VAN DER WESTHUIZEN, J	10th Respondent
YACOOB, J	11th Respondent
NKABINDE, J	12th Respondent
JAFTA, AJ	13th Respondent
KROON, AJ and	14th Respondent
JUDICIAL SERVICE COMMISSION	15th Respondent

JUDGMENT

Gildenhuys J

Introduction

[1] I have had the advantage of reading the judgment prepared in this matter by my brother Mojapelo DJP. I cannot, however, agree with his conclusion that some of the declaratory orders sought by the applicant should be granted. I am of the view that the application ought to be dismissed in its entirety. It is necessary for me to state my reasons for coming to this conclusion.

[2] The application before us is for interdictory relief (contained in part A of the Notice of Motion) and for a number of declaratory orders (set forth in part B of the Notice of Motion). The applicant is the Judge President of the Cape High Court. The first respondent is the Constitutional Court. The second to fourteenth

respondents are judges of the Constitutional Court. The fifteenth respondent is the Judicial Service Commission.

[3] The application relates to a complaint of judicial misconduct lodged by the judges of the Constitutional Court against the applicant with the Judicial Service Commission, and a counter-complaint of judicial misconduct lodged by the applicant against the Constitutional Court judges. The judges (the second to fourteenth respondents) oppose the relief sought in part B of the notice of motion. The Commission (the fifteenth respondent), although it was represented by counsel at the hearing before us, indicated that it will abide the findings of the Court.

[4] When these proceedings were initiated, the Judicial Service Commission had already decided to hear oral evidence on both the complaint and the counter-complaint. After service of the application on the Commission, the Commission gave an undertaking that it will not proceed with the hearing of oral evidence pending the outcome of these proceedings in respect of the relief sought in part B of the notice of motion. Mr Ntsebeza, who appeared for the applicant, informed us that in the light of this undertaking, the applicant will not ask for any relief under part A.

[5] The applicant asked, in part B of the notice of motion, for orders in the following terms:

"1. Declaring that the lodging of a complaint of gross misconduct by the Constitutional Court judges, acting as a Court, against the applicant and with the Judicial Service Commission violated the judicial authority of the Constitutional Court as conferred on it by sections 165(1), 165(2) and 165(4) of the Constitution;

2. Declaring that the publication of a media statement by the Constitutional Court judges, acting as a Court, of untested allegations of gross misconduct against the applicant on the basis of *ex parte* representations by two judges of the Constitutional Court to be unlawful;

3. Declaring that the publication of allegations in the media of gross misconduct against the applicant by the Constitutional Court judges, acting as a Court, on the basis of *ex parte* representations by two judges of the Constitutional Court unreasonably and unjustifiably violated the applicant's constitutional right to human dignity;

4. Declaring that the publication of allegations in the media of gross misconduct against the applicant by the Constitutional Court judges, acting as a Court, on the basis of *ex parte* representations by two judges of the Constitutional Court unreasonably and unjustifiably violated the applicant's constitutional right to privacy;

5. Declaring that the publication in the media of allegations in the media of gross misconduct against the Constitutional Court judges, acting as a Court, on the basis of *ex parte* representations by two judges of the Constitutional Court, the judges of the Constitutional Court unreasonably and unjustifiably violated the applicant's constitutional right to a fair hearing;

6. Declaring that the decision of the Constitutional Court judges, acting as a Court, to lodge a complaint of gross misconduct with the Judicial Service Commission against the applicant on the basis of *ex parte* representations by some Constitutional Court judges unreasonably and unjustifiably violated the applicant's constitutional right to equality;

7. Declaring that the decision of the Constitutional Court judges, acting as a Court, to lodge a complaint of gross misconduct with the Judicial Service Commission against the applicant on the basis of *ex parte* representations by some Constitutional Court judges unreasonably and unjustifiably violated the applicant's constitutional right of access to courts;

8. Declaring that the decision of the Constitutional Court judges, acting as a Court, to lodge a complaint with the Judicial Service Commission is unlawful and legally incompetent;

9. Directing, in the event that the Court is unable to deal with the relief sought in this notice of motion, that the application is referred to the Constitutional Court on an urgent basis and on the basis of direct appeal;

10. Granting such further and/or alternative relief as this Honourable Court may consider appropriate."

There is no prayer for costs.

[6] At the behest of the Court, Mr Trengove and Ms Steynberg were requested to present argument for the assistance of the Court as *amici curiae*. None of the parties raised any objection to their appointment on the first day of the hearing. On the second day however, Mr Ntsebenza informed us that he has been instructed to object against the appointment of Mr Trengove on the basis that he acted for the prosecuting authority in some of the Zuma/Thint matters. At our request, Mr Tengove and Ms Steinberg then withdrew form the case. Although they prepared and handed up heads of argument, we have not read them, nor did we receive any argument from the *amici*.

