidence in support of the counter-complaint did not support a finding that the Constitutional Court Justices were guilty of gross misconduct and that the matter was accordingly finalised; and

c. none of the judges against whom complaints had been lodged was guilty of gross misconduct.'

[34] Subsequent to the decision, the Premier of the Western Cape Province launched proceedings in the Western Cape High Court, Cape Town, challenging the validity of that decision on the basis that the JSC had not been properly constituted. The application by the Premier was contested by the JSC and Hlophe JP. The Premier was successful and the JSC proceedings and the decisions referred to in the preceding paragraph were set aside.[10] The JSC and Hlophe JP unsuccessfully appealed to the Supreme Court of Appeal against that decision.[11]

[35] Aggrieved at the JSC's decision referred to in paragraph 32 above, Freedom Under Law (FUL) launched review proceedings in the North Gauteng High Court, seeking, *inter alia*, an order:

'(a) setting aside the decision of the JSC, reversing its earlier decision to hold a formal inquiry into the complaints and deciding to hold a preliminary inquiry; and

(b) reversing the decision of the JSC taken on 15 August 2009 in which it was declared that the evidence in respect of the complaints did not justify a finding that Hlophe JP was guilty of gross misconduct and that the matter be treated as finalised.'

[36] The North Gauteng High Court, Pretoria, dismissed the application. FUL, however, in an appeal to the Supreme Court of Appeal, was partially successful.[12] The Supreme Court of Appeal set aside the JSC's decision of 15 August 2009 to dismiss both the complaint and the counter-complaint, but refused to set aside the decision of

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[10] See *Premier, Western Cape v Acting Chairperson, Judicial Services Commission* 2010 (5) SA 634 (WCC).

[11] See *Acting Chairperson: Judicial Service Commission & others v Premier of the Western Cape Province* [2011] ZASCA 53; 2011 (3) SA 538 (SCA).

[12] See *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA).

the JSC of 22 July 2009 to hold a preliminary inquiry rather than to embark immediately on a formal inquiry. In para 28 of *Freedom Under Law*, Streicher JA held:

'There is obviously no unanimity among the members of the JSC concerning the decision that was taken on 5 July 2008, and whether the enquiry proceeded with thereafter was intended to be an enquiry in terms of rule 5. That being the case and in the light of the fact that the composition of the JSC had changed, the sensible course to follow would have been to reconsider the matter de novo, whatever the previous decisions may have been.'

[37] In relation to the JSC's decision to dismiss the complaint, this court, in *Freedom Under Law*, considered the two possibilities facing the JSC. The one being that Hlophe JP attempted to influence the two Justices as alleged by them and the other that he did not do so. Neither of the two conflicting versions had been tested by cross-examination. In para 45 of *Freedom Under Law* the following appears:

'The finding that it could not reject Hlophe JP's version is quite correct. By disallowing cross-examination that result was made inevitable. It would have been highly irregular to reject his evidence without having given him an opportunity to cross-examine his accusers. Utilising this procedure for the final resolution of a complaint of misconduct by a judge will always lead to a dismissal of the dispute, where the conduct alleged by the accuser is disputed by the judge, because the judge's version can never be rejected without having given him an opportunity to cross-examine his accusers. The procedure adopted was therefore not appropriate for the final determination of the complaint.'

[38] In *Freedom Under Law*, this court made it clear that proceedings in relation to complaints against judges are in the nature of a disciplinary inquiry and that proof on a balance of probabilities is required (para 46). It rejected the JSC's justification for dismissing the complaint on the basis that the entrenched versions would be adhered to and that cross-examination would serve no purpose. It also considered cross-examination essential to a decision by the JSC.[13] It said the following in paragraph 50:

'. . . [T]he decision by the JSC to dismiss the complaint, on the basis of a procedure inappropriate for the final determination of the complaint, and on the basis that cross-

[13] Paragraph 48.

examination would not take the matter any further, constituted an abdication of its constitutional duty to investigate the complaint properly.'

[39] In respect of the counter-complaint this court, in *Freedom Under Law*, had regard to its earlier decision in *Langa CJ & others v Hlophe*,[14] in which it held that the filing of the complaint by the Constitutional Court judges and the making of a public statement that they had done so, before he had been given a hearing, were not unlawful. In para 55 of *Freedom Under Law*, the following appears:

'Unlike in the case of the complaint, there was no evidence contradicting the evidence of the Constitutional Court judges on the basis of which the allegations against them could be established. The JSC was therefore entitled to dismiss the counter-complaint on the basis that the allegations were incapable of establishment.'

That put paid to the counter-complaint.

[40] For completeness it is necessary to record that, during 2010, the Mail and Guardian newspaper had brought an application in the South Gauteng High Court, Johannesburg, in which it was contended that the JSC could not have reversed its earlier decision to hold a formal enquiry. Malan J held that the JSC was entitled to reverse its earlier decision and conduct a new preliminary hearing. The decision is reported as *Mail and Guardian Ltd & others v JSC & others; e.tv (Pty) Ltd & another v Judicial Service Commission & others* 2010 (6) BCLR 615 (GSJ).[15]

[41] Following on the litigation referred to above, the JSC, during April 2012, decided to refer the collective complaint by the 11 Justices of the Constitutional Court to the Judicial Conduct Committee (the JCC), purportedly in terms of s 14 of the JSCA.

The regulatory regimes relating to judicial misconduct

[42] I interpose to state that until 1 June 2010 complaints against judges were dealt with in terms of Rules established by the JSC, pursuant to its powers as provided for in s 178(6) of the Constitution:

[14] *Langa CJ & others v Hlophe* [2009] ZASCA 36; 2009 (4) SA 382 (SCA).
[15] See paras 12-14.

'The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.'

Section 178(5) of the Constitution provides, *inter alia*, that when the JSC considers any matter except the appointment of a judge, 'it must sit without the members designated in terms of subsection (1)*(h)* and *(i)*'.

The persons excluded are politicians, namely, members of the National Assembly and the National Council of Provinces.

[43] At the time that the complaint by the 11 Constitutional Court judges was lodged, the Rules that governed complaints against judges provided that the JSC 'shall consider any complaint received from any source alleging incapacity, gross incompetence or gross misconduct of a judge'.[16] Rule 2.2 is of particular significance to the present dispute and reads as follows:

'The JSC may require any complaint to be on oath, but shall be entitled to act on any complaint whether on oath or not or in writing or reported to it orally, which it deems of sufficient seriousness to justify investigation or possible action in terms of Section 177 of the Constitution.'

