IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 08/22932

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

25/09/2008
DATE

SIGNATURE

In the matter between:

HLOPHE, MANDLAKAYISE JOHN	Applicant
and	
CONSTITUTIONAL COURT OF SOUTH AFRICA	First Respondent
LANGA CJ	Second Respondent
MOSENEKE DCJ	Third Respondent
MADALA J	Fourth Respondent
MOKGORO J	Fifth Respondent
O'REGAN J	Sixth Respondent
SACHS J	Seventh Respondent
NGCOBO J	Eighth Respondent
SKWEYIYA J	Ninth Respondent
VAN DER WESTHUIZEN J	Tenth Respondent
YACOOB J	Eleventh Respondent
NKABINDE J	Twelfth Respondent
JAFTA AJ	Thirteenth Respondent
KROON AJ	Fourteenth Respondent
JUDICIAL SERVICE COMMISSION	Fifteenth Respondent

JUDGMENT

MOJAPELO DJP:

[1] The Judge President of the Cape High Court (the applicant) seeks an order in Part B of the Notice of Motion declaring that the lodging of a complaint of gross misconduct against him by all the judges of the Constitutional Court of South Africa (the second to fourteenth respondents) violated the judicial authority of the Constitutional Court of South Africa (the first respondent) (prayer 1). The applicant seeks further orders declaring that the publication of a media statement by the second to the fourteenth respondents (all judges of the Constitutional Court) of untested allegations of gross misconduct against the applicant made by two of the judges of the Constitutional Court was unlawful (prayer 2), unreasonably and unjustifiably violated his constitutional right to human dignity (prayer 3), privacy (prayer 4), right to a fair hearing (prayer 5), right to equality (prayer 6) and his right to access to courts (prayer 7). Further he seeks an order declaring that a decision by the second to the fourteenth respondents to lodge a complaint with the Judicial Services Commission (the fifteenth respondent) is unlawful and legally incompetent (prayer 8). The applicant seeks in the alternative to all of the above prayers, an order directing, in the event that this Court is unable to deal with the relief sought, that the application is referred to the first respondent (the Constitutional Court) on an urgent basis and on the basis of

direct appeal (prayer 9). As this Court proceeded to entertain the application with the concurrence of all the parties prayer 9, which is the alternative prayer, does not stand to be considered.

[2] On the papers before court the applicant also seeks in Part A of the Notice of Motion, an order against the Judicial Services Commission (the fifteenth respondent) interdicting the Judicial Services Commission (JSC) from proceeding with the hearing of oral evidence in respect of the alleged complaint by the second to fourteenth respondents, pending the outcome of the proceedings for the relief sought in Part B (the declarations in the preceding paragraph). However, as the fifteenth respondent furnished an undertaking to the applicant, prior to the commencement of the hearing of the application, not to proceed with the hearing of oral evidence pending the outcome of the application in this matter, it became unnecessary for this court to consider the interdict. Furthermore, while there was, on the papers before us, an application for consent to institute the proceedings against the second to fourteenth respondents as contemplated in section 5 of the Constitutional Court Complementary Act 13 of 1995, the court was advised at the commencement of the hearing that the requisite consent for institution of proceedings against all respondents, where applicable, had been obtained from the relevant authorities. This Court therefore proceeded to consider the application for declaratory orders with the concurrence of all parties to the application.

[3] The application in Part B is opposed by the second to the fourteen respondent. The fifteenth respondents filed an affidavit indicating that it will abide the finding of the court and was represented at the hearing by counsel who made submissions on the limited area of the jurisdiction of the fifteenth respondent (the JSC) and on the discretion to be exercised by this court whether to make declaratory orders sought by the applicant. As this judgment is about Part B of the application, which is against the second to the fourteenth respondents (all judges of the Constitutional Court), the second to fourteenth respondents are for the sake of convenience and unless the context indicates otherwise, simply referred to as the respondents.

[4] The genesis as well as the facts and background to the application may be stated briefly as follows:

[4.1] Towards the end of March 2008 and after certain matters involving the current President of the African National Congress, Mr J G Zuma, had been argued before the Constitutional Court and when judgment in those matters was pending, the applicant visited Judges Chambers at the Constitutional Court, during which, amongst other judges, he visited Jafta J (the thirteenth respondent) who was then acting as a Judge in the Constitutional Court;

[4.2] Again on 25 April 2008 the applicant visited the Judges Chambers at the Constitutional Court during which, amongst

others, he visited the chambers of Nkabinde J (the twelfth respondent);

[4.3] On 30 May 2008, the respondents lodged a complaint against the applicant with the JSC and also released a media statement announcing that they had lodged such a complaint.

[4.4] It is the lodging of that complaint and the publication of a statement about the complaint that gave rise to the present application. Since the lodging of the complaint and its publication are at the centre of this application, it is important to reproduce the complaint and make some observations about its outline. The complaint to the JSC read as follows:

> *"COMPLAINT TO THE JUDICIAL SERVICE COMMISSION BY THE JUDGES OF THE CONSTITUTIONAL COURT*
>
> *1 A complaint that the Judge President of the Cape High Court, Judge John Hlophe, has approached some of the judges of the Constitutional Court in an improper attempt to influence this Court's pending judgment in one or more cases is hereby submitted by the judges of this Court to the Judicial Services Commission, as the constitutionally appointed body to deal with complaints of judicial misconduct.*
>
> *2 The complaint relates to the matters of Thint (Pty) Ltd v National Director of Public Prosecutions and Others (CCT 89/07), JG Zuma and Another v National Director of Public Prosecutions and Others (CCT 91/07), Thint Holdings (South Africa)*

(Pty) Ltd and Another v National Director of Public Prosecutions (CCT 90/07) and JG Zuma v National Director of Public Prosecutions (CCT 92/07). Argument in these matters was heard in March 2008. Judgment was reserved in all four matters. The Court has not yet handed down judgment.

3 *We stress that there is no suggestion that any of the litigants in the cases referred to in paragraph 1 were aware of or instigated this action.*

4 *The judges of this Court view conduct of this nature in a very serious light.*

5 *South Africa is a democratic state, founded on certain values. These include constitutional supremacy and the rule of law. This is stated in section 1 of our Constitution. The judicial system is an indispensable component of our constitutional democracy.*

6 *In terms of section 165 of the Constitution the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. No person or organ of state may interfere with the functioning of the courts. Organs of state must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts.*

7 *Each judge or acting judge is required by item 6 of schedule 2 of the Constitution, on the assumption of office, to swear an oath or solemnly affirm that*

she or he will uphold and protect the Constitution and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. Other judicial officers or acting judicial officers must swear or affirm in terms of national legislation.

8 *Any attempt to influence this or any other Court outside proper court proceedings therefore not only violates the specific provisions of the Constitution regarding the role and function of courts, but also threatens the administration of justice in our country and indeed the democratic nature of the state. Public confidence in the integrity of the courts is of crucial importance for our constitutional democracy and may not be jeopardised.*

9 *This Court – and indeed all courts in our country – will not yield to or tolerate unconstitutional, illegal and inappropriate attempts to undermine their independence or impartiality. Judges and other judicial officers will continue – to the very best of their ability – to adjudicate all matters before them in accordance with the oath or solemn affirmation they took, guided only by the Constitution and the law.*

30 May 2008

JUDGES OF THE CONSTITUTIONAL COURT"

[4.6] The complaint appeared on the letter head of the Constitutional Court and was unsigned.

[4.7] The media statement issued on the same day is identical in all respects to the complaint statement, save only that it bears a heading "*Statement by Judges of the Constitutional Court*" and in paragraph 1 uses the words "*has been referred*" in the place where the complaint uses the words "*is hereby submitted*". Save for those differences the two documents are identical word for word and in all other respects. The one does not clarify or add to the other in any way.

[4.8] The applicant only knew for the first time on that day, that is 30 May 2008, that there was a complaint against him. This is how he came to know about it: At 11h58 he receives a call from the Chief Justice informing him that the judges of the Constitutional Court have decided to lodge a complaint against him. He is puzzled and when he asks for particulars of the complaint the Chief Justice asks him for his private telefax number and at 11h59 he receives the complaint statement by fax in his office.

[4.9] In his words he says: "*My heart sank when I received this fax from the Chief Justice but soon after receiving this alleged complaint I started receiving telephone calls from journalists. I was told by them that the Constitutional Court had issued a*

press statement on the alleged complaint. This was most disturbing and for a while unbelievable until I got hold of the media statement myself. I realised that the media statement was in exactly the same terms as the alleged complaint." (Founding Affidavit paragraph 33.)

[4.10] In Annexure "PL2" (paragraph 6) he describes his response further as follows: *"On receipt of the media statement, I contacted, through my attorney of record the Judicial Services Commission, in order to obtain the details of the complaint. My attorney was forwarded with a response in which the media statement was attached as the complaint by the judges lodged against me. I was required to respond to the alleged complaint referred to in the media statement before the Judicial Services Commission met on 6 June 2008. I was unable to respond to the alleged complaint and in subsequent communication with the Judicial Services Commission I indicated my inability to respond to a media statement of the Constitutional Court judges. I attach the letter written on my behalf by my attorney in which I make the requests for the particulars of the alleged complaint."*

[4.11] The media statement received extensive and prominent coverage in electronic and print media. It was evidently sent, upon its release, to a wide-ranging number of journalists, professional organisations in the legal field, as well as statutory

bodies. The addressees to whom the media statement was sent include, amongst others, The Law Society of South Africa, Die Burger, The Mercury, Cape Law Society, University of KwaZulu-Natal, the National Association for Democratic Lawyers, the Black Lawyers Association, General Council of the Bar, Highveld News, Juta Publishers, Lexis Nexis Publishers, National Prosecution Authority, Rapport, Mail & Guardian, the Democratic Alliance and the South African Human Rights Commission.

