IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO:66300/11

DATE HEARD: 15 August 2012

DATE DELIVERED: 7/9/2012

Reportable/~~Not reportable~~

In the matter between

NKOLA JOHN MOTATA	**Applicant**
and	
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**First Respondent**
THE JUDICIAL SERVICE COMMISSION	**Second Respondent**
AFRIFORUM	**Third Respondent**
ADVOCATE G C PRETORIUS SC	**Fourth Respondent**

JUDGMENT

NEPGEN J

[1] The applicant is a judge of the High Court of South Africa, based in the North

Gauteng High Court Division, Pretoria. First respondent is the Minister of Justice and Constitutional Development of the Republic of South Africa. Second respondent is the Judicial Service Commission, established in terms of Section 178 of the Constitution of the Republic of South Africa, 1996. Third respondent is Afriforum, an incorporated association (according to its letterhead in the papers before me). Fourth respondent is an advocate of the High Court of South Africa.

[2] On 5 January 2007 the applicant was involved in a motor vehicle accident in Gleneagles Road, Hurlingham. Subsequently the applicant was arrested and charged with a number of offences. He thereafter appeared in Court and was eventually convicted of driving under the influence of liquor. An appeal against this conviction was unsuccessful.

[3] On 7 July 2008, while the criminal trial was in progress, third respondent lodged a complaint with second respondent against the applicant. The complaint related to remarks allegedly made by the applicant on 5 January 2007 after the accident occurred. These remarks, so third respondent contended, constituted gross misconduct on the part of the applicant. Whether or not there is any merit in the complaint lodged against the applicant is something that I do not have to consider for purposes of this judgment.

[4] While the criminal trial was in progress the applicant was granted special leave of

absence pending the finalization of the criminal matter. Such finalization came about on 9 September 2009. On 10 September 2009 the Deputy Judge President of the North Gauteng High Court addressed a letter to first respondent recommending that special leave of absence be granted to the applicant pending the finalization of the complaint against him by third respondent. I can mention at this stage that there were other complaints, including one by fourth respondent (which is the reason for him having being joined herein), but for purposes of this matter it is unnecessary to discuss them further. On 10 September 2009 first respondent responded to the aforesaid recommendation by granting the applicant special leave "pending the consideration and finalization of the complaints against him which are currently before the Judicial Service Commission".

[5] On 14 April 2011 the Judicial Conduct Committee of second respondent wrote a letter to the applicant advising him that the Chairperson of the Judicial Conduct Committee had referred the complaints against him to the Judicial Conduct Committee to consider whether it should recommend to second respondent that the complaints should be investigated and reported on by a Judicial Conduct Tribunal. It was stated that a sitting to consider whether or not such recommendation should be made would take place on 14 May 2011. The applicant attended the meeting on that date. The applicant avers that at the meeting the committee decided that the complaint against him by third respondent, if established, *prima facie* indicated gross misconduct on his part. In any event, on 17 May 2011 the Judicial Conduct Committee addressed a letter

to the applicant's legal representatives informing them that a recommendation had been made to second respondent that the complaint lodged against the applicant by third respondent should be investigated by a Judicial Conduct Tribunal. A further letter dated 28 June 2011 was addressed to the applicant in which he was informed that second respondent had decided to request the Chief Justice to appoint a Tribunal to investigate and report on the complaint. The possible suspension of the applicant was also raised in this letter, but this is something which has not occurred and requires no further consideration. At present a Tribunal has not yet been appointed by the Chief Justice.

[6] On 4 October 2011 the applicant's legal representatives wrote to the Judicial Conduct Committee requesting the Code of Judicial Conduct on which the alleged gross misconduct charge against the applicant would be based. This letter was replied to on 4 October 2011. In that letter the applicant's legal representatives were informed that the Code of Judicial Conduct was still awaiting approval by Parliament. This resulted in the applicant's legal representatives addressing a letter to second respondent in which it was contended that as Parliament had not approved a Code of Judicial Conduct there was no basis upon which the applicant could be charged with misconduct and that they therefore demanded that second respondent should "stop the process" in connection with the complaints of misconduct and allow the applicant to resume his duties immediately. Second respondent responded that it was satisfied that it was empowered to institute proceedings against judges, and therefore the applicant, for misconduct.