[44] In terms of Rule 2.5, the JSC was entitled to appoint a sub-committee to deal with complaints, when it was not in session. In the event of the JSC resolving that the conduct complained of, if established, would justify a judge's removal from office, it was entitled to appoint a sub-committee consisting of one or more of its members to investigate and report to the Commission. The sub-committee was entitled to hear evidence if necessary and to report back to the Commission as to the future conduct of the matter.[17] Upon receipt of a report of the sub-committee, the JSC would resolve whether or not to accept the recommendation of the sub-committee.[18] Rule 5 provided for the procedure in the event of a formal inquiry. Rule 5.4, which is pertinent to the present dispute, reads as follows:

'The JSC may appoint *an attorney and/or counsel* to [act] as pro-forma prosecutor and to undertake any or all the following tasks: to prepare a charge sheet, to lead evidence, to cross-

[16] Rule 2.1.
[17] Rules 3.3 and 4.1.
[18] Rule 4.3.

examine witnesses, to present argument and to do all other things necessary that may assist the JSC in fulfilling its task under Section 177(1)*(a)* of the Constitution.' (My emphasis).

[45] At the time that the complaint by the 11 Justices of the Constitutional Court was lodged in terms of the JSC Rules then in force, it was not necessary for it to have been on oath. A complaint on oath was optional. At that time it must have been in everyone's contemplation that the matter would be dealt with in terms of the then existing Rules. The JSCA was amended in June 2010 and a new statutory regime to deal with complaints against judges came into operation. This, as can be seen, occurred approximately two years after the complaint was lodged. Sections 8, 9, 10 and 14 through 33 of the JSCA, introduced by the amendments, are extensive and set out mechanisms for the lodging and disposal of complaints. The amendments provided for the establishment of a Judicial Conduct Committee and a tribunal to deal with complaints against judges. The new provisions of the JSCA set out in some detail the procedures to be followed in relation to the adjudication of complaints.

The JCC and the Tribunal

[46] The new statutory regime was in place when the JSC decided during April 2012 to have the matter dealt with prospectively in terms of the new procedures by referring the complaint to the JCC established in terms of s 8 of the JSCA, to be dealt with in terms of s 14 read with s 16 of the JSCA. I shall, in due course, deal with the relevant statutory provisions in greater detail.

[47] The JCC to which the complaint was referred was chaired by the then Judge President of the Free State, Musi JP. Acting in terms of s 16 of the JSCA, the JCC recommended to the JSC that a tribunal be appointed in terms of s 21 of the JSCA to investigate the complaint. On 17 October 2012 the JSC decided, in terms of s 19 of the JSCA, to request the Chief Justice to appoint a tribunal to investigate and report on the complaint lodged by the Justices of the Constitutional Court. The Chief Justice, acting in terms of s 21 of the JSCA, appointed the Tribunal to investigate the collective complaint. Labuschagne J was appointed as the Tribunal President and Sandi J and a

Ms Pather served as its members. I shall for convenience refer to this Tribunal as the Labuschagne Tribunal.

[48] Section 24(1) of the JSCA provides:

'(1) The President of a Tribunal may, after consulting the Minister and the National Director of Public Prosecutions, appoint a member of the National Prosecuting Authority to collect evidence on behalf of the Tribunal, and to adduce evidence at a hearing.'

The fourth respondent, Ms Xolisile Khanyile, is a member of the NPA. She was appointed by the president of the Labuschagne Tribunal in consultation with the third respondent, the Minister of Justice and Constitutional Development and the National Director of Public Prosecutions to collect and adduce evidence before the Labuschagne Tribunal.

[49] On 1 October 2013, at the Labuschagne Tribunal hearing, it was submitted on behalf of the appellants that since the complaint by the Constitutional Court Justices had been lodged during May 2008, it ought rightly to be adjudicated in terms of the Rules which constituted the regulatory regime prior to the amendments to the JSCA. As noted, under the old regime a complaint need not have been on oath, whereas the present statutory framework obliged a complaint to be in the form of an affidavit. The prior regime did not make provision of the appointment of a tribunal nor did it have a provision for a prosecutor drawn from the NPA to lead and adduce evidence. It was submitted that after the decision of this court in *Freedom Under Law* it was not open to the JSC to withdraw its earlier decision not to conduct a formal inquiry. It was contended, in the alternative, that if the amended provisions were to be applied, there was no proper complaint before the JSC as the complaint was not on oath. Seen in proper perspective, the appellants were challenging the Labuschagne Tribunal's jurisdiction to adjudicate the complaint. The Labuschagne Tribunal rejected these contentions. The following is a summary of the reasons supplied for the rejection:

(a) The complaint had been submitted in terms of s 177(1)*(a)* of the Constitution[19] and in accordance with the Rules governing disciplinary procedures which the

[19] Section 177(1)*(a)* of the Constitution provides:

JSC was entitled to adopt in terms of s 178(6) of the Constitution.[20] There is nothing in the amending provisions of the JSCA that invalidates complaints made before it took effect and it was a well-known principle that amending legislation does not strike at acts completed before its enactment.

(b) The validity of the lodging of the complaint, as opposed to its merits, had never during the many years of intervening litigation and attempts at adjudication, been challenged.

(c) Even if s 14(3) of the amended JSCA were to be applied, it did not necessarily mean that the complaint was invalidated. The question was still whether the purpose of the legislation had been achieved and whether there had been substantial compliance with its provisions. And, '[t]he common cause facts are that the Constitutional Court justices were very serious when the complaint was lodged. They made confirmatory statements and confirmed the contents of the statement by the late Chief Justice as true and correct. In the first interdict proceedings and in the hearings before the JSC on 7-8 April 2009, the complaint was confirmed under oath.' To the extent that compliance with the JSCA was mandatory, the defect had been cured.

(d) The JSC was not *functus officio* and in terms of the decision in *Freedom Under Law* and the *Mail and Guardian*, the inquiry following upon the complaint had to commence de novo and the Labuschagne Tribunal had jurisdiction to hear the matter in terms of the provisions of the JSCA.

[50] Dissatisfied with that outcome, the appellants attempted to obtain an undertaking from the fourth respondent that she would not give effect to subpoenas issued by the JSC, calling upon them to appear before the Labuschagne Tribunal on 8 October 2013 pending the finalisation of contemplated review proceedings. This she refused to give. The appellants then applied to the court a quo, the Gauteng Local Division of the High

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'(1) A judge may be removed from office only if –
(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.'

[20] Section 178(6) reads as follows:
'The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.'

