



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no: 550/2022

In the matter between:

**FREEDOM UNDER LAW (RF) NPC**

**APPELLANT**

and

**JUDICIAL SERVICE COMMISSION**

**FIRST RESPONDENT**

**NKOLA JOHN MOTATA**

**SECOND RESPONDENT**

**Neutral citation:** *Freedom Under Law v Judicial Service Commission and Another*  
(Case no 550/2022) [2023] ZASCA 103 (22 June 2023)

**Coram:** PONNAN, MOCUMIE and SCHIPPERS JJA and KATHREE-  
SETILOANE and MASIPA AJJA

**Heard:** 11 May 2023

**Delivered:** 22 June 2023

**Summary:** Section 177 of the Constitution – removal of judge from office – Judicial Conduct Tribunal finding Judge guilty of gross misconduct – no justification for the Judicial Service Commission (JSC) rejecting the findings and conclusion of the Judicial Conduct Tribunal – matter remitted for it to be dealt with by the JSC in terms of s 20(4) of the Judicial Service Commission Act 9 of 1994.

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## ORDER

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

- 1 The appeal is upheld, and the cross appeal is dismissed, in each instance with costs, including those of two counsel.
  - 2 The order of the court below is set aside and substituted by:
    - ‘1. The application succeeds with costs, including those of two counsel.
    2. The matter is remitted to the first respondent for it to be dealt with in terms of Section 20(4) of the Judicial Service Commission Act 9 of 1994.’
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## JUDGMENT

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**Ponnan JA (Schippers JA and Kathree-Setiloane AJA concurring):**

*‘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.’<sup>1</sup>*

[1] As Lord Phillips observed in *Re Chief Justice of Gibraltar*:

‘A summary of the standard of behaviour to be expected from a judge was given by Gonthier J when delivering the judgment of the Supreme Court of Canada in *Therrien v Canada* (Ministry of Justice) and another [2001] 2 SCR 3:

“The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.”

While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious

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<sup>1</sup> *Moreau-Berube v New Brunswick* (Judicial Council) [2002] 1 SCR 249; 2002 SCC 11 at 286 (*Moreau-Berube*).

as to destroy confidence in the judge's ability properly to perform the judicial function. As Gonthier J put it at paragraph 147 of the same case:

“... before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.”<sup>2</sup>

That is the issue that confronts us in this appeal – namely, whether the conduct encountered here is of such a kind as to render the second respondent, Judge Nkola John Motata, incapable of performing the duties of his office.

[2] In the early hours of 6 January 2007, Judge Motata attempted to execute a U-turn whilst driving his vehicle along Glen Eagles Road in Hurlingham, Johannesburg, when he reversed into the boundary wall of a residential property owned by Mr Richard Baird. Having been informed telephonically of the incident by Mr Lucky Melk, the tenant of the property, Mr Baird arrived at the scene, whereafter he contacted the police. Whilst waiting for the police to arrive, Mr Baird took a number of photographs of the vehicle and of the driver, Judge Motata, who was still seated behind the steering wheel in the driver's seat.

[3] In the course of those events, Judge Motata became involved in a verbal altercation with Mr Baird. Mr Baird formed the view that Judge Motata was inebriated. When two female officers of the Johannesburg Metropolitan Police Department (the JMPD) arrived at the scene Judge Motata refused to co-operate with them. When one of the officers, Ms Paulina Mashilela, informed him that she would arrest him, he responded that he would not be arrested by a female officer. She also suspected that he was under the influence of alcohol. The two female JMPD officers had to call for assistance. The two male officers, who responded, encountered similar resistance, but they eventually managed to handcuff Judge Motata, remove him from his car and arrest him.

[4] Using his mobile phone, Mr Baird recorded some of the events as they unfolded. Those recordings are telling. They reveal Judge Motata making racist

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<sup>2</sup> *Re Chief Justice of Gibraltar* [2009] UKPC 43 paras 30 and 31.

utterances, resorting to profanities and employing derogatory language, the most notable of which ran thus:

‘JUDGE MOTATA: Yes, but you know all of you, let me tell you most of us this is our world, it is not the world of the boers. Even if they can have big bodies, South Africa is ours.

WITNESS 1: But sir, the problem is you drove into his wall.

JUDGE MOTATA: Even if I can drive into it I will pay it. It is not a problem that I can pay for the wall but he must not criticize me. There is no boer who will criticize me, (indistinct) what he thinks.

WITNESS 1: But Mr you of the law person.

JUDGE MOTATA: Yes I am the man of the law, I am saying if I knocked his wall. . . (intervenes).

WITNESS 1: Do you know the law of. . . (intervenes).

JUDGE MOTATA: Yes I know the law. Let me go to the law. I do not care about him. Yes he must not look at me as a black man. Let me go before the law. That is how much I owe him for the wall which I broke down.

WITNESS 1: But then it is not good to insult him.

JUDGE MOTATA: Fuck him, fuck him, he must not insult me. I say fuck him. Anybody who insults me, I say fuck you.’

[5] Following upon the events of 6 January 2007, Judge Motata was charged with: (i) a contravention of s 65(1)(a) of the National Road Traffic Act 93 of 1996, namely driving a motor vehicle whilst under the influence of intoxicating liquor, and, in the alternative, with two further statutory contraventions under that Act (count 1); and, (ii) defeating the ends of justice, and, in the alternative, with having resisted arrest in contravention of s 67(1)(a) of the South African Police Act 68 of 1995 (count 2). He pleaded not guilty to all the charges. However, on 2 September 2009, and following a trial, he was convicted by the Regional Division of the Magistrates’ Court, Pretoria (the trial court) of the main charge on count 1 and acquitted on both the main and alternative charges on count 2.

[6] The trial court found that much of Mr Baird’s testimony about Judge Motata’s voice, manner of speech and uncooperativeness was borne out by the recordings. It was further satisfied that, given Judge Motata’s proven speech, physical and mental impairment, as also his general conduct shortly after the collision, the only reasonable inference was that Judge Motata was indeed under the influence of intoxicating liquor

at the time that he drove his vehicle into the wall. Judge Motata's appeal against his conviction to a Full Bench of the Gauteng Division of the High Court, Pretoria (the appeal court) failed.<sup>3</sup>

[7] On 29 November 2010, the appeal court confirmed his conviction. The appeal court found it 'extremely improbable that any High Court judge in his or her sober senses would use the kind of foul language used by the appellant in the presence of – to him – unknown members of the public and police officers – some of whom being women'. Likewise, the appeal court found that it was 'extremely improbable that any High Court judge in his or her sober senses would make the kind of racist remarks uttered by [Judge Motata] in public'.

[8] In a country with a lively press, the media, perhaps anxious for copy, did not shrink from reporting on both the events at Mr Baird's home and the ensuing criminal trial. Over time, three complaints came to be lodged against Judge Motata with the first respondent, the Judicial Service Commission (JSC). The first was a complaint by the Catholic Commission for Justice and Peace lodged on 8 January 2007 (the CCJP complaint). It requested the JSC to investigate 'Judge Motata's actions which, if accurately reported . . . bring disgrace on him, the judiciary and undermine public respect'.

[9] The second, which was lodged on 5 July 2008 by AfriForum,<sup>4</sup> 'officially request[ed] the [JSC] to initiate the process in terms of [s] 177 of the Constitution . . . in order to remove [him] permanently from his position as judge because of his gross racist misconduct' (the AfriForum complaint). The AfriForum complaint alleged that Judge Motata had made 'crass racist remarks regarding whites' and that: 'A judge should be able to act in the interest of all communities without any prejudice. Any judge who makes himself guilty of racist conduct, like Judge Motata according to the audio recording did, therefore has no place on the judges' bench. Such a judge betrays the public's confidence in the judicial system.'

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<sup>3</sup> *Motata v S* (A345/2010) [ZAGPJHC] 134 (29 November 2010).

<sup>4</sup> AfriForum is an association incorporated not for gain in terms of s 21 of the Companies Act 61 of 1973.

[10] The third complaint was lodged by Mr Gerrit Pretorius SC, a senior advocate at the Pretoria Bar (the Pretorius SC complaint). On 6 April 2011, he wrote to the JSC: 'I expected the Judicial Service Commission ("JSC") to have taken judicial notice of the completely unacceptable conduct of the honourable Mr Justice Motata. As far as I can ascertain, it is the first time that a sitting judge is mentioned in a legal publication (Juta's Digest of South African Law 4 March 2011 page 4) as a convicted accused. I respectfully submit that this is sufficient reason why the learned judge should no longer be a judge. Added to this are his public protestation that he was not drunk, never recanted, and the finding of the trial court, confirmed on appeal, that this statement was untrue, as well as his wholly unacceptable drunk tirades.

To the extent that it is necessary to have an independent complaint, I submit this complaint. I apologise for its lateness.'

[11] On 10 May 2011, Pretorius SC amplified his complaint as follows:

'All I want to add to my original written complaint is that I have yet to meet anyone who does not regard the Judge's conduct as wholly inappropriate and incompatible with the office of a Judge. His conduct not only caused the office to be the object of ridicule, but his false denial that he was drunk strikes at the heart of the judiciary's integrity. It is one thing for an accused person to put the State to the proof of its case. It is entirely a different position for a Judge to publicly state a fact which he knows is false, build a defence on such an untruth and then accuse witnesses of manipulating evidence and being racist.'

[12] All three complaints were considered by the Judicial Conduct Committee (the JCC) of the JSC on 14 May 2011. The Pretorius SC complaint was noted, but not considered at that time because it had not been under oath. Nothing came of the CCJP complaint because the JCC took the view that it was a general invitation to conduct an investigation and that it, like the Pretorius SC complaint, was also not under oath. With regard to the AfriForum complaint, the JCC decided in terms of s 16(4)(b) of the Judicial Service Commission Act 9 of 1994 (the JSC Act) that the complaint, if established, would *prima facie* indicate gross misconduct by Judge Motata and accordingly recommended that it be investigated by a Judicial Conduct Tribunal (the Tribunal). On 22 May 2011, Pretorius SC deposed to an affidavit in compliance with s 14(3)(b) of the JSC Act, in which he confirmed the facts set out in his letters dated 6 April and 10 May 2011.

[13] Judge Motata unsuccessfully sought, on procedural grounds, to forestall consideration of the AfriForum complaint by the Tribunal. According to the presiding judge who heard the application, Judge Motata had alleged that ‘as Parliament had not approved a Code of Judicial Conduct there was no basis upon which [he] could be charged with misconduct and . . . therefore demanded that the [JSC] should “stop the process” in connection with the complaints of misconduct and allow [him] to resume his duties immediately’.<sup>5</sup> Those arguments did not find favour with the court and his application was accordingly dismissed.

