

**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, JOHANNESBURG)****CASE NO: 2021/43482**

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
<u>2021/11/29.</u> DATE	<u><i>Edith L. L. L.</i></u> SIGNATURE

In the matters between:

The Rule 30 Application:**MANDLAKAYISE JOHN HLOPHE**

Applicant

and

**FREEDOM UNDER LAW**

Respondent

*In re:*

The joinder application by Freedom under Law

**FREEDOM UNDER LAW**

Applicant (in Joinder Application)

and

**MANDLAKAYISE JOHN HLOPHE**

Respondent (in Joinder Application)

*Also*

The Joinder Application by retired Justices of the Constitutional Court:

**JUSTICE DIKGANG MOSENEKE**

1<sup>st</sup> Applicant

**JUSTICE JENNIFER YVONNE MOKGORO**

2<sup>nd</sup> Applicant

**JUSTICE CATHERINE MARY ELIZABETH O'REGAN**

3<sup>rd</sup> Applicant

**JUSTICE ALBERT LOUIS SACHS**

4<sup>th</sup> Applicant

**JUSTICE JOHANN VAN DER WESTHUIZEN**

5<sup>th</sup> Applicant

**JUSTICE ZAKERIA MOHAMMED YACOOB**

6<sup>th</sup> Applicant

and

**MANDLAKAYISE JOHN HLOPHE**

Respondent

Both Joinder Applications - In Re: The Review Application:

**MANDLAKAYISE JOHN HLOPHE**

Applicant

And

**JUDICIAL SERVICES COMMISSION**

1<sup>st</sup> Respondent

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

2<sup>nd</sup> Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

3<sup>rd</sup> Respondent

**SPEAKER OF THE NATIONAL ASSEMBLY**

4<sup>th</sup> Respondent

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**JUDGMENT**

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**CORAM SUTHERLAND DJP (WITH WHOM LEDWABA DJP AND VICTOR J CONCUR):**

**Introduction**

1. Initially three interlocutory applications were brought before the Court. To avoid the confusion caused by some of the parties being variously both applicants and respondents in different applications, the several parties are referred to only by name. The interlocutory applications relate to a review application brought by Hlophe JP to set aside a decision of the Judicial Service Commission (JSC) which found him guilty of gross misconduct and then referred that finding to Parliament for impeachment proceedings against him.

2. One application for a joinder was by several retired Justices of the Constitutional Court who were implicated in the initial complaint laid against Hlophe JP, namely Justices Moseneke, DCJ, and Mokgoro, O'Regan, Sachs, Van der Westhuizen and Yacoob JJ. Hlophe JP indicated that he had no objection to their joinder. An order to that effect shall be made joining them as the 5<sup>th</sup> to 10<sup>th</sup> respondents.
3. The remaining two applications concern an application by Freedom under Law (FUL) to join and an application brought by Hlophe JP to set aside the replying affidavit of FUL in that joinder application. This judgment deals primarily with these two interlocutory applications.
4. After the review application had been served on the JSC, the President of the Republic, the Minister of Justice and the Speaker of Parliament, only the JSC entered a notice of opposition; the other parties gave notice to abide the decision of the court.
5. Freedom under law (FUL) then brought an application to be joined as a party. Hlophe JP opposed this application. No other party objects to the joinder of FUL.
6. Thereafter Hlophe JP filed an answering affidavit. FUL then filed a replying affidavit. Hlophe JP thereupon filed a Rule 30 application alleging that the replying affidavit was an irregularity and sought an order that it be set aside.
7. The matters are addressed in three parts:
  - 7.1. The background
  - 7.2. The rule 30 application in respect of the replying affidavit of FUL.
  - 7.3. The joinder application by FUL.



