31 March 2010
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 The Constitution of the Republic of South Africa, 1996 – Judicial Services Commission – composition of the JSC – interpretation of section 178(1)(k) of the Constitution – the premier of a province is entitled to sit as a member of the JSC when it considers a matter relating to the composition of a court of the province – this includes a sitting of the JSC to consider an allegation of gross misconduct which might lead to proceedings for the impeachment of a judge of the court in question – also considered was the required numerical composition of the JSC where members were absent, and the majority necessary for a valid decision.

Coram: JONES and EBRAHIM JJ

Dates of hearing: 11 and 12 March 2010

JUDGMENT

JONES J:

[1] The 15th respondent is the Judge President of the Western Cape High Court, Cape Town. On 30 May 2008 judges of the Constitutional Court laid a complaint of misconduct against him with the Judicial Services Commission ('the JSC'), which is represented herein by its acting chairperson, the 1st respondent, and which is cited as the 2nd respondent.[1] Subsequently, the 15th respondent laid a counter-complaint against the Constitutional Court judges which arose out of the lodging of the complaint that they had made against him. Over the period 20 to 22 July 2009, and again on 15 August 2009, the JSC met to consider the complaint and the counter-complaint. It dismissed them both. The applicant in this application challenges the outcome of these proceedings. She does so in her capacity as Premier of the Western Cape Province. Her challenge is to the legal validity of the complaint proceedings on procedural grounds. The substantive relief in the notice of motion is for orders

1. 'Condoning the non-compliance with the time periods laid down in the rules of Court and declaring this matter to be one of urgency;
2. Declaring that Premiers of the provinces of the Republic of South Africa contemplated in section 103(1) of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), or an alternate designated by them, must be given a reasonable opportunity to participate as members in all meetings of the Judicial Service Commission ('the JSC') when it considers matters relating to a specific High Court in the Premiers' respective province, failing which such meetings are inconsistent with the Constitution and invalid for want of compliance with section 178(1)(k) of the Constitution;

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[1] In making the complaint the judges of the Constitutional Court acted collectively as a group of individual judges and not institutionally as a court. See *Langa CJ* v *Hlophe* 2009 (4) SA 382 (SCA) 390E.

3. Declaring that the proceedings and decisions taken pursuant thereto of the JSC conducted on 20 to 22 July 2009 and 15 August 2009 ('the proceedings') in relation to the complaint lodged by the Third to Fourteenth Respondents and the Sixteenth Respondent against the Fifteenth Respondent and the counter-complaint lodged by the Fifteenth Respondent were unconstitutional and invalid'.

[2] Initially, only the JSC, through the persons cited as the 1st and 2nd respondents, filed notices of opposition and opposing affidavits. At the commencement of the hearing, a late opposing affidavit by the 15th respondent was handed in without opposition, and, also without opposition, an affidavit in answer thereto by the applicant. In addition, an affidavit by Johan Christiaan Kriegler, a retired judge of the Constitutional Court, was placed before us in answer to certain allegations in the affidavit by the 15th respondent relating to Judge Kriegler. The contents of Judge Kriegler's affidavit and the matter to which it gave answer in the 15th respondent's affidavit were not referred to in argument, and although Judge Kriegler appeared by counsel to hand in the affidavit, he took no further part. No more need be said about his affidavit. The 15th respondent based his opposition partly on allegations of bias on the part of the applicant which are made in his opposing affidavit, which are dealt with in the applicant's reply thereto, and which are now properly before us. The other respondents, the judges of the Constitutional Court, have not filed papers or taken part in the proceedings.

[3] The complaint before the JSC in this matter, and also the counter-complaint, 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 alleged acts of judicial misconduct, however, have nothing in common. The focus in this application is on the complaint against the 15th respondent which, if established, might make him guilty of gross misconduct in terms of section 177(1) of the Constitution. That section provides that

> 'A judge may be removed from office only if-
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> (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'.

If the JSC finds that a judge is guilty of gross misconduct, and if a resolution of the National Assembly for the judge's impeachment is adopted with the requisite majority, the President is obliged by section 177(2) to remove him or her from office.