Court, Johannesburg, for an order, inter alia, setting aside two decisions by the JSC, namely, the decision during April 2012, when the JSC decided to refer the matter to the JCC for a preliminary inquiry and the decision on 17 October 2012 when the JSC decided to request the Chief Justice to appoint a tribunal. In addition, the appellants also sought an order declaring s 24(1) of the JSCA to be unconstitutional.

The decision of the court a quo

[51] The court a quo (Mayat J, Claassen and Kgomo JJ concurring) considered the assertions by the appellants that after this court's decision in *Freedom Under Law* they expected the JSC to refer the matter back to the sub-committee of the JSC in terms of the old Rules or that the JSC itself would undertake the inquiry to attempt to resolve the disputes of fact by way of cross-examination. The two appellants were aggrieved that the 'rules of engagement' had been changed. They were adamant that, whilst they wanted to co-operate fully and were not opposed to giving further evidence, they were motivated by their commitment to the rule of law, of which the principle of legality was an essential component. They asserted that they wanted things to be done in strict accordance with the law. Insofar as the undue delay in the finalisation of the complaint is concerned, the appellants were aggrieved that the impression had been created that they are contributing in no small measure to the matter being deferred. The following statement in the founding affidavit by Nkabinde J bears repeating:

'These damaging and unhelpful perceptions are far from correct. Any suggestion that we refuse to testify misses the point. We reiterate that we do not have the slightest problem testifying before a properly constituted structure seeking to resolve the complaint that may have been properly lodged with the JSC either under the old Rules or in terms of the amended JSC Act. It needs to be emphasised also that we have never held back or delayed the proceedings of the JSC. This is underscored by the transcript of the proceedings of the JSC. We mention further, at the risk of repetition, that we have testified before committees of the JSC under the old Rules. We do not take kindly to the damaging and unhelpful insinuations that we are *"back tracking"* on the original complaint. Far from it.' (Emphasis in original.)

[52] The essence of the argument on behalf of the appellants was that it is a fundamental principle that statutes generally apply prospectively unless a retrospective

application is contemplated by the statute itself. It was contended on behalf of the appellants that the JSC incorrectly applied the amendments referred to above retrospectively. The main preliminary objection before the Labuschagne Tribunal was that if it were to continue in terms of the amended JSCA, it must follow that it did not in terms of the new statutory regime have a valid complaint before it. In terms of s 14(3)*(b)* of the JSCA, a complaint based on the grounds set out in s 14(4)*(a)* has to be lodged by means of an affidavit or affirmed statement, specifying the nature of the complaint and the facts on which the complaint is based.

[53] Mayat J, after considering the old Rules and the provisions introduced by the amendments, addressed the issue raised by the appellants, namely, the improper retrospective application of the new statutory regime that applied to complaints against judges. After examining the applicable authorities, the learned judge concluded that, in the absence of the impairment of any existing substantive rights, the inquiry ought rightly to be conducted in terms of the new statutory regime. She rejected the contention that, in the event of the new statutory regime being applicable, it could correctly be said that there was no valid complaint and that there could therefore be no valid inquiry, nor indeed could a tribunal be established. She went on to hold that there would, in any event, have been substantial compliance with the provisions of s 14(3) of the JSCA, as the appellants and the other Justices of the Constitutional Court had, in subsequent litigation, on affidavit confirmed their positions in relation to the complaint.

[54] In relation to the application to have s 24(1) of the amended JSCA declared unconstitutional, Mayat J considered the contentions on behalf of the appellants, namely, that it violated constitutional principles in relation to the separation of powers and in particular that it impinged on judicial independence. The appellants submitted that in terms of the impugned subsection the Minister and the NDPP necessarily play a role in the appointment of a member of the prosecutorial services to collect and lead evidence before the Tribunal. The appellants were opposed to a ‘non-judicial’ person playing a role in relation to an inquiry involving a judge’s conduct. The involvement of a prosecutor was viewed negatively by the appellants, more particularly since at least

notionally, the prosecutorial services might later be involved in criminal proceedings involving a judge against whom damning findings might be made by a tribunal.

[55] The court a quo considered it important that a tribunal, established in terms of the JSCA, has the power to investigate and report on an inquisitorial basis, purely with a view to making a recommendation to the Commission, which is then, in turn, empowered to make a finding in terms of s 177(1)*(a)* of the Constitution about whether a judge is guilty of gross misconduct. In the event of such a finding by the Commission, as opposed to the Tribunal, the President and two-thirds of the National Assembly are empowered in terms of s 177(1)*(b)* read with s 177(2) of the Constitution, to take further steps to remove a judge from office. Mayat J took the view that it was significant that no powers were given to a prosecutor to either investigate or make a determination on the complaint. She held that a prosecutor appointed in terms of s 24(1) of the JSCA, was subject to directions from the Tribunal and differed from the role of a prosecutor in a criminal trial. The learned judge had regard to the answering affidavit on behalf of the Minister and found that it plausibly and tenably justified the appointment of a prosecutor from the members of the NPA, by obvious considerations of costs and convenience for all parties if the Tribunal elects to appoint a prosecutor.

[56] The court a quo had difficulty with the contention that the independence of the judiciary was compromised by the appointment of a prosecutor in terms of s 24(1). Mayat J doubted that a perception could be created that judges would somehow lose their independence by the participation of a prosecutor in the role of assisting the Tribunal. The learned judge also had difficulty comprehending how, at a practical level, a prosecutor could be viewed as part of the executive.

[57] Consequently, the court a quo dismissed the application. It is against that conclusion and the findings referred to above that the present appeal is directed. The court a quo refused the appellants' application for leave to appeal with costs. Pursuant to an application for leave to appeal to this court in terms of s 17(2)*(b)* of the Superior Courts Act 10 of 2013, on 17 March 2015 this court referred the application for leave to

appeal for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act. At the commencement of proceedings before us it was agreed between the parties that this was a matter where leave ought to be granted in terms of s 17(1)*(a)*(ii), there being a compelling reason, namely, finality and the importance of the case in relation to the administration of justice and its importance to the judiciary.[21] The parties proceeded to argue the merits of the matter.

The *functus officio* principle

[58] Although counsel on behalf of the appellants did not, in oral argument, pursue with any vigour the contentions previously made before the Labuschagne Tribunal in relation to the *functus officio* principle, the issue was nevertheless raised pertinently in written heads of argument and can be disposed of summarily. In *Freedom Under Law*, this court, having regard to the changed composition of the JSC, considered it sensible for the complaint to be addressed de novo.[22] Malan J, in *Mail and Guardian*, had regard to the provisions of s 178(6) of the Constitution and held that it was implicit that the JSC may vary earlier decisions on the procedure to be followed in relation to an inquiry but that in doing so it must have regard to procedural fairness.[23] It is necessary to record that in that case the appellants and Hlophe JP gave early notice that they would abide a decision of the court. It needs to be stated that *Mail and Guardian* principally concerned the right of access by the media to the inquiry. However, the issue of whether the JSC was *functus officio* had been specifically raised and dealt with by that court. That would have been a decision they should have abided by. Having regard to the slew of cross-cutting litigation and resultant outcomes, I agree with what was stated by Streicher JA in the *Freedom Under Law* decision, namely, that the common sense approach compelled the conclusion that the inquiry be approached anew.