[7] There was also an application for consent to the institution of these proceedings against the first to the fourteenth respondents as contemplated in section 5 of the Constitutional Court Complementary Act No 13 of 1995. Mr Marcus, who appeared for the second to the fourteenth respondents, informed us that none of the Constitutional Court judges raised any objection to being party to these proceedings on the basis that such consent has not been formally granted. The application for consent was therefore not proceeded with.

[8] Mr Marcus pointed out during his argument that there is nothing in the Constitution or any other statute which vests the Constitutional Court with legal personality. On the contrary, the Constitutional Court has none of the hallmarks associated with legal personality. The Constitutional Court, despite its citation as first respondent, is not and cannot be a party to these proceedings. Nothing of a

practical nature turns on this, inasmuch as all the members of the Constitutional Court have been cited in their individual capacities.

The facts

[9] I shall very briefly state the facts which gave rise to this application. The full facts are set out in the judgment of my brother Mojapelo DJP.

[10] During March 2008, a number of applications involving Thint, Thint Holdings, the National Director of Public Prosecutions and Mr J G Zuma were argued in the Constitutional Court. Judgment was reserved. Towards the end of March 2008 the applicant visited the thirteenth respondent (Jafta AJ) in his chambers at the Constitutional Court. On 25 April 2008 the applicant visited the twelfth respondent (Nkabinde J), also in her chambers at the Constitutional Court. The two judges say that the applicant approached them in an improper attempt to influence the pending judgments in one or more of the applications.

[11] After the commencement of the Constitutional Court term in May 2008, the twelfth respondent approached the fifth respondent (Mokgoro J) and told her of the visit by the applicant. Meetings between various Constitutional Court judges ensued. The judges decided to lodge a complaint with the Judicial Service Commission against the applicant, and to issue a press statement that they have done so.

[12] The document containing the complaint is dated 30 May 2008. The first paragraph reads as follows:

> "A complaint that the Judge President of the Cape High Court, Judge John Hlope, 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 Service Commission, as the constitutionally appointed body to deal with complaints of judicial misconduct."

This paragraph is the only one which sets forth the factual allegations on which the complaint is based. The rest of the document deals mainly with the implications of the alleged conduct. The Chief Justice informed the applicant telephonically of the complaint, and thereupon sent it to him by facsimile transmission. On the selfsame day, shortly after the applicant was apprised of the complaint, the complainant judges released a press statement that the complaint has been lodged. The content of the press statement is almost identical to that of the complaint. Still on the same day, journalists started calling the applicant for his comments on the complaint.

[13] On 2 June 2008 the Judicial Service Commission asked the Constitutional Court judges for further particulars of the complaint. Four days later, on 6 June 2008, the Judicial Service Commission requested to be furnished with statements from the twelfth and thirteenth respondents.

[14] On 10/11 June 2008, the applicant lodged a counter-complaint against the Constitutional Court judges with the Judicial Service Commission. The counter-complaint contains the following accusations:

> "17.1 The judges of the Constitutional Court have undermined the Constitution by making a 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 Service Commission in terms of section 177 of the Constitution;
>
> 17.2 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 court (section 34 of the Constitution);
>
> 17.3 The conduct of the judges of the Constitutional Court failed to adopt a procedure that has upholds the democratic values of human dignity, equality and freedom; section 7(1) of the Constitution;
>
> 17.4 The conduct of the judges of the Constitutional Court failed to respect, protect, promote and fulfill the rights in the Bill of Rights;
>
> 17.5 The judges of the Constitutional Court failed to adopt a procedure that is fair in than even as I file this complaint I do not have a complaint from the judges of the Constitutional Court."

[15] On 12 June 2008 the twelfth and thirteenth respondents issued a joint statement reading as follows:

"1. For the record, we wish to state that we have not lodged a complaint and do not intend to lodge one and, consequently, we are not "*complainant Judges*".

2. With regard to the request by the Judicial Service Commission for statements from us we wish to state that we are prepared to make only this joint statement, and no other.

3. We place on record that, from the moment the matter about Judge President Hlope's visits was reported by O'Regan ADCJ to the Deputy Chief Justice Moseneke, we have on a number of 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.

4. We further record that on 28 May 2008, we attended a meeting called by Chief Justice Langa and Deputy Chief Justice Moseneke. We had occasion to discuss the issue that formed that subject of the complaint against Judge President Hlope. We again made it clear to them that we were not intending to lay a complaint against Judge President Hlope and neither did we intend making any statement about the matter. Reasons for such decisions were given to them.

5. Save for what is stated in the preceding paragraph, we are not at liberty to disclose the content of our discussion with the Chief Justice and Deputy Chief Justice, but wish to state that should they wish to disclose such content to the Judicial Service Commission, we have no objection thereto."