[4.12] On 06 June 2008 the JSC convened an urgent meeting to consider the complaint lodged against the applicant. However, the meeting was unable to achieve its objective as details of the complaint were still not available and the applicant had not responded. The JSC thus, on that day, addressed a letter to the Constitutional Court judges requesting *"that details be provided in the form of a statement by each of the two judges concerned."* Accepting that the judges might require till 13 June 2008 to furnish the statements, the JSC decided that the applicant would have 10 days after receipt of the detailed complaint to respond. His response would then be referred to the complainant Judges for a reply within 5 calendar days. Anticipating the programme to run on that basis, the JSC scheduled itself to *"meet on 05 July 2008 to consider the material thus obtained."*

[4.13] Having not received details of the complaint against him, which he required to enable him to respond thereto, on 10 June 2008 the applicant lodged his own complaint with the JSC against Judges of the Constitutional Court (second to fourteenth respondents) complaining that:

(a) "The judges of the Constitutional Court have undermined the Constitution by making public statement in which they seek to activate a procedure for my removal for alleged improper conduct before properly filing a complaint with the Judicial Services Commission in terms of section 177 of the Constitution;"

(b) "The judges of the Constitutional Court have violated my right to dignity (section 10 of the Constitution), right to privacy (section 14 of the Constitution), right to equality (section 9 of the Constitution), right to procedural fairness (section 33 of the Constitution), right to access courts (section 34 of the Constitution);"

(c) "The conduct of the judges of the Constitutional Court failed to adopt a procedure that upholds the democratic values of human dignity, equality and freedom; section 7(1) of the Constitution;"

(d) "The conduct of the judges of the Constitutional Court failed to respect, protect, promote and fulfil the rights in the Bill of Rights;"

(e) "The judges of the Constitutional Court failed to adopt a procedure that is fair in that even as I file this complaint I do not have a complaint from the judges of the Constitutional Court;" (emphasis added).

[4.14] On 12 June 2008 Nkabinde J (the twelfth respondent) and Jafta J (the thirteenth respondent) made a joint statement, which they sent to the JSC recording that *"we have not lodged a complaint and do not intend to lodge one."* They placed on record further that *"from the moment the matter about Judge President Hlophe's visits was reported by O'Regan ADCJ to the Deputy Chief Justice Moseneke, we have on a number occasions informed Chief Justice Langa and Deputy Chief Justice Moseneke that we were not intending to lodge a complaint and neither we were willing to make statements about the matter."* (emphasis added). They further recorded *"that on 28 May 2008, we attended a meeting called by Chief Justice Langa and Deputy Chief Justice Moseneke"* (the second and third respondents) and that at the meeting *"we again* (emphasis added) *made it clear to them that we were not intending to lay a complaint against Judge President Hlophe and neither did we*

intend making any statement about the matter." They stated further *"with regard to the request by the Judicial Services Commission for statements from us we wish to state that we are prepared to make only this joint statement, and no other"* (emphasis added).

[4.15] On 17 June 2008 the respondents submitted to the JSC a comprehensive statement giving details of their complaint against the applicant. The comprehensive statement was signed by the second respondent (the Chief Justice) and was confirmed in writing by each of the second to the fourteenth respondents in so far as the contents relate to each of them.

[5] When one takes a look at the complaint of the respondents to the JSC, as reproduced in paragraph 4.4 above, it will be noted that the only paragraph, which contains factual allegations of the complaint and allege a conduct of the applicant, is paragraph 1. The content of the complaint as set out therein is that the applicant "*has approached some of the judges*" of the Constitutional Court "*in an improper attempt to influence*" the pending judgment in one or more of the cases.

[6] The paragraph identifies the applicant as the person against whom the complaint has been lodged. It does not identify the judges whom he is alleged to have approached, nor does it say when, how and in what manner he

approached the judges as alleged. The statement also does not say in what manner he attempted to influence the judgment improperly.

[7] Paragraph 2 of the complaint identifies the cases in which the judgment was pending. Paragraph 3 merely records that there is no suggestion that any of the litigants in the cases were aware of or instigated the approach. It says nothing about the alleged conduct of the applicant. Paragraph 4 merely says that the judges view the conduct "*in a very serious light*". Paragraphs 5, 6 and 7 are broad statements of principles and do not say anything about the alleged conduct complained of. And finally, paragraphs 8 and 9 tells the reader of the principled feelings and attitude of the complainants with regard to improper conduct, again without adding an allegation by way of fact as to what the applicant is alleged to have done as set out in paragraph 1.

[8] The applicant was clearly unable to respond to the published allegations against him of gross judicial misconduct because of the lack of particularity in the media statement and the "*complaint*". He says so expressly and had to rely on the JSC to call upon his accusers to furnish details of their broad allegations against him.

[9] It is clear from the joint statement of Nkabinde J and the Jafta J, which is paraphrased in paragraph 4.14 above, that since the visit to them by the applicant in March 2008 and April 2008 respectively, they had not intended to lodge any complaint against him. They were unwilling to make any statements

about the matter, even on the repeated requests of the Chief Justice (second respondent) and the Deputy Chief Justice (the third respondent), in fact up to the eve of lodging of the complaint against the applicant on 30 May 2008.

[10] It is fair to deduce from their joint statement of 12 June 2008 that they remained unwilling to lodge a complaint against the applicant and unwilling to make statements in support of the complaint even after the lodging of the complaint and publication of the statement on 30 May 2008 until at least on 12 June 2008 when they reiterated that they did not intend to lodge a complaint and they were only prepared to make the particular joint statement "and no other."

[11] The deduction, which is wholly consistent with the expressed words of the authors, however, casts a heavy shadow over whether they were willing supporters of the unsigned complaint and media statement issued on the letterhead of the Constitutional Court on 30 May 2008.

[12] Eventually however, it is an established fact that they not only supported the statement made by the Chief Justice on 17 June 2008 in support of the complaint but that they also signed statements confirming the contents of the statement of the Chief Justice insofar as the statement in question related to them.

[13] One learns from the second respondent's statement of 17 June 2008 that in the preparation of the statements in response to the call of the JSC for

details of the complaint, the Nkabinde J and the Jafta J were legally represented by Adv Madlanga SC and Adv Takota SC while the rest of the Constitutional Court judges were represented by Adv Marcus SC and Adv Sikhakane. In a sense the fact that in the preparation of the statements in support of the complaint to the JSC the twelfth and thirteenth respondents (Nkabinde J and Jafta J) were represented separately from the rest of the judges of the Constitutional Court is indicative of the fact that their interests in the matter at that stage were not identical with those of their colleagues.

[14] As it appears from the summary of the background facts set out in paragraph 4 above, it was only on 17 June 2008 that the complaint of the Constitutional Court judges against the applicant was particularised. It was only then that the Constitutional Court judges revealed publicly the identity of judges that were approached, as alleged, where and when this took place as well as the full circumstances.

[15] However, because the applicant complains in this case of a violation of his constitutional rights by the lodging of the complaint and the publication of a media statement on 30 May 2008, the effect of the lodging of the complaint and publication of the media statement must be assessed as on 30 May 2007. If the lodging of the complaint and publication thereof on that day violated any of the applicant's rights, the effect of such violation must be assessed for its duration. The lodging of a detailed statement signed by the Chief Justice and supported by other judges of the Constitutional Court on 17 June 2008 represents an important cutting point. From that day there was a signed

detailed complaint before JSC. The violation, if any occurred, of the applicant's constitutional rights, would have ceased on that day, because from that day the applicant and the JSC had details of the complaint against him, and the applicant was able to and did respond thereto in due course. The fact that the violation may have ceased on a particular day will, however, not be an indication that it did not occur. The applicant would have suffered from a violation of his rights for as long as the violation continued until it ceased or was curbed. In other words, violation may have taken place on a particular day and ceased on another day.

Right to be heard

[16] The applicant pegs his case on (a) the common cause fact that he was not given an opportunity to be heard (i) prior to the decision to lodge and (ii) prior to the lodging of the complaint of gross misconduct, and (b) that the complaint against him was not kept confidential at its initial stages.

Right to be heard by respondents "*as a Court*"

[17] On the papers before us, the applicant seems to assert his right to be heard on the basis that the second to fourteenth respondents acted "*as a Court*" in taking the decision and in lodging the complaint and making a media statement. If this were so, however, there could hardly be a question that the applicant was entitled to be heard before a court took a decision affecting him.

Failure then to hear him would violate his constitutional right to a fair hearing by the court and possibly his other constitutional rights.

[18] In the argument before us however, the applicant sought to argue that even if the respondents did not act "*as a Court*", in whatever capacity they may have acted, whether "*as an institution*", "*as a group of Judges*" or as a collection of individual judges, their action still had the same effect, which is, the violation of the rights of the applicant. The respondents too in argument, argued that although it is their case that the applicant brought them to court on the basis that they acted "*as a Court*", they did not wish to hide behind that assertion to oppose the application. The respondents thus agreed that this court was at large to consider the declaratory prayers even on the basis that the respondents acted in a capacity other than "*as a Court*". We are to proceed thus, on the basis of a concession by the parties, to examine whether on any basis established by the facts before us the respondents violated the constitutional rights of the applicant in lodging the complaint and publishing the media statement.

[19] On the facts before us it is overwhelmingly clear that in lodging a complaint the respondents did not act as a Court in the sense of performing an adjudicatory or judicial function. They acted, as they say, as complainants against the applicant. They took a decision to and proceeded to file a complaint. They are complainants. They also took a decision to and proceeded to release a media statement about the complaint. The latter act is a far cry from being a judicial function.

Judges did not act as a Court

Right to be heard (if complaint lodged) – in any capacity

[20] The applicant argues that, even as a group of thirteen judges, the respondents, who chose to act as one unit in lodging the complaint, after receiving a report, were under a duty to hear him, as part of his constitutional right to a fair hearing. Needless to say too, that if his right to be heard is violated, and he is unable to defend it, his dignity and the integrity of the judiciary, of which he is a senior member, will be violated at the same time. The foundation of the right to be heard is not only constitutional; it is also anchored, in the common law principle of *audi alteram partem* that recognises as part of the rules of natural justice the right of every person to be consulted or heard before a decision or step is taken that affects or may affect such person.

[21] The respondents answer to the applicant's invocation of this right by asserting that a complainant has no duty to hear the accused prior to submitting or lodging a complaint. They argue that as complainants, theirs was only to lodge or refer the complaint to the JSC and that the applicant's right to be heard would be accommodated in due course in the proceedings before the JSC. They argue that in asserting the right to be heard, as against them, the applicant misconceives and confuses the role of a complaint with that of an adjudicator.

[22] In my view, it is the respondents who miss the point here. The applicant asserts the right to be heard not just at the final adjudication stage of

the complaint procedure but at each material stage of the procedure. This is a right which is asserted in favour of the applicant as a member of the judiciary. The integrity of the judiciary resides in each and every member of the judiciary. The complaint procedure must therefore assume the integrity and innocence of the judge, even in the face of a complaint, until the guilt of the judge has been proven following a fair procedure and process. The reason is not far to find. The judiciary as an institution stands to suffer in its image and integrity, each time an accusation of misconduct is made. One must therefore afford the judge, facing a complaint, an opportunity to clear his or her name and correct any misunderstanding or misgiving of the complainant before the process has gone too far and the harm to the dignity and integrity has become irreversible.