[4] The issue of whether the misconduct has been established is not before us in this application. The applicant seeks to impugn the decision of the JSC by reason of its constitutional invalidity on a procedural basis and not on the merits. She has three grounds for doing so. She alleges

1. that when the JSC took its decision it was not properly constituted for want of compliance with the provisions of section 178(1)(k) which provides for the applicant to be a member of the JSC when considering matters relating to the High Court of her province. It is common cause that she was not part of the JSC when it took its decision. The bulk of the argument before us was devoted to the interpretation of section 178(1)(k);
2. in the alternative and in any event, 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)) to consider complaints against judges; and
3. as a further alternative, that the decision of the JSC was not supported by a majority of the JSC's members as required by section 178(6) of the Constitution.

[5] Before dealing with each of these grounds one by one, I should mention that counsel for the applicant enjoined us, in the interests of justice and to avoid a piecemeal hearing possibly involving different tiers of courts, to deal with all the issues raised in the arguments. That is a salutary approach in a matter such as this. It is not necessary, however, for us to deal with issues which are raised in the papers but abandoned or not pursued in argument.

Thus, the applicant's heads give answer to potential arguments raised in the papers that the Promotion of Administrative Justice Act No 3 of 2000 was not of application in this matter and that the applicant has no standing to bring proceedings under that Act. But nobody contends in this court that the Act does not apply or that the applicant does not have standing. Furthermore, an antecedent objection was raised in the 1st and 2nd respondents' papers and heads of argument that section 167(4) of the Constitution deprives this court of jurisdiction to hear this application because only the Constitutional Court can decide disputes between organs of State within the national or provincial sphere. It also raised a second related objection that the applicant should be non-suited by reason of the provisions of sections 40 and 41 of the Constitution which provide for co-operative government and which, so the heads submitted, preclude litigation between the parties except as a last resort. These points were not specifically abandoned, and they remain in the heads. Mr *Rosenberg* dealt with the first point as part of his main argument, and stated that he would, if necessary, deal with the second in reply. However, Mr *Maleka* for the 1st and 2nd respondents presented no argument at all in respect of either antecedent objection, and it was not necessary for Mr *Rosenberg* to say more in reply than that they had not been argued. I do not believe that it is necessary for me to say anything about any of these matters, other than perhaps to comment that they seem to me to be without merit.

[6] There is no longer opposition to allowing the matter to proceed as a matter of urgency. For the rest, I shall try to deal with all issues arising in the papers.

[7] It is convenient, by way of introduction, to give a brief description of the JSC. It is created by section 178 of the Constitution of the Republic of South Africa, 1996. Section 178(5) empowers it to advise the national government on any matter relating to the judiciary and the administration of justice. Section 174 and section 177, read with section 178, lay down its duties and functions in the appointment and removal of judges. Its independence from the legislative and executive organs of state is conceded by the parties and is of fundamental constitutional importance. This does not, however, mean that members of the

legislative and executive organs of government are excluded from membership of the JSC. Its composition is laid down by section 178. It comprises the Chief Justice, the President of the Supreme Court of Appeal, a judge president designated by the judges president, the cabinet minister responsible for the administration of justice, two practising advocates, two practising attorneys, one teacher of law, and four persons designated by the head of the national executive (the President) after consultation with the leaders of all parties in the National Assembly. These members, thirteen in all, may be described as the core members. There are two additional categories of member. First, there are six members designated by the National Assembly (of which three must be members of opposition parties) and four members designated by the National Council of Provinces (who must have the support of at least six provinces). In terms of section 178(5), the JSC must sit without them when it considers all matters except the appointment of a judge. Second, when the JSC considers matters relating to a specific High Court, the Judge President of that court and the Premier of the province concerned are also members of the JSC (section 178(1)(k)). Provision is made for the appointment of alternate members and for the replacement of members.