[14] The JCC considered the Pretorius SC complaint at a hearing held on 5 October 2012. And, after hearing submissions from both Pretorius SC and Judge Motata’s legal representatives, the JCC decided that the complaint, if established, would also, *prima facie*, indicate gross misconduct on the part of Judge Motata. The JCC thus recommended that this complaint should also be investigated and reported on by a Tribunal.

[15] Based on the recommendations of the JCC, the JSC resolved, on 16 October 2012, to request the Chief Justice to appoint a Tribunal to investigate the complaints. The Tribunal was appointed on 4 March 2013. It consisted of Judge President AN Jappie (as chairperson), Justice NC Dambuza, a Judge of the Supreme Court of Appeal, and Mr A Lax, an attorney of the High Court of South Africa.

[16] Judge Motata once again instituted legal proceedings. This time, he sought, again on technical grounds, to challenge aspects of the JSC Act. This challenge too was ultimately unsuccessful.<sup>6</sup> It was dismissed on 30 December 2016. In the course of dismissing the application with costs, the presiding judge observed: ‘[Judge Motata] has delayed launching this application. This application is surprisingly sparse on facts’. The learned judge added:

‘[101] Third: [Judge Motata] fails to account not only for his criminally proven conduct but also his reasons for delaying this application. Furthermore, the material omissions in his

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<sup>5</sup> *Motata v Minister of Justice and Constitutional Development and Others* [2012] ZAGPPHC 196 para 6.

<sup>6</sup> *Motata v Minister of Justice and Constitutional Development and Another* [2016] ZAGPPHC 1063.

submissions call for an explanation. He is no ordinary litigant. As a member of the judiciary he remains accountable for his acts and omissions.’

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‘[104] To paraphrase the Constitutional Court in *Nkabinde*: In conclusion, I would be failing in my duty if I did not take this opportunity to emphasise that it is in the interests of justice that the matter of the complaint against the applicant should be dealt with and concluded without any further delay. The events that gave rise to the complaint occurred in 2007. Nine years later, the matter has not been finalised. It is in the interests of justice that this matter be brought to finality.’

Judge Motata then sought direct access to the Constitutional Court, which was refused on 17 May 2017.

[17] After conducting a hearing, at which Mr Kallie Kriel, on behalf of AfriForum, Pretorius SC and Judge Motata testified and, after having considered the record of the criminal trial and appeal proceedings, the Tribunal concluded that Judge Motata’s conduct constituted gross misconduct and recommended to the JSC that the provisions of s 177(1)(a) of the Constitution be invoked.

[18] On 16 April 2018, the JSC wrote to AfriForum, Pretorius SC and Judge Motata to furnish them with a copy of the Tribunal report and invited submissions or written representations. On 2 May 2018, AfriForum submitted representations. Judge Motata’s representations followed two days later. On 2 June 2018, the JSC convened to deliberate on the Tribunal report. It resolved to set up a committee ‘to draft a report on behalf of the [JSC]. Once the report has been produced, it will be examined and [a] final decision will be taken’.

[19] By the time the JSC met again to consider the matter on 1 October 2018, three reports had been prepared by the committee. The following is recorded:

‘44. Thus, after lengthy debate, and while concerns regarding the procedural propriety of the entire process stemming from Smuts SC’s involvement therein were still on the table, the JSC conducted a vote by secret ballot in respect of the following issue:

44.1 “Whether the JSC should accept the finding of the Judicial Conduct Tribunal that Judge Motata has rendered himself guilty of gross misconduct, as envisaged in section 177 of the Constitution.”

45. The outcome of that vote was as follows:



45.1 “Total number of votes received, yes six. No eight. Total number of votes cast fifteen, total number of abstentions one, total number of spoilt votes, zero. Minority votes received yes. The JSC will not accept the finding of the Judicial Conduct Tribunal that Judge Motata has rendered himself guilty of misconduct as envisaged in section 177 of the Constitution.”

46. The JSC then turned to discuss, *inter alia*, what (if any) finding of misconduct should be made against Judge Motata in respect of the AfriForum and Pretorius SC complaints, what sanction would be appropriate, and how (and by whom) the report on the JSC’s decision would be prepared. These discussions continued until 2 October 2018. By this stage, however, the decision not to recommend Judge Motata’s impeachment had already been made.’

[20] On 10 October 2019, the JSC convened to finalise the matter. The JSC’s report of its decision consists of four parts: (a) A summary of the JSC’s findings and decision entitled ‘Decision of the [JSC] in the Matter of Judge Nkola John Motata’ dated 10 October 2019 (the majority decision); (b) a Majority Report, comprising three submissions (the majority report); (c) a Separate Concurring Opinion; and, (d) a Minority Report (the minority report). The majority decision, which was signed by the Chief Justice, *inter alia*, reads:

- ‘6. After much deliberation, the majority of the JSC decided to reject the JCT’s recommendation. The majority of the JSC finds that Judge Motata’s conduct did not constitute gross misconduct.
7. A minority dissented. They agreed with the recommendation of the JCT.
8. The majority of the JSC considered that it was not necessary for the JSC to revisit the criminal conviction and the reasons articulated therein by the Court.
9. However, the majority of the JSC was disturbed by the manner in which the complaint of misleading the court was generated. It has transpired that Advocate Izak Smuts SC, who was at the time a member of the JSC, approached the ostensible complainant, Advocate Gerrit Pretorius SC, and requested him to lodge the complaint on the grounds that the AfriForum complaint was seemingly “insufficient” to secure a guilty finding.
10. What is of concern is not so much that Advocate Smuts SC was the source of the complaint. In terms of the applicable law, any person, including a member of the JSC, may lodge a complaint. However, Advocate Smuts SC failed to disclose his role as the originator or instigator of the complaint. Furthermore, Advocate Smuts SC sat in and actually chaired the deliberations of the JSC, which resolved to refer the matter to the JCT. This he did after the Chief Justice and the President of the SCA had deliberated

at length on the issue of bias or perceived bias. Smuts SC contributed to the debate. He had a clear obligation to disclose and recuse himself.

11. Such conduct was in breach of one of the principles of justice which offers protection against bias or perceived bias. The Pretorius complaint can accordingly not stand.
12. As to whether this irregularity would operate to taint the entire proceedings was a matter of some debate which was left unresolved. There can be no doubt that, but for the intervention of Advocate Smuts SC, the "Pretorius complaint" would not have arisen, alternatively, would have been dealt with differently.
13. It was the view of the majority of the JSC that in spite of the above and due to the public importance of this matter, the facts that led to the conviction still needed to be taken into account despite the procedural flaw identified above. In any event that flaw relates to only one complaint, that of Pretorius SC.
14. The conduct that led to his conviction and sentence by the criminal Court amounts to misconduct. More specifically, the majority of the JSC found that the racially loaded utterances made by Judge Motata were unbecoming of a Judge, notwithstanding the majority's acceptance that his responsibility was diminished by his proven intoxication and provocation in the form of the alleged use of the k-word by the owner of the house.'

[21] The majority of the JSC thus rejected the Tribunal's recommendation. It found Judge Motata guilty of misconduct *simpliciter* and imposed a fine of R1 152 650.40 to be paid to the South African Judicial Education Institute.

[22] On 21 July 2020, the appellant, Freedom Under Law (FUL), issued an application out of the Gauteng Division of the High Court, Johannesburg (the high court) to review and set aside the JSC's decision of 10 October 2019, and to substitute that decision with a finding that Judge Motata is guilty of gross misconduct as contemplated in s 177(1)(a) of the Constitution, alternatively, for the matter to be remitted to the JSC to be decided afresh taking into account the findings of the court. FUL contended that Judge Motata's conduct constituted gross misconduct, which warranted his removal from office in terms of s 177 of the Constitution. It submitted that the JSC's decision to the contrary was irrational, unreasonable, unlawful and accordingly unconstitutional and invalid. FUL raised six grounds of review.

[23] The high court rejected all of FUL's grounds of review. It dismissed the review application based on the AfriForum complaint; remitted the determination of the

Pretorius SC complaint to the JSC for a decision to be made thereon; and, ordered each party to pay its own costs. In a written judgment delivered on 12 April 2022, the high court (per Nhlangulela DJP) issued the following order:

‘[48] In the result the following order shall issue:

1. The review application based on the Afriforum Complaint is dismissed.
2. The determination of the Pretorius Complaint is remitted back to the First Respondent for a decision to be made thereon in terms of s20 of the JSC Act 9 of 1994.
3. Each party to pay its own costs of the application, including those incurred in the application for condonation.’

[24] FUL applied for leave to appeal, and the JSC applied for leave to cross-appeal paragraph 48(2) of the high court judgment. Both applications succeeded. Leave was granted to this Court. Judge Motata did not participate in the proceedings either in this Court or the one below.

[25] Parenthetically, it is necessary to make three observations: First, the composition of the JSC did not remain constant when the matter was discussed. Despite several changes in its composition as the matter progressed, the JSC simply picked-up its deliberations whence previously left off. Second, the JSC chose to oppose both the application in the high court and the appeal before this Court. This, despite the evident difficulty that the matter had occasioned it; having split eight to six, with one abstention. Moreover, there had been serious dissensus within its own ranks. It is thus somewhat surprising that it resolved to defend the majority decision, instead of simply abiding the decision of the courts. Third, and, this links to the second, having resolved to oppose the application, its Secretary, Mr Chiloane, deposed to the answering affidavit that came to be filed in opposition to the application. Although he was not a member of the JSC and could not have participated in any of the deliberations or decision-making, he asserted that ‘the facts . . . are within my personal knowledge and are, to the best of my knowledge and belief, both true and correct’.

[26] Unsurprisingly, in its replying affidavit, FUL challenged that assertion:

‘10. The JSC’s answering affidavit is deposed to by Mr Chiloane. Mr Chiloane speaks widely, broadly and with alleged authority about what the JSC decided, what its reasons and reasoning were, what motivated it to act in a particular way and what factors it took into

account. Mr Chiloane is not a member of the JSC or the JSC majority which took the Decision and issued the submissions which formed the basis of the Decision. He is simply not in a position to speak with personal knowledge to any of the issues on which he professes to express a factual view. Almost the entirety of his affidavit is hearsay and falls to be disregarded.'

[27] Had the JSC merely participated with a view to placing the record of its deliberations before the court to assist it in its consideration of the matter, there could hardly have been any objection to Mr Chiloane deposing to an affidavit for that purpose. Not so, once it had decided to oppose the application. As a lay witness it was simply not open to him to depose to all manner of opinion evidence. Mr Chiloane's affidavit was not accompanied by even a single confirmatory affidavit from any of those persons with personal knowledge of the facts. The high court approached the evidential material proffered by Mr Chiloane in his affidavit as if it constituted proof of the truth of the matter so asserted. In that, as counsel for the JSC accepted at the bar in this Court, it erred. For my part, I am willing to pass over the issue, because on the view that I take of the matter, even on the JSC's own showing, the decision of the majority does not survive scrutiny.