## The Background

8. This matter is another chapter in a protracted controversy concerning the allegation that Hlophe JP, tried to suborn two Justices of the Constitutional Court to pervert their judgment to favour President Jacob Zuma, as he then was. The history had been recounted several times in judgments of various courts and shall not here be regurgitated, save as is unavoidable.<sup>1</sup>
9. FUL, who seeks to intervene, is no stranger to the controversy. The first phase of saga was the decision in 2009 of the JSC to decline to refer the allegations of gross misconduct for an enquiry that included a cross examination of the persons involved in the alleged acts of subornation. FUL entered the fray to seek, and ultimately succeed in obtaining, an order overturning the non-referral, and thereupon, an order directing the JSC to undertake the disciplinary enquiry.
10. The subsequent passage of events over the past decade led ultimately to the decision of the JSC in 2021 to find Hlophe JP guilty of gross misconduct, the subject matter of the decision sought to be reviewed and set aside. FUL again enters the fray, seeking to be a party to the review proceedings brought by Hlophe JP with the intention to support the decision of the JSC.

## The Rule 30 application

11. The Uniform Rules of Court prescribe the manner of presentation of documents that serve the process of court. Sometimes practitioners fail to satisfy these prescripts. Such failures

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<sup>1</sup> See: *Freedom Under Law v Acting Chairperson Judicial Services Commission* 2011(3) SA 538 (SCA); *Hlophe v Premier, Western Cape Province*; *Hlophe v Freedom Under Law & Another* 2012 (6) SA; *Nkabinde & Another v Judicial Service Commission & others* 2017 (3) SA 119 (CC) 13 (CC)

are the subject matter of Rule 30 which deals with “irregular proceedings” and what an aggrieved party may do about the irregularities allegedly perpetrated by an adversary.<sup>2</sup>

12. The Rule 30 application in this case is based squarely and solely on the failure of the replying affidavit to comply with the prescripts of Rule 18 (5), ie, the injunction that there shall be a ‘clear and concise statement of the material facts relied on’ for a claim, answer or defence and that this be made with ‘sufficient particularity to enable the opposite party to reply.’ No similar complaint is made about FUL’s founding affidavit.

13. Rule 18 is titled “Rules relating to pleading generally”. Because the heart of the controversy implicates the meaning of ‘pleading’ in the context of this rule it is necessary to read it in full:

‘(1) A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act No. 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party.

(2) The title of the action describing the parties thereto and the number assigned thereto by the registrar, shall appear at the head of each pleading, provided that where the parties are numerous or the title lengthy and abbreviation is reasonably possible, it shall be so abbreviated.

(3) Every pleading shall be divided into paragraphs (including sub-paragraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment.

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<sup>2</sup> Rule 30: (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;  
 (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;  
 (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

(4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.



(4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.

(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.

(6) A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

(7) It shall not be necessary in any pleading to state the circumstances from which an alleged implied term can be inferred.

(8) A party suing or bringing a claim in reconvention for divorce shall, where time, date and place or any other person or persons are relevant or involved, give details thereof in the relevant pleading.

(9) A party claiming division, transfer or forfeiture of assets in divorce proceedings in respect of a marriage out of community of property, shall give details of the grounds on which he claims that he is entitled to such division, transfer or forfeiture.

(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for —

- (a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;
- (b) pain and suffering, stating whether temporary or permanent and which injuries caused it;
- (c) disability in respect of —
  - (i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);
  - (ii) the enjoyment of amenities of life (giving particulars);
 and stating whether the disability concerned is temporary or permanent; and
- (d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.

(11) A plaintiff suing for damages resulting from the death of another shall state the date of birth of the deceased as well as that of any person claiming damages as a result of the death.

(12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.’  
(Emphasis supplied)

14. The import of this rule is to regulate the information that must be contained in a pleading and the format of the pleading. Sub-rule (1) makes clear the responsibility is that of the *pleader*, ie counsel or attorney. It does contemplate a deponent to an affidavit.