On the same day, the Judicial Service Commission wrote to the Chief Justice, seeking clarification. Further meetings of the Constitutional Court judges

followed. On 17 June 2008 the judges (including the twelfth and thirteenth respondents) lodged statements with the Judicial Service Commission in amplification of their complaint.

[16] On 4 July 2008 the Constitutional Court judges delivered a response to the applicant's counter-complaint. On 5 July 2008, the Chief Justice met with the Heads of Court to brief them on the matter. On 9 July 2008 the Heads of Court (excluding the Chief Justice and the applicant) issued the following media statement:

> "Press reports in the recent past have highlighted comment by various prominent people seriously critical of one or other of the parties to the dispute between the Constitutional Court Judges and Judge President Hlope. This is a matter of concern to the Heads of Court and the judiciary as a whole. Such comment assumes the truth of one or other version of the facts. When widely published, as it has been, it may well prompt or entrench unwarranted conclusions in the public mind as to where the truth lies. Understandably, the matter has aroused intense public interest but it is neither in the public interest nor fair to the parties to prejudice the issue. It will be for the Judicial Service Commission to deal with the matters as it deems fit. The Heads of Court therefore appeal to all concerned to refrain from such comment or its publication and to allow the Commission's process to go forward unimpeded."

Application of the Bill of Rights

[17] Section 8 of the Constitution (Act 108 of 1996) regulates the application of the Bill of Rights. It reads as follows:

> "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
>
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
>
> (4) ..."

[18] O'Regan J explained the import of section 8 in *Khumalo & Others v Holomisa*, 2002 (5) SA 401 (CC) at 420D-E [para 31], by saying:

> "Section 8(1) binds the Legislature, Executive, Judiciary and all organs of State without qualification to the terms of the Bill of Rights. Section 8(2), however, provides that natural and juristic persons shall be bound by provisions of the Bill of Rights 'to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty

imposed by the right'. Once it has been determined that a natural person is bound by a particular provision of the Bill of Rights, s 8(3) then provides that a court must apply and, if necessary, develop the common law to the extent that legislation does not give effect to the right. Moreover, it provides that the rules of the common law may be developed so as to limit a right, as long as that limitation would be consistent with the provisions of s 8(3)(b)." [Footnotes omitted]

[19] It is apparent from the above that the South African Constitution requires legislation or, in the absence of legislation, a common law rule to give effect to a constitutional right. This implies, according to Cheadle Davis Hayson, *South African Constitutional Law – the Bill of Rights* (2nd ed, 3-10 note 36, issue 5) that –

"Once the constitutional right has been validly expressed as a statutory or common-law rule, the right, in a sense, goes into hibernation – it is the statutory or common-law rule that does the work."

[20] In practice (as stated by Cheadle Davis Hayson, *op cit* 3.19) this is implemented as follows:

"• The court must determine whether there is any legislation giving effect to the right. If there is such legislation, that legislation regulates the conduct of private persons, and, subject to the constitutionality of that legislation, the Constitution's reach into the exercise of private power is through that legislation.

• If there is no legislation, the court must determine whether the common law gives effect to the right. If there is such a common-law rule, that rule regulates the conduct of private persons, and, subject to the constitutionality of that rule, the

Constitution's reach into the exercise of private power is through the common law.

- If there is no legislation or common law giving effect to the right, the court must develop a common-law rule to do so. This means that the Bill of Rights only reaches into the exercise of private power through the medium of a common-law rule.
- In developing the common law to give effect to the right, the court may limit the right, provided the limitation accords with section 36(1)."

[21] The applicant alleges that his constitutional rights to human dignity, privacy and equality were violated. All of them are injuries to personality rights. The first two are protected by the *actio injuriarum*. It was stated by O'Regan J in *Khumalo v Holomisa* (*supra*, at 518F-G):

> "In the contect of the *actio injuriarum*, our common law separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights."

The constitutional rights to dignity and privacy, insofar as they apply to interaction between private persons, are given effect to by the common law. Private persons who claim that such rights have been violated must claim redress under the common law. I will revert to this later in my judgment.

[22] The constitutional right to equality is closely related to that of human dignity. See Cheadle Davis Hayson (*supra*, 4-8 to 4-11, issue 1). The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000 governs unfair discrimination and contains positive measures in the public and private spheres. Litigants must bring their equality claims in terms of the Act, and not as claims based directly on a constitutionally entrenched right. See Cheadle Davis Hayson (*supra*, par 4.9.1 at 4-62, issue 6).

May the Court refuse to make declaratory orders in constitutional matters?