[23] While the applicant may seem to be, and is possibly in fact, the immediate beneficiary of the right to be heard at every stage, the actual and ultimate real beneficiary is the judiciary as an institution.

[24] The rules and process of filing and considering complaints against judges should however not inhibit the filing or consideration of complaints. It is thus an established principle in this regard that to impose on the complainant an obligation to afford the accused judge an opportunity to be heard before lodging the complaint would be to stretch the requirements of procedural fairness a bit too far. See for example *George Meerabux v The Attorney General of Belize* [2005] UKPC 12 to which I refer more fully later in this judgment. The complaint ought to be lodged with ease subject to safeguards

that will ensure that frivolous and obviously unfounded complaints must be weeded out without delay.

[25] There is a salutary rule of practice in our courts that if the head of court or a senior judge receives a complaint from a litigant or member of the public alleging some form of judicial misconduct on the part of a judge, the head of court or senior judge refers the complaint to the judge concerned for the comments of the latter before considering or referring the complaint to the JSC. This happens whether the member of the public requests the head of court or senior judge to refer the complaint to the JSC or not. This rule of practice is applied even where the complainant is another judge. In fact, in the case of complainant judges, the Code of Conduct: Judicial Ethics in South Africa (Guidelines for Judges), which was adopted at a meeting of the Chief Justice and senior judges held in Pretoria on 03 April 2000 provides that:

> "*A judge who reasonably believes that a colleague has been acting in a manner which is unbecoming of the judicial officer, should raise the matter with that colleague or with the head of the court concerned.*" (Rule 21.)

[26] The idea here is not to stifle complaints, but to ensure that complaints are sorted out as swiftly as possible and as close to source as possible. A similar practice, I believe, exists in most professional organisations and associations. The more serious complaints of deviant conduct will always escalate to the top and are dealt with in a more formalised way. Practice has

shown too that what may appear to be deviant conduct, may turn out to be a minor misunderstanding once one has afforded each side an opportunity to state their respective version.

[27] Where the person who became aware of misconduct does not himself or herself lodge the complaint and instead refers it to another person (often the senior) to lodge the complaint, the salutary rule of practice would require that the first recipient of the complaint should raise the conduct complained of with the one being accused. The benefit there, once more, will be that the complaint is ventilated and mere misunderstandings falling short of misconduct are isolated and resolved as early as possible in the complaint procedure.

[28] Similarly a Report and Recommendations on Racism and Sexism adopted by the Heads of Court in South Africa and issued by the Office of the Chief Justice in 2005 laid down a procedure which envisages that complaints and allegations of racist and sexist behaviour are dealt with and sorted out first by a discussion between the complainant and the perpetrator, if at all possible (step one), then by the involvement of a mutually acceptable colleague (step two), referral to the head of court (step three), referral to local committee (step four) and finally by National Committee (step five). There are sound reasons for the procedure in terms whereof the next step is invoked each time only when the problem could not be resolved in the preceding step.

[29] The question in the present case is whether the applicant was entitled to be heard prior to the respondents lodging the complaint with the JSC. If he was, the further question is at what stage he became so entitled. He contends that he was and that the admitted failure on the part of the respondents to provide him an opportunity to be heard led to the violation of his rights. The respondents argue that he was not. The applicant places the time or stage of his entitlement to be heard generally as prior to the complaint being lodged and prior to the publication of the complaint against him.

[30] I proceed to examine this claim of entitlement to be heard from the genesis of the complaint to the lodging and publication.

[31] The genesis of the lodging of the complaint is the visit by the applicant to the thirteenth respondent (Jafta J) and the twelfth respondent (Nkabinde J) in March 2008 and April 2008. From the evidence before court, it is clear that the twelfth and thirteenth respondents did not intend to lodge a complaint or make a publication after the visit. Then early in May at the beginning of the term of the Constitutional Court, the twelfth respondent speaks to Mokgoro J (fifth respondent) about the visits and seeks the latter's response. The advice of Mokgoro (fifth respondent) was that the matter should be reported to the second respondent, presumably as head of the Constitutional Court and of the South African Judiciary. There was still no decision to lodge a complaint or to make a public media statement about it. Before the twelfth respondent could act on the advice, if she so intended, Mokgoro J (fifth respondent) mentions the visit to O'Regan J (the sixth respondent) who is by then the

Acting Deputy Chief Justice in the absence of the third respondent (Moseneke DCJ). There is at that stage still no decision to file a complaint with the JSC. In due course news of the visits of the applicant to the twelfth and thirteenth respondents eventually reaches the second and third respondents (the Chief Justice and his deputy), as head of and deputy head of the judiciary respectively (meeting of 28 May 2008).

[32] On 28 May 2008 the second and third respondents, in that capacity convene a meeting with the twelfth and thirteenth respondents which is held in the chambers of the second respondent. It appears that the matter is then viewed by the second and third respondents as of a very serious and the two leaders of the judiciary inform the twelfth and thirteenth respondents accordingly indicating that the importance of the matter goes beyond the judges concerned (the twelfth and thirteenth respondents). Prior to the meeting of 28 May 2008, the second respondent had held two meetings with the twelfth respondent at the instance of the second respondent. During each of those meetings the second respondent had advised the twelfth respondent to make a written statement about the visit of the applicant, and at each such meeting the twelfth respondent expressed her unwillingness to furnish a statement. It is not clear as to whether the second respondent had by then decided that a complaint had to be laid with the JSC, but it is fair to deduce from his repeated request for a written statement that he intended to act on the allegations. The meeting of 28 May 2008 in the second respondent's chambers lasted for two hours. During the meeting, the twelfth and thirteenth respondents recount to the second and third respondents at the latter's

request, what had transpired during the visits by the applicant to their chambers in March 2008 and April 2008. Despite what the applicant had said to them about the matters in which judgment was pending before the Constitutional Court, both the twelfth and thirteenth respondents inform the second and third respondents that the applicant's approach has not influenced them. They do not intend to lodge a complaint or to make a statement. They feel that they have effectively dealt with the matter by rejecting the approach of the applicant. It is the decision of the second and third respondents at the conclusion of the meeting of 28 May 2008 that, in the light of the seriousness of the matter, a meeting of judges of the Constitutional Court should be held to discuss what steps should be taken.

[33] It is clear that at this meeting the twelfth and thirteenth respondents were still not willing to make statements. The second and third respondents were aware of this.

[34] The meeting or conference was then held on Thursday 29 May 2008. It was attended by all the second to fourteenth respondents, with the exception of Sachs J (the seventh respondent) and Ngcobo J (the eighth respondent). At this meeting the second and third respondents recounted to the other respondents the essence of what had been told to them at the meeting of 28 May 2008. They asked the other respondents not to subject the twelfth and thirteenth respondents to questioning "*given the distressing circumstances in which they were*".

[35] I pause here to remark that it is not clear to me why the twelfth and thirteenth respondents would have been "*distressed*". What is clear is that they were unwilling to make statements. Why this would distress them, is also not clear, if they were allowed to exercise their option. Were they perhaps being urged, against their will, to make statements on the basis that the matter went beyond them as judges that had been "*approached*" by the applicant? What is clear however is that they still did not make any statements on that day, and for that matter until 12 June 2008 when they, in a joint statement, recorded their unwillingness to lodge a complaint nor to make a statement and their resolve not to make any statement other than the joint statement of that day.

[36] The applicant complains in this application that the request by the second and third respondents for the twelfth and thirteenth respondents not to be subjected to questioning, violated his right as it suppressed the possible unearthing of more information. As I understand him, he seeks to argue that more information could have come forth which would explain issues which are as yet unexplained. Could a version more favourable to the applicant have been brought forth? Could an explanation of their reasons for being unwilling to lodge a complaint or to make statements perhaps have persuaded other respondents not to support the lodging of a complaint? Could some of the judges have supported the stand of the twelfth and thirteenth respondents not to lodge a complaint nor to make statements? The problem with a question which was never allowed to be posed or asked is that there is no way of knowing what answer or information it would have elicited.

[37] A number of decisions were taken at that meeting of 29 May 2008. As I synthesise them from the second respondent's statement of 17 June 2008 (paragraph 37) the decisions that were taken on that day are the following:

(a) it was unanimously decided, by all judges present, to lay a complaint with the JSC against the applicant;

(b) it was specifically stated that judges who had been approached by the applicant (i.e. the twelfth and thirteenth respondents) "*would have to give oral evidence to the JSC in due course*", if the applicant resisted the complaint;

(c) "*the judges agreed that the JSC would be the appropriate body to determine any dispute of fact that might arise*";

(d) "*given the perceived attack on the integrity of the court all judges should be party to the complaint*";

(e) "*a clear and brief press statement had to be prepared*".

[38] This is thus the meeting that took the decision to lodge a complaint against the applicant. It is also the meeting that decided to issue a press statement. The question whether the respondent should have been afforded a hearing before the decisions were taken arises in relation to this meeting.

There was no decision to lodge a complaint or to issue press statement prior to that day. The question therefore only arises from that day and in relation to the decisions of that day. What is significant is that the respondents present at that meeting already foresaw the possibility of a "*dispute of fact*" arising in relation to the complaint. They therefore foresaw that there could be a version different from the one on which they wished to lodge a complaint. They had the version of the twelfth and thirteenth respondents. The only other version which they appreciated could be different from that of the two respondents was that of the applicant. They knew and decided that the dispute of fact, between the versions of the two respondents on the one hand and the applicant on the other can only be resolved by the JSC in due course. They did not intend to hear the version of the applicant, which they appreciated, could be different from the one they would rely on. When they left it to the JSC to sort out the possible dispute of fact, they must have appreciated that the applicant will not have an opportunity to put his side of the story until the proceedings are in front of the JSC.

[39] They already then identified two of their colleagues, the twelfth and thirteenth respondents, as the ones who would give oral evidence before the JSC. The question is compelling and must be asked whether the twelfth and thirteenth respondents agreed also that they would be witnesses to give oral evidence to resolve a foreseeable dispute of fact. If they did, they would have done so with the appreciation that a version of one side may have to be preferred over that of another side, in order to resolve the dispute of fact. A credibility finding, favourable or unfavourable was looming. What is known is

that they did not furnish a statement on that day or any day prior thereto. They were unwilling to do so. Is that perhaps the reason why one of them (the twelfth respondent) did not attend the meeting of the following day, 30 May 2008? They had been singled as witnesses to give oral evidence to support a complaint they had (up to then at least) been unwilling to lodge.