15. Nowhere in the replying affidavit of FUL is there a direct reply to any paragraph in the answering affidavit of Hlophe JP; indeed, there is no reference to any paragraph number. The character of the replying affidavit is to identify topics or themes in the answering affidavit and address them in the form of a series of critiques. The discreet critiques articulate the essence of what is stated in the topics drawn from the answering affidavit but nowhere does the replying affidavit identify the paragraphs from which the topics are drawn. The complaint is that the replying affidavit does not comply with the prescripts of Rule 18(5). By the same token, it could also be said that the replying affidavit does not comply with Rules 18 (3) or (4) too.
16. On this ground it is contended on behalf of Hlophe JP that the replying affidavit must be set aside. The relief sought is not to strike out parts of the replying affidavit; rather it seeks the wholesale setting aside of the affidavit.
17. It was acknowledged by counsel for Hlophe JP that the application stands or falls on a decision whether Rule 18 applies to affidavits. The contention that Rule 18 applies to affidavits draws on dicta from several judgments, which, it is argued, support the proposition that an affidavit is also a pleading. Axiomatically, the substance of the contention is that the meaning of 'pleading' in Rule 18 includes an 'affidavit'.
18. A notable attribute of the judgments cited in support for this argument is that no allusion is made to Rule 18 in any of them. The caselaw is therefore not direct authority that Rule 18 does apply to an affidavit. The argument must, therefore, be that a proper reading of these dicta lead to the conclusion that when Rule 18 refers to a pleading, it must accordingly include a reference to an affidavit. In my view this is a misconceived thesis.



19. In *Theron NO v Loubser No & others in re Theron NO v Loubser & Others 2014 (3) SA 323 (SCA)* the court of appeal was concerned to address the propriety of an appeal being decided piecemeal. The court was divided 4 -1. The majority concluded that it was inappropriate, but, pragmatically, allowed the criticism to pass and decided the point put to the court of appeal, namely the locus standi of a party. At para 26 what Wallis JA states is this:

‘Needless to say this approach [a separated issue referred on appeal] is most unsatisfactory because it results in the piecemeal determination of the litigation. This is not a case where the court below was asked to hear a point in limine without traversing the merits. That is a course that has on occasions been followed by courts in application proceedings, where for example there is a dispute of fact that will otherwise need to be resolved by oral evidence, but the respondent contends that even if the applicant's factual allegations are proved it will not be entitled to the relief sought. Similarly, in *Reymond v Abdulnabi and Others*, where the court was seized of a reference to oral evidence, it disposed of the case on the preliminary point that even accepting the applicant's version, the application had to fail as a matter of law. In general, however, the desirable course to be followed in application proceedings, where the affidavits are both the evidence and the pleadings, is for all the affidavits to be delivered and the entire application to be disposed of in a single hearing. Whilst there are two recent judgments in which it has been suggested that issues of locus standi are suitable for separate disposition in this way, caution must be exercised in that regard as pointed out by this court in the *Democratic Alliance* case.’ (Emphasis supplied)

20. The court of appeal was not addressing the application of Rule 18, nor can the throw-away remark made in this passage, as highlighted, be understood to imply that affidavits and pleadings were being equated. The allusion to the affidavit also being the pleadings is a loose way of describing the locality of the issues raised for decision.

21. Again, in *Kham & Others v Electoral commission & another 2016 (2) SA 338 (CC)* the issue addressed by the court was jurisdiction; in this instance whether the Electoral Court could review the Independent Electoral Commission (IEC). At para 46, Wallis AJ, in considering the question of what material a court would need to examine to determine whether a particular decision of the IEC was susceptible to a review, stated this:

‘The relief sought by the applicants before the Electoral Court narrowed considerably in the course of argument. Before this court it was confined to seeking an order that the outcome of the by-elections should be set aside and fresh by-elections held. But this relief was

consequential upon the Electoral Court concluding that there were decisions by the IEC that were susceptible of review in terms of s 20(1)(a) of the Commission Act. That requires an examination of the underlying complaints that the applicants said justified the grant of this relief. As this court held in *Gcaba*, questions of jurisdiction are to be determined on the basis of the issues identified in the pleadings and in application proceedings the affidavits represent both the pleadings and the evidence.' (Emphasis supplied)

22. This remark does not equate a pleading with an affidavit. Rather, it speaks to the function of an affidavit containing the definition of the issues such as one, in an action, would expect to find in a pleading.