[28] In my view, the matter can be disposed on a far narrower footing than that foreshadowed in the papers. Accordingly, it hardly seems necessary, for the present, to define the nature of the power exercised by the Tribunal or the extent to which the JSC may have been bound by its findings. The JSC appears to accept that whatever the standard, it was not simply at large to ignore the findings of the Tribunal or to depart from the conclusion reached by the Tribunal for flimsy, speculative or unsustainable reasons.

[29] Nor, for the same reason, does it seem necessary to essay a definition of gross misconduct. Perhaps, Justice Stewart's famous observation (of hard-core pornography in *Jacobellis v Ohio*): 'I could never succeed in intelligibly doing so. But I know it when I see it . . .'<sup>7</sup>, is apposite. Properly construed, the case sought to be advanced by the JSC is that it was justified in: (i) rejecting the Pretorius SC complaint;

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<sup>7</sup> *Jacobellis v Ohio* 378 US 184.

and, (ii) departing from the findings of the Tribunal insofar as the AfriForum complaint is concerned. The matter thus reduces itself to whether, for the reasons given by the JSC, it was justified in either ignoring or deviating from the findings and approach of the Tribunal.

[30] Of the Pretorius SC complaint, the high court held, in agreeing with the JSC, that:

*‘(a) Error of law with regard to the Pretorius Complaint:*

It is common cause that the JSE considered the Pretorius Complaint without deciding its merits. Instead, it dismissed it on the ground of procedural irregularity arising from a failure by Smuts SC, the member of the [JSC], to disclose that he, not Pretorius SC, was the author of the complaint. The JSC’s rejection of the complaint was founded on proven perception of bias, it being a legally recognised objection.

Ms Steinberg SC submitted that this Court may itself dispose of the Pretorius Complaint without remitting it back to the JSC for consideration in terms of the JSC Act. Mr Maleka SC held the opposite view which I happen to share. However, more needs to be said about this issue. A remittal is not the proper remedy, but a re-lodgement of the complaint, if so advised, is an appropriate remedy under the circumstances. If the so called Pretorius Complaint should have been lodged as a complaint of Smuts SC, that must have been clearly stated at the lodgement stage. Mr Pretorius SC disavowed authorship of the complaint when he appeared before the JCT. In that sense, arguably, the filing of the complaint by Mr Pretorius SC is not the act that initiated the investigation of the complaint (the trigger) – See *Langa v Hlophe* at 417. It should have been Mr Smuts SC, but who unfortunately still remains in the dark. Until such time when he does show up, it cannot be said that the JSC had a duty to consider his complaint. The decision to exclude ought not to be reduced into the act of avoidance on the part of the JSC to consider and make findings on the complaint that complied with s 14(1).

[31] As I see it: First, on the facts there can be no reasonable apprehension of bias. Second, the involvement of Smuts SC is legally irrelevant. Third, it may not have been open to the JSC to dismiss the complaint without a consideration of the merits.

[32] As to the first: the JSC was wrong in concluding that there was a reasonable apprehension of bias on the part of the JSC. Smuts SC’s involvement was confined to one preliminary step in the complaint process. The Pretorius SC complaint had been referred in terms of s 16(1) of the JSC Act to the Committee to determine whether it

should be investigated by a Tribunal. The Committee, comprising Moseneke DCJ, Musi JP and Pretorius J, decided in terms of s 16(4) of the JSC Act, to recommend that the complaint should be investigated by a Tribunal. Smuts SC was involved in the next step of the process. He was the chair of a 11-member JSC (which included the DCJ and various JPs) that decided in terms of s 19(1) to accept the recommendation of the Committee to appoint a Tribunal.

[33] That was sum total of Smuts SC's involvement. He was not part of the Tribunal that heard the complaint in terms of s 26(1)(a) and (b). He was also not part of the JSC that considered the Tribunal's report and made the final decision in terms of s 20(4) and (5) of the JSC Act. It might well have been improper for Smuts SC not to disclose that he had prompted Pretorius SC to lay the complaint, but that did not taint the hearing of the complaint by the Tribunal or the decision of the JSC. Those who took those decisions were not biased and could not be reasonably suspected of bias.

[34] As to the second: much like a public prosecution, the public interest in the effective disciplining of a judge and the maintenance of judicial independence demands that the focus of the enquiry should be on the merits of the complaint, not its provenance. In this context, this Court has held that even an ulterior purpose should not vitiate a prosecution that was well founded on the merits.<sup>8</sup> The JSC resorted to 'accusing the accuser', instead of considering and engaging with the allegations of wrongdoing. Courts should be slow to countenance such a strategy. The JSC's refusal to determine the merits of the Pretorius SC complaint defeats the very purpose of the powers given to it to discipline judges and, in so doing, to protect the public's perception of the integrity of the judiciary. As this Court held in *Nkabinde and Another v Judicial Service Commission and Others (Nkabinde)*, where the applicant had applied to set aside the referral of the complaint based on procedural unfairness, '[i]nvalidating the complaint would infringe upon the rights of the complainants . . . and impact negatively on the image of the judiciary'.<sup>9</sup>

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<sup>8</sup> *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); [2009] All SA 277 (SCA) para 37.

<sup>9</sup> *Nkabinde and Another v Judicial Service Commission and Others* [2016] ZASCA 12; [2016] 2 All SA 415 (SCA); 2016 (4) SA 1 (SCA) para 87.

[35] As to the third: it is not clear when precisely the JSC took the view that the Pretorius SC complaint was no longer on the table. The record reveals that until the split between the majority and minority on the question as to whether or not Judge Motata's conduct rose to the level of gross misconduct, no formal decision had been taken that it be excluded. Only after that split, so it would seem, did the majority resolve to exclude it. But, that surely must call into question the basis on which the JSC split and whether it was simply open to the majority to thereafter exclude the complaint. What is more, by the time the majority resolved to exclude the Pretorius SC complaint, one Commissioner had already chosen to abstain (in itself rather remarkable).

[36] There may be something to be said for FUL's submission that the JSC Act does not permit the JSC to simply refuse to consider the Tribunal's report on this or any other score. The JSC had already decided in terms of s 19(1) to request the Chief Justice to appoint the Tribunal to hear the complaint. It may accordingly not have been open to the majority to have taken the view that the Pretorius SC complaint 'should not have been before the JCT in the first place'. This, because the decision to appoint the Tribunal stood and, until set aside, had consequences.<sup>10</sup> That is why, in *Nkabinde*, the appellants had to apply to the high court for an order setting aside the decision of the JSC to refer the complaint and appoint a Tribunal in terms of s 19(1) of the JSC Act.

[37] Section 20 of the JSC Act does not appear to contemplate that the JSC may refuse to consider the Tribunal's report on the basis that the complaint was invalid. On the contrary, s 20(2) prescribes that 'the Commission must consider' the Tribunal's report and the respondent's submissions and s 20(3) prescribes 'the Commission must make a finding as to whether the respondent is suffering from an incapacity; is grossly incompetent; or is guilty of gross misconduct'.

[38] The question of the initiator of the complaint is thus irrelevant. Section 14(1) of the JSC Act provides that 'any person' may submit a complaint. This means that Smuts SC could have laid the complaint himself, in his capacity as a member of the Committee. If it comes to the JSC's attention that the conduct of a judge might threaten

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<sup>10</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA).

public confidence in the judiciary, it is arguably incumbent on it to itself initiate and determine the complaint. After all, the purpose of disciplinary proceedings is to protect the standing of the judiciary in the eyes of the public.

[39] In any event, as this Court has held: ‘the JSC should properly and lawfully deal with every complaint of gross misconduct by a judge that may threaten the independence and impartiality of the courts and may justify the removal of that judge from office. Should it shirk its duty, as it is alleged to have done in this case, it can have grave repercussions for the administration of justice.’<sup>11</sup>

[40] With respect to the high court, it erred in its finding that the JSC cannot hear the complaint unless the initiator of the complaint, Smuts SC, ‘shows up’ (whatever that is intended to mean). Contrary to the finding of the high court, Pretorius SC did not ‘disavow authorship of the complaint’. He testified in support of the complaint before the Tribunal and was cross-examined by Judge Motata’s counsel. As this Court has previously stated: ‘. . . it would indeed be a sorry day for our constitutional democracy were serious allegations of judicial misconduct to be swept under the carpet . . . The public interest demands that the allegations be properly investigated . . .’<sup>12</sup> It follows that I cannot agree with the finding of the majority of the JSC that ‘[t]he Pretorius complaint cannot stand’ or with the high court’s insistence on a ‘re-lodgement of the complaint’. This means that the JSC’s cross appeal must fail.

[41] In considering the complaints in a compartmentalised fashion, as it did, the JSC may well have acted arbitrarily and capriciously. It ought to have considered Judge Motata’s conduct, which had its genesis in the events of 6 January 2007, holistically and against the conspectus of all of the evidence. It, moreover, approached the evidence in a piecemeal fashion. In *S v Hadebe*,<sup>13</sup> this Court, cited with approval from *Moshephi and Others v R*, which held:

‘The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a

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<sup>11</sup> *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA) (*FUL*) para 21.

<sup>12</sup> *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province* [2011] ZASCA 53; [2011] 3 All SA 459 (SCA); 2011 (3) SA 583 (SCA) para 25.

<sup>13</sup> *S v Hadebe* 1998 (1) SACR 422 (SCA) at 426E-H.



tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.’<sup>14</sup>

[42] The majority decision does not say why the factual findings of the Tribunal in respect of the Afriforum complaint were rejected, including the findings on the credibility of the witnesses. It also does not engage with the heart of the complaint that a judge who conducted himself as Judge Motata did betrays the public’s confidence in the judicial system. The mosaic as a whole detracts from the foundation upon which the majority decision came to rest. In particular, two examples that go to the heart of the majority’s finding and are particularly germane, find little support in the evidence – namely, that Judge Motata’s ‘responsibility was diminished by his proven intoxication and provocation in the form of the alleged use of the k-word by the owner of the house’.

[43] Insofar as the provocation is concerned, it was asserted in the answering affidavit filed on behalf of the JSC:

‘43. As such, the evidence on provocation was clear and irrefutable. The provocation concerned was not ordinary. It was racist, affecting the dignity of Judge Motata. He himself described it as “extreme” and there is no reason not to consider it as such.

43.1. The Magistrate found that Judge Motata had been provoked. The provocation had taken place prior to the commencement of the recording.

43.2. The High Court accepted that Judge Motata had been called “a drunk” by Mr Baird, which could be a reason for the provocation.

43.3 The JCT also appears to accept provocation, although it finds that the source of that provocation could not be the use of the “k”-word, but could perhaps be the confiscation of his keys.