[40] The rest of the respondents who attended the meeting and took the decision of 29 May 2008 knew that they did not have a written version of the twelfth and thirteenth respondents to back the complaint they intended to lodge, unless they had recorded the proceedings of 28 May 2008. They knew too that the two respondents were unwilling to provide such statements. They would not be in a position to provide the applicant with any written version of details of the complaint to which he would need to respond.

[41] The respondents knew too that the complaint that they intended to lodge was serious and would have grave impact on the dignity and standing of the applicant. They proceeded nevertheless.

[42] If the complaint was lodged by the twelfth and thirteenth respondents there could have been no question of them being obliged to give the applicant a hearing. They knew of only one version and that is what they had experienced in direct interaction with the applicant. There is thus nothing to speak of as another version from their perspective. However if someone else is to take their version and, based thereon, lodge a complaint, the picture is different. A person receiving an allegation from another, about the conduct of

a third person, must surely be aware or alert to the fact that there is possibly another version to the same story, namely, that of the third person whose conduct is being relayed. When the person lodging the complaint is alive to the possibility that there is another version of events, surely there must be an obligation to get that version as well, so as to inform the decision or action of lodging the complaint. In my view, therefore, the rest of the respondents were under an obligation to afford the applicant a hearing before acting on allegations of improper misconduct against him. The obligation is heavier when the recipient of the allegation who intends to lodge the complaint is a senior over both the person making the allegation and the person against whom such allegation is made. The second and third respondents, as heads of the entire judiciary in South Africa are in such a position over both the twelfth and thirteenth respondents on the one hand and the applicant on the other. The latter three people look up to them as heads of the judiciary to provide leadership and should therefore expect to be dealt with on a fair basis.

[43] I hold accordingly that while there was no obligation on the twelfth and thirteenth respondents, if they lodged a complaint, to offer the applicant the right to be heard before proceeding to lodge the complaint on the basis of what they had experienced directly with the applicant, there was certainly such an obligation on the rest of the respondents (second to fourteenth). The obligation was heavier on the second and third respondents who stand in different relation to the applicant, as a person over whom they hold a position of leadership and who rightly look up to them, *inter alia*, not only for guidance

but also for fair action in matters involving him and the rest of members of the judiciary.

[44] The benefit of affording a hearing to the affected person is not only to act with fairness towards the affected person, it is also to enrich the decision maker or action taken in the decision making or action taking process. The decision maker or action taker is therefore the poorer for not availing himself or herself of the benefit of hearing the version of the affected person.

Meeting of Friday 30 May 2008

[45] A further meeting was held on Friday 30 May 2008 at which the decisions to lodge a complaint and to release a media statement were discussed. This meeting was held at the request of Ngcobo J (the eighth respondent) who had not attended the meeting of 29 May 2008. Nine respondents attended that meeting, namely, the second, fourth, fifth, sixth, eighth, ninth, tenth, thirteenth and fourteenth respondents. It is necessary once more to synthesise the decisions that were taken at that meeting as they impacted directly on the lodging of the complaint and the release of the media statement which were done after the meeting. These again are synthesised from the second respondent's statement of 17 June 2008 (paragraph 39). The following decisions and positions were taken at that meeting:

(a) *"it was agreed that the terms of the press statement should largely be in the same terms as the complaint"*;

(b) although all judges agreed in the decision in (a) above, the second respondent "*did note that as chairperson of the JSC, it would not be appropriate for him to issue a media statement*";

(c) the second respondent "*would call Hlophe JP and inform him of the complaint*";

(d) "*the complaint would be sent to Hlophe JP*";

(e) "*and thereafter (the complaint) would be lodged with the JSC*";

(f) "*it was agreed that thereafter the media statement would be released*".

[46] It appears from the decisions as recorded by the second respondent in his statement that the close similarity (in fact the identical nature) of the complaint and media statement was in fact the decision of the meeting. The second respondent considered and noted that as chairperson of the JSC, it would not be appropriate for him to issue a media statement. It is not clear what informed the latter view of the second respondent. It is fair to suppose that he considered that the issuing of the complaint would conflict with his duties and obligations as chairperson of the JSC. If this is correct, which, with respect, appears to have been a fair and reasonable consideration, it is not clear why it was not considered that the lodging of the complaint itself, based

on the statement of others, would conflict with the same position (as chairperson of the JSC) and as chief justice and leader of the judiciary in South Africa. The effect of the decision by him to become part of the lodging of the complaint is that he is not available to act as chairperson of the JSC in relation to the complaints against the applicant and by the applicant against the respondents. It is also the result and effect of the same decision that he is now not able to speak freely on this issue, the impact of which affects the whole judiciary. It is also not clear from the unsigned media statement which comes from "*Judges of the Constitutional Court*" that he in fact distanced himself from the issuing of the statement. The statement purports to have been issued by exactly the same persons as those who lodged the complaint, namely "*Judges of the Constitutional Court*".

[47] It appears further from a recordal of the decision by the second respondent as set out in (c) to (e) above that there was to be a particular sequence of events: the applicant was to be informed by the second respondent of the complaint, he would be sent a copy of the complaint, the complaint was thereafter to be lodged with the JSC, and only thereafter the media statement would be released. The applicant was thus to know of and receive the complaint before it was lodged with the JSC. The release of media statement was to be the last thing that would happen. If that sequence of events had been followed with sufficient time lapse in between, and provided that the complaint contained sufficient material information, the applicant would have had an opportunity to be heard both by the respondents and the public which read the statement, prior to the complaint being lodged and prior

to the media statement being released. As it happened, however, the steps appear to have been taken within a minute of each other and almost at the same time. In the result, whatever the purpose was of deciding on the particular sequence of events, such purpose was totally negated by the lack of meaningful time lapse between the various steps. One purpose that would have been served is fairness towards the applicant. That however was totally excluded by the speed with which the various steps were taken and the applicant was dealt with unfairly in the process of lodging the complaint and releasing the media statement. Whatever rights he had in that process were violated.

[48] In the evidence before court the respondents proffer no explanation or justification for the speed and haste in which the steps were taken one after the other. It is that speed and haste that brought about the unfair treatment of applicant and a violation of his rights. The respondents admittedly had a right and a duty to lodge the complaint with the JSC once they received information about the events and they considered that a breach of judicial conduct had taken place. It is however not in the lodging of the complaint *per se* that the applicant's rights were violated, but in the speed and lack of detail that took no account of his right to dignity and the right to have his dignity respected and protected.

[49] The respondents also possibly had a right to decide to go public about the complaint inasmuch as they possibly considered it in the public interest to publish. In deciding to go public at that initial stage of the complaint the

respondents had to act in a manner that ensured a delicate balance between the right of the public to know and the inevitable result that publication itself may result in the corrosion of public confidence in the judiciary. The public right to know had to be balanced with the way that knowledge and information is purveyed. That balance was lost in the speed and haste with which the matter was handled and the lack of sufficient averment of factual details of what the applicant allegedly did which constitute an improper approach, how he approached such person or persons, where and when he made the approach, and what in the approach constitutes an attempt to influence the pending judgment of the court. The applicant was dealt with unfairly and his rights were violated by the failure to strike a balance between the right of the public to know and the need to maintain public confidence in the judiciary. The respondents had decided on a process of laying the complaint and a sequence of steps leading to publication, which if executed in a reasonable manner would have afforded the applicant the right to be heard and would not have violated any of his rights. They however, for inexplicable reasons, executed their decision in haste and with the speed that eroded and negated all reasonableness. If for instance, in telephoning the applicant the second respondent had conveyed to him the details of the alleged misconduct, listened to what he had to say before proceeding with all other steps, each of the successive steps would have been enriched by the preceding one, resulting in no unfairness to any one. That is however not what happened.

[50] As Chief Justice Conteh of Belize remarked in the opening of the judgment in the matter of *Meerabux v The Attorney General of Belize and Another*, Action [2005] UKPC 12 No 65 delivered on 12 March 2001:

> *"News that a judge of the Supreme Court is to appear before any body for the purposes of investigation is certainly of general interest. This must be so because of the position of a judge in nearly every society. It has been said and rightly so; in my view, that society attributes honour, if not veneration, learning if not wisdom, together with detachment, probity, prestige and power to the office of a judge. Therefore, news of any probe concerning a judge would elicit public attention, whether of the concerned or the plainly curious. This may be for the public good.*
>
> *But the public weal itself will be damaged if the news is not handled with care and circumspection; for it may inevitably result in the corrosion of public confidence in the judiciary itself, with deleterious effects on the administration of justice as a whole.*
>
> *The public right to know and be informed is one which the courts ought always to protect, but this must be balanced with the way that knowledge or information is purveyed. Anything tending to convey unsubstantiated rumours, idle gossip or the salacious must be restrained, particularly in a society such as we have in Belize, which is a veritable fish bowl for almost every public office holder. Otherwise, the right to know becomes corrupted with the zeal to feed frenzy on unsubstantiated rumours and stories. This will be a positive disservice to all Belizeans, for when facts and fiction collide, faction is the result."*

The Honourable Chief Justice Conteh continued further to remark:

> *"This is why I regret the way in which some sections of the media covered the developments concerning the applicant that have culminated in this application before me. And the Applicant has, not*

without reason, complained. But I am satisfied that none of the parties to this application is in any way responsible for the less than satisfactory manner in which some sections of the press tried to portray the applicant. It is therefore reassuring to note the fact that the President of the second Respondent, the Belize Bar Association, has filed an Affidavit in these proceedings distancing the Association from the publication of their allegations contained in their complaint to the Governor-General, and has affirmed that the Association bears or harbours no malice towards the Applicant."

It would have been re-assuring if indeed in the present case it could be said that the complainant respondents distance themselves from the publication of their allegations contained in their complaint to the JSC. They are however solely responsible for the publication of their complaint to the JSC of which the applicant complains.

[51] Indeed, ever since the spat between the applicant and the respondents came into the open (media), if truth be told, the judiciary in this country has been criticised and lambasted publicly by all and sundry in a manner which is unprecedented. This is the best indicator of corrosion of public confidence in the judiciary.