23. The reference by Wallis AJ to *Gcaba v Minister for Safety and Security & Others 2010 (1) SA 238 (CC)* bears mention. This case too was about jurisdiction. The question was the extent of the exclusive jurisdiction of the Labour Courts and what jurisdiction was shared with the High Court. At para 75, Van der Westhuizen J held thus:

'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa* and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court' (Emphasis supplied)

24. Plainly, the same point is being made as in the other cases cited.

25. In summary, in none of the cited judgments is an affidavit equated to a pleading. The common thread throughout the cases is a discussion of the forensic function performed by an affidavit in motion proceedings. The various remarks address the dynamics of litigation and, in the course thereof, deal with the necessity in any legal proceedings to identify the issues for decision. What is said is that in motion proceedings an affidavit serves the



purpose that a pleading performs; because pleadings, by implication, are absent, therefore, by force of circumstance affidavits, in addition to encapsulating the evidence, function to identify the issues too. This is a far cry from suggesting that the word “pleading” in Rule 18 includes an affidavit.

26. Interpreting the meaning of a word or phrase in a judgment requires due weight to be given to the context of the words used. The oft cited dictum of Wallis JA, about the significance of context in interpreting any document, in *Natal Municipal Joint Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* must be adhered to.<sup>3</sup>

27. The critical insight to be drawn from the dictum by Wallis JA is that when reading a reference to a term or a phrase in one context, it cannot be simply understood to mean the

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<sup>3</sup> [18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'



exact same thing in a different context. It is not feasible to airlift the meaning of a word out of one sentence in a given context and then parachute that meaning into a sentence using the same word in another context.<sup>4</sup>

28. Moreover, independently of these considerations it is plain that Rule 18 has no application to motion proceedings. This point is made by the Uniform Rules of Court, themselves. Rule 6 is the primary rule that regulates applications. After an extensive array of prescripts, it is provided in rule 6(14) that:

‘The provisions of rules 10, 11, 12, 13, and 14 apply to all applications.’

These listed rules all are expressed as being applicable to actions. Prominently absent from the list is any reference to Rule 18. Were Rule 18 to apply to affidavits it could not have been omitted here. Its omission under these circumstances points away from the notion that, by implication, the term ‘pleading’ when used in Rule 18 has any application to an affidavit.

29. Some reliance was placed on judgments which suggest that a court has the inherent jurisdiction to apply various rules of court that apply only to actions to motion proceedings too. Thus, for example, the utility of a Rule 33(4) separation of questions for decision has been suggested as a rule which can be applied to motion proceedings.<sup>5</sup> Similarly, Rule 19(5) about an extension of time to file opposition in an action has been suggested as appropriate to apply to motion proceedings, pursuant to a courts inherent jurisdiction.<sup>6</sup> There are also several other such examples. The correctness of this perspective is, in my view, not free from doubt. Axiomatically, the scope to exercise inherent jurisdiction does not extend to

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<sup>4</sup> See too: *Slims (Pty) Ltd and another v Morris NO 1988 (1) SA 715*, where Botha JA, at 4732J – 733A, said: ‘...it will bear repetition that caution is called for when it is sought to apply a meaning ascribed to a word in a previous case, in relation to a particular context and subject-matter, to the same word appearing in a different context and relating to a different subject-matter.’

*Reymond v Abdulnabi & others 1985 (3) SA 348 (W) at 349F-F; De Reuck v DPP, Witwatersrand Local Division 2002 (6) SA 370 (W) at 347G-H.*

<sup>6</sup> *Persadh & Another v General Motors of South Africa (Pty) Ltd 2006 (1) SA 455 (SE) at 457I.*

contradicting a law. What inherent jurisdiction caters for is the elimination of a lacuna in order to prevent an injustice. It is trite that a court must enjoy dominion over its own procedure to achieve that outcome. It seems to me that the courts' inherent jurisdiction to separate an issue or to allow additional time to file opposition did not require an *application* of a rule conceived to address the needs of an action. That the exercise of that inherent jurisdiction may have been inspired by an awareness of the rules is a distinct matter. The notion therefore of an application to motion proceedings of rules framed to deal with actions is misconceived and unnecessary to achieve the objectives of orderly litigation or to avoid an injustice.