43.4. Judge Motata has throughout asserted provocation, from the very moment of the arrest when he specifically accused Mr Baird on the scene of insulting him.’

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<sup>14</sup> *Moshephi and Others v R* (1980 -1984) LAC at 59F-H.

[44] This assertion (and it remains just that an assertion) is inaccurate on several fronts. The evidence of provocation was neither clear, nor irrefutable. Not having testified at the criminal trial, provocation was not squarely raised by Judge Motata. The trial court did not find as a fact that Judge Motata had been provoked. Nor could it, given that there was no evidence to that effect before the court. The trial court was willing however to assume in Judge Motata's favour that:

'I must add that there appears certainly to be an element of provocation prior to the recordings. Mr Motata's answers speak of a level of anger, the tone of his voice as in the audio, which does not support a scenario of an unprovoked individual.'

[45] That assumption appears to rest on the following that was put on Judge Motata's behalf:

'It was put to Mr Baird that the accused was allegedly annoyed with the interrupting, interfering and passing of unnecessary comments by Mr Baird himself. It was also put on behalf of the accused that Mr Motata denied writing down the particulars on the handwritten note which was received, Exhibit "E".'

It goes without saying that what was put on Judge Motata's behalf, which was not accepted by the witness, did not constitute evidence. Significantly, it was not put to Mr Baird that he had used the 'k-word'. It is hard to imagine that, if employed by Mr Baird, it would not have been put to him.

[46] It is so that Judge Motata had accused Mr Baird of using the k-word, however, the Tribunal found that he had ultimately conceded that Mr Baird did not use the k-word. It stated:

'46. While the trial court found that he was provoked, it did not set out the provocative conduct. However, the Judge's evidence that he was provoked into making these utterances by being insulted is not borne out by the record. And the fact that at no stage in the exchange of "pleadings" in these judicial conduct proceedings did the Judge mention that he was provoked by the use of the "k-word".

47. But even if he had been provoked, that does not justify his conduct of manipulating race to isolate Mr Baird and to get the police on his side. Further, if he was provoked by Mr Baird he would have, in all likelihood directed his response to Mr Baird and not to the police officers. In this sense, his defence that he was responding to provocation does not make sense. Even if he was provoked, perhaps by the fact that his car keys were taken from him, restraint is an essential trait in the character of a judicial officer. His reaction far exceeded the provocation.'

[47] That finding was based, in part, on the Chairperson of the Tribunal clarifying with Judge Motata during his cross-examination that at his criminal trial he had made and then withdrawn the accusation. When the Chairperson sought further clarity, Judge Motata's counsel, Mr Skosana SC, said:

'... what angered him, the first thing he did is he grabbed the key. . . That is the provocation he spoke about.

...

But for the purposes of this Tribunal and our submissions, we rely on provocation based on the taking of the key. I think we should limit ourselves to that, because the others I do not think I can really support it much, in view of what has taken place in these proceedings.'

[48] The Tribunal found, not only that Mr Baird did not use the k-word, but that Judge Motata had embarked on 'a deliberate racially motivated strategy chosen . . . to get the police officers on his side and to alienate Mr Baird'. The majority decision does not acknowledge these findings, let alone explain why it rejected them. The high court, in turn, finds that the majority was correct that the provocation in question was Mr Baird's use of the k-word. Like the JSC, it does not explain why it makes this finding in the face of the evidence, Judge Motata's abandonment of the accusation and the findings of the Tribunal. The high court approached the matter thus:

'The findings of the JSC are that JM was provoked by utterances of the "k-word" emanating from Mr Baird, and that proven intoxication diminishes guilt from gross to ordinary misconduct. Ultimately, at issue for decision by this Court is whether it was irregular / irrational for the JSC to reach the finding that JM is guilty of misconduct. It was not suggested in this Court that the extremely provocative "k-word" utterances and the admitted fact that JM was as a fact intoxicated at the time when he made racial utterances as he did on 17 January 2007 are not valid defences in law. In argument Mr Maleka SC demonstrated the serious manner in which the "k-word" is viewed by the members of South African society, and expressed by the courts as in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* . . .'

[49] Importantly, when testifying before the Tribunal about the use by Mr Baird of the 'k-word', the evidence of Judge Motata ran thus:

'JUDGE MOTATA: I say I was not prejudiced against say the Afrikaners. I was looking at the man who was disparaging me or undermining me or criticising me without even looking at the wall. I said but is it necessary for this man to do that to me?

CHAIRPERSON: Well, what precisely did he do or say?

JUDGE MOTATA: He said this drunken kaffir.

CHAIRPERSON: Did he actually use those words?

JUDGE MOTATA: Yes.

CHAIRPERSON: Was that actually put to him at the trial?

JUDGE MOTATA: I cannot recall

CHAIRPERSON: And was any finding made to that effect?

JUDGE MOTATA: It does not appear from the record.

CHAIRPERSON: But that certainly is not on the record. Do you agree?

JUDGE MOTATA: But what can I say, my recollection is even one of the state witnesses repeated that, that he called me a kaffir, that arrest this kaffir, he must land in jail.

CHAIRPERSON: As far as I can recollect, that was denied and it was then subsequent[ly] withdrawn. Is that correct?’

[50] The claim that ‘Judge Motata has throughout asserted provocation’ is also inaccurate. It came to be accepted that the allegation had not been raised by Judge Motata at any earlier stage in response to the AfriForum complaint. In that regard, the record reflects:

‘CHAIRPERSON: Because you did not testify, but perhaps you might have said so in the response to the complaint.

JUDGE MOTATA: Yes.

CHAIRPERSON: And that response you will find at page 105. Now, if we go through it, if you could show us where you have raised the issue of you being provoked.

JUDGE MOTATA: If I am looking at this is that these were submissions made by my legal representatives.

CHAIRPERSON: Yes?

JUSTICE DAMBUZA: But there is also your initial response at page 3, which is signed by yourself.

JUDGE MOTATA: Page 3?

JUSTICE DAMBUZA: Yes, at the beginning, page 3 of that record that you are looking at, Judge.

JUDGE MOTATA: Yes, okay.

JUSTICE DAMBUZA: That is the first time that you responded to the complaint by AfriForum. It consists of four pages. It is page 3 to 6, just so that at least we have a complete reference to your response so that we are not omitting something else that you may have said in this document.

JUDGE MOTATA: Yes, I see that. Thank you. I do not know . . .

JUSTICE DAMBUZA: Could there be something in there perhaps that points towards your reference to a provocation of the nature that you alluded to today?

JUDGE MOTATA: This was specifically through the advice I got and we were merely just responding to what AfriForum said, because when we come to page 5, 5.1, I do say “I dispute the allegation that I am guilty of any racist conduct and confirm that whenever I am called upon to perform my duties as a Judge, I do so in the interest of all communities without prejudice or favour or any racial grouping”.

CHAIRPERSON: Yes, is that your response?

JUDGE MOTATA: Yes.’

[51] One scours the record, but one does so in vain, for any earlier reference to the use of the ‘k word’. The first allusion to provocation in that form was before the Tribunal some 11 years after the incident. It had not been raised at any prior stage before the JSC in response to the complaint. Nor, had it been raised in the course of the criminal trial. And, once raised, it had almost immediately thereafter been disavowed by Judge Motata’s counsel, Mr Skosana. This lends support to the finding of the Tribunal that provocation in the form of the use of the k word was an afterthought. And, yet it formed an important edifice upon which the majority decision of the JSC came to rest. In that the JSC was not only far too receptive to Judge Motata’s assertion, but impermissibly made far more of it than a proper analysis of the evidence permits.

[52] The Tribunal found that Judge Motata was intoxicated at the time of the incident. It recorded that even if he had believed at the time of the incident that he was not intoxicated, by the time he went to trial (and subsequently appeared before the Tribunal), he would have considered the evidence, including the visual and audio recordings made at the time of the incident, and realised that ‘a denial of intoxication was against all [the] prevailing evidence [and] could not be true’.

[53] The Tribunal was thus satisfied that Judge Motata had conducted a defence both at his trial and before the Tribunal that he knew to be untrue and ‘lacked integrity’. The majority does not engage with Judge Motata’s dishonesty regarding his intoxication at all. It merely regards his ‘proven intoxication’ as a mitigating factor. There appear to be deep inconsistencies in the JSC’s approach to the issue of Judge

Motata's intoxication. The majority uses his 'proven intoxication' as a factor that somehow reduces his moral blameworthiness. In other words, the majority accepted that despite his denial, he was indeed intoxicated. They ignore that this necessarily implies that he advanced a dishonest defence in court and lied before the Tribunal.

[54] During the course of the trial, Judge Motata's then counsel, Mr Dorfling SC, put to Mr Baird that he 'will deny being under the influence at the time of driving his motor car'. In the majority report (upon which the majority decision appears to rest), it is stated:

'29. Purely for illustrative purposes and as our own theoretical postulation, we present the following words for consideration. The variations and meanings of the statement could theoretically have been:

29.1. "The accused will deny being drunk at the time of driving his car and at the time when the videos of him were taken"; or

29.2. "The accused will deny being drunk at the time of driving his car . . . but will admit being drunk at the subsequent stage when the videos were taken".

30. If the first meaning is imputed, he should be impeached.'

[55] The majority accepted that the JSC could not revisit the criminal conviction and that it was bound by the findings of the trial court. In convicting Judge Motata of what is more colloquially referred to as drunken driving, the trial court found that he was 'under the influence of intoxicating liquor at the time that [he] drove [the] vehicle when it crashed into the wall of the property belonging to Richard Baird'. That admits of no doubt. What is more, such a finding had to have been made to support a conviction on that charge. So understood, the semantic debate undertaken by the majority simply does not arise.

[56] In support of the conclusion that Judge Motata was indeed guilty, the trial court noted:

'My assessment of the audio recording is, having found them to be admissible and in evaluating same I am able to state the following, and conclude that there indeed were racial slurs, derogatory language, the reference to "F you" on at least ten occasions is clear from the audio recordings. That the speech of the accused was drawn out and laboured and he stumbled over his words.

The fact that his word construction was inadequate is also set out in the transcript and can be heard on the audio. There is also proof of drawing out of certain words in a very different fashion from a normal person. There are occasions where indeed his sentence construction was inadequate. Some of the answers that he gave, to my mind, do not make sense on the scene.

There are occasions when the voice tone and the volume of the accused changes to loud shouting, then toning down. There is confirmation that the accused alighted from his vehicle as can be seen from the transcript and heard on the audio.

Clearly indeed it is evident from the audio recordings that the tone of certain individuals speaking around the accused was certainly of trying to get the accused to cooperate. This is in contrast with the tone, the volume of the manner in which Mr Motata's voice appears on the audio recordings that were downloaded from the cellphone to the computer.