The interpretation of section 178(1)(k)

[8] The applicant's contention is that because she, as Premier of the Western Cape Province, was not part of the JSC when it met to consider the complaint of judicial misconduct against the Judge President of the Western Cape High Court, the proceedings were a nullity. The correctness of this contention will depend on the meaning of section 178(1) of the Constitution, which says:

> 178 Judicial Service Commission
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> (1) There is a Judicial Service Commission consisting of-
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> (a) the Chief Justice, who presides at meetings of the Commission;
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> (b) the President of the Supreme Court of Appeal;
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> (c) one Judge President designated by the Judges President;
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> (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;

(e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) one teacher of law designated by teachers of law at South African universities;

(h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;

(i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

(j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them.

At issue is the meaning to be given to section 178(1)(k).[2] The subsection makes the Premier of a province a member of the JSC only **when considering matters relating to a specific High Court.** The applicant argues that the clear wording and intention of that phrase required her participation in the JSC proceedings of 20 to 22 July 2009 and 15 August 2009 when it considered the complaint against the 15th respondent. The JSC and the 15th respondent contend that, properly interpreted, the subsection has no application to a matter involving the alleged misconduct of a judge, and that her exclusion was accordingly not an irregularity.

[9] The intention of the legislature in determining the composition of the JSC when considering matters relating to a specific High Court must be seen in the light of section 178(1) as a whole. When considering matters relating to a specific High Court, the section enacts that the JSC shall consist of all the members referred to subsection 178(1)(a) to (g)

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[2] Subparagraph (k) was substituted by s. 2 of the Constitution Second Amendment Act of 1998 and by s. 16 (b) of the Constitution Sixth Amendment Act of 2001. The wording of the original subsection, the amendments, and the subsection's predecessor, section 105(1)(j) of the Interim Constitution, 1994, does not assist one way or the other in the interpretation of the present subsection. The provisions of the Judicial Services Commission Act No 9 of 1994 also do not assist.

(the judges, the Minister of Justice, members of the legal profession, and the law teacher). These members sit on the JSC in all matters. So do the four members designated by the President in terms of subsection 178(1)(j). This obviously includes matters relating to a specific High Court. In addition there are two special members in terms of subsection 178(1)(k): the Judge President of the High Court, and the Premier of the province. The ten members referred to subsection 178(1)(h) and (i) (the members designated by the two legislative bodies) are excluded. Regard being had to the plain wording of sections 178(1)(k) and section 178(5) and the different choice of the wording of the two sections, it is clear to me that the JSC has been constructed in a structured and careful manner to include the members who sit in all JSC matters and to add two members with a special interest in the High Court in question. The involvement of the two additional members is not limited to particular matters relating to their High Court. They are involved in all matters relating to their High Court. That is the plain meaning of the phrase '**when considering matters relating to a specific High Court'** in the section.

[10] Mr *Newdigate* for the 15th respondent commenced his argument before us by making the point that 'the phrase "**relating to**"[3] may connote either a remote connection or a close relationship. It may be used in a wide sense embracing almost anything which has any reference to another matter or in a more restricted sense . . .' (*United Dominions Corporation (SA) Ltd* v *Tyrer* 1960 (3) SA 321 (T) at 323A-B and *Johannesburg City Council* v *Victteren Towers (Pty) Ltd* 1975 (4) SA 334 (W) 336A-B). That is so. But the first question is not whether the phrase must be given a narrow or a wide interpretation. It is whether or not the meaning of the phrase in the context of section 178 and in the context of the Constitution as a whole is clear and unambiguous. If its meaning is unambiguous, it is the duty of the court to give effect to it. Whatever the boundaries of a purposive interpretation may be, the court has no power to depart from the clearly expressed intention of the Constitution because it

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[3] My emphasis.

thinks that the Constitution should have said and meant something else. See *S* v *Zuma* 1995 (2) SA 642 (CC) para 17.

