Not reportable

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 25467/2009

In the matter between:

PREMIER OF THE WESTERN CAPE PROVINCE	Applicant
and	
THE ACTING CHAIRPERSON: JUDICIAL SERVICE COMMISSION	First Respondent
THE JUDICIAL SERVICE COMMISSION	Second Respondent
CHIEF JUSTICE SIRRAL SANDILE NGCOBO	Third Respondent
DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE	Fourth Respondent
JUSTICE CHRISTOPHER NYAOLE JAFTA	Fifth Respondent
JUSTICE BAAITSE ELIZABETH NKABINDE	Sixth Respondent
JUSTICE THEMBILE LEWIS SKWEYIYA	Seventh Respondent
JUSTICE JOHANN VINCENT VAN DER WESTHUIZEN	Eighth Respondent
JUSTICE ZAKERIA MOHAMMED YACOOB	Ninth Respondent
JUSTICE PIUS NKONZO LANGA	Tenth Respondent
JUSTICE THOLAKELE HOPE MADALA	Eleventh Respondent
JUSTICE JENNIFER YVONNE MOKGORO	Twelfth Respondent
JUSTICE CATHERINE MARY ELIZABETH O'REGAN	Thirteenth Respondent
JUSTICE ALBERT LOUIS SACHS	Fourteenth Respondent
JUSTICE PRESIDENT MANDLAKAYISE JOHN HLOPHE	Fifteenth Respondent
JUSTICE FRANKLYN KROON	Sixteenth Respondent

Summary Leave to appeal granted against an order declaring certain proceedings before the Judicial Service Commission to be null and void.

Coram: JONES and EBRAHIM JJ

Date of hearing: 18 June 2010

JUDGMENT ON LEAVE TO APPEAL

JONES J:

[1] On 12 April 2010 we issued a declaratory order, with costs, that the proceedings before of the Judicial Service Commission on 20 to 22 July 2009 and 15 August 2009 and the decisions to dismiss the complaint and counter-complaint which were the subject of those proceedings were unconstitutional and invalid, and were set aside. The 1st and 2nd respondents (collectively referred to as the Judicial Service Commission or the JSC) and the 15th respondent (the Judge President of the Western Cape High Court), who were the only respondents to oppose the relief, now apply for leave to appeal to the Supreme Court of Appeal against that order.

[2] The application before us arose out of a complaint laid by the judges of the Constitutional Court against the 15th respondent, and a counter-complaint laid by the 15th respondent against the Constitutional Court judges. The complaints were considered and dismissed by the Judicial Service Commission. The applicant, who is Premier of the Western Cape Province, challenged the constitutional validity of those decisions on procedural grounds. We upheld the three main grounds upon which she relied. We accordingly ruled that the proceedings, and the decisions taken at them, were a nullity.

[3] The complaints before the JSC were complaints of judicial misconduct. They were dealt with together by the JSC because the counter-complaint by the 15th respondent arose directly out of the laying of the complaint against him by the judges of the Constitutional Court. The allegations of misconduct against the Constitutional Court judges had no bearing on the application before us, which was focused on the complaint against the 15th respondent. Those allegations, if established, might result in impeachment proceedings against him in terms of section 177(1) of the Constitution which provides that a judge may be removed from office if the JSC finds that he or she is guilty of gross misconduct and if the

National Assembly calls for him or her to be removed by a resolution adopted with a supporting vote of at least two thirds of its members.

[4] The order sought to be appealed against did not relate to the merits or otherwise of the complaints against the 15th respondent. The three grounds upon which the order was based were, as I have said, procedural. They were:

1. that when the JSC took its decisions and conducted its proceedings, it was not properly constituted for want of compliance with the provisions of section 178(1)(k) of the Constitution, which provides for the Premier to be a member of the JSC when considering matters relating to a High Court of a Province (the section 178(1)(k) point);

2. alternatively and also as an independent argument in its own right, that the JSC was not properly constituted when it took the decision because only ten of its members participated in the decision making process when there should have been at least thirteen members – on the JSC's interpretation of section 178(1)(k) – to consider complaints against judges (the composition point); and

3. as a further alternative, that the decisions of the JSC were not supported by a majority of the JSC's members as required by section 178(6) of the Constitution (the majority point).

[5] The application for leave to appeal requires us to consider whether another court might reasonably come to a different conclusion on each of these points. They are pertinently raised in the 1st and 2nd applicants' notice of application for leave to appeal, and are the only grounds alleged. They are consequently the only grounds which fall to be considered in respect of the 1st and 2nd respondents' application. It is necessary to make this observation at the outset because we were invited during argument to consider additional grounds which, though part of the heads and not previously abandoned, were not pursued in

oral argument by counsel for the 1st and 2nd respondents at the hearing of the main application. An attempt to resurrect these other arguments[1] in the application for leave to appeal is not possible unless they are incorporated as part of the grounds of the application for leave to appeal now brought before us. I need therefore say no more about them. But it is necessary to consider the application for leave to appeal in the light of the three grounds outlined in paragraph 4.