If you look at Exhibit "B" photo 3, it is clear, my observation is of a man who appears to be asleep at the wheel. Head sagging forward, oblivious to his surroundings. Photo 4 is clearly Mr Motata, not Mr Motata that I have seen in this court no less than 25 times.'

[57] Given the elements of the charge, for any denial advanced on behalf of Judge Motata to have been meaningful and not illusory, it had to relate to the time when he crashed into Mr Baird's wall. The charge had nothing to do with his state of inebriety after the collision, when the 'videos were being taken of him'. The distinction sought to be drawn between the two aforementioned postulations thus appears artificial and contrived.

[58] The majority report recorded:

'Crucially, nobody seems to have thought of calling Adv Dorfling to clear up the matter . . . It would have been the easiest thing for the Johannesburg Bar Council to conduct its own investigation of the matter and, if necessary to take the necessary action. It would seem that the basic premise and assumption from which he departed was simply that: Judge Motata was *prima facie* guilty and Adv Dorfling was *prima facie* innocent and even incapable of a bad formulation of a question. This approach cannot be willy nilly endorsed by the JSC. It is plainly wrong and irrational. There is no logical basis for counsel to enjoy the presumption of honesty and/or infallibility and a judge be presumed to be dishonest and/or fallible.

. . .

To add insult to injury, Judge Motata is being crucified, terminally so, for words which were uttered not by him but by counsel, who was never called to explain his choice of words.'

[59] It is important to point out that it was not open to the evidence leader before the Tribunal to have called Mr Dorfling to testify. Only Judge Motata could have done so. What the majority appear to lose from sight is that such evidence would be evidence of privileged communications between an accused person and his counsel. The privilege is that of the accused, not that of counsel, and in the normal course would be inadmissible against an accused. Although the privilege can be waived either expressly or impliedly by the accused (and there is no suggestion of that having happened here), it is in general undesirable that counsel should be compelled to give evidence against his client.<sup>15</sup>

[60] There is yet a further reason why the approach of the majority is untenable. Under cross-examination before the Tribunal and after Judge Motata had repeated that he was not drunk at the time he crashed into Mr Baird's wall, he admitted that 'counsel was not exceeding or misrepresenting my instruction to any appreciable or significant extent'. Yet the majority found that the mistake was that of his advocate and sought to excuse Judge Motata on this basis.

[61] The majority also took the view that:

'Moreover, he was entitled, like any other accused person and in terms of section 35 of the Constitution, not to take the stand. In so doing, both he and the court lost a golden opportunity to put the matter of his version beyond any doubt and guesswork. This is unfortunate but it cannot be artificially cured by skewing the meaning of the suggestion posed by counsel (perhaps inelegantly rather than dishonestly) to suit a particular result.'

[62] Once again, so it seems to me, that is to misconstrue the position. Judge Motata did not advance a defence to speak of at his criminal trial. Whilst he had a right to silence, which he sought to exercise at his criminal trial, that may not have been without its consequence. Somewhat surprisingly he did not testify. When he made that choice there was a body of evidence that already operated against him, which certainly called for an answer. In respect of the first charge a *prima facie* case had been established by the prosecution. That should have been patent to him when his application for a discharge on that charge had been refused at the end of the State

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<sup>15</sup> *S v Boesman and Others* 1990 (2) SACR 389 (E).



case. Yet he countered it with nothing, preferring instead to shun the witness stand. His choice to remain silent in the face of the evidence implicating him in criminal conduct is suggestive of the fact that he had no answer to it. For, if the evidence implicating him was capable of being neutralised by an honest rebuttal, it surely would have been.<sup>16</sup> If there was an explanation consistent with his innocence it should have been proffered. For him not to have risen to the challenge and remained silent in the face of the evidence was nothing short of damning.<sup>17</sup>

[63] I do not believe that Judge Motata, who had legal advice throughout, misapprehended any of the issues before the trial court or Tribunal. In the circumstances, it is passing strange to suggest, as the majority does, that ‘the court lost a golden opportunity to put the matter beyond any doubt and guesswork’. It was not for the trial court to ferret out the evidence. There is no suggestion that Judge Motata’s right to be heard had been infringed. A litigant has a choice to prove a contested fact. Common sense suggests that a litigant would produce the most persuasive evidence possible. In this instance that would have been the evidence of Judge Motata himself. Even though the evidence was peculiarly within his knowledge, he chose not to place it before the court. That can hardly redound to the discredit of the court. The trial court was under no misapprehension. It recorded: ‘It was put to Mr Baird that he will deny being drunk or under the influence at the time of driving his car’.

[64] The majority approached the enquiry thus:

‘The only question to be answered is accordingly whether there is any legally acceptable basis upon which the explanation tendered by Judge Motata can be outrightly rejected as false or improbable by the JSC.’

But, by then his version, such as it was, had already been rejected by the trial court. The majority went on to assess the matter solely from Judge Motata’s perspective. For example, in regard to its finding of ‘diminished responsibility due to intoxication’, the majority says that ‘[t]he issue becomes whether [Judge Motata] subjectively believed himself to be drunk’, not what the public would make of his conduct in driving drunk and then denying he was drunk. Ironically, diminished responsibility was not even

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<sup>16</sup> *Dos Santos and Another v The State* [2010] ZASCA 73; 2010 (2) SACR 382 (SCA); [2010] 4 All SA 132 (SCA) para 35.

<sup>17</sup> *S v Monyane* 2008 (1) SACR 543 (SCA) para 19 and the cases there cited.

raised or relied upon by Judge Motata himself. Quite the contrary, he insisted throughout that he was not drunk.

[65] Neither the Tribunal, nor the JSC, commenced with a clean slate. Each was bound by the findings and conclusions reached by the trial court, which, had been reached employing the higher ‘beyond a reasonable doubt’ yardstick. The trial court recorded:

‘Mr Baird describes the language of the accused . . . to be very “colourful”. There were racial slurs and derogatory language, his word construction way in adequate. They were very illogical arguments. He had a glazed look on his face. He had a look in his eyes that they were swimming. He smelled of alcohol. He could not stand up without holding onto his car. He was holding on, uncertain, trying to grab onto steadiness as if a blind person would want to search in front of him. In my opinion, according to Mr Baird, he was drunk. He just fell over, caught the car, I do not think his knees touched the ground then. There was a time when he got out of the car, he was unstable and fell over. He caught himself on the car.’

[66] The trial court thereafter concluded:

‘What is also of importance to me in this matter is the accident, which remains a mystery. It is a single car accident . . . in the dead of the night. The question remains, why reverse over a pavement, right through a garden wall when there are driveways on that road into which you could reverse.

. . .

I am satisfied that Mr Motata’s proven speech impairment, physical impairment, mental impairment and general conduct shortly after the accident were such coupled with the spelling mistakes and inaccuracies in the handwritten note, that the only reasonable inference is that he was indeed under the influence of intoxicating liquor at the time that he drove the vehicle and collided into the wall.’

[67] Those findings by the trial court admit of no doubt and appear to call the lie to Judge Motata’s assertion. When his denial that he was drunk is juxtaposed against the body of evidence relied upon by the trial court, it can hardly survive scrutiny. Following his conviction, and even after more than sufficient opportunity for reflection, he persisted in his version, initially before the JCC and thereafter the Tribunal and JSC, that he had only drunk two glasses of wine. The Tribunal found:

'Before instructing counsel, the Judge must have considered *inter alia*, the evidence of not only Mr Baird but the evidence of both the visual and audio recordings made at the locality at the time of the incident. No doubt, the Judge together with his legal representatives must have considered the evidence of witnesses other than Mr Baird as well. All the admissible evidence which would be placed before the court which the Judge had access to before he pleaded, must have made it clear that a denial of intoxication was against all prevailing evidence and could not be true. The response by the Judge that he had no control over questions put by his counsel to state witnesses cannot be sustained. That being so, the conclusion to be drawn is that the Judge knowingly conducted a defence which he knew lacked integrity.'

[68] When the findings of the Tribunal are read together with those of the trial court, there could be no room for the finding that Judge Motata subjectively believed himself not to be drunk. In any event, the JSC did not pause to consider why the intoxication was a relevant consideration or seek to demonstrate how Judge Motata's breach of the standards of judicial conduct was rendered any less egregious by his intoxication.

[69] There is a further disquieting feature about the conduct of Judge Motata's defence in the criminal trial. Mr Baird became the main focus of Judge Motata's attack. He was cross-examined over a number of days. In heads of argument filed on behalf of Judge Motata in the trial court, Mr Baird was described as 'biased, unreliable, dishonest and who has concocted evidence has contradicted himself and above all is a racist'. Those were allegations of a most serious kind. They ought not to have been made in the absence of a proper factual foundation having been laid for them. The long and short of it is that Mr Baird was a prosecution witness, with no axe to grind.

[70] As the trial court noted, with reference to Mr Baird, 'my observation speak[s] to an individual being called from his house in the dead of the night and finding a vehicle crashed into . . . property'. To label someone a 'racist', absent a true factual foundation is most unfortunate. To suggest of a witness that he is 'dishonest' or 'concocted evidence', is to suggest that such witness has made himself guilty of a deliberate falsehood. It excludes room for any honest mistake on the part of the witness. Those are not allegations to be lightly made and certainly not in circumstances where no evidence has been adduced by the defence to gainsay the testimony of the witness.

[71] The trial court formed a favourable impression of Mr Baird. It said:

'I hold the view that Mr Baird could have packed up more, could have added more, could have recorded more and he had the opportunity to do so if he wanted to doctor he could certainly omit some of the thing[s] [that] seems to favour Mr Motata. But he agreed with Mr Dorfling on more than occasion with issues that were favourable to Mr Motata'.

[72] Mr Baird testified that Judge Motata had written his particulars on a piece of paper, which contained incorrect spelling, repetition and was very difficult to read. The trial court recorded:

'The note was handed in as Exhibit "E" and contained . . . various spelling and inaccuracies which are set out hereunder. The contents of the note were as follows: "The honourable mister mister justice NJ Motata Transvall Provincial division." Beneath that "TPD" plus something that was not clear and telephone numbers: 012 33 illegible digit 75 and something that could either be 54 or 81. Mr Baird was adamant that the accused wrote his details on the piece of paper.'

[73] The trial court gave short shrift to the apparent attempt by Judge Motata to dispute that it was his handwriting on the piece of paper. It dealt with it in these terms: 'I accept the evidence of Mr Baird together with everything else I have said, including the fact that the accused has remained silent. I must therefore accept the handwritten note and except that Mr Baird's testimony is that Mr Motata wrote on that note in that fashion, where some of the letters do not spell out words correctly and numbers are written incorrectly. I accept that Mr Motata wrote on that handwritten note and gave same to Mr Baird. I have also the portions of the evidence of Mr Madibo and Ms Mashilela which corroborate Mr Baird's testimony.'