The presumption against retrospectivity

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[21] Section 17(1)*(a)* reads as follow:

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.'

[22] Para 28 of *Freedom Under Law*.

[23] Para 14 of *Mail and Guardian*.

[59] The application of the provisions of the JSCA is objected to by the appellants on the basis that it flies in the face of certain fundamental principles in our law, which give effect to important constitutional values. In particular it is contended that the application of the provisions of the JSCA is in contravention of the presumption against the retrospective application of statutory enactments. That is the discussion to which I now turn.

[60] The development of the law, in relation to the presumption against retrospectivity, stretching back to Roman times, is usefully set out in the decision of this court in *Adampol (Pty) Ltd v Administrator, Transvaal* [1989] ZASCA 59; 1989 (3) SA 800 (A) at 805E-807F. As far back as 440 AD the Emperors Theodosius and Valentian enacted a decree, recorded in *Cod* 1.14.7, the translation of which reads as follows:

'It is certain that the laws and decrees give shape to future matters and are not applied to acts of the past, unless express provision is made for past time and for matters which are still pending.'[24]

[61] The rule was introduced into England and developed by the courts there with many exceptions. In *Williams v Williams* [1971] 2 All ER 764 (PDA) at 770j-771a, Lord Simon P said:

'This rule is a presumption only; and it may be overcome either by express words in the statute showing that the provision is intended to be retrospective, or "by necessary and distinct implication" demonstrating such an intention.'

[62] It developed along similar lines in America. See *Corpus Juris Secundum* vol 82 (1953) s 412:

'Literally defined, a retrospective law is a law which looks backwards or on things that are past; a retroactive law is one which acts on things that are past. In common use, as applied to statutes, the two words are synonymous, and in this connection may be broadly defined as having reference to a state of things existing before the act in question. A retroactive or retrospective law in the legal sense, is *one that takes away or impairs vested rights acquired*

[24] *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sit.*

under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. However, a statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its passing, but is retroactive only when it is applied to rights acquired prior to its enactment.' (My emphasis.)

[63] The rule was also adopted in Roman-Dutch law and our courts followed suit. In *Curtis v Johannesburg Municipality* 1906 TS 312, Innes CJ, although asserting the presumption against retrospectivity, reflected above, stated the following in relation to legislation effecting procedural changes:

'Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation . . . it must regulate all such procedure even though the cause of action arose before the date of promulgation, and even thought the suit may have been then pending.'

At 316 of *Curtis* the following qualification appears:

'. . . [I]f the effect of construing a statute literally would be to take away existing rights, then the literal construction should not be adopted, unless it is evident beyond doubt that the legislature intended it, or unless any other construction would defeat the evident object of the statute, or would render it meaningless.'

[64] In *Minister of Public Works v Haffejee NO* [1996] ZASCA 17; 1996 (3) SA 745 (A), this court said at 753 B-D:

'. . . [I]t does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not.'

[65] After the advent of our constitutional democracy, the Constitutional Court in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC), observed that generally, legislation is not to be interpreted to

extinguish existing rights and obligations. In para 26 of that judgment, Mokgoro J stated the following:

'That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed".' (Footnotes omitted.)

[66] In *Veldman*, O'Regan J with reference to *Haffejee*, stated (para 49):

'The distinction between substance and procedure, however, is not always easy to draw, as courts have often observed. Some procedural provisions can have a fatal effect on the ability to launch a cause of action or to raise a defence and so have a material substantive effect. In these circumstances Courts have been slow to take the view that the statute should operate with immediate effect on all pending claims.' (Footnote omitted.)

[67] In *Veldman*, in para 34 the following appears in the judgment of Mokgoro J:

'In a constitutional democracy, if new legislation affects a person in a manner that is detrimental to his or her substantive rights, the application of that law will not escape scrutiny simply on the grounds that it is procedural in nature.' (Footnote omitted.)

[68] In *Veldman*, in a concurring judgment, Ngcobo J said the following (para 69):

'However, an exception to this general rule was made in the case of purely procedural statutes. These statutes were considered to operate retrospectively. The rationale for this was that "no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed". In this context the distinction between statutes that regulated procedure and those that did not assumed particular importance in determining whether a particular statute operates prospectively or retrospectively. However, as the Appellate Division case law demonstrates, and O'Regan J observes, the distinction between procedural and non-procedural statutes is not always easy to draw, and the distinction was thus not always helpful.' (Footnotes omitted.)

[69] In *Veldman*, Ngcobo J stated that it was offensive to a right to a fair trial to subject an accused person to a more severe punishment that was not in operation at the time when the accused committed the offence.

[70] I did not understand counsel on behalf of any of the parties to contend that the question of whether the new statutory regime should be applied to pending cases is to be addressed other than on the basis of whether existing rights were infringed. If existing rights were to be found to be impinged upon, then it follows that the appeal must succeed. Counsel on behalf of the appellants was asked by this court to encapsulate the appellant's rights that might possibly be infringed as a result of the new statutory regime being applied. Counsel encountered difficulty replying. Counsel's best efforts in this regard were restricted to an oft repeated reliance on the principle of legality. Counsel was emphatic that the appellants insisted that the law be properly applied and that the principle of legality must be strictly obeyed. That proposition merely begs the question and is conducive to circular reasoning. Counsel experienced similar difficulties when he was asked to enumerate the substantive, rather than non-material, differences between the inquiry to be conducted in terms of the old Rules and an inquiry to be conducted in terms of the provisions of the JSCA.

[71] In written heads of argument it was contended on behalf of the appellants that the change in the rules of engagement was 'in total disregard of the procedural rights enjoyed by the applicants under the Old Rules'. The further written submissions in this regard were as follows:

'As part of "complainants" in terms of those Rules, we submit that the applicants were entitled to have their complaints investigated and determined either by the entire JSC or a sub-committee appointed by it and consisting of members of the JSC only. Furthermore, we submit that the applicants were entitled to have the resumption of proceedings in relation to the complaint, following the decision of the above Honourable Court in *Freedom Under Law*, done in terms of the Old Rules which did not subject them to a subpoena issued by a Tribunal and a forced consultation with a prosecutor.' (Footnote omitted.)