[6] In argument before us the 15th respondent concentrated on two grounds which were indeed raised in his notice of application for leave to appeal – the section 178(1)(k) point referred to in paragraph 4.1 above, and a factual argument that the issue was moot because, even if a Premier is constitutionally part of the JSC when it sits to consider complaints of misconduct against a judge of the province, this Premier has publicly made statements on the merits of this complaint which preclude her from being part of the JSC for that purpose. He aligned himself with the submissions of the 1st and 2nd respondents in respect of the composition point and the majority point.

[7] The issues in the application for leave to appeal, therefore, are the three points isolated in paragraph 4 above, and the mootness point raised by the 15th respondent. There must be a reasonable prospect of success on the three arguments in paragraph 4, or, in the case of the 15th respondent's application, the mootness point, before we can give leave to appeal.

[8] The 15th respondent has no prospects of success on the mootness point. We did not accept this argument for the simple reason that the possibility of the Premier's recusal from the JSC was not one of the issues before us. There was no relief sought in regard thereto. The Premier has not been properly heard on that issue. If we had made a declaratory order in that regard, it would have been incompetent. The 15th respondent is not entitled on these

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1 An example is the argument that only the Constitutional Court had jurisdiction to hear the main application because it involves a dispute between organs of state.

papers to an opinion from this Court about whether or not she should recuse herself in the event of a future JSC hearing into the issues which underlie this application.

[9] As in the main application, most of the argument was directed at the section 178(1)(k) point, which concerned the interpretation of the Constitution. In a nutshell, the argument is that when viewed against the background of the doctrine of separation of powers and the material difference between the process of appointing a judge on the one hand and his or her impeachment on the other, another court may reasonably consider that a more restricted interpretation of the words of the section is to be preferred. In the course of the judgment I remarked that this argument was not without its attraction but that the wide language of the Constitution did not permit the restricted interpretation because the Constitution had had the doctrine of separation of powers in mind in constructing the JSC. It provided for ten representatives of the legislative branch to be members despite the doctrine, but expressly restricted their participation to the issue of the appointment of judges. It also provided for selected members of the executive branch to be members, but did not expressly restrict their participation in similar fashion. They are the cabinet minister responsible for the administration of justice, four persons designated by the President as head of the national executive, and the Premier of the province concerned or his or her designate when the JSC considers a matter relating to the high court of that province. As it stands, the Constitution makes them members for all purposes, and not merely for the appointment of judges. We were unable to find any signs or indications to justify the conclusion that the Constitution did not mean what it said. I am still of that view. Similarly, nothing has been said in argument before us to make me doubt the correctness of our findings on the composition point and the majority point.

[10] But the issue is not whether or not we are correct. It is whether there is a reasonable prospect of success on appeal. I have already alluded to attractive features of the argument advanced by the respondents *a quo*. In addition, there is information on record that for a considerable number of years members of JSC – which include distinguished Chief Justices,

judges and members of the legal profession – and the officials responsible for its administration have understood and applied section 178(1)(k) to exclude premiers of the provinces from the JSC when it sits to consider complaints of judicial misconduct. There is, of course, no way of knowing whether they applied their mind to the specific wording of the Constitution when they did so, and no court is bound by the opinion of an administrative official on the meaning of the Constitution. But this is nevertheless an additional reason for the conclusion that the arguments put by the respondents are not so lacking in substance that they can properly be said to be entirely without prospect of success.

[11] Counsel have suggested other reasons for granting leave – the importance of the issue, not only to the parties from a personal point of view but also in respect of the conduct of proceedings in the JSC in the future; the absence of authority on the point; and the complexity of the application of the general principles of interpretation to this particular section of the Constitution. Mr *Katz* correctly argued on behalf of the applicant that these considerations do not permit granting leave if there are no prospects of success (*Janit* v *Van den Heever and another NNO* (2) 2001 (1) SA 1062 (W) paras 3, 4, 5 and 6). But the respondents do not argue that leave should be granted because of the importance or complexity of the issues, regardless of the prospects of success. Their submission was that these are additional reasons why we should find that there are prospects of success.

[12] My conclusion is that there are reasonable prospects of success on appeal on the three grounds alleged in the 1st and 2nd respondents' notice of application for leave to appeal, and the first ground in the 15th respondent's notice. The proper forum is the Supreme Court of Appeal. In the result, the 1st, 2nd and 15th respondents are granted leave to appeal to the Supreme Court of Appeal. Ordinarily, I would order that the costs of this application be costs in the appeal, but there has been a suggestion that in this case that may not be appropriate. The costs will therefore stand over for later determination, but in the absence of a future determination, they will be costs in the appeal.

RJW JONES
Judge of the High Court
24 June 2010

EBRAHIM J I agree.

S EBRAHIM
Judge of the High Court