[74] Mr Baird's evidence and Judge Motata's denial that he was drunk were mutually incompatible. Both could not have been true. Once the trial court accepted Mr Baird's evidence, it inexorably followed that Judge Motata's denial was false. In that sense, the handwritten note was no neutral piece of evidence. It spoke to Judge Motata's inebriety at the scene and lent support to Mr Baird's version. The denial by Judge Motata that it was his handwriting on the note is telling. It was consistent with his false denial that he was drunk. The JSC did not consider at all whether the advancing of a false defence would have a deleterious effect on the public perception of Judge Motata's ability to act with honesty and propriety.

[75] To be sure, it is not being postulated that the JSC was obliged to slavishly endorse the findings of the Tribunal. Far from it. Even on the acceptance that the Tribunal's findings are not binding on the JSC, nor is the conclusion that the Tribunal drew from those findings, it still remained for the JSC, at the very least, to enquire into whether or not the Tribunal had addressed the issues fully and fairly and directed its mind to the right questions in reaching the conclusion that Judge Motata should be removed from office. One finds no evidence of it having done so. The report of the Tribunal is clear and comprehensive. There is no reason to doubt the fairness of the procedure adopted. There is no complaint of a lack of balance in the approach of the Tribunal or suggestion that Judge Motata did not receive a proper hearing before it. That notwithstanding, the JSC disregarded the factual findings of the Tribunal, without explaining why it did so. It ignored that the Tribunal was the body that had the advantage of hearing the evidence and assessing the credibility of the witnesses.

[76] AfriForum complained that '[a] judge should be able act in the interest of all communities without any prejudice. Any judge who makes himself guilty of racist conduct. . . therefore has no place on the judge's bench. Such a judge betrays the public's confidence in the judicial system'. The Tribunal asked rhetorically ' . . . what would be the attitude of an ordinary person, let alone a person of Afrikaner descent, if she/he is to be tried before Judge Motata?' It said:

'Our Constitution protects South African citizens against racism and guarantees their right to dignity. Our judges are custodians of these rights. Post-apartheid, our courts have consistently decried persistent racist conduct and affirmed the right of all South African citizens to dignity. Racist conduct on the part of a judge therefore strikes at the heart of judicial integrity and impartiality, particularly against the background of South Africa's apartheid history. Accordingly, racist conduct on the part of a judge constitutes gross misconduct.'

[77] The Tribunal found, *inter alia*, that:

'Judge Motata's conduct at the scene of his motor accident and the remarks he made were racist and thus impinge on and are prejudicial to the impartiality and dignity of the courts'; 'the lack of integrity in the manner which Judge Motata allowed his defence to be conducted at his trial . . . is incompatible with or unbecoming of the holding of judicial office . . . [T]o permit Judge Motata to remain a judicial officer would negatively affect the public's confidence of the courts'.

[78] The majority report, on the other hand, ignored entirely the impact of the Judge Motata's racist comments on the public's confidence in the judiciary. It recorded: 'At the JSC meeting of June 2018, it was overwhelmingly agreed and recorded that the ground of impeachment based on racial slurs could not be sustained and must fall away'. Why that was so, is not explained. Nor, as I shall demonstrate, is that approach supportable. 'Racial slurs' and 'racially loaded utterances' are the epithets preferred by the majority. Even on the acceptance of those euphemisms, the majority was still impelled to the conclusion that the utterances were unbecoming of a Judge. The point ignored is that the utterances, which evidence an apparent bias, would result in Judge Motata being substantially disabled from performing his judicial function, because on any reckoning racist utterances are fundamentally irreconcilable with the standards expected of a judicial officer.

[79] In arriving at a contrary conclusion to the Tribunal, the JSC largely overlooked a great many important findings of fact. As I have been at pains to show, the reliance sought to be placed by the majority decision on the provocation and intoxication is not supported by the evidence. Once it is accepted that those factors are illusory, rather than real and, do not tip the scales in Judge Motata's favour, then the JSC accepts (as it was put in its answering affidavit) that:

'106. **Ad paragraph 11**

106.1 This allegation is denied. The decision of the JSC of 10 October 2019 clearly applies the standard for gross misconduct. Moreover, the issue of whether or not racism is serious misconduct is clear. Racism is a breach of section 9 of the Constitution, which prohibits discrimination based on race. Racism is also inconsistent with the Judicial Code of Conduct. Racism of a Judge additionally breaches the principle of judicial independence because it undermines public confidence in the Judiciary.

106.2 These instruments clearly articulate the standard of gross misconduct as applicable to racism conduct of a Judge. It is senseless for the JSC, each time it adjudicates a case of misconduct, to articulate a fresh standard applicable to those facts.

106.3 Nevertheless, as stated above in this particular instance the JSC clearly found Judge Motata's conduct to be racially loaded, but it lacked the element of "gross" because of two mitigatory factors: intoxication and provocation. Absent those factors, it is clear that the racist utterances by Judge Motata would have been considered to be gross.'

[80] Like the JSC, the high court failed to consider the impact of Judge Motata's conduct on the public confidence in the independence, impartiality and integrity of the judiciary. Both failed to consider the impact on the public of him remaining 'Judge Motata' and continuing to receive the benefits of his pension as a judge, after he was found to have made racist statements and thereafter conducted a dishonest defence in his criminal trial and before the Tribunal. That he had retired, as the majority and the high court seemed willing to emphasise, was thus irrelevant.

[81] The JSC has been charged by the Constitution and the JSC Act to inter alia protect the integrity of the judicial system. In discharging that function, it had to be sensitive to the expectations of a reasonably well-informed and dispassionate public that holders of judicial office would at all times remain worthy of trust, confidence and respect.<sup>18</sup> The court below merely found that the JSC is not bound by the recommendation of the Tribunal. That goes without saying. However, the JSC is required by s 20(1) to (3) of the JSC Act to 'consider' the Tribunal's report at a meeting, and thereafter make a finding whether the judge suffers from an incapacity, is grossly incompetent or committed gross misconduct. The JSC's decision was anchored in the factual findings of Judge Motata's alleged provocation by the use of the k-word and his diminished incapacity due to intoxication. It was incumbent on the high court to determine whether the JSC's decision in this regard was supported by the facts, particularly since the JSC did not accept the Tribunal's factual findings. The high court should have enquired whether the JSC was entitled to simply disregard the Tribunal's factual findings in the manner that it did. It did not do so. Had the high court undertaken that task, the conclusion would perhaps have been inevitable that no justifiable warrant existed for the JSC to have rejected the Tribunal's findings.

[82] It was argued on behalf of the JSC that were we to reach this conclusion, then the matter should be remitted to the JSC for it to consider afresh the Tribunal's finding. It is so that if a court sets aside a decision, it will ordinarily remit the matter to the decision-maker for reconsideration, with or without a direction. There are instances though where a court will substitute the decision with its own. This seems to be such an instance.

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<sup>18</sup> *Moreau-Berube* fn 1 above at 291.

[83] FUL had initially sought a remittal. However, this was plainly as an alternative to the main relief of substitution. It had always been FUL's case that substitution was the appropriate remedy. It asserted in its founding affidavit:

'170. Justice and equity demand that the Decision should not be remitted to the JSC for reconsideration. If the matter were referred back to the JSC, then the end-result would be a foregone conclusion. The facts are common cause. All the materials are before this Court and they lead to only one conclusion consistent with the constitutional mandate. Judge Motata's conduct clearly amounts to gross misconduct and incapacity. This court is in as good a position to make the decision as the JSC, given that all the material is before it, it is not required to make findings of fact afresh, the decision involves the application of legal standards which the Constitutional Court has ruled objective in character, and the subject-matter of these proceedings is in the heartland of this Court's remit, given that it involves the constitutional role of the judiciary and judicial standards of conduct.

171. The Decision is, at its heart, a disciplinary decision and is thus judicial in nature. In this respect, therefore, the court is as well qualified as the JSC to make a final determination as to whether Judge Motata's conduct constitutes gross misconduct.'

[84] In response, in resisting an order of substitution, Mr Chiloane stated on behalf of the JSC:

'189 **Ad paragraphs 168 to 173**

189.1 These allegations are denied. It is not accurate that if the matter is referred to the JSC the "*end result would be a foregone conclusion*". Nor is it clear that the facts are common cause. It is denied that it is clear that the conduct of Judge Motata amounts to gross misconduct.

189.2 One of the key considerations in the remittal would be whether or not the complaint of Adv Pretorius SC should be taken into account. If taken into account, the question is whether or not the defence of Judge Motata, namely, that he did not instruct his counsel to ask the specific question that he did but merely told him that [h]is own subjective belief was that he was not at the time drunk. It is speculative at this stage to talk of how the JSC would approach the matter.

189.3 It is not obvious whether or not questions of intoxication and provocation should play any role in the assessment of the degree of seriousness of the misconduct. These are questions to be resolved, ultimately by the JSC itself.

...

189.6 The complaint that it is taken a long time to resolve the matter is neither here nor there. One cannot subvert principle for expediency. If the Court directs the JSC to deal with the



matter expeditiously, there is no reason at this stage to believe that such direction will not be complied with. Therefore, it is submitted that the correct outcome will be the remittal of the matter to the JSC.’

[85] One may have been entitled to conclude that no proper evidentiary basis had been laid by the JSC for a remittal. However, on the acceptance once again in the JSC’s favour that what Mr Chiloane had to say constituted admissible evidence and did indeed have some evidential weight, this is not quintessentially the kind of matter where a court need necessarily defer to the original decision-maker. Quite the contrary. This is very much in the nature of a value judgment to be made in the light of all of the relevant considerations.<sup>19</sup> In any event, none of the considerations advanced by the JSC in support of a remittal for the purposes of a reconsideration can still hold water. The facts admit of no doubt. Nor, is the acceptance of the Pretorius SC complaint still open to discussion. Judge Motata’s defence, his instructions to his counsel, as well as his intoxication and alleged provocation have been subjected to careful consideration and scrutiny. His version, in respect of each (to the extent that it can be said that he had advanced one) has been found to be wanting. It can thus hardly be open to the JSC to revisit these matters or, more importantly, in doing so, to simply disregard our findings, by which, I daresay, it would be bound. Remittal, in the circumstances, would, for all intents and purposes, amount to an insistence of form above substance.

[86] In *Trencon*, the Constitutional Court summarised the factors a court should consider when determining whether an order of substitution is appropriate, namely: (i) whether the court is as well qualified to decide the issue as was the original administrator; (ii) whether the end result is a foregone conclusion; (iii) where there has been a delay in the finalisation of the matter, whether further delay of the matter would be unjustifiable; and, (iv) whether the original decision-maker has demonstrated bias or incompetence.<sup>20</sup> The Constitutional Court further held that the first two factors should be considered first and cumulatively, and thereafter the other factors should be considered. The ultimate consideration is whether substitution is just and equitable.