[72] Section 30 of the JSCA provides the Tribunal with powers of subpoena. Such a power, understandably, could not be located in the Rules. Section 30 was not challenged in the court below nor is its constitutionality in issue before us. It is particularly difficult to appreciate the appellants' written contentions referred to in the preceding paragraph when regard is had to their repeated expressed willingness to testify and be cross-examined, as stated for example by Nkabinde J in her founding affidavit, in paragraph 49.2 and 49.4:

'49.2 Our position is articulated in the affidavit by Jafta J, which requires no detailed elaboration here. It suffices to restate that we will testify before any structure that is properly constituted as is required by the Constitution. . . .

49.4 After the decision of the SCA in *Freedom Under Law v Acting Chairperson: JSC* 2011 (3) SA 549 (SCA), we expected that the JSC committee would convene and afford all concerned, including Justice Jafta and I, an opportunity to be cross-examined. We are at a loss regarding why the matter has been referred to this Tribunal, which, in our respectful submission, lacks the lawful authority to pursue the complaint.'

It must be borne in mind that the collective complaint with which the appellants aligned is being persisted in. In the light of these factors, the submission in the written heads of argument, referred to in the preceding paragraph, loses all its power. The appellants submit that they are willing to testify and be cross-examined, and this is precisely what a subpoena is designed to achieve.

[73] I have difficulty in appreciating the appellants' general objections to the inquiry being conducted in terms of the new statutory regime. I can see no existing rights being affected, nor any material prejudice. That conclusion is buttressed by a comparison of the procedures under the old Rules with the processes established in terms of the amendments to the JSCA, to which I will now turn. In what follows a reference to the Rules is a reference to the old regime, in contrast to the provisions of the JSCA introduced by the amendments which came into operation in June 2010.

[74] Rule 1.2 recognised that when the JSC considers any matter, except the appointment of a judge, it must, in terms of 178(5) of the Constitution, sit without the six members of the National Assembly and the four delegates from the National Council of

Provinces, who otherwise form part of the JSC. The same constitutional principle pertains to the application of the new statutory procedures.

[75] Rule 1.1 acknowledged that in terms of s 177(1) of the Constitution, a judge may be removed from office only if the JSC finds that he or she suffers from incapacity, is grossly incompetent or is guilty of gross misconduct. Following on such a finding a judge could only be removed by a resolution adopted by the National Assembly with a supporting vote of at least two-thirds of its members. The amendments to the JSCA could not and do not alter that position.

[76] Rule 2.1 of the Rules obliged the JSC to consider 'any complaint received from any source' alleging incapacity, gross incompetency or gross misconduct on the part of a judge. Section 14(1) of the JSCA, in similar terms, provides that 'any person' may lodge a complaint about a judge with the Chairperson of the JCC[25] established in terms of s 8.

[77] Rule 2.5 entitled the JSC to appoint a sub-committee to deal with complaints when the JSC was not in session. Similarly, s 10(1) of the JSCA, which forms part of the new statutory regime, provides that one of the objects of the JCC (comprised of judges exclusively) is to receive, consider and deal with complaints in terms of Part 3 of Chapter 2 of the JSCA that includes ss 14 and 16. Those sections provide, inter alia, for a preliminary consideration by the Chairperson of the JSC and recommendations concerning the establishment of a tribunal.

[78] Rule 2.3 made provision for the JSC to refer a complaint to the affected judge for a response in writing. Section 16 of the JSCA obliges the Chairperson of the JSC, if he

[25] In terms of s 8 of the JSCA, the JCC is comprised of:
(a) the Chief Justice, who is the Chairperson,
(b) the Deputy Chief Justice, and
(c) four judges, at least two of whom must be women,
designated by the Chief Justice in consultation with the Minister.
Section 9(4) of the JSCA allows for the Deputy Chief Justice to stand in for the Chief Justice and in the absence of both, for a Chairperson to be chosen from the remaining members.

or she is satisfied that in the event of a valid complaint being established, it is likely to lead to a finding that the judge complained of suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, to refer the complaint to the JCC and to allow for written representations to be made by the complainant and/or the affected judge.

[79] It is common cause that the process, both in terms of the Rules and the provisions of the JSCA, is inquisitorial[26] with rights pertaining both to the complainant and the judge in question. Rule 4.1 provided for a preliminary inquiry to be conducted by a sub-committee of the JSC consisting of one or more of its members. The sub-committee was empowered to hear evidence, if necessary. That Rule provided that, after investigation the sub-committee had to report to the JSC, with recommendations as to the further conduct of the matter. The JSC then made a decision on whether to proceed to a formal inquiry. Section 16 which forms part of the new statutory scheme, provides for a complaint to be referred to the JCC to consider whether to make a recommendation to the JSC that a complaint should be reported on and investigated by a tribunal. In circumstances that justify it, the JCC will make a recommendation for the matter to be investigated by a tribunal. The Tribunal in turn, after its inquiry, reports to the JSC which then makes the final decision on whether the judge concerned was guilty of impeachable conduct.[27] The ultimate decision, pursuant to a finding to that effect by the JSC, either in terms of the Rules, or the provisions of the JSCA, as to whether a judge should be removed from office, rests with the National Assembly in terms of s 177(1) of the Constitution.

[80] With reference to the appellants' complaint that the JSCA's provisions relating to the appointment of a prosecutor to assist a tribunal is constitutionally impermissible, which I discuss in greater depth later, the provisions of Rule 5.4 are significant:

'The JSC may appoint an attorney and/or counsel to act as pro-forma prosecutor and to undertake any or all the following tasks: to prepare a charge sheet, to lead evidence, to cross-

[26] See for example ss 17(2) and 26(2) of the JSCA, where this is expressly recognised in the enabling legislation.
[27] See s 20(3) of the JSCA.

examine witnesses, to present argument and to do all other things necessary that may assist the JSC in fulfilling its task under s 177(1)*(a)* of the Constitution.'

Section 24(1), provides for a member of the NPA to collect and adduce evidence at a hearing of the Tribunal. I shall in due course deal with the appellants' constitutional challenge to the validity of that section. However, clearly either in terms of the Rules or of the provisions of the JSCA above, the leader of evidence is not necessarily a member of the JSC. Significantly, Rule 5.4 also does not exclude the involvement of any member of the NPA who is either an attorney or advocate.