30. In the case before this court, no injustice exists that requires us to impose on FUL an obligation to compose a replying affidavit to resemble a pleading as contemplated in Rule 18. In any event that was not the premise of the Rule 30 application, nor of the relief sought.
31. Moreover, the argument that a prejudice inured to Hlophe JP because of the absence of a point-by-point reply to the statements in the answering affidavit is wholly unsubstantiated. Generally, a failure by an applicant to use the chance to reply in order to respond to new material raised in the answer, and thereby, offer a rebuttal, usually is to the advantage of the respondent whose allegations stand unrebutted and who can invoke the dictum in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 634 E-635C, that the respondent's unrebutted answers stand firm.
32. The appropriate perspective to hold about the work that affidavits do in motion proceedings is that articulated by Joffe J in *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323G – 324C:

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the



parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (D) it was stated at 469C--E that 'where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof. As was held in *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 849B in regard to a constitutional issue:

'Dit is myns insiens vir die behoorlike ordening van die praktyk absoluut noodsaaklik dat konstitusionele punte nie deur advokate as laaste debatspunt uit die mou geskud word maar pertinent in die stukke as geskilpunt geopper word sodat dit volledig uitgepluis kan word deur die partye ten einde die Hof in staat te stel om dit behoorlik te bereg.'

The dictum is not only of application to constitutional issues - it applies to all issues. Nor is the dictum only of application in the context of a founding affidavit - it applies equally to answering affidavits and replying affidavits. The more complex the dispute between the parties the greater precision that is required in the formulation of the issues. See in regard to actions, *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 106--7. Although this dictum relates to pleadings in an action it is equally applicable to affidavits in motion proceedings.' (Emphasis supplied)

33. Accordingly, as the sole rationale upon which the Rule 30 application was brought is invalid, it follows that the application to set aside the replying affidavit must be dismissed.

## **The joinder application**

### ***The legal tests***

34. The primary test for a joinder is well established. The Constitutional Court in *SA Riding for the Disabled Association v Regional Land Claims Commissioner & Others* 2017 (5) SA 1 (CC) has articulated the test thus:

'It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court.



This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

'In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.'

(Emphasis supplied)

35. The import of this formulation is that a 'legal Interest' must be put forward. The possibility of such an interest is sufficient. (See: *Peermont Global (KZN) (Pty) Ltd v Afrisan KZN Ltd* [2020] 4 All SA 226 (KZP))

36. In respect of matters that implicate constitutional values and concerns, a generous approach to joinder has been recognised. This is apparent, not least in Section 38 of the Constitution. A generous approach has been consistently applied. In *Ferreira v Levin NO & others 1996 (1) SA 984 (CC)*, a case dealing with the effect of being subjected to an interrogation in an enquiry under the provisions of the Companies Act on a right to a fair trial, O'Regan J stated:

'[164] The objection to constitutional challenges brought by persons who have only a hypothetical or academic interest in the outcome of the litigation is referred to in *Zantsi v Council of State, Ciskei, and Others*. The principal reasons for this objection are that in an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover, the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes. The United States Courts also have regard to 'the proper role of the Courts in a democratic society' which is to settle concrete disputes, and to the need to prevent Courts from being drawn into unnecessary conflict with co-ordinate branches of government. These objections do not apply to the present case. The applicants have a real and not a hypothetical interest in the decision. The decision will not be academic; on the contrary it is a decision which will have an effect on all s 417 enquiries and there is a pressing public interest that the decision be given as soon as possible. All the requirements ordinarily set by a Court for the exercise of its jurisdiction to issue a declaration of rights are therefore present. The question is whether different considerations apply in constitutional cases.

[165] Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled. Such an approach would also be consistent in my view with the provisions of s 7(4) of the Constitution on which counsel for the respondents based his argument. ...’ (Emphasis supplied)

### *The FUL case for joinder*

37. FUL presents itself as a public interest not-for-profit entity. It proclaims its function is to engage in public interest litigation as a champion of the Rule of Law and of our constitutional democracy and, in particular, asserts that it has a direct interest in maintaining the integrity of the Judiciary. The reputation of FUL in this regard is beyond doubt because it has repeatedly been recognised as such by our courts.<sup>7</sup> Furthermore, as alluded to earlier in this judgment, FUL has been actively involved in the saga concerning the alleged misconduct of Hlophe JP. Part of FUL’s case for intervention is its historical connection to the evolving case ever since 2009.