[11] I can see no reason to conclude that the Constitution is **unclear** or **ambiguous** when it makes the Premier of a province a member of the JSC when considering matters relating to the specific High Court of his or her province. It is so that the provision is of general import. But that is surely intentional, just as intentional as the provision which excludes members of the national and provincial legislatures from sitting when the JSC considers all matters other than the appointment of a judge. There is nothing vague or inconsequential or irrational about making him or her a member when the JSC sits for the purpose of considering a matter relating to **the composition** of the High Court of his or her province. There is certainly nothing in the wording of the section which can justify a restrictive interpretation that he or she is a member for the purpose of considering the composition of 'his or her' High Court except where the matter involves the misconduct of one of the judges of that Court and hence that judge's possible exclusion from its composition. Unlike the exclusion of members of the national and provincial legislatures, provision is not expressly made for it, which makes it unlikely that that is what the Constitution really intends. Mr *Rosenberg*'s argument on behalf of the applicant is compelling that the composition of the High Court – the judges who make up its compliment – is clearly a matter relating to a specific High Court. Indeed, the role of the JSC in the appointment of judges under section 174 and the removal of judges under section 177 is described as pivotal in the *First Certification Judgment* (*Ex parte the Chairperson of the Constitutional Assembly: In re certification of the Constitution of the RSA* 1996 (4) SA 744 para 120). Equally compelling is his argument that, because the appointment of a judge is a matter relating to the composition of a specific High Court (which, it is common cause, entitles the Premier to membership of the JSC when it considers appointments), so, too, matters which could result in the removal of a judge from the compliment of its judges. To hold otherwise is inconsistent and illogical.

[12] Mr *Maleka* (for the 1st and 2nd respondents) and Mr *Newdigate* (for the 15th respondent) attempted to circumvent the inconsistency and illogicality. They point to differences between the procedure and consequences of appointment on the one hand and removal (which requires a judicial process of adjudication) on the other, and argue that it is artificial to regard one as the flip side of the coin of the other for the purposes of interpreting the section. Of course there are differences. But these differences do not imply that they do not both relate to the composition of the High Court in question, and it seems to me that the real artificiality is an interpretation which does not recognize that relationship.

[13] Mr *Maleka*'s main argument was that in the case of a complaint of judicial misconduct the JSC does not sit to consider a matter relating to a specific High Court within the meaning of section 178(1(k). It sits to consider the particular conduct of an individual judge, which is something different. The argument is that a complaint against a judge is not a complaint against the court in which the judge sits. It may have nothing to do with the conduct of litigation in that court or his or her membership of it. It is his or her personal conduct which is the matter to be considered by the JSC. In principle, therefore, so the argument goes, the JSC does not consider matters relating to a specific High Court when it sits to investigate a complaint of misconduct which is laid against an individual judge. Its consideration is confined to an investigation of the facts upon which the allegation of misconduct is grounded. Mr *Maleka* argued that the principle is well illustrated by the facts of this complaint. The Constitutional Court judges do not complain that the 15th respondent acted as the Judge President of the Western Cape High Court, or in his capacity as a judge of that Court. He is alleged to have made suggestions designed to influence judges of the Constitutional Court in their judgment in a particular case pending before them. But he is not alleged to have done so in his Court, in his official capacity as a judge of his Court, or in respect of a case which emanated from his Court. The argument is that on the facts the complaint investigated by the JSC on 20 to 22 July 2009 and 15 August 2009 had nothing to do with the Western Cape High Court.

[14] This argument is ill-conceived. In seeking to support it, Mr *Maleka* submitted that the applicant's case erroneously conflates a matter relating to a specific High Court and a matter relating to an individual member of that Court. That is not so. The error is Mr *Maleka*'s assumption that because judicial misconduct involves, as it always must, the particular conduct of an individual judge in particular circumstances, it is therefore not a matter relating to his or her specific High Court when that conduct comes to be investigated following a formal allegation of judicial misconduct. It should not be forgotten that all judges are members either of the Constitutional Court, or the Supreme Court of Appeal, or the High Court of a province. Their alleged misconduct is a matter of the utmost importance not only to the administration of justice as a whole, but also to that of the Court in which they operate on a daily basis. I do not understand the suggestion that the consideration of the alleged misconduct of a judge is not a matter which relates to his or her Court. The details of the misconduct – whether it be, for example, taking a bribe from a litigant (which arises directly out of the performance of judicial duties), or whether it be an act of dishonesty where the judge seeks, for example, to defraud his or her personal creditors (which need not arise out of the performance of judicial duties) – is of secondary importance to the present inquiry. Of prime importance is the need to hold an investigation into the allegation against the judge in question, an investigation properly conducted before the constitutional body created to carry it out. Such an investigation is, in my view, unquestionably a matter which relates to the specific High Court of which the judge is a member because of the consequences of its outcome to that Court. That it also relates to the good administration of justice as a whole does not take it out of the category of matters which, at the same time, relate to the specific High Court. My conclusion is that the narrow meaning of section 178(1)(k) for which the 1st and 2nd respondents contend is unsustainable.