[81] As can be seen from the comparisons set out above, both in terms of the Rules and the provision of the JSCA, a tiered inquiry process is envisaged. In both instances, the final decision to refer a request for removal to the National Assembly, is the JSC in its full complement, excluding the members of the National Assembly and the National Council of Provinces. In terms of rule 5.4 as well as in terms of s 24(1) of the JSCA, it is not envisaged that a member of the JSC must lead evidence or cross-examine witnesses.

[82] It has always been our law, even during the pre-constitutional era, that anyone subject to administrative hearings and proceedings which might affect his or her rights, privileges and liberties is entitled to present his or her case and must be given the opportunity to do so.[28] The extent to which a person is allowed to advance his or her case depends on the circumstances. In English law, where an oral hearing is given, 'it has been laid down that a tribunal must (a) consider all relevant evidence which a party wishes to submit; (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently; (c) allow witnesses to be questioned; (d) allow comment on the evidence and argument on the whole case.'[29] In England failure to allow cross-examination by an objector at a statutory inquiry has led to the quashing of the Secretary of State's decision. The order of a Scottish magistrate

[28] This was expressed as the *audi alteram partem* rule. See 1 *LAWSA* 1 ed para 82 and 1 *LAWSA* 2 ed para 107.

[29] Sir William Wade & Christopher Forsyth *Administrative Law*, 9 ed (2004) at 518-519, and the authorities there cited.

who ordered the destruction of a large quantity of cheese on grounds of food safety without allowing cross-examination of the food safety experts was also quashed.[30] Having regard to our Constitutional values, the position in our country can hardly be different. Section 6(2)*(c)* of the Promotion of Administrative Justice Act 3 of 2000 provides as a basis for judicial review of administrative action a failure to observe procedural fairness.

[83] Rules 5.4 and 5.7 made provision for cross-examination in relation to a formal inquiry. Having regard to the nature of the proceedings before a tribunal in terms of the JSCA the right to cross-examination is implicit. In *Freedom Under Law* this court rightly expected that exercise to be undertaken in an attempt to arrive at the truth in relation to the complaint. In the present case, Hlophe JP is clearly entitled to lead evidence in rebuttal of the complaint and to cross-examine his accusers. That issue is not in contention.

[84] The appellants' reliance on the decision of this court in *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission & others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission & others* [1999] ZASCA 40; 1999 (4) SA 1 (SCA), in support of its contention that the JSC was wrong to change the terms of engagement and resort to the provisions of the JSCA, is also misplaced. In that case existing rights were affected. The introduction of legislation in that case had the effect that a statutory body empowered to grant road-carrier permits was divested of that power, despite there being pending decisions in respect of applications for such permits. The result was that the applications in the pending decisions were rendered abortive. This is precisely the sort of situation identified by O'Regan J in *Veldman*, quoted in para 66 above, where a procedural provision has a 'fatal effect on the ability to launch a cause of action . . . and so [has] a material substantive effect'. In essence, the process under the old procedure was well advanced,

[30] The authors do not suggest that parties always have the right to cross-examine witnesses. They go on to say (at 519-520) that 'there must be many administrative proceedings in which formal testimony and cross-examination are inappropriate, the inquiry being informal'. In other words, whether a right to cross-examine exists will always depend on the nature of the particular process involved.

and retrospective application of the new procedure would have prematurely terminated that process, leaving the litigant with no means of enforcing a right which previously was enforceable. This must be contrasted with a very different scenario, where a process is, by operation of a court order, begun de novo, in terms of a new statutory procedure which is substantially the same as that which preceded it. In such an instance, there is no 'fatal effect' on existing rights. In *Unitrans* this court referred with approval to its other decision in *Haffejee*. In para 23 of *Unitrans* the following appears:

'Of course, there may be cases where an amending statute introduces new procedural provisions which may, on a proper interpretation, leave intact the steps that have already been taken and operate prospectively only. But that will not be the position where prospective operation would render abortive the steps taken in the past – unless such was the clear intention of the legislator. To apply the statute to the pending application in the present case would extinguish there and then the ability to proceed with the application. It would nullify the steps already taken by Interkaap.'

In reaffirming this court's prior decision in *Haffejee*, Olivier JA in *Unitrans* reiterated that questions of fairness and equity should be taken into account in deciding whether amending legislation is applicable to pending matters. That exercise was undertaken by the court a quo and is what we are presently engaged in.

[85] When the amendments to the JSCA were before Parliament, the legislature must have been aware that there were pending complaints before the JSC. There is no transitional provision and there is no indication in the legislation that it does not apply to pending complaints. It must have been intended to apply to pending complaints since the JSC is a creature of the Constitution, which envisages in s 180*(b)* that national legislation may provide for procedures for dealing with complaints about judicial officers. The JSCA is the contemplated legislation and the JSC can only act within the powers conferred upon it in terms of the Constitution and constitutionally mandated legislation. If it could be shown that applying the provisions of the JSCA would result in the infringement of the substantive rights of a complainant or respondent judge, a court might, in appropriate circumstances, be persuaded to refrain from applying the provisions of the JSCA retrospectively. In the present case, as held in *Freedom Under Law* and also recognised in *Mail & Guardian*, because of the history of the matter and

the cross-cutting litigation and the change in composition of the JSC and considering what is set out in the preceding paragraphs, the most sensible, fair and just method of proceeding would be to start the inquiry in terms of the provisions of the JSCA. All that the JSC was doing was following what had been decided in those two cases. For all these reasons I agree with the conclusion reached by the court a quo, namely, that the JSC was correct in its decision to hold the preliminary inquiry and to constitute the Labuschagne Tribunal in terms of the provisions of the JSCA.

The submission in relation to the invalidity of the complaint

[86] I now turn to deal with the alternative submission on behalf of the appellants, namely, that, in the event of the amending provisions being applicable, the inquiry should not have been proceeded with as in terms of those very provisions there was no valid complaint before the JCC or the Labuschagne Tribunal. The lack of a complaint under oath as required by s 14(3)*(b)* of the JSCA was the underlying premise.