38. FUL seeks to be joined as a party not as an amicus. The foundation of the application to join is based on its own interest, having regard to its *raison d’être* and its prior involvement in the matter and also, in the public interest for which it is an agent. There cannot be any serious doubt that, on these grounds, a case has been made out.

### *The grounds of opposition to the joinder of FUL*

39. I enumerate the articulated grounds of opposition to the joinder of FUL, as best can be teased out of the answering affidavit and the heads of argument; some of which overlap:

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<sup>7</sup> See Supra, footnote 1.



- 39.1. FUL is not a public interest entity.
- 39.2. FUL does not in this case, act in the public interest.
- 39.3. FUL has no direct and substantial legal interest.
- 39.4. No dispute as between FUL and Hlophe JP exists.
- 39.5. FUL is not a necessary party.
- 39.6. FUL's so-called historical connection to the case is irrelevant, inter alia, because the 2009 case was under a different case number.
- 39.7. FUL is not a party whom it is convenient to join.
- 39.8. FUL's invocation of rule 12 is misconceived; similarly, Rule 16A cannot apply.
- 39.9. FUL seeks a joinder qua respondent which it cannot do on public interest grounds; a person may only act in the public interest qua applicant.
- 39.10. The public interest is not, as a fact, served by admitting FUL as a party.
- 39.11. It is not appropriate that any stranger usurp the role of the JSC in defending its own decision and FUL has therefore no standing to defend the JSC.

40. In the answering affidavit Hlophe JP makes several statements which, paradoxically, it seems to me, support the FUL application. For example, in para 5, after denying FUL has any interest in the case, it is stated that:

‘What FUL has shown instead, over time, is that it has a keen interest, and even a committed adversarial position in my person. I set out hereunder how the FUL interest appears to promote my removal at all costs. This however, does not translate to a legal interest giving FUL an entitlement or right to be joined in the review application.’

41. At some length, the answering affidavit then goes on to describe the partisan stance of FUL towards Hlophe JP. A great emphasis is given to the public condemnation of Hlophe JP by retired Constitutional Court Justice Kriegler. Justice Kriegler is the chair of FUL. Not all of his public remarks about Hlophe JP have been made formally on behalf of FUL.



However, Justice Kriegler and FUL are so intimately connected in the public mind, it is fair to assume for the purposes of this analysis that his statements carry the endorsement of FUL. The threads of the resistance to FUL's application is the hostile posture adopted by Justice Kriegler in particular.

42. The contention that FUL is ineligible to act in the public interest goes beyond mere hostility towards Hlophe JP; the argument embraces the notion that the allegedly extravagant condemnation by Justice Kriegler brings the judiciary into disrepute and that such an inference leads therefore to the conclusion that the stance adopted by FUL is against the public interest. On this footing, it is argued that FUL is acting contrary to the public interest and thus is disqualified from joining. This perspective loses sight of the test for the joinder which does not involve a qualitative evaluation of the merits of a party's viewpoint.

43. I do not, at this stage, discount the possibility that in addressing the merits of any criticism that FUL directs towards Hlophe JP, when the review is argued, that perhaps some mileage might be derived from this partisanship or hostility, though none occurs to me on the material before me at this time. However, as regards establishing a legal interest to intervene, such hostility in no way diminishes the case put up by FUL. Paradoxically, the reality of a long-standing adversarial involvement in this controversy about the alleged misconduct of Hlophe JP enhances FUL's case for intervention. FUL has, it is common cause, devoted no little energy over a decade to drive the relevant organs of state to investigate and discipline Hlophe JP. Its investment in the case is palpable. Moreover, by taking the initiative to seek a review of the decision by the JSC in 2009 to decline to institute a disciplinary enquiry, FUL established the very foundation for the chain of events culminating in the 2021 decision of JSC. Of course, whether that decision of the JSC is

lawful and whether FUL's stance is justifiable remain to be seen and those questions await the conclusion of the review proceedings.