[15] Mr *Newdigate* for the 15th respondent also argued for a narrow interpretation. His argument is a principled one, based on the independence of the judiciary and the doctrine of separation of powers. The submission is that the applicant placed undue emphasis on the

ordinary meaning of the words '**matters relating to'** a specific High Court, which, according to her, signify and require no more than a connection between the matter being considered and a specific High Court, and which is, according to her, sufficiently established if the judge concerned is a member of that Court. Mr *Newdigate* submitted that the context of the section not only justifies but requires a more confined interpretation. This context is provided by the independence of the judiciary and the doctrine of separation of powers. These are principles which go to the root of constitutional interpretation in a matter such as this. It is indeed so, as he argued, that the doctrine of separation of powers is enshrined in the structure and spirit of the Constitution, and that the independence of the courts from the executive and legislative branches of the State is of fundamental constitutional importance. See *South African Association of Personal Injury Lawyers* v *Heath* 2001 (1) SA 883 (CC) paras 25-26. It is also so, as he argued, that the procedure for the removal of judges under section 177 can potentially make serious inroads into the rights, duties and functions of a particular judge and the judiciary generally. He accordingly argued that that section and those related to it should be interpreted so as to avoid as far as possible placing the independence of the courts in jeopardy. This can and should be done by interpreting the Constitution to exclude members of the executive branches of government, such as the applicant, from the process of disciplining or impeaching a judge. Both he and Mr *Maleka* make the point that there are no sound reasons of policy for specially including the premier of a province among those called upon to investigate and discipline a judge for misconduct or to recommend his or her removal from office. He or she has no special skills or knowledge as head of the provincial executive which call for him or her to be part of the adjudicative process of section 177(1)(a) in determining whether a judge is guilty of gross misconduct. There is, he submitted, no constitutional purpose in making him or her part of an inquiry into the alleged misconduct of a judge. He accordingly argued that the narrow interpretation of section 178(1)(k) for which he contended was consistent with a proper understanding of the Constitution, the true purpose of the section, and the proper functioning of the JSC.

[16] These arguments are all very well as far as they go. I can see merit in the suggestion that judges, or at any rate lawyers, are in the best position to determine whether or not a judge is guilty of gross misconduct. But I can also see merit in a dispensation which, for reasons of both constitutional policy and social accountability (as to which see section 1(d) of the Constitution), particularly in the light of the history of the administration of justice in this country, widens the adjudicative process to include in the investigation tribunal persons who are not judges or lawyers. Mr *Newdigate*'s argument is sound only if it is in line with what the Constitution says and intends. The Constitution gives its considered attention to persons who sit on the JSC when it is called upon to determine, *inter alia*, matters relating to judicial misconduct. It specifically excludes the ten members of the national and provincial legislatures. It also says and intends that persons other than judges or persons with a legal background should be part of the process. Included are the Minister of Justice as the cabinet minister responsible for the administration of justice (section 178(1)(d)) and the four members designated by the President as head of the national executive, after consulting the leaders of all parties in the National Assembly (section 178(1)(j)). These members are there by reason of their designation, and not as lawyers. Clearly, the Constitution considered and required the inclusion of a member of national government and representatives of the leader of national government. On the face of it, it also considered and admitted to membership the leader of provincial government in matters relating to the High Court of his or her province. It is not, in my view, possible to conclude that the Constitution did not have the doctrine of separation of powers and the independence of the judiciary very much in mind when it constructed the JSC. I can find no justification for concluding that the Constitution does not mean what it says when it includes members of the executive branch of national government (the Minister and the President through his nominees) and provincial government (the Premiers) as member of the JSC in matters involving the High Court of the province in question. I can see reason for restricting the wide terms in which it has chosen to do so. The reasons for the narrow interpretation for which the 15th respondent contends have a measure of attraction, but in my view they cannot prevail.