[87] The appellants' stance on this issue is also difficult to comprehend. They were part of the collective complaint which, as stated above, is being persisted in. None of the litigating parties in any of the preceding litigation took the view that the complaint was not seriously made after due consideration, nor, for that matter, did any of the other Justices of the Constitutional Court. Moreover, it was never contended that, in receiving the complaint in terms of its Rules then in force, the JSC acted in a fashion other than in accordance with its constitutional obligations and duties as envisaged in ss 177 and 178 of the Constitution. Invalidating the complaint would infringe upon the rights of the complainants, including the appellants', and it could only redound to their prejudice and impact negatively on the image of the judiciary. This could never have been in the contemplation of the legislature when the JSCA amendments were enacted. In any event, it is not contested that in the litigation referred to and in the present case, the complaint has been confirmed on affidavit. It will be recalled that s 14(3)*(b)* of the JSCA, states that a complaint must be lodged by means of an affidavit or affirmed statement. Section 15(2)*(b)* provides for the summary dismissal of a complaint if it 'does not comply *substantially* with the provisions of s 14(3)'. (My emphasis.) This is a clear indication

that a complaint is not automatically invalidated because it was not on affidavit. It is clear that an affidavit is required by s 14(3) of the JSCA in order to provide the required degree of solemnity to a complaint. It is to discourage frivolous complaints being lodged. That purpose was clearly achieved in relation to the complaint under discussion. It has subsequently been confirmed by oral testimony under oath before the JSC in terms of the Rules and has been reconfirmed in the litigation referred to above. Even if one were to take the view that a complaint under oath was required in order for the JSC to conduct a preliminary inquiry and to establish the Tribunal, then the conclusion is compelled that there has been substantial compliance with this requirement. Thus, I agree with the reasoning and conclusions reached by the Labuschagne Tribunal and the court below.

The constitutionality of s 24(1) of the JSCA

[88] It is now necessary to consider the constitutionality of s 24(1) of the JSCA. In this regard, it is important to begin with a rejection of the notion that a prosecutor is to be regarded as part of the executive. This is evidenced first and foremost by the NPA's location within the Constitutional framework. The NPA is established in terms of s 179 of the Constitution, which falls under Chapter 8, entitled 'Courts and the Administration of Justice'. This Chapter also includes provisions relating to the judiciary and the courts. The executive, on the other hand, is dealt with under other Chapters of the Constitution. For example, the President and the National Executive are dealt with in Chapter 5, the Provinces are dealt with in Chapter 6, and Local Government is dealt with in Chapter 7. The NPA is not even classified as a State Institution Supporting Constitutional Democracy (Chapter 9), but is treated as an integral part of the justice system.[31]

[89] In *Democratic Alliance v President of the Republic of South Africa & others* [2011] ZASCA 241; 2012 (1) SA 417 (SCA), this court, in dealing with the National Prosecution Authority established in terms of s 179 of the Constitution and regulated by

[31] It must be mentioned that s 179(6) of the Constitution does state that the 'Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.' However, given the context of this provision, as well as what follows relating to the express recognition of the independence of the NPA, this clearly does not mean that they are beholden to the executive.

the National Prosecuting Authority Act 32 of 1998 (NPAA), observed, with reference to constitutional values, that institutions of state, including the National Prosecuting Authority, are integral to the well-being of a functioning democracy, have to be above reproach, have to be independent and must all serve the people without fear, favour or prejudice.[32] In that case this court considered views on prosecutorial independence in comparable jurisdictions and agreed that democracies have found the means to insulate prosecutors from political pressures. Prosecutors are seen as bulwarks against human rights abuses. In *Sharma V Brown-Antoine & others* [2007] 1 WLR 780 (PC) the Privy Council said, with reference to prosecutorial independence, that the maintenance of public confidence in the administration of justice required that the prosecution should be, and be seen to be, even-handed.

[90] In the first *Certification*[33] judgment, the Constitutional Court, in considering the power of the President to appoint the National Director of Public Prosecutions, said the following (para 146):

'[Section] 179(4) provides that the national legislation *must ensure* that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts. In the circumstances, the objection to [s] 179 must be rejected.'

As can be seen, legislative or executive action threatening that independence would be contrary to constitutional values.

[91] Section 32 of the NPAA obliges prosecutors to take an oath of office or make an affirmation in terms of which they swear or affirm to 'uphold and protect the Constitution and the fundamental rights entrenched therein and to enforce the Law of the Republic without fear, favour or prejudice and, as the circumstances of any particular case may require, in accordance with the Constitution and the Law'. Importantly, s 25(1)*(a)* of the NPAA provides:

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[32] Paragraph 70.

[33] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC).

'(1) A *prosecutor* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her –

(a) under *this Act* and any other law of the *Republic*; . . . .'

The JSCA is 'other law' of the Republic. There is no challenge to the validity of s 25(1)*(a)* of the NPAA.

[92] The independence of members of the NPA is protected, both in terms of the Constitution and the provisions of the NPAA. That independence and the obligation to uphold the Constitution does not simply dissipate because they are called upon to perform a task in terms of the provisions of the JSCA.

[93] Furthermore, it is correct, as concluded by the court a quo, that the JSCA does not give a prosecutor any adjudicative powers but limits his or her involvement to the collection and leading of evidence. The prosecutor is subject to the powers of the Tribunal and does not participate in the final decision-making, either by the Tribunal or the JSC. It must also be reiterated that the Tribunal operates in an inquisitorial manner, further reducing any dependence it may otherwise have had on an appointed prosecutor.

[94] It is not insignificant, as appears from the documentation before us, that the fourth respondent is an advocate. In terms of the Rules she would not only have been entitled to lead evidence but would also have been entitled to cross-examine witnesses and to present argument. In other words, her involvement in the proceedings may in fact have been more extensive under the old Rules than under the new proceedings in terms of the amended JSCA.

[95] As observed by the court a quo, the affidavit on behalf of the Minister explains that the rationale for the appointment of a prosecutor is to ease the workload of a tribunal and to increase efficiency in a cost effective manner as the involvement of outside attorneys or advocates will have cost implications. This seems to me to be entirely plausible and justifiable.

[96] Section 32 of the JSCA does provide that if the Tribunal is of the opinion that evidence before it discloses the commission of an offence by a respondent judge, the Tribunal President must notify the National Director of Public Prosecutions and cause a copy of the record in question to be submitted to his or her office. A prosecution can only be undertaken within the strict terms of the NPAA with its attendant safeguards. A prosecution will only ensue within the parameters of prosecution policy and directives and in terms of the hierarchical structures established by the NPAA. It is also true that s 38 of the JSCA precludes any person associated with inter alia the JSC, JCC, Tribunal or support staff from disclosing any confidential information or document obtained in the performance of his or her function. This can only redound to the benefit of witnesses and/or the judge involved.

[97] It is also correct that s 24 of the JSCA does not make the involvement of a prosecutor mandatory. It is a discretionary power afforded to the President of the Tribunal who has to consult the Minister of Justice and Constitutional Development and the National Director of Public Prosecutions before a prosecutor is appointed.

[98] Having regard to what is set out above I fail to see how judicial independence is threatened by the participation of the prosecutor in the limited role provided for by s 24(1) of the JSCA. I cannot see how it offends against the doctrine of the separation of powers. For all the reasons aforesaid, I agree with the conclusion in this regard reached by the court a quo.