44. The argument advanced by FUL in response to the resistance to its joinder references the decision in *Freedom under Law v Acting Chairperson, Judicial Service Commission 2011 (3) SA 549 (SCA)* to demonstrate its credentials. This is the decision that set the chain of events in motion that led ultimately to the review. On the standing of FUL to involve itself in the discipline of Hlophe JP, the Court stated as follows, important both as a statement of the law and as a statement of fact relating to FUL:

'Standing

[16] The applicant [FUL] is a not-for-profit company registered in terms of s 21 of the Companies Act 61 of 1973. Its mission is, amongst others, to promote democracy under law, advance the understanding and respect for the rule of law and the principle of legality, and secure and strengthen the independence of the judiciary. It states that the application is being brought in its own interest, in the public interest, and in the interest of all litigants and future litigants before the courts over which the 14 judge respondents may preside.

[17] The applicant's case is that the decision by the JSC to have a preliminary enquiry and its decision to dismiss the complaint and counter-complaint were in breach of s 165(4) of the Constitution, and also constituted unlawful administrative action in breach of s 33 of the Constitution. Section 165(4) of the Constitution provides that organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. In terms of s 33 of the Constitution, everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was enacted to give effect to these rights as required by s 33(3) of the Constitution.

[18] In terms of s 38 of the Constitution, anyone acting in the public interest has the right to approach a competent court, alleging that a right in the Bill of Rights, which includes a right in terms of s 33, has been infringed or threatened.

[19] The Constitutional Court has repeatedly stressed that a broad approach to standing should be adopted, also in matters that involve an infringement of rights other than those protected in the Bill of Rights In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) para 165 Chaskalson P said that he could see no good reason for adopting a narrow approach to the issue of standing in constitutional cases.<sup>5</sup> In *Krugr v President of Republic of South Africa and Others* 2009 (1) SA 417 (CC) the Constitutional Court recognised the standing of an attorney who applied in his own interest, and in the public interest, for a proclamation to be declared invalid in circumstances where s 38 was not of direct application. Skweyiya J said:

'Where the practitioner can establish both that a proclamation is of direct and central importance to the field in which he or she operates, and that it is in the interests of the administration of justice that the validity of that proclamation be determined by a court, that practitioner may approach a court to challenge the validity of such a proclamation.'

[20] In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) (2004 (7) BCLR 775) para 17 the Constitutional Court once again confirmed that a broad, rather than a narrow, approach should be adopted to standing, to ensure that



constitutional rights enjoy the full measure of the protection to which they are entitled. In respect of litigation in the public interest they adopted the approach advocated by O'Regan J in *Ferreira v Levin* when dealing with the standing provisions of the interim Constitution, which they considered for all practical purposes to be the same as the standing provisions of s 38 of the Constitution. According to that approach, a court will be circumspect in affording standing to applicants purporting to act in the public interest. Various factors to determine whether a person is genuinely acting in the public interest were identified by O'Regan J, and some were added. They stressed that the list of relevant factors is not closed, and stated that 'the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations . . .'

[21] There is no reason to doubt the applicant's statement in its founding affidavit that it is acting in the public interest. Every South African citizen has an interest to be served by judges who are fit for judicial office, and by courts which are independent and impartial. But no judge may be removed from office, unless the JSC has found that he suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct. It is therefore in the interest of every South African citizen that 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 is alleged it had done in this case, it can have grave repercussions for the administration of justice.

[22] The Constitutional Court judges did not act in their own interest, and their complaint is not that they have been wronged in their individual capacities. They acted in what they considered to be the public interest. I therefore agree with counsel for the applicant's submission that this 'is not a matter that can or should be left to the judges individually involved. They are entitled to act in their own interests and are not required to litigate in the public interest. They are also inhibited by the constraints of the reserve appropriate to judicial office, which renders them averse to involvement in public controversy.' One can also not expect individuals to call the JSC to account in expensive court actions. It is for bodies like the applicant, that can afford to do so, and whose very mission is to secure and strengthen the independence of the bench, to take action.

[23] For these reasons I am satisfied that the High Court correctly held that the applicant has standing in this matter, which means that the counter-appeal must fail.' (Emphasis supplied)

45. This passage in that judgment, in my view, disposes of several of the grounds of resistance advanced on behalf of Hlophe JP; i.e., grounds 1, 2, 3, 5, 6, 7 and 10 mentioned above in paragraph 39.