[7] It was thereafter that the present application was launched. In the Notice of Motion the following relief is sought:

> "1. That the decision taken by the second respondent on 25 June 2011 that the Chief Justice must appoint a Judicial Conduct Tribunal to investigate a complaint by the third respondent against the applicant be declared unconstitutional and unlawful;
>
> 2. That the second respondent be ordered and directed to stop the said misconduct investigations or enquiry against the applicant;
>
> 3. That the decision of the first respondent dated 10 September 2009 granting the applicant special leave be declared unconstitutional and unlawful;
>
> 4. That the first and second respondents be directed and ordered to allow the applicant to resume his judicial work as a Judge forthwith;
>
> 5. That any respondent who opposes this application be ordered to pay the costs on a scale as between attorney and own client."

The application is opposed by first respondent, second respondent and third respondent.

[8] Despite the wording of paragraph 3 of the Notice of Motion, it was made clear to me at the outset of argument that it was not contended on behalf of the applicant that first respondent did not have the power to grant special leave to a judge. The applicant's contention in regard to the granting of special leave, so I was informed, was that as the continued investigation of the complaint against the applicant was unlawful, the special leave granted pending the consideration and finalization of such complaint was impermissible as it had the effect of preventing the applicant from pursuing his occupation as a judge. This amounted to a violation of the applicant's right to pursue

his occupation in terms of section 22 of the Constitution. On this basis, so it was contended, first respondent was acting unlawfully and unconstitutionally.

[9] The applicant's concession regarding the power of first respondent to place a judge on special leave was, in my view, correctly made. Section 13 of the Judges' Remuneration and Conditions of Employment Act, No. 47 of 2001, provides for regulations to be made, *inter alia*, in respect of the periods for which and the circumstances under which and conditions upon which leave of absence may be granted to a judge. Regulation 5 of the regulations promulgated in terms of this section provides as follows:

> "Special Leave
>
> 5. If in exceptional circumstances the Minister is satisfied that leave for which no provision has been made in these regulations should be granted in a specific case, he or she may, on the recommendations of the Chief Justice, the President of the Supreme Court of Appeal or the Judge President concerned, grant such leave on such conditions as he or she may deem necessary, whether it be leave with full remuneration."

The special leave granted to the applicant was granted in terms of the aforesaid regulation 5.

[10] A decision on the relief sought by the applicant in relation to him being placed on special leave is accordingly dependent upon the outcome of the relief sought by him in

paragraphs 1 and 2 of the Notice of Motion. I shall endeavor to summarize as briefly as possible the applicant's contentions in this regard.

[11] I was referred to section 12 of the Judicial Service Commission Act, No. 9 of 1994 (the JSC Act), which provides that the Chief Justice, acting in consultation with the Minister, must compile a Code of Judicial Conduct which the Minister must table in Parliament for approval. It was pointed out that section 12 (5) of the JSC Act provides that the Code of Judicial Conduct serves as the prevailing standard of judicial conduct, which judges must adhere to. The Code of Judicial Conduct has not yet been approved by Parliament. It was submitted that in the absence of an approved Code of Judicial Conduct, which is required to stipulate and define what is meant by "gross misconduct", no enquiry may be conducted by a Judicial Conduct Tribunal as provided for in Section 26 of the JSC Act. Thus, so it was argued, to consider a complaint against the applicant in respect of an "offence" which has not been created is unconstitutional as it is against the principle of legality.

[12] Although this was not raised in the papers, it was further contended that those provisions of the JSC Act which provide for the formulation of a Code of Judicial Conduct and a process to investigate complaints were only introduced by Section 9 of the Judicial Service Commission Amendment Act, No. 20 of 2008 and came into operation on 1 June 2010. It was argued that such provisions thereforedo not apply to

the applicant as this would amount to a breach of the presumption that statutes are not meant to operate retrospectively.

[13] The preamble to the JSC Act, which was introduced by Section 9 of Act 20 of 2008, specifically refers to the provisions of Section 177 (1) of the Constitution. Section 177 of the Constitution provides as follows:

"177. **Removal**.-

(1) a Judge may be removed from office only if –

a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) the President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) the President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)."