[52] The rights of the applicant were violated by the denial of natural justice and breach of procedural fairness in lodging the complaint and particularly in publishing the making of the complaint.

[53] The finding that the applicant was treated unfairly and his rights violated in the manner in which the lodging of the complaint and the decision to publish the complaint were handled is totally separate from the question whether the applicant is guilty of the complaint lodged against him. That complaint stands to be and will still be adjudicated upon by the JSC. It can also not be said, as the applicant submits, that that complaint is tainted by the procedural unfairness in lodging it, because the applicant will be afforded procedural fairness in the consideration of the complaint by the JSC when it deals with that complaint. For instance, procedural fairness in that process has already been accorded to him by JSC insisting that factual details of the misconduct alleged against him be furnished to him before he is required to respond thereto in writing and by affording him an opportunity to respond in writing to the written complaint before the JSC considers same. The Rules of the JSC are indeed there to ensure procedural fairness in the dealing with the complaint once it is before the JSC. There is a difference between procedural fairness in lodging the complaint and publishing same prior to the JSC dealing therewith, on the one hand, and procedural fairness before the JSC when the complaint is dealt with, on the other. The finding herein relates to procedural fairness in the decision to lodge and in lodging the complaint and publishing same in the initial stages and does not touch the receipt of and the consideration of that complaint by and before the JSC.

[54] I deal later with the extent, if any, to which any finding herein has an effect on the counter-complaint lodged by the applicant against the respondents with the JSC.

[55] Home based legal precedent is the best decisive authority on any point whenever argument arises on legal principles. Luckily the present spat in the judiciary is totally unprecedented in this country. This, however, leaves us with no judicial precedent of note. It is however helpful to refer to other jurisdictions where helpful pronouncements are found in resolving problems in the judiciary which feature before the courts.

United States of America

[56] In the United States of America, the initial investigation stage of judicial misconduct complaints is absolutely confidential. On March 11, 2008, the Judicial Conference of the United States approved the first-ever binding, nationwide set of rules for handling conduct and disability complaints against federal judges, bringing consistency and rigor to the process. The new rules codified a long-established tradition that judicial conduct and disability complaint process remain confidential, as required by federal law. Under the rules, even a final order dismissing a complaint will not identify a complainant or the judge who is the subject of the complaint. In most cases, only a final order sanctioning a judge will identify the judge.

[57] The principles in the rules are not new. The US Supreme Court ruled more than 30 years ago in *Landmark Communications v Virginia* 435 U.S. 829; 835 (1978) that confidential investigations of judicial misconduct serve salutary purposes in protecting judicial independence. The appealing

defendant, Landmark Communications owned a newspaper which had been convicted of publishing details of a judicial misconduct inquiry in violation of Virginia's statute. One Judge H Warrington Sharp, who sat on the Juvenile and Domestic Relations Court, was under investigation by a judicial fitness panel. The panellists were deciding whether or not to begin disciplinary proceedings against Sharp. Under Virginia statute, each complaint against a judge was confidential and would be publicly disclosed only if deemed serious enough (after investigation) to require a public hearing. All states in the USA had (and still have) confidentiality requirements to avoid use of the disciplinary inquiry as retribution against a judge and to preserve the dignity of the judiciary from unjustified attacks; however, only Virginia and Hawaii provided for criminal penalties for disclosure.

[58] The *Landmark* Court listed four state interests served by confidentiality in the early period of the investigation: (1) encouraging the filing of complaints; (2) protecting judges from unwarranted complaints; (3) maintaining confidence in the judiciary by avoiding premature announcement of groundless complaints; and (4) facilitating the work of the commission by giving it flexibility to accomplish its mission through voluntary retirement or resignation of offending judges. *Id.* at 835-37, 98 S.Ct. at 1539-41. The court assumed that these interests were legitimate. *Id.* at 841, 98 S.Ct. at 1542-43. In a concurring opinion, moreover, Justice Stewart described these interests more generally as the state's interest in the "*quality of its judiciary*", and stated that there could "*hardly be a higher governmental interest*". *Id.* at 848, 98 S.Ct. at 1546.

[59] The court noted that "*much of the risk* [from disclosure of sensitive information regarding judicial disciplinary proceedings] *can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings*" *supra*, at 845. The Supreme Court also acknowledged that the confidentiality can facilitate the work of a commission by giving it flexibility to accomplish its mission through voluntary retirement or resignation of offending judges.

[60] The foregoing principles underlying the confidentiality rationale were further interpreted and applied by the federal Third Circuit Court of Appeals in *The First Amendment Coalition v Judicial Inquiry And Review Board*, 784 F.2d 467 (3rd Circ. 1986). The court acknowledged that the "*trauma of public accusation*", one which is "*greater for an official who, due to the special constraints of the bench, is largely disabled from seeking public support*" is a relevant consideration. It gave considerable weight to the reasons for the US Senate's belief "*that the establishment of a confidentiality provision will avoid possible premature injury to the reputation of a judge*", and that specified measures ought to be taken in "*protecting the judge from malicious publicity*". The court noted that: "*In practice, it has been demonstrated that one of the most effective methods of meeting the problem of the unfit judge is to remove him from the bench by voluntary retirement or resignation. Experience has shown that some judges would prefer to resign rather than undergo complete formal hearings ... if the confidentiality provisions were not in effect, the*

accused judge might feel compelled to seek vindication by requiring a hearing".

[61] Furthermore, it is instructive that US Congress has concluded that confidentiality of inquires into federal judicial misconduct is of great value. See 28 U.S.C. Sec. 372(c) (14) (all papers, documents and records of investigations into judicial misconduct are confidential). In addition, confidentiality may encourage judges who have engaged in misconduct or have a disability to resign or retire "*quietly*" before the complaint becomes public with the commencement of formal proceedings. *Kamosinsfci v Judicial Review Council*, 797 F. Supp. 1083 (D. Conn. 1991).

[62] It is noteworthy that at the state level, all states in the US which operate under judicial disciplinary rules similar to the federal system, have stressed the importance of confidentiality in judicial disciplinary proceedings, especially before formal charges are filed against the judge. See, e.g., *First Amendment Coalition v Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3rd Cir. 1986) (state constitutional provision permitting public access to records of the judicial inquiry and review board only if board recommends that stage supreme court discipline a judge is not unconstitutional); *Bradbury v Idaho Judicial Council*, 28 P.3d 1006 (Idaho 2001) (confidentiality in judicial disciplinary proceedings does not infringe upon a fundamental right and is rationally related to the state's legitimate interests); *In re Inquiry Concerning Stigler*, 607 N.W. 2d 699 (Iowa 2000) (judge failed to establish how statute providing that all hearings of the judicial disciplinary commission be

confidential denied him due process of law); *In re Deming*, 736 P.2d 639 (Wash. 1987) (confidentiality is mandated during investigatory stage of proceeding; once probable cause is determined and formal complaint is filed, judicial discipline commission has discretion in disclosing information and holding public hearings); *State ex rel. Lynch v Dancey*, 238 N.W. 2d 81 (Wis. 1976) (statute requiring governmental bodies to hold open meetings did not apply to judicial commission; judicial commission rules of procedure that required public hearings after formal charges had been filed pre-empted the application of the open meetings statute); *McCartney v Comm'n on Judicial Qualifications*, 526 P.2d 268 (Cal. 1974), overruled on other grounds by *Spruance v Comm'n on Judicial Qualifications*, 532 P.2d 1209 (Cal. 1975) (because judicial commission's proceedings were neither criminal nor before a "*court of justice*", there was no impropriety in commission's refusal to hold public hearings). The Arkansas Supreme Court underscored the policy reasons for requiring confidentiality of Judicial Commission meetings held prior to the filing of formal charges in *In re Rules 7 and 9 of the Rules of Procedure of the Arkansas Judicial Discipline & Disability Comm'n*, 302 Ark. Appx. 633, 790 S.W. 2d 143 (1990) (per curiam). In that order, the court said:

> *"When adopting and implementing laws and rules that provide for a judicial discipline system, we are confronted with the issue as to when in the process of proceedings does the right to constitutional access attach. Every state in the Union recognizes that some confidentiality is necessary, and from our research, we found that all states, ... provide for disclosure in all judicial discipline cases only after probable cause has been determined and some type of formal hearing or charge has been completed or filed. See J. Shaman and Y. Beque, Silence Isn't Always Golden, 58 Temp. L.Q. 755, 756 (1985)."*

Canada

[63] In Canada the independence of the federally appointed judiciary is guaranteed by the Canadian Constitution (namely sections 96 to 100 of the Constitution Act, 1867) which provides for the appointment, security of tenure and financial security of superior court judges. Section 99 of the Constitution Act states: "*Subject to subsection 2 of this section the judges of Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and the House of Commons*". This provision aims to ensure judicial independence by making it extremely difficult to remove judges from office for political or other reasons. The 1971 amendments to the Judges Act created the Canadian Judicial Council and gave it statutory authority to investigate complaints against federally appointed judges.

[64] Security of tenure has been recognized as the first of the essential conditions of judicial independence. *Valente v The Queen*, [1985] 2 S.C.R. 673 at 694. There the Supreme Court clearly states that the rule of security of tenure means: "*... that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard*".

[65] The approach of the Canadian courts gives a glimpse of how older democracies from whom South African Court have borrowed extensively have

dealt with questions of judicial discipline and independence. In Canada, the Canadian Judicial Council which, like the JSC, has the authority under the Judges Act to handle complaints and allegations of judicial misconduct about federally appointed judges has this to say on its website: "*The Council is committed to reviewing complaints about the conduct of judges in a way that is sensitive to the person making the complaint, fair to the judge who the complaint was about, and credible to the judiciary and the public. While the public must have a way to voice its concerns about members of the judiciary, the judges must be given an opportunity to respond to the allegation of misconduct*".

[66] Professor Martin L Friedland, in his book *A Place Apart* (1995), a comprehensive study of the Canadian federal and provincial judiciary, specifically points out the vital importance of confidentiality in the judicial discipline process:

> "*The visibility of the process is also a matter that requires careful consideration. At the early stages of the process, there has to be a large measure of confidentiality. An allegation of impropriety against a judge can have serious consequences in terms of the credibility of the judge.* (emphasis added) *Thus, it would be very unfair for the Council itself to publicize unfounded complaints that have not gone on to a hearing. One cannot prevent a complainant from going public. There are, of course, cases where the issue is already public and it is in the judge's interest to make the result known. No jurisdiction that I am aware of gives the public access to the investigation stage or routinely reveals the judge's identity at that stage. The new American Bar Association procedures maintain confidentiality at the investigation*

stage. The same seems to be true in Canada for complaints against lawyers. And in the criminal process generally, police investigations are also normally kept confidential until a charge is laid or some other action is taken. (emphasis added)" Friedland, A Place Apart, supra, p 134.