46. As to the balance of the grounds enumerated, it suffices to say this:

46.1. Ground 4, the notion that there must be a dispute directly between FUL and Hlophe JP is misconceived. The legal interest need not derive from that source alone and no authority supports such a contention.



- 46.2. Ground 8, as to the scope of Rule 12 and Rule 16A: first, Rule 16A concerns only amici curiae, a status FUL does not seek; second, Rule 12 does not exclude a party who seeks to join to advance the public interest, nor could such an implication be reasonably attributed to that rule. Such a restriction would serve no useful purpose.
- 46.3. Ground 9, the notion that it is relevant whether a party seeking to join must be an applicant rather than a respondent need only to be stated to be dismissed as meritless. Such a distinction has no useful function.
- 46.4. Ground 11, the notion that only the JSC has standing to defend its decisions flies in the face of what was said in *Ferreira v Levin* (Supra) and in the face of common sense. The widespread practice of admitting public interest organisations with expertise in various fields or aspects of constitutional law, (eg the Centre for Child Law, Lawyers for Human Rights, the Legal Resources Centre, Section 27, Action Treatment Campaign, the Socio-economic Rights Institute (SERI) and several others) demonstrates the value of supposed busy-bodies contributing to the jurisprudence of our constitutional democracy and whose intervention has been welcomed by our courts. Moreover, the JSC does not object to the joinder of FUL to bolster its case.

### ***Conclusions about the Joinder application***

47. FUL has demonstrated its credentials as a bona fide public interest organisation, acknowledged to be so by our courts, whose objectives are the upholding of constitutional norms through participation in litigation of constitutional significance. The issue in the review is a question of profound constitutional importance. FUL has been engaged in this case at earlier stages of its evolution. The merits or demerits of its stance on the controversy

are irrelevant to the joinder question. On grounds of its own legal interest evidenced by its prior involvement in the series of cases and as an agent of the public *interest*, FUL has shown proper grounds to be joined.

### **Costs in both applications**

48. FUL has been successful in both applications. On behalf of Hlophe JP it was stated that no costs order was sought. FUL sought a punitive costs order. In my view, no sound reason exists not to apply the ordinary approach to the successful party being awarded the costs. A similar application to join by the retired Constitutional Court Judges was unopposed by Hlophe JP. As regards the scale of costs, despite the criticism which the Rule 30 application undoubtedly deserves, it seems appropriate to me that the two applications be treated as being intertwined and no useful purpose is served by the attempt to distinguish the costs incurred in respect of the notionally separate parts of the controversy. Costs on the party and party scale including the costs of two counsel shall be awarded in each application,

### **The Orders**

#### **The Joinder application by the retired Constitutional Court Justices:**

- (1) The applicants, Moseneke DCJ, and Mokgoro, O'Regan, Sachs, van der Westhuizen and Yacoob JJ, are joined as the 5<sup>th</sup> to tenth respondents in the review application.

#### **The Rule 30 application by Hlophe JP**

- (1) The application is dismissed.
- (2) The applicant in the Rule 30 application shall bear costs of the respondent in the Rule 30 application, including the costs of two counsel on the party and party scale.



### **The Joinder application of FUL**

- (3) The applicant is joined in the review application as the 11<sup>th</sup> respondent.
- (4) The costs of the applicant shall be borne by the respondent, including the costs of two counsel, on the party and party scale.



Sutherland DJP (with whom Ledwaba DJP and Victor J concur)

Heard: 15 November 2021

Judgment: 29 November 2021

For Hlophe JP (Respondent in the joinder applications and Applicant in the Rule 30 application):

Adv T S Sidaki, with him,

Adv I Shai,

instructed by Attorney B Xulu.

For Freedom under Law (Applicant in the joinder application and Respondent in the rule 30 application):

Adv M Du Plessis SC, with him,

Adv T Palmer and

Adv S L Mohapi,

instructed by Attorneys Webber Wentzel.

For the retired Justices of the Constitutional Court;

Adv G Marcus SC,

instructed by the State attorney.

The other parties did not participate in the hearing.