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<sup>19</sup> *Commissioner for the South African Revenue Service v Nyhonyha* [2023] ZASCA 69 paras 16 – 23.

<sup>20</sup> *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 47.

[87] There are instances where ‘a single, highly prejudicial or offensive, comment might be sufficiently grave to seriously undermine public confidence in a judge to the extent that removal is the only outcome’.<sup>21</sup> Here, there are several demonstrations by Judge Motata of a serious lack of judgment. His actions and expressions trigger concerns about the judicial function itself. There appears to be nothing to suggest that he had even recognised that he had made himself guilty of serious misconduct. Such lack of awareness, in and of itself, seems to manifest an underlying defect in character.

[88] We have the benefit of the judgment of the trial court, the appeal court, as also, the record of the proceedings and the report of the Tribunal. The Tribunal conducted a full enquiry into the complaints. There has been no complaint from anyone about any aspect of that enquiry. We also have the reports of the majority decision as well as the majority, minority and concurring opinions. We are accordingly as well placed as the JSC.

[89] It was of course open to Judge Motata to offer, at any time, an apology for his conduct. But, he did not. Whether an apology would have been sufficient to restore public confidence need not detain us, because none was proffered by him. It appears that he failed even after finalisation of the criminal trial to appreciate that he had engaged in misconduct of a most serious kind. This reveals both his lack of insight and his lack of appreciation for his misconduct on the public confidence in the judiciary.

[90] Judge Motata’s conduct was egregious, particularly when one has regard to the cumulative consequence of both the AfriForum and Pretorius SC complaints. His behaviour at the scene of the incident was characterised by racism, sexism and vulgarity. The public watched him conduct a dishonest defence during his trial and on appeal. They watched him dishonestly accuse Mr Baird of using the k-word, only to thereafter withdraw the accusation. They watched him lie under oath to the Tribunal about his level of intoxication, as the video of him slurring his words and stumbling went viral. His conduct is inimical to his office. For as long as he is entitled to be called ‘Judge Motata’, the judiciary continues to be stained in the eyes of the public.

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<sup>21</sup> Canadian Judicial Council Inquiry into the conduct of *The Honourable Robin Camp*. Report to the Minister of Justice, dated 8 March 2017 para 49.

[91] The incident occurred on 6 January 2007. Sixteen years have since passed. It has taken nearly thirteen years for the JSC to make a final decision. Undoubtedly, some of the delays were on account of Judge Motata's high court challenges and points *in limine* before the Tribunal. Should this Court remit the matter to the JSC, there is every likelihood that any fresh decision by it will be reviewed, and the matter will again wind its long, slow journey through the courts. Further delay does not serve the interests of justice.

[92] The majority's approach disregarded the purpose for which it was exercising its disciplinary powers. It sought to test whether there was a basis to reject Judge Motata's version, which, as I have endeavoured to demonstrate, it could safely have done. It found, in effect, that it could not conclude that he was lying because he subjectively believed what he said, notwithstanding the body of cogent and compelling evidence that operated against him. In so doing, the majority blurred the distinction between the protection of the institution in the interests of the public at large and the protection of the personal interests of the judge.

[93] The majority decision also shows no regard whatever for the damning factual findings of the trial court and the Tribunal. The AfriForum complaint is disposed of on the basis of the flimsiest of reasoning. The refusal to consider the merits of the Pretorius SC complaint is a striking example of the JSC 'shirk[ing] its duty' which 'can have grave repercussions for the administration of justice'.<sup>22</sup> The JSC thus manifestly 'blurred the distinction' between the 'protection of the institution in the interests of the public at large' and the 'protection of the personal interests of the judge'.

[94] 'Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy and founded on the rule of law'.<sup>23</sup> A fair minded and dispassionate observer is bound to conclude that Judge Motata cannot properly discharge his functions. The conduct that I have been at pains to describe is of such gravity as to warrant a finding that Judge Motata be removed from office. There is no alternative measure to removal that would be sufficient to restore public confidence in the judiciary. This means that the conclusion reached by the JSC to

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<sup>22</sup> *FUL* fn 11 above para 21.

<sup>23</sup> *Moreau-Berube* fn 1 above at 286.

‘reject the Tribunal’s recommendation’ and that ‘Judge Motata’s conduct did not constitute gross misconduct’, falls to be rejected. Consequently, the recommendation by the Tribunal that the ‘provisions of section 177(1)(a) of the Constitution be invoked’, must stand. Accordingly, the matter will be remitted to the JSC. It is not being remitted, however, for the JSC to consider the report of the Tribunal in terms of s 20(1) or to make a finding under s 20(3), but for it to be dealt with in terms of s 20(4) of the JSC Act.<sup>24</sup>

[95] In the result:

- 1 The appeal is upheld and the cross appeal is dismissed, in each instance with costs, including those of two counsel.
- 2 The order of the court below is set aside and substituted by:
  - ‘1. The application succeeds with costs, including those of two counsel.
  2. The matter is remitted to the first respondent for it to be dealt with in terms of section 20(4) of the Judicial Service Commission Act 9 of 1994.’

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VM PONNAN  
JUDGE OF APPEAL

### **Mocumie JA and Masipa AJA (dissenting):**

[96] We have read the main judgment penned by Ponnan JA. We agree with his reasoning, and therefore, accept the summary of the facts, which we will adopt to the extent that is relevant for the conclusion that we reach hereafter. However, regrettably, we cannot agree with the order that the majority judgment proposes.

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<sup>24</sup> Section 20(4) provides:

‘If the Commission finds that the respondent is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct, the Commission must submit that finding, together with the reasons therefor and a copy of the report, including any relevant material, of the Tribunal, to the Speaker of the National Assembly’.

[97] In the overall, we concur with the majority judgment that the decision of the JSC should be set aside, for the reasons given. Similarly, the JSC itself, in its Answering Affidavit, has expressed agreement with this proposition, albeit as an alternative course of action contingent upon this Court's determination. FUL too, aligns with this proposition, as evidenced by the relief sought in the Notice of Motion (para 3), their Heads of Argument, and their submissions presented before this Court.<sup>25</sup> Thus, we propose to remit the matter to the JSC for a reconsideration of its own decision, guided by the principles articulated in the whole of this judgment (both the majority and the minority judgment).

[98] The JSC is the sole authority empowered to make a finding of gross misconduct against a judge in terms of s 177(1)(a) of the Constitution. The JSC was established in terms of s 178 of the Constitution and consists of 23 members comprising of diverse individuals from the legal profession; including judges (most senior in the judiciary), advocates, attorneys, and law professors. Pursuant to s 178(5) of the Constitution, only the JSC is entitled to advise the national government on any matters relating to the judiciary.

[99] The JSC Act was promulgated 'to regulate matters incidental to the establishment of the Judicial Service Commission by the Constitution; to establish the Judicial Conduct Committee to receive and deal with complaints about judges; to provide for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct which judges must adhere to; to provide for the establishment and maintenance of a register of judges' registrable interests; to provide for procedures for dealing with complaints about judges; to provide for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges; and to provide for matters connected therewith'.<sup>26</sup>

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<sup>25</sup> Para 3 of the Notice of Motion reads:

'3 Substituting the Decision with a finding that the second respondent is guilty of gross misconduct and/or suffers from an incapacity as contemplated in section 177 (1)(a) of the Constitution; alternatively, *remitting the matter to the first respondent to be decided afresh* within 20 days of the date of the order; considering the findings of this Honourable Court;' (Emphasis added.)

<sup>26</sup> Long title of the Judicial Service Commission Act (9 of 1994) after amendment by the Judicial Service Commission Amendment Act (20 of 2008).

[100] The majority judgment highlights several concerning features, including how the regional court's evidence (which the JCT took into account as it ought to) was treated by the JSC, which have not been adequately addressed at any stage. It also raised a concern on how 'the composition of the JSC did not remain constant when the matter was discussed. [But] despite several changes in its composition as the matter progressed, the JSC simply picked-up its deliberations whence previously left off.' This must have left doubt in the minds of many (including those aggrieved) as to what drove the JSC to decide as it did. These and other disquieting features highlighted in the majority judgment are of serious concern not only for this specific matter, but also for the entire judiciary and the public at large which should be addressed by the JSC appropriately.

[101] This case represents a test case for the JSC and the judiciary regarding the impeachment of judge. It focuses on the two complaints lodged by AFRI Forum and Pretorius SC and inevitably the interpretation of s 20 of the JSC Act. We interpose to mention that Ms Steinberg, counsel for FUL, is also a Commissioner of the JSC. As such, it is reasonable to expect that she be aware that the current JSC, with the advantage of many new members, including her, will fulfil its responsibility as directed by the JSC Act as this Court will direct. Thus, the necessity to remit the matter to the JSC to allow it to put its house in order, is not only in the public interest, but it is also to ensure that that the JSC fulfils its role in continuously monitoring the conduct of judges under its purview without fear, favour or prejudice. Historically, the judges of this country have behaved and conducted themselves with fortified behaviour, this incident being an exception to the norm. It would be unjust for the public and the society at large to tarnish the entire judiciary based on a single incident.

[102] The high court correctly found that the appeal revolves around the interpretation of s 20 of the JSC Act. In interpreting this provision, the seminal judgment of *Jaga v Dönges*<sup>27</sup>, remains pivotal in our minds where this Court states:

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<sup>27</sup> *Jaga v Donges and Another NO and Another; Bhana v Donges NO and Another* 1950 (4) SA 653 (A).

‘Certainly, no less important than the oft repeated statement that *the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context*. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.’(Emphasis added.)<sup>28</sup>

[103] The Constitutional Court states the principle as follows:

‘What this Court said in *Cool Ideas* in the context of statutory interpretation is particularly apposite. It said:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).” (Footnotes omitted.)

[104] Section 20 provides:

‘(1) The Commission must consider the report of a Tribunal at a meeting [d]etermined by the Chairperson, and the Commission must inform the respondent and, if applicable, the complainant, in writing- (a) of the time and place of the meeting; and (b) that he or she may submit written representations within a specified period for consideration by the Commission.

(2) At the meeting referred to in subsection (1) the Commission must consider- (a) the report concerned; and (b) any representations submitted in terms of subsection (1) (b).

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<sup>28</sup> Ibid para 662G; see also *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12; 2019 (6) BCLR 749 (CC); 2019 (5) SA 29 (CC) para 29 citing *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

(3) After consideration of a report and any applicable representations in terms of subsection (2), the Commission must make a finding as to whether the respondent- (a) is suffering from an incapacity; (b) is grossly incompetent; or (c) is guilty of gross misconduct.

(4) If the Commission finds that the respondent is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct, the Commission must submit that finding, together with the reasons therefore and a copy of the report, including any relevant material, of the Tribunal, to the Speaker of the National Assembly.