Other Commonwealth Countries

[67] The case of *Rees v Crane* [1994] 2 AC 173 emanated from Trinidad and Tobago and ended up before the Privy Council as an appeal. The Privy Council quashed the suspension of a judge and the decision of the Judicial and Legal Service Commission to represent to the President that the judge's removal from office ought to be investigated. The case concerned a High Court judge in Trinidad and Tobago who had been excluded from the roster of sittings from the following term. The procedure laid down by the Constitution of the Republic of Trinidad and Tobago has three stages. First, the Judicial and Legal Services Commission (JLSC) has to decide whether "*the question of removing a Judge under this section ought to be investigated*". Secondly, where the JLSC represents to the President that an investigation is necessary, the President appoints a Tribunal to investigate the matter. Thirdly, on the basis of the Tribunal's recommendations, the Privy Council decides to remove (or not to remove) the judge from office. In *Rees v Crane*, the JLSC found (at the first stage) that an investigation was required and the President set up a tribunal without informing the judge of the complaints made against him and without giving him a chance to reply to them. The first time that the respondent knew of these happenings was through a television report on the day upon which the President had acted. The judge brought a

successful constitutional challenge on the ground that his fundamental right to the protection of the law under paragraph 4(b) of the Constitution (the right to the protection of the law) had been violated. The state appealed to the Privy Council.

[68] The Privy Council dismissed the State's appeal against the Trinidad and Tobago Court of Appeal's order upholding the judge's constitutional challenge on the ground that the Judge's fundamental right to the protection of the law under paragraph 4(b) of the Constitution (the right to the protection of the law) had been violated. The decision to suspend him was contrary to section 137(1) of the Constitution which provided that: *"A judge may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of mind or body or any other cause), or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section*".

[69] The Privy Council held that the rules of natural justice had to be implied at the preliminary (representation) stage of the three-stage process outlined in the Constitution. It did not matter that the first two stages of the procedures did not involve the actual investigation itself but dealt with preliminary matters such as whether the question of removing a Judge under this section ought to be investigated.

[70] Natural justice was implied because of the seriousness of the allegations and the potential damage to the judge's reputation if he was not

given an opportunity to be heard at the representation stage. The Judicial Committee held, *inter alia*, that: *"Although natural justice would not normally require that a person be told of the complaints against him and given an opportunity to answer them if the investigation into the complaints was purely a preliminary inquiry and the person affected was entitled to be heard at a later stage of the inquiry or investigation, there was no universal rule to that effect. Nor did it follow that because the rules of natural justice applied to the procedure as a whole they did not have to be applied at every stage. The courts were not bound by rigid rules as to when the audi alteram partem rule applied and would have regard to all the circumstances of the case*".

[71] In that case the Judicial Committee decided that having regard to the serious nature of the charges against the respondent, the publicity surrounding his suspension and the damage to his reputation and position as a judge, he ought to have been given the opportunity to reply to the charges before representation was made to the President. The fact that the matter involves a judge provides a compelling reason to accord justice and to comply with the rules of natural justice and the provisions of the Constitution.

[72] It is pointed out by the Privy Council in *Rees v Crane* that "*knowledge of the fact of a complaint may damage the subject of it, and specifically confidence in him or her as a professional person, in a way which may not be entirely repaired even by a successful out-come at the full hearing*". The court in *Rees v Crane* emphasised the importance of this aspect when the enquiry is into the conduct of a judge. He said at 847:

"But a judge, though by no means unique, is in a particularly vulnerable position, both for the present and for the future, if suspicion of the kind referred to is raised without foundation. Fairness, if it can be achieved without interference with the due administration of the Courts, requires that the person complained of should know at an early stage what is alleged so that, if he has an answer, he can give it." (emphasis added).

[73] Finally, on this point the words of Chief Justice Conteh in *Meerabux v The Attorney General of Belize (supra)*, when he quoted from Sir William Wade in his *Administrative Law* (6th Ed) at pages 570 are instructive:

"Natural justice is concerned with the exercise of power, that is to say, with the acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected." (emphasis added).

[74] Chief Justice Conteh then proceeds:

"I respectfully adopt this exposition of the law. Looking therefore at the relevant constitutional provisions on the removal of a judge of the Supreme Court (the statutory procedure if you will), I hold that a judge

who is the subject of those provisions, as the applicant in the instant case, is entitled, ex debito justitiae, to be heard at every stage of the procedure. This is so, even though the relevant Constitutional provisions are silent on the right of the affected judge to be heard. Justice requires it and if the independence of the judiciary means anything, this must be so. For without the right to be heard at each stage of the procedure, a judge would be condemned unheard. This will be a terrible day for the independence of the judiciary, the due administration of justice, and the rights and freedoms of Belizeans the protection and enforcement of which are entrusted to judges of the Supreme Court. If a judge of the Supreme Court does not have the right to procedural fairness, natural justice, fundamental justice, fair play in action, rational justice, substantial justice, or call it by whatever name or simply justice without any epithet, in a critical area as his tenure of office or the question of his removal therefrom, then it simply boggles the imagination to fathom how he can truly, with independence and integrity, dispense justice let alone protect the rights and freedoms of all Belizeans."

[75] I associate myself fully with and agree with the principle outlined here by Chief Justice Conteh. A judge who is a subject of accusations of gross misconduct, or for that matter any serious misconduct, is entitled, *ex debito justitiae*, to be heard at every material stage of the procedure. This must be so even though the relevant constitutional or statutory provisions may be silent on the right of the affected judge, because the right to be heard is a requirement of natural justice. Justice itself requires this. Indeed the denial of the right to be heard at every stage of the procedure, exposes a judge to the danger of being condemned unheard. It is not enough that the judge facing serious allegations of misconduct is given the right to be heard only at the

final stage of the procedure. This is so because a material step such as publication of the allegation of serious or gross misconduct against a judge, without affording the judge a right to be heard prior to such publication, may lead to serious or even irretrievable corrosion of the moral acceptance and dignity and stature of not only the judge concerned, but of the judiciary as an institution.

[76] It is in recognition of the sensitivities around accusations of misconduct against a judge that the *United Nations Basic Principles on the Independence of the Judiciary* (adopted by the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders held at Milan 26 August 1985 and endorsed by the United Nations General Assembly Resolution 40/32 of 29 November 1985 and 40/146 of 13 December 1985) provides in Article 17 that the examination of a complaint of judicial misconduct "... *at its initial stage shall be kept confidential unless otherwise requested by the judge*". Although the laying of a complaint or publication thereof is to be distinguished from its "*examination*", where the complaint, at its early stages and prior to it being lodged, is conveyed to a senior person who did not himself or herself observe the alleged misconduct, the rules of natural justice require that the judge being accused should be afforded an opportunity to be heard when such senior person considers lodging such complaint. This is particularly so if the senior person considers not only to lodge the complaint but also to publish the allegations of judicial misconduct against a judge.

South Africa

[77] Similarly, the Rules of the Judicial Service Commission, that regulate the procedure for complaints and enquiries in terms of section 177(1)(a) of our Constitution, empowers the JSC to permit the media and public, subject to such restrictions as may be considered appropriate, to attend any enquiry unless good cause is shown (Rule 5.6). Although in keeping with our constitutional values of openness and transparency, the rule is framed in language that is positive towards and empowers media and public access, the rule has two important control measures. Firstly, the JSC is empowered to impose such restrictions to media and public access, as may be considered appropriate. Secondly, if good cause is shown such access may not be permitted. Naturally, the judge being accused of misconduct will himself have an opportunity to show "*good cause*", if any. In the light of this double safe-guard valve, the decision to publish the complaint by any person through whose hands the allegation or complaint may pass, has to be carefully considered with due regard to, not only the right of the public to know, but also the interest and right of the judge being accused and the interests of justice and the judiciary as a whole. In my respectful view, such a step may not be taken without, at the very least, affording the judge or judicial officer concerned, the right to be heard. If the right to be heard is not accommodated in such circumstances, it is being violated.

[78] As is the case in the USA under the American Bar Association Rules and in Canada, in South Africa there is no requirement for routine publication at the initial stages of professional misconduct inquiries against attorneys and advocates under the Law Society Rules and the Bar Rules respectively. This is so, I presume, for sound reasons. The proceedings become a matter for public knowledge at the stage when legal proceedings are initiated before courts for removal or suspension of the respective member following a finding of misconduct by the professional disciplinary committee endorsed by the main governing council. By then the offending member has been informed fully of the allegations against him or her and has exercised the right to be heard before the professional disciplinary body. It makes no sense to expose South African judges routinely to less protective regime with regard to confidentiality at the initial stages of investigation into judicial misconduct.

Publication without details

[79] As I have already observed earlier in this judgment, the media statement released by the respondents, which is identical to the "*complaint*", of 30 May 2008 was lacking in material factual allegations. It simply labels the complaint lodged as one that alleges that an "*approach*" has been made by the applicant to some unnamed judges of the Constitutional Court in an improper attempt to influence that court's pending judgment. It does not say who the judges are that were approached as alleged, when and where they were approached or in what manner the unnamed judges were approached. It lacks the basic details that one would expect to find in a charge sheet or

indictment. It certainly does not have enough details to enable the person being accused to identify the event or conduct that is being indicted and to put him or herself in a position to respond. An objective reader or recipient of the news is not being given details of the alleged conduct to enable him or her to conclude that an "*approach*" has taken place as alleged. The reader and recipient of the news is being presented with a conclusionary statement without factual allegations. The applicant would for instance not reasonably have been expected to know which one of his interactions with which one of the judges of the Constitutional Court is alleged to have been an approach in an improper attempt to influence.

[80] The only portion of the complaint and media statement of 30 May 2008 which makes allegation of conduct of the applicant is paragraph 1 amplified to a limited extent by paragraph 2 that identifies the pending judgments. The rest of the seven paragraphs contain statements of principle and the view of the complainants as to why they regard the alleged approach (conduct) in a serious light without shedding light on what conduct of the applicant is complained of.