[14] It will be noted from the aforegoing that with the adoption of the Constitution, long before 1 June 2010, there was provision for "a procedure" in terms of Section 177 (1).

That procedure, applied to the facts of the present matter, would involve a finding whether or not the applicant is guilty of gross misconduct, and if so, whether the National Assembly thereafter calls for the removal of the applicant by a resolution adopted with a supporting vote of at least two thirds of its members. That this is so appears clear from what was said in *Langa CJ and others vs Hlophe*, 2009 (4) SA 382 (SCA) at 389 AB, para [23];

> "The JSC is under the Constitution the forum for deciding whether or not a judge is guilty of gross misconduct. Such a conclusion presupposes a finding that the judge committed the conduct complained of, which may involve factual or legal findings. The JSC may find that the complaint is without merit and summarily dismiss it. If it has merit, two value judgments follow: did the conduct amount to misconduct and, if so, was it gross? If it finds that the judge was guilty of misconduct which was not "gross" that ends the matter. If however, it finds that the misconduct was gross, impeachment proceedings follow."

It is clear from the aforesaid dictum that, in determining whether or not any conduct of a judge amounts to gross misconduct, second respondent exercises a value judgment. In my view it is obvious that it was both empowered and obliged to make such a determination long before 1 June 2010. Any doubt there may be in this regard is removed by the express statement that this is one of the "powers and functions" assigned to second respondent by the Constitution, see *Acting Chairperson: Judicial Service Commission and Others vs Premier of the Western Cape*, 2011 (3) SA 538 (SCA) at 541 G, para [7].

[15] The essence of the argument advanced on behalf of the applicant is that because there is no Code of Judicial Conduct no guidelines exist upon which to measure

whether any conduct of a judge constitutes gross misconduct or not; and as neither the Constitution nor the JSC Act provide any definition of gross misconduct no offences have been created with which a judge can be charged. If this argument is to be upheld it would mean that second respondent does not yet have and has never had the power to consider any complaints in connection with the conduct of judges. It will only have such power once the Code of Judicial Conduct has been adopted. In my view, as discussed more fully in para [14], *supra*, this contention is so contrary to the express provisions of Section 177 (1) of the Constitution that it cannot be upheld. If it was to be upheld it would mean that no judge can ever be found guilty of misconduct until a Code of Judicial Conduct exists. Clearly any conduct of a judge committed before the coming into operation of the Code of Judicial Conduct cannot be measured against what is provided for in such Code of Judicial Conduct in order to determine whether such conduct amounted to misconduct as this would be manifestly unfair. Applying the aforegoing to the facts of the present matter, the fact that the conduct complained of preceded the adoption of a Code of Judicial Conduct means, of necessity, that such conduct cannot be judged against a standard that did not exist at the time. The position is, therefore, that second respondent must consider the complaint against the applicant by exercising a value judgment as referred to above.

[16] It is apparent from the papers that second respondent has decided to deal with the complaint against the applicant in terms of the procedures provided for in the JSC Act. Such procedures were only established by Act No. 20 of 2008. The applicant does not

complain, in this application, about the fact that the complaint is being dealt with in terms of these procedures. Accordingly, this aspect need not be considered for present purposes. I would mention, however, that I agree with the submission made by counsel for second respondent that second respondent may either proceed with its investigation into the applicant's conduct in terms of Part III of the JSC Act by way of an enquiry conducted by a Judicial Conduct Tribunal, or it may conduct such enquiry in accordance with such procedures as it may decide upon as provided for in Section 178 (6) of the Constitution.

[17] Having regard to the aforegoing, it is clear that the application cannot succeed. None of the respondents sought an order for costs against the applicant in the event of the application failing.

[18] The application is dismissed.

J J NEPGEN

JUDGE OF THE HIGH COURT

Appearance:

On behalf of the applicant:

Adv B R Tokota SC, Adv D T Skosana, Adv Z Z Matebese

On behalf of the respondents:

1st Respondent: Adv L M Montsho SC, Adv S M Malatji, Adv T M Masevhe

2nd Respondent: Adv I Jamie SC

3rd Respondent: Adv Q Pelser SC