(5) If the Commission, after consideration of a report and any applicable representations in terms of subsection (2) finds that the respondent- (a) is not grossly incompetent, but that there is sufficient cause for the respondent to attend a specific training or counselling course or be subjected to any other appropriate corrective measure, the Commission may make a finding that the respondent must attend such a course or be subjected to such measure; or (b) is guilty of a degree of misconduct not amounting to gross misconduct, the Commission may, subject to section 17 (9), impose any one or a combination of the remedial steps referred to in section 17 (8).

(6) The Commission must in writing inform the respondent in respect of whom a finding referred to in subsection (4) or (5) is made, and, if applicable, the complainant, of that finding and the reasons therefore.'

[105] The majority judgment holds as follows (on s 20):

'[75] Even were it to be accepted that the Tribunal's findings are not binding on the JSC, nor is the conclusion that the Tribunal drew from those findings, it still remained for it, at the very least, to enquire into whether or not the Tribunal had addressed the issues fully and fairly, and directed its mind to the right questions in reaching the conclusion that Judge Motata should be removed from office. One finds no evidence of it having done so. The report of the Tribunal is clear and comprehensive. I see no reason to doubt the fairness of the procedure that was there adopted. There is no complaint of a lack of balance in the approach of the Tribunal or suggestion that Judge Motata did not receive a proper hearing before it. That notwithstanding, the JSC paid scant regard to the factual findings of the Tribunal, without explaining why it did so. It ignored that the Tribunal was the body that had the advantage of hearing the evidence and assessing the credibility of the witnesses.'



[106] The essence of s 20 is that the JSC, upon receipt of the report(s) and recommendation, must consider the reports and make its own decision whether the respondent judge is guilty of misconduct *simpliciter* or gross misconduct and then under s 177(1)(a), refer the matter to Parliament for its consideration. It is important to interpret the word 'consider'. In its plain English meaning 'consider' means 'think carefully about (something), typically before making a decision.'<sup>29</sup> The high court albeit on different grounds, interpreted s 20 to mean that the Tribunal could only make recommendation(s), which the JSC, upon reflection, could accept or reject. Thus, the JSC was not bound to accept the recommendation of the majority of the Tribunal.

[107] From a comprehensive consideration of s 20, read with the relevant provisions of the JSC Act,<sup>30</sup> it is discernible that the legislature intended for the JSC to establish mechanisms for it to function efficiently through several Committees; considering the onerous responsibility, which it bears, including the appointment and disciplining of judges.<sup>31</sup> The section is unambiguous and couched in clear language. It says, unequivocally, once the JCT (the Tribunal) has held its investigations, it must submit its report to the JSC for consideration before making the decision. When arriving at this decision, the JSC is to consider not only the reports of the Tribunal but *any applicable representations* and in the scheme of enquiries of this nature, any relevant factors which the Tribunal did not consider.

[108] On these facts, it is common cause that the JCT submitted its report including the judgments of the regional court and the full bench to the JSC. It is also apparent from the record that the JSC did not fully interrogate the report of the Tribunal and the additional material submitted to it. If it did, as it purported to have done, it did not adequately reflect this with the result that there is doubt that it conducted itself as a reasonable decision maker would, and should have.

[109] Notably, apart from the material before it, the JSC took cognisance of what it believed were other relevant factors which the JCT did not consider such as, that Judge Motata was no longer in active service as he had since retired and the possibility

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<sup>29</sup> Oxford English Dictionary.

<sup>30</sup> Sections 14, 15, 16 and 17 and sections 177 and 178 of the Constitution.

<sup>31</sup> For that reason, amongst other ad hoc committees, the JSC functions through the JCC and the JCT.

of him committing this 'transgression' was non-existent. This, however, is not the issue for determination.

[110] The question should be, why did the legislature not couch s 20 in a stronger language to the effect that 'the report and recommendation of the Tribunal are final and binding.' The wording is not, '...upon considering the report and recommendations of the JCT, the JSC shall accept them as they are.' It carefully chose the word 'consider' in s 20(2) followed by s 20(3) which states '*after consideration* of a report and any applicable representations in terms of subsection (2), *the Commission must make a finding ...*'. What mischief was it providing for, in legislation which deals with disciplining of judges? The most obvious would be, it took into consideration that impeachment of a judge is a serious matter with vast consequences which cannot and should not be done arbitrarily. This should not be in the domain of a tribunal, a subcommittee of the JSC, but should be that of the JSC itself.

[111] Taking a step back to look at the entire mosaic picture; it is apparent that the JSC did not 'enquire into whether or not the Tribunal had addressed the issues fully and fairly'. For that reason, it becomes apparent that the JSC did not adhere to the language of s 20. Its failure to consider the recommendation, gives s 20 a different meaning than that intended by the legislature. The fact that the JSC failed to adequately consider the recommendation of the Tribunal and directed its mind to what FUL believed to be irrelevant considerations, makes an even stronger case why the matter should be remitted to the JSC to do exactly that.

[112] There are disquieting features highlighted in the majority judgment that are of serious concern, not only for this specific matter, but also for the entire judiciary and the public at large – the JSC should address them appropriately. Questions can be asked, whether the JSC should have delayed the matter, even if all the concerned parties seem to have put it under pressure not to delay it any further? Was the JSC so rushed and or pressurised to decide, to the point where procedural steps (defined in s 20) were ignored?

[113] It is the duty of the courts to ensure that the JSC, like all other similar independent institutions (resembling Chapter 9 institutions), fulfils its responsibility

diligently when those affected by its decisions seek relief from the courts. Importantly, in carrying out their responsibility to uphold the law and promote the rule of law, the courts must not act with vengeance but rather allow room for reflection, on whether the JSC, when constituted differently, can conduct itself in accordance with the guidance provided by this Court in this matter. Especially taking into account the previous judgments referred to in this judgment to; (a) address the highlighted anomalies identified by the majority judgment and (b) ensure that proper processes are in place to prevent a recurrence of such incidents in future cases that may come before it. The approach adopted by the majority judgment would necessitate for the amendment of s 20 to read that the recommendations of the Tribunal are final and binding, and that the JSC should slavishly implement them. The unintended results of an amendment implicit in the order of the majority judgment, is a function of the legislature, and not that of the courts as prescribed by the principles of the separation of powers.

[114] Despite all these concerns, the disquieting features, FUL seems to have accepted the trite principle that this Court, along with the Constitutional Court, has repeatedly emphasized in numerous judgments<sup>32</sup> that, courts should exercise caution, if not utmost deference, in usurping the decision-making function of a functionary, simply because they are in a position comparable to that of the functionary to make the decision, especially if motivated by expediency rather than principle.<sup>33</sup> Deferring to the JSC in this matter represents the more sensible approach and remedy. More so, considering ‘...the importance of recognising and preserving the distinction between a fair procedure and the merits of a particular case and the need to avoid being

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<sup>32</sup> *Jacobs and Others v S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC) para 84; *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 12; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 46-49; *Cooper NO v First National Bank of SA Ltd* (272/98) [2000] ZASCA 188; [2000] 4 All SA 597 (A) para 39.

<sup>33</sup> *Minister of Trade and Industry v Sundays River Citrus Company (Pty) Ltd* (798/2018) [2019] ZASCA 184; [2020] 1 All SA 635 (SCA) (3 December 2019) para 31; <https://www.judgesmatter.co.za/conduct/>; See also *Koyabe v Minister for Home Affairs* [2009] ZACC 23; 2010 (4) SA 327 (CC) para 36, “[A]pproaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution.’

seduced by what may seem to be the inevitable result of a rehearing. The danger of assuming that a particular result is inevitable has been pointed out frequently.’<sup>34</sup>

[115] The JSC is best advised to study this judgment (both majority and minority judgments), reflect on it, establish processes in line with this judgement, and properly consider the report and recommendation of the JCT. Nonetheless, this Court cannot be seen as endorsing an ‘eye for an eye’ approach, but rather a path of reconciliation, based on the values underpinning the Constitution, aspiring toward a united nation that seeks to rebuild itself as one, irrespective of race, sex, or creed. This case should not be viewed through the lens of expediency but rather as an opportunity to strengthen the systems within the JSC that hold judges accountable.

[116] Lastly, we must address two issues: First, that Judge Motata was fined an amount in excess of R 1 Million to be paid to SAJEI (a body responsible for judicial education). This was an innovation on the part of the JSC, which was not explained. Section 20(5) of the JSC Act provides for ‘a respondent judge to attend a specific training or counselling course or be subjected to any other appropriate corrective measure; the Commission may make a finding that a respondent judge (in this case Judge Motata) attends such a course or be subjected to such measure....’ This would have been the appropriate measure because then Judge Motata would have (through an intensive programme) come to terms with the magnitude of his transgression. He would have thereafter taken steps to correct the perception that he has created about the judiciary, including tendering a public apology and many other measures.

[117] Second, the issue of the Secretary of the Commission deposing to affidavits on behalf of the JSC, despite not being a member or Commissioner of the JSC, which is covered thoroughly in the majority judgment. One point to make, it was disconcerting to witness a respected body like the JSC comprising of judges, and legal practitioners from both the Bar and side Bar and law professors being found wanting in procedural matters of their own institution. The JSC should correct this, if it has not done so already. In any event, if the Secretary (who is a layperson) deposes to an affidavit, surely, the trite principle is that such must be confirmed in a confirmatory affidavit by

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<sup>34</sup> *Cooper op cit* footnote 8.

the responsible person/Chairperson of the Committee concerned, on behalf of the JSC.<sup>35</sup>

[118] In conclusion, for the reasons in the preceding paras, and as all parties believed, the appropriate remedy is to remit the matter to the JSC, to rectify the deficiencies in its previous proceedings properly. Therefore, we would have granted the following order:

- 1 The appeal is upheld with costs, including the costs of two counsel, where so employed.
- 2 The cross appeal is dismissed with costs, including the costs of two counsel, where so employed.
- 3 The order of the high court is set aside and replaced with the following:
  - ‘(a) The application is upheld with costs, including the costs of two counsel where so employed.
  - (b) The matter is remitted to the JSC to reconsider the reports and the recommendation of the JCT, including other available material, afresh ensuring that every ruling which is made, is supported by reasons. The remittal should be dealt with within 90 days from the date of this order.’

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BC MOCUMIE  
JUDGE OF APPEAL

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MBS MASIPA  
ACTING JUDGE OF APPEAL

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<sup>35</sup> See *Ganes and another v Telekom Namibia Ltd* 2004 (3) SA 615 (SCA).

## Appearances

For the appellant:	C Steinberg SC and N Luthuli
Instructed by:	Webber Wentzel Attorneys, Johannesburg Symington De Kok Inc, Bloemfontein
For the first respondent:	C Georgiades SC and YS Ntloko
Instructed by:	The State Attorney, Johannesburg The State Attorney, Bloemfontein.