Whether, in any event, the JSC was improperly constituted

[17] When the JSC sat on 20 to 22 July 2009 and 15 August 2009 to consider the complaint and the counter-complaint, it was composed of only ten members. Absent were the Chief Justice, Mr Ntsebeza SC, and one of the practising advocates who had been or should have been appointed in terms of section 178(1)(e). The applicant contends that the JSC was not properly constituted because its full complement was not in attendance during the proceedings and the decision-making process. The argument is based on the principle laid down in *Schierhout* v *Union Government (Minister of Justice)* 1919 AD 30 and the line of cases which follow it, particularly in respect of adjudication processes.[4] Innes CJ puts the general rule thus in the *Schierhout* case (at p 44):

> When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together; there can only be one adjudication, and that must be the adjudication of the entire body (*Billings* v *Prinn*, 2 W. B1., p. 1017). And the same rule would apply whenever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of all of them (see *Cook* v *Ward*, 2 CPD 255; *Darcy* v *Tamar Railway Co*, L.R. 3 Exch., p. 158, *etc*.), for otherwise they would not be acting in accordance with the provisions of the Statute.

The rule is not absolute. Proceedings need not be regarded as a nullity if there are sound reasons for the non-attendance of a member. The papers explain that the Chief Justice was excluded because he is one of the parties (the 10th respondent). The papers also explain that Mr Ntsebeza recused himself because he had been the 15th respondent's legal representative in other related proceedings. Although Mr *Rosenberg* pointed out that an *ad hoc* member could have been appointed in substitution of Mr Ntsebeza, the applicant appeared to accept the soundness of the reasons for the non-participation of these two members. But she takes the view that the second practising advocate's absence is not

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[4] *Watchenuka* v *Minister of Home Affairs* 2003 (1) SA 619 (C) 626F-627G approved by the full bench in *Ruyobeza v Minister of Home Affairs* 2003 (5) SA 51 (C), and see 2004 (4) SA 326 (SCA); *Minister of Health* v *New Clicks (SA) (Pty) Ltd* 2006 (2) SA 311 (CC) paras 170-171; *Yates* v *University of Bophuthatswana* 1994 (3) SA 815 (B) *847I-849B; Schoultz* v *Personeel-Advies Komitee van die MunisipaleRaad van George* 1983 (4) SA 689 (C) 707F-H; *S* v *Naude* 1975 (1) SA 681 704G-H; *R* v *Price* 1955 (1) SA 219(A)223E-G.

satisfactorily explained and she therefore complains that the JSC was not properly constituted because at least one member was not present.

[18] I agree that the absence of at least one member of the JSC was not satisfactorily explained. This was despite the applicant's invitation to the 1st and 2nd respondents to give a proper explanation in a fourth affidavit (see *Tantoush* v *Refugee Appeal Board* 2008 (1) SA 232 (T) para 70 and 71).[5] On the face of it, therefore, this objection is good. Mr *Maleka* argued that the situation was rescued by section 2(5)(a) of the Judicial Services Commission Act which provides that a vacancy in the Commission shall not affect the validity of the proceedings or decisions of the Commission. This provision only applies once it has been established that there was a vacancy. There is no evidence before us that there was a vacancy. The evidence on behalf of the 1st and 2nd respondents was simply that the second representative of the advocates' profession had not yet been appointed which, in my view, is an admission that the JSC was not properly constituted. I conclude that the second objection to the validity of the proceedings before the JSC is well taken.