[99] The constitutionality of ss 21 to 23 of the JSCA were not impugned before the court a quo and the Minister was not called upon to justify their enactment. It is necessary to restate, briefly, that ss 21 to 23 of the JSCA provide for the establishment of a tribunal, its composition and the inclusion of non-judicial members. A belated constitutional challenge in relation to these sections of the JSCA appears, for the first time, in written heads of argument before this court on behalf of the appellants. The following is the relevant part of the written submissions:

'Although sections 21 to 23 of the Amendment Act were not pertinently challenged as unconstitutional in the Court *a quo* they have been covered in the papers. We submit that Parliament was not constitutionally authorised to enact these provisions as they altered the composition of the JSC. There is no provision either in section 177 or 178 permitting the appointment of structures such as the Tribunal to perform the work of the JSC.' (Footnote omitted.)

Reliance was placed on paragraph 49.7 of the founding affidavit of Nkabinde J. That sub-paragraph does not substantiate the submission. It reads as follows:

'We submit that the decision appointing the Tribunal is liable to be set aside, and so is the decision appointing the fourth respondent as officer leading evidence at the Tribunal. In any event, for the reasons set out more fully in the affidavit of Jafta J, section 24(1) of the JSC Act is liable to be declared invalid.'

The appellants' case was premised on the Rules being applicable and not the provisions of the JSCA and that they were therefore not liable to testify or be cross-examined before the Labuschagne Tribunal. It was not that the appointment of a prosecutor to assist the Labuschagne Tribunal offended the principle of the separation of powers.

[100] In *Prince v President, Cape Law Society & others* [2000] ZACC 28; 2001 (2) SA 388 (CC), the Constitutional Court made it clear that (para 22):

'Parties who challenge the constitutionality of a provision in a statue must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal.' (Footnotes omitted.)

[101] In the present case the Minister's mind was not directed to any other provision than s 21(4) of the JSCA and the deponent on his behalf directed his attention to the justification for the enactment of the statutory provision. He was thus not provided with an opportunity to deal with the more substantial structural challenges, raised for the first time in written heads of arguments before this court. In addition, setting aside the latterly impugned provisions will certainly affect the interests of existing complainants and respondent judges and, also, of potential complainants. Civil society might rightly also be said to have an interest in the statutory mechanisms dealing with complaints against judges. They have all not been afforded an opportunity to be heard. Uniform Rule 16A(1) reads as follows:

'(1)*(a)* Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.

(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.

(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose.

(d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days.'

The purpose of this Rule is:

'[T]o enable parties interested in a constitutional issue to seek to be admitted as *amici curiae* in the case in which the issue is raised so that they can advance submissions in regard thereto.'[34] (Footnote omitted.)

[102] The late raising of the constitutional validity of ss 21 to 23 of the JSCA, in the manner described above, is impermissible. In any event, for all the reasons set out above there appears to be no substance to the contentions on behalf of the appellants in this regard.

[34] DE van Loggerenberg, E Bertelsmann and PBJ Farlam *Erasmus: Superior Court Practice* (Revision Service 1, 2016) para D1-166.

[103] In dismissing the application in the court below, Mayat J rightly made no order as to costs. However, in refusing leave to appeal, she ordered the appellants to pay costs. Before us the parties were agreed that having regard to the constitutional issues to be addressed, there ought not to be costs on appeal and that the costs order attendant upon the refusal by the court a quo of the application for leave to appeal ought to be set aside.

[104] One final aspect requires consideration. The considerable delay in the finalisation of the complaint in a matter which is of crucial and national importance does the judiciary great harm. Section 27 of the JSCA reads as follows:

'(1) In the interests of protecting and enhancing the dignity and effectiveness of the judiciary and the courts, a Tribunal must –

(a) as soon as reasonably practicable after its appointment, determine a date, time and place for conducting a hearing in respect of the allegations referred to it; and

(b) conclude the hearing without unreasonable delay.

(2) Subject to subsection (1)*(b)*, a Tribunal may adjourn its proceedings at any time, to any date, time and place.

The appellants were rightly concerned about the negative perceptions that abound because of the delay in finalising this complaint which, it bears repeating, was laid almost eight years ago in 2008. In *Mail and Guardian*, Hlophe JP filed an affidavit in which he stated that he would abide the decision of the court and continued to say the following (quoted in para 5 of that judgment):

'Let me state at the outset that I have nothing to hide from the public of South Africa relating to the allegations made against me by the Justices of the Constitutional Court. My conscience is clear about these allegations, and I will appear before a properly constituted Judicial Service Commission . . . when I am called to do so . . .

In my view, the duty that I owe the public is to appear before the JSC and to answer any questions relating to the allegations made against me by the Justices of the Constitutional Court. It is a duty that the public is entitled to demand from me if public confidence in me as a Judge is to continue. I will accordingly meet with the JSC to answer questions about the allegations against me, whether the meetings are open or whether they are closed. However, my duty does not extend to appearing before the media to answer allegations of wrongdoing, in

my experience and view, the media coverage of these allegations against me has been unfair and most disparaging.'

The appellants also assert that they are willing to testify and be cross-examined. Against all of these assertions it was unsettling when counsel on behalf of the appellants, with emphatic certainty, stated during submissions before us that this matter would never end, speculating without specificity that there would be on-going challenges to proceedings related to the complaint. The judicial image in South Africa cannot afford to be further tarnished in this manner. As can be seen from the extensive litigation referred to above, each of the protagonists, including the JSC, has contributed to the delay. There 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. After all, as observed by Horace as long ago as approximately 13 BC, '[a] good and faithful judge ever prefers the honourable to the expedient'[35]. The country expects nothing less.

[105] The following order is made:

1. The application for leave to appeal is granted.
2. The appeal is dismissed.
3. The costs order in relation to the application for leave to appeal in the court below is set aside.

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M S Navsa

Acting Deputy President

[35] Taken from Ode 9 of Book IV of Horace's Odes. See James Michie (ed) *The Odes of Horace* (1964).

APPEARANCES:

For the Appellant:	B R Tokota SC (with T V Norman SC) Instructed by: The State Attorney, Kimberley The State Attorney, Bloemfontein
For the First and Third Respondents:	N H Maenetje SC (with P G Seleka) Instructed by: Mashaba Attorneys, Johannesburg Phatshoane Henny Inc., Bloemfontein
For the Second Respondent:	T Motau SC (with R Tshetlo) (Heads of argument prepared by T Motau SC and C Gibson) Instructed by The President: Judicial Conduct Tribunal, Johannesburg Phatshoane Henny Inc., Bloemfontein