[81] It is no wonder that the applicant was not able to respond thereto other than by denying that he had attempted to influence the judges of the Constitutional Court. It is for this reason too, I presume, that the JSC was unable to deal with the complaint at its meeting of 6 June 2008 and ended up calling for details of the complaint to be furnished in the form of a statement by the complainant judges. All this, while his name is being paraded through

the media as a wrongdoer, and pressure is even being mounted on him to resign.

[82] In my respectful view, the lack of factual details in the published complaint added to the violation of the applicant's rights.

What violation and to what degree

[83] The complaint and the lodging thereof with the JSC are not *per se* a violation of the applicant's rights. It is proper and legitimate for any person who is aware of improper conduct to lodge a complaint with the relevant authority for examination of such conduct. The violation lies in the manner in which the complaint was lodged and published. The effective day on which the violation must be assessed is therefore 30 May 2008 when the complaint was lodged and the media statement was made accusing the applicant of improper judicial conduct. The violation as I find in this judgment to have taken place started on that day and endured until 17 June 2008 when details of the complaint were furnished and the applicant placed in a position to respond thereto.

[84] The unfairness with which the applicant was dealt with in the lodging and publication of the complaint is manifest in the following events and effects:

(a) The applicant's name was published in the media as a wrongdoer in "*serious*" judicial misconduct, whilst he did not have details to enable him to respond thereto;

(b) The applicant was thus unable to defend an attack on his dignity;

(c) The JSC, when approached by applicant, through his attorneys, was unable to furnish him with details of the complaint to enable him to respond thereto before the JSC meeting of 6 June 2008;

(d) The reasonable objective member of the public was disenabled to form their own opinion on "*facts*" (never mind balanced facts) as to whether there was in fact the alleged "*improper*" attempt to influence the decision of the highest court in the land;

(e) The JSC was not able to deal with the complaint referred to speedily and without delay, as required by international principles governing the handling of complaints against judges;

(f) There was pressure on the applicant to resign or accept suspension from office even before he knew the factual allegations against him;

(g) The applicant's own provincial bar council, the Cape Bar Council, found it inappropriate for him to remain in office and said so publicly. They thus implicitly withdrew their support for him to continue to serve as the judicial head of the Cape Provincial Division of the High Court;

(h) The applicant was in fact forced by the public and media pressure, without due process, to ask the Minister of Justice and Constitutional Development, to grant him special leave pending the determination of the complaint against him;

(i) It was not until the applicant had laid a counter-complaint against the respondents (10 days after the negative publications) that the respondents furnished details of their complaint against him (17 days after the unsubstantiated complaint);

(j) The applicant must have suffered in his image and esteem in the eyes of his colleagues and the wider public to which the media statement was disseminated.

[85] I now proceed to examine and identify the rights of the applicant which were violated as alleged by him. In other words, each alleged violation is considered separately.

Publication unlawful (Prayer 2)

[86] As I have found the publication of a media statement in the circumstances was unfair to the applicant and violated his rights. Prayer 2 has therefore been established.

Dignity (Prayer 3)

[87] There was an assault on the applicant's dignity from 30 May 2008 when he was unable to defend himself until 17 June 2008. Prayer 3 has thus also been established.

Fair Hearing (Prayer 5)

[88] All these violations emanate from the applicant not being accorded the right to a hearing in relation to the publication and the laying of the complaint. Prayer 5 is in my respectful view thus only established in relation to publication and the laying of the complaint. The right to fair hearing in relation to the complaint laid by the respondents and later substantiated on 17 June 2008 is not violated. The opportunity for the applicant to be accorded that right lies in the proceedings before the JSC which are still to commence.

Equality (Prayer 6)

[89] The applicant's right to equality before the law and equal protection of the law has equally been infringed in relation to the publication. He was

placed in an unequal position with regard to the protection of his rights in the face of negative publication against him between 30 May 2008 and 17 June 2008. His complaint in this matter relates solely to that period. Prayer 6 has thus also been established.

Privacy, access to courts and incompetence of complainant (Prayers 4, 7, 8)

[90] In regard to privacy (prayer 4) and the right to access to the courts (prayer 7), I cannot find that the applicant's rights were infringed or violated in any manner. No basis has been established for the alleged violation of those rights. Similarly, the assertion that it is incompetent, and therefore unlawful, for the respondents (as Judges of the Constitutional Court) to lodge a complaint with the JSC is unsustainable on the facts. Any one of them and therefore all of them are competent to lay complaints of judicial misconduct. As to whether it was advisable for all the second to fourteenth respondents to lay a complaint as one group, that is a different question which I commend on later in this judgment. Prayers 4, 7 and 8 have accordingly not been established. For reasons already mentioned at the beginning of this judgment prayer 9 does not fall to be considered.

[91] I reiterate for the sake of clarity that wherever in the course of this judgment I found a violation of one or more of the applicant's rights to have been established, I express no view in regard to the degree of violation. In particular this judgment has not considered and expressly refrains from expressing a view as to whether any of the respondents' conducts constitute

judicial misconduct. That is a question which falls exclusively within the jurisdictional domain of the fifteenth respondent (the JSC). It is certainly not the purpose or purport of this judgment to traverse the area of jurisdiction of the JSC.

Violation of judicial authority (Prayer 1)

[92] The applicant contends that the lodging of the complaint of gross misconduct by the respondents (second to fourteenth) against him and with the JSC (fifteenth respondent) violated the judicial authority of the Constitutional Court as conferred on the court by sections 165(1), 165(2) and 165(4) of the Constitution of the RSA, 1996. As I said earlier in this judgment, this contention is to be considered on the basis that the respondents concerned acted either "*as a Court*" or as a group of individual judges and outside the exercise of their judicial authority. On an overall conspectus of all the facts, the respondents did not act as a court exercising judicial authority in laying the complaint. For this reason alone, the citation of the Constitutional Court as a respondent, apart from other submissions made by the respondents, is improper and not permissible. The Constitutional Court as the custodian of judicial authority played no role in the facts that form the subject of the proceedings and should therefore not have been cited.

[93] As I understand the applicant's argument with regard to violation of judicial authority, he asserts that by reducing the court and themselves as judges to complainants, the respondents (second to fourteenth) have placed

themselves in a position where they cannot adjudicate over the applicant's case of alleged violation of rights, as they have now become litigants. There is no suggestion that the respondents cannot or may not adjudicate in any other cases in the Constitutional Court or that the authority of the Constitutional Court is violated in regard to any other matter. There is nothing in law to prevent any of the second to fourteenth respondents, or any other judges, from becoming litigants in this or any other court; and when they become litigants, as they have become in this case, they do not thereby violate the judicial authority of the courts in which they preside from time to time. It is in fact not unheard of for judges to be litigants in their own courts. After all as individuals they have rights like any other legal subject and are liable to be sued and entitled to sue. All that the law requires is that when their own cases serve before the courts they shall recuse themselves on the basis of ordinary principles that govern recusal. At best for the applicant therefore, his argument amounts to this, that there is likely to be an application for recusal if this case should ever serve before the Constitutional Court. That eventuality is not before this Court and need therefore not be considered. When and if it does occur, it will be dealt with on the basis on which it arises (possibly recusal). It is equally not necessary for this Court to speculate over what will happen if some or all of the respondents recuse themselves. That is not an issue before this court and I cannot see why it should be. There is therefore no merit in these proceedings for the applicant to aver violation of judicial authority. The violation of judicial authority has not been established as a fact in the proceedings before this Court.

[94] It may indeed be so that if only two respondents had lodged the complaint the number of judges that may one day have to recuse themselves would have been extremely limited; and that the route of two judges lodging the complaint would have been a wiser option to take as it would have been less disruptive of possible future proceedings before the Constitutional Court. That may be so. Indeed it would have been less dramatic for the respondents to have opted for only two of them being complainants. This Court is however mindful of the reasons advanced by the respondents for having decided to act as a group, though it is unnecessary to express myself thereon. As far as the disruptive effect of a wholesale recusal by all judges of the Constitutional Court is concerned, it deserves to be said that even if one or two of them had become the complainants and therefore the litigants in the long run, the likelihood is that the rest of the respondents would in any event have considered to recuse themselves, because traditionally colleagues who sit on the same bench do not preside over each other's cases, unless in purely formal and non-contentious proceedings. Be that as it may I am satisfied that the applicant has not established a case for violation of the judicial authority of the Constitutional Court. Prayer 1 has not been established.

Discretion and jurisdiction of the JSC

[95] The applicant has approached this Court and alleges that his rights protected in the Bill of Rights have been infringed. He seeks a declaration to that effect. He is entitled to do so in terms of section 38 of the Constitution

which is the supreme law. This Court does have jurisdiction to grant the relief sought by the applicant.

[96] As already mentioned the applicant has also, prior to instituting the present proceedings, and on 10 June 2008, lodged a complaint with the JSC, against the respondents (second to fourteenth), which complaint is still pending.

[97] The applicant's complaint before the JSC and his application before this Court are based on the same facts. The remedy which the applicant seeks from this Court and that which he seeks from the JSC are however different. Before this Court the applicant seeks a judicial declaration that his rights have been violated while before the JSC he seeks a finding that the conduct of the respondents amounts to gross judicial misconduct.

[98] The JSC is the constitutionally mandated body to determine whether a judge is guilty of gross judicial misconduct (section 177(1)(a)) and thus liable to be removed from office. Having regard to the wording of section 177 as a whole read with section 178(6) of the Constitution and the Rules Governing Complaints and Enquiries in terms of section 177(1)(a), it is clear that the JSC is vested with both the power and the duty to investigate allegations of gross judicial misconduct. It is correct too, as the respondents argue, that the JSC has exclusive jurisdiction to investigate such complaints of gross misconduct against judges. The jurisdiction exercised by the JSC is however different from that exercised by this Court. This Court has jurisdiction to issue a judicial

declaration of rights which is binding and subject only to an appeal to a competent court. The JSC does not have such jurisdiction either in terms of the Constitution or its founding legislation.

[99] In terms of section 19(1)(a)(iii) of the Supreme Court Act, 1959 (Act 59 of 1959) the power and jurisdiction of the court to enquire into, determine and to issue a declaration of rights is one which is exercised in the discretion of the court. The court has the power to enquiry into, determine and issue such a declaration at the instance of any interested person notwithstanding that such a person cannot claim any relief consequent upon such determination.