The absence of a majority

[19] Section 178(6) of the Constitution provides that decisions of the JSC must be 'supported by a majority of its members'. The debate between the applicant and the 1st and 2nd respondents is whether this means a majority of members who compose the JSC, or whether it is a majority of those who attended. Mr *Maleka*'s heads submitted that for good reasons of policy the JSC does not disclose how the voting on a particular decision went, and that there was insufficient evidence to conclude that the majority was not a sufficient majority. His argument in this court, however, was that it was common cause that there was a majority of six to four, and he confined himself to the bald submission (a) that the section requires no more than a bare majority of members present; and (b) that on the facts

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[5] See also *Sigaba* v *Minister of Defence and Police* 1980 (3) SA 535 (Tk) 550E-G; *Pretoria Portland Cement Co Ltd* v *Competition Commissioner* 2003 (2) SA 385 (SCA) para 63; *Da Mata* v *Otto NO* 1972 (3) SA 858 (A) 868G-869E; *Thint (Pty) Ltd* v *NDPP: Zuma* v *NDPP* 2008 (2) SACR 421 (CC) para 325 and footnote 112 (Ngcobo J, dissenting).

presented by the applicant, this majority – six out of the ten members present – was indeed attained. In view of the conclusion that the JSC should have been composed of fifteen members, a majority of six to four is not a majority. Even if the JSC should have been composed of thirteen and not fifteen members, six does not make up a majority. It is only a majority if the JSC can be regarded as having been properly constituted when it sat with only ten members. I am of opinion that a majority merely of those who happened to attend is insufficient. The result is that in my view the third objection – that the JSC decision was not supported by the requisite majority – was also well taken.

The applicant's entitlement to relief

[20] There are two further points to be considered. They both relate to the relief which should be ordered if the application is successful. At the close of argument, the applicant confined her claim for relief to an order in terms of paragraph 3 of the notice of motion, and a costs order against the 1st and 2nd respondents. The 1st, 2nd and 15th respondents argued that even if she is successful on the law, her relief should be confined to a declarator in terms of paragraph 2 of the notice of motion that the Premiers of the provinces are entitled to sit on the JSC when it considers matters relating to the High Court of their province, but that she should not be granted an order in terms of paragraph 3. Paragraph 3 is for an order declaring that the proceedings and decisions taken in pursuance of the JSC hearing of 20 to 22 June 2009 and 15 August 2009 were unconstitutional and invalid.

[21] First is the argument by the 15th respondent that, regardless of how section 178(1)(k) of the Constitution should be interpreted, the applicant has not made out a case for the relief in paragraph 3 of the notice of motion because the point is moot and an order in those terms would be meaningless. The basis for this argument is that an order in terms of paragraph 3 would require a re-hearing of the complaint and counter-complaint by the JSC with the applicant as a member, which would be an exercise in futility because the applicant has disqualified herself from sitting as a member of the JSC by reason of statements she has

made in public about the 15th respondent. These statements are set out in the 15th respondent's opposing affidavit. I prefer not to deal with their content. It is sufficient to reject the 15th respondent's argument on the basis that the constitutional importance of the interpretation of section 178(1)(k) is, in my opinion, not moot and neither are any of the other points raised in this judgment; that the fitness of the applicant to sit as a member of the JSC in any particular matter in the future is not before us; and that it is in my judgment inappropriate for this court to consider, let alone to determine, her possible disqualification from being part of a JSC hearing in the future, or, if she should decide not to sit, her possible disqualification from appointing an alternate.

[22] The second point is an argument by the 1st and 2nd respondents that we should exercise a discretion in terms of section 172(1)(b) to refuse the order sought by the applicant in terms of paragraph 3 on the ground that it is just and equitable to do so. The suggestion is that it is just and equitable in the circumstances of this case to limit the retrospective effect of our decision by allowing the decisions of the JSC to stand even though they are unconstitutional and invalid. I have difficulty with the notion that it is just and equitable to allow an unconstitutional decision to stand where the decision relates to allegations of serious judicial misconduct. In my judgment there are insufficient reasons placed before us in this case to justify the exercise of a discretion to refuse the applicant relief in the terms sought, if we indeed have such a discretion.

Order

[23] There will be the following order.

1. The proceedings before of the Judicial Services Commission on 20 to 22 July 2009 and 15 August 2009, and the decision to dismiss the complaint and counter-complaint which were the subject of those proceedings, are declared to be unconstitutional and invalid and are set aside.

2. The 1st and 2nd respondents are ordered to pay the costs of this application, which shall include the costs of two counsel.

RJW JONES
Judge of the High Court
31 March 2010

EBRAHIM J I agree

S EBRAHIM
Judge of the High Court