[100] This Court has been urged upon on behalf of the respondents in exercising its discretion to decide not to determine and issue the declaration sought by the applicant, it being contended that the granting of the relief sought by the applicant will prevent the JSC from fulfilling its constitutionally mandated function. I do not agree. As I have already stated, the JSC and the court of law exercise two separate and different jurisdictions in regard to the matter: the JSC enquires into allegations or complaints of gross judicial misconduct and the court of law enquiries into violations of rights. It does not follow that because there is violation of rights then there is gross judicial misconduct. Nor does it follow that because there is gross judicial misconduct then there is or has to be a violation of constitutional rights. This is more so in the present case where an examination and finding of violation of rights is restricted to the time when the complaint was made and published (30 May 2008) up to and excluding the date when the full and detailed complaint

against the applicant was lodged by the respondents (on 17 June 2008). The JSC on the other hand will have the opportunity and power to enquire into the matter taking into consideration all the facts before it including the detailed complaint of the respondents against the applicant and the applicant's full response thereto.

[101] The matter in regard to which the applicant seeks a declaration of rights is not an abstract, academic or hypothetical one but one in which the applicant has real and substantial rights. There is quite clearly a material dispute between the applicant and the second to fourteenth respondents as to whether the applicant had the right to be heard and was entitled to the protection of dignity when the complaint was lodged and published via the media statement. When the dispute as to the existence of rights is real and the court has jurisdiction, the court should not lightly shirk or oust its own power and jurisdiction to issue a declaratory order, when all other requirements and prerequisites for the exercise of such powers are satisfied. Furthermore, the fact that another remedy is available, for the applicant against the respondents, before the JSC does not render the grant of a declaratory order incompetent.

[102] As Farlam *et al* put it in *Erasmus: Superior Court Practice* (at A1-34 Service 29, 2007):

> "*Though it may be competent for a court to make a declaratory order in any particular case, the grant thereof is dependent upon the judicial exercise by that court of its discretion with due regard to the*

circumstances of the matter before it. In Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd the Supreme Court of Appeal held that s 19(1)(a)(iii) requires a two stage approach: (a) firstly, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; (b) secondly, if the court is satisfied that such an interest exists, it must be considered whether or not the order should be granted. In the exercise of its discretion, the court may decline to deal with a matter where there is no actual dispute. The court may, in the exercise of its discretion, decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract and academic. The principle that a court may decline to issue a declaratory order for the purpose of answering an hypothetical, abstract and academic question has no application where the court is asked to make a declaratory order on the basis of assumptions of fact and there is a real and pertinent dispute between the parties.

The availability of another remedy does not render the grant of a declaratory order incompetent." (Footnotes omitted)

[103] I also do not share the applicant's view that a declaratory order in his favour may have the effect of vitiating or tainting the process before the JSC with illegality. The process before the JSC, particularly the complaint against the applicant, remains totally uncontaminated and will be determined on a different basis from the issues decided in this judgment. It is in fact in the interest of public policy, justice and the judiciary as a whole that the complaint be fully investigated by the JSC. Nothing in this judgment and the proceedings before this Court prevents that and nothing should be construed as preventing that from happening.

[104] There is a further consideration why this court should accept and exercise its jurisdiction to declare a violation of constitutional rights where it has occurred on the facts before it. The consideration of violation of constitutional rights is essentially a judicial matter. The judicial authority of the Republic is vested in the courts (section 165(1) of the Constitution). It is the authority which the courts must exercise without fear, favour or prejudice (sec 165 (2)) irrespective of the identity of the litigants. When courts are approached by litigants who complain of violation of their rights and there is clear indication that such violation has taken place the courts should not lightly defer their jurisdiction to another tribunal not having such authority. Courts have an obligation in the exercise of their judicial authority to develop binding judicial precedents to guide future conduct in similar circumstances. The authority of the JSC on the other hand, besides with regard to the appointment of judges, is to conduct investigations and bring out findings in regard to allegations of judicial incapacity, incompetence and gross misconduct. See sections 174, 177 and 178 of the Constitution. It has no judicial authority to issue binding declaratory orders of the nature that the applicant seeks in this case.

Effect on the applicant's complaint

[105] In the complaint lodged with the JSC by the applicant against the second to fourteenth respondents, the JSC will focus on and decide whether any one or more or all of the said respondents is guilty of gross misconduct. In a way, the end question to be answered by the JSC is different from the one

which has been considered by this Court, which is whether the respondents have violated the constitutional rights of the applicant. Before the JSC the applicant however relies on the same facts as he relies on in this case and alleges that by the same misconduct the respondents violated his constitutional rights. It is therefore theoretically possible for the JSC to consider whether the conduct complained of constitutes misconduct without having to consider whether the conduct violated constitutional rights. It is however also probable that in order to evaluate and consider misconduct the JSC may end up having to consider the violation of constitutional rights. To the latter extent however the JSC will have to accept that this Court has already considered the violation of rights and issued an order which is binding on the parties and the JSC. That is the practical effect of any judicial declaration of rights. It has the binding effect and binds all parties and persons to whom it relates. I reiterate however that it is possible for the JSC to consider the question of misconduct without having to decide whether the conduct constitutes violation of particular constitutional rights. In the event the JSC has to look at the question of violation of rights, it will be bound by this judgment unless and until overturned on appeal.

[106] On behalf of the respondents this Court was urged not to exercise its discretion to pronounce on violation of rights on the basis that it was undesirable that this Court should issue an order that curtails the power of the JSC to look comprehensively at the conduct complained of in the proceedings before it. It goes without saying that I do not agree with the submission. As already mentioned, the consideration of violation of constitutional rights is

essentially a judicial process and is therefore the duty of the courts. The obvious benefit for the parties is that when violation of constitutional rights is considered by the courts, the rulings and findings of the courts are subject to appeal. This ensures that the rulings and findings will stand as final only if they can stand the test of appeal process. That advantage is lost when violations of rights are considered by a body other than a court of law. It is necessary to reiterate that when the JSC has to accept certain questions as already answered by a court of law, it is not thereby prevented from exercising its powers nor are its powers curtailed in performing its constitutionally mandated function. The JSC is still free to consider judicial misconduct in its fullness. It is simply to ensure that each question (in this case the violation of rights) is considered by the body most appropriate for the function (in this case a court of law) with all the advantages to all parties which attach to a consideration and decisions of a court of law.

[107] The over-arching consideration is that unless there are compelling considerations to the contrary, when approached by an aggrieved litigant, a court of law should not hesitate to exercise its constitutionally mandated function and must be slow to oust or restrict its own power and jurisdiction. In the present case, in my view, considerations point to the appropriateness and beneficial effect of violations of rights being considered by the court. The jurisdiction and constitutional mandate for the JSC to consider judicial misconduct remain unaffected.

Declaration of invalidity in terms of section 172(1) (a) of the Constitution

[108] In seeking to persuade the court to issue the orders prayed for by the applicant, Mr Ntsebeza SC, on behalf of the applicant, argued that once the applicant's constitutional rights are violated the court has no discretion, but is obliged to declare the lodging of the complaint to be invalid. He relied in this regard on section 172(1) (a) which provides that: "*When considering a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency*". The applicant relied particularly on the words "*must declare*". I do not agree with the submission. The court is not faced here with a situation contemplated in section 172(1) (a) where it is required to declare a law or conduct to be invalid for its unconstitutionality. The matter before court is simply one for declaration of rights and has been dealt with on that basis. The declaration of rights in this case has been found to have been established and is declared in the exercise of discretion which the court has in terms of section 19(ii)(a)(iii) of the Supreme Court Act 59 of 1959 read with section 38 of the Constitution. Section 172(1) (a) is not applicable in this matter. There is in any event no prayer in the application for declaration of invalidity and I would specifically decline to declare the complaint lodged against the applicant to be invalid.

Conclusion

[109] I therefore find that the applicant has established that certain of his rights were violated and that he is entitled to a declaratory order to that effect. He has, however, as already stated, failed to establish his entitlement to certain of the prayers in his Notice of Motion.

Order

[110] In the result, an order is issued in the following terms:

1. It is hereby declared that:

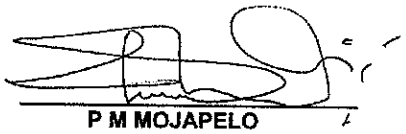
1.1 The publication by the Constitutional Court judges of untested allegations of gross misconduct against the applicant on the basis of *ex parte* representations by two judges of the Constitutional Court is unlawful (prayer 2);

1.2 The publication of allegations in the media of gross misconduct against the applicant by the Constitutional Court judges, on the basis of *ex parte* representations by two judges of the Constitutional Court unreasonably and unjustifiably violated the applicant's constitutional right to dignity (prayer 3);

1.3 The publication in the media of allegations of gross misconduct against the applicant by Constitutional Court judges, on the basis of *ex parte* representations by two judges of the Constitutional Court, unreasonably and unjustifiably violated the applicant's right to be heard prior to and in relation to such publication (prayer 5 – reworded to accord with finding);

1.4 The decision of the Constitutional Court judges to lodge a complaint of misconduct with the JSC against the applicant on the basis of *ex parte* representations by some Constitutional Court judges unreasonably and unjustifiably violated the applicant's right to equality (prayer 6);

2. Prayers 1, 4, 7 and 8 have not been established and are therefore dismissed.

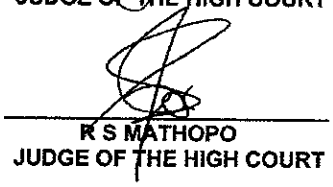


P M MOJAPELO
DEPUTY JUDGE PRESIDENT

I agree

D S S MOSHIDI
JUDGE OF THE HIGH COURT

I agree



R S MATHOPO
JUDGE OF THE HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA
WITWATERSRAND LOCAL DIVISION

Case No: 08/22932

Heard on 19 and 20 August 2008
Judgment delivered on 26 September 2008

Before Mojapelo DJP, Marais J, Gildenhuys J, Moshidi J and Mathopo J

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: (YES) / NO
(2) OF INTEREST TO OTHER JUDGES: YES / (NO)
(3) REVISED: (YES) / NO

25 Sept 2008 .....
DATE

.....
SIGNATURE

HLOPE, MANDLAKAYISE JOHN Applicant

and

CONSTITUTIONAL COURT OF SOUTH AFRICA 1st Respondent

LANGA CJ, 2nd Respondent

MOSENEKE DCJ, 3rd Respondent

MADALA, J 4th Respondent

MOKGORO, J 5th Respondent

O'REGAN, J 6th Respondent

SACHS, J 7th Respondent

NGCOBO, J 8th Respondent

SKWEYIYA, J 9th Respondent