[23] Mr Ntsebesa submitted that the Court has no discretion to refuse a declaratory order in a constitutional matter. He relied on section 172(1)(a) of the Constitution, which reads:

> "(1) When deciding a constitutional matter within its power, a court-
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; ..." [Emphasis added]

[24] In my judgment the issue of declaratory orders remains discressionary, irrespective of whether or not constitutional issues are involved. Didcott J considered section 98(5) of the Interim Constitution (1993), which section is similar to section 172(1)(a), in the case of *JT Publishing (Pty) Ltd & Another v Minister of Safety and Security & Others* 1997 (3) SA 514 (CC). He held as follows (at 524H-525D):

"The reversal of the decision reached in the Court below brings duly before us the claim for a declaratory order which the applicants wish us to grant on the constitutional issues presented by them. That does not necessarily mean, however, that we are now bound to resolve those issues. Whether we should say anything at all about them must be settled first. I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here. Perhaps, what is more, a declaratory order on an issue quite unsuitable for one does not even amount to "appropriate relief", the type which section 7(4)(a) empowers us to grant. The description may well encompass not only the form of the relief but also the setting for it."

See also *Rail Commuters Active Group & Others v Transnet Ltd t/a Metrorail & Others* 2005 (2) SA 359 (CC) at 410C-E.

[25] Langa DCJ (as he then was) described a Court's power under section 172 of the Constitution in *Islamic Unity Convention v Independent Broadcasting Authority & Others* 2002 (4) SA 294 (CC) at 302D-E and 303A-C as follows:

"A court's power under section 172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or

conduct that is inconsistent with the Constitution invalid. It provides that when a court decides a constitutional matter, it ***must*** declare invalid any law or conduct inconsistent with the Constitution. It does not however expressly regulate the circumstances in which a court should decide a constitutional matter. ... [Emphasis added]

It is already settled jurisprudence of this Court that a court should not ordinarily decide a constitutional issue unless it is necessary to do so. Nor should it ordinarily decide a constitutional issue which is moot."

[26] The applicant's reliance on section 172(1) is misplaced. The publication of the media statement has happened. A declaration of invalidity cannot change that. In the application before us, the applicant does not seek an order invalidating the decision to lodge the complaint against him. Mr Ntsebeza informed us during argument that the applicant is prepared to submit to the investigation by the Judicial Service Commission. That notwithstanding, he still seeks an order declaring that the manner in which of the complaint against him was lodged, violates his constitutional rights. Such an order is not covered by section 172(1)(a) but by section 38 of the Constitution.

[27] Section 38 of the Constitution reads as follows:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) anyone acting in their own interest;

(b) ...

(c) ...

(d) ...

(e) ..."

Where, in a case such as this, a person brings an application to Court in his own interest, existing law relating to declaratory orders remains applicable. *Cf* Cheadle Davis Hayson (*supra* par 32.2.1 at 32-4, issue 1).

The circumstances under which the Court may make declaratory orders

[28] Section 19(1)(a)(ii) of the Supreme Court Act No 59 of 1955 empowers this Court, at the instance of any interested person, to enquire into and declare any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination. Watermeyer JA, in considering a provision in antecedent legislation similar to section 19(1), said in *Durban City Coucil v Association of Building Societies*, 1942 AD 27 at 32:

> "The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it."

The correctness of this approach was confirmed by the Appellate Division in *Reinecke v Incorporated General Insurance Ltd,* 1974 (2) SA 84 (A) at 93A-C and by the Supreme Court of Appeal in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd,* 2005 (6) SA 205 (SCA) at 212H-213A.

[29] At the first stage of the enquiry, the applicant must show that he has a legal interest in the right in respect of which he seeks a declaratory order. That means a direct interest the subject matter of the litigation, not merely an indirect concern. See *Henri Viljoen (Pty) Ltd v Awerbuch Brothers,* 1953 (2) SA 151 (O) at 169H and *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd v Investec Bank Ltd,* 2007 (5) SA 564 (W) at 574G-575C. If the orders are sought merely to assuage feelings wounded by an infringement of the applicant's constitutional rights, there would in my judgment not be a legal interest.

[30] The applicant says that he approached this Court for the declaratory orders because the Judicial Service Commission, not being a judicial institution, cannot grant such orders. He does not, however, explain what interest he claims to have in the orders sought. The applicant's interest could, firstly, lie in the impact which the orders will have on the investigation by the Judicial Service Commission. Secondly, it can serve as a precursor to a damages claim which the applicant might decide to institute. But for these possible interests, the orders sought would be no more than pronouncements on abstract or academic questions, with which the courts will not deal. See Van Winsen Cilliers Loots *The*

Civil Practice of the Supreme Court of Africa (ed) at 1054, and the cases listed in footnote 19.

[31] Coming to the second stage of the enquiry, the court must exercise a discression in each case to determine whether or not it is a proper case for making a declaratory order. Williamson J outlined the discression as follows in *Adbro Investment Co Ltd v Minister of Interior and Others,* 1961 (3) SA 283 (T) at 285B-D:

> "For a case to be a proper case, in my view, generally speaking it would require to be shown that despite the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."

[32] There is no limit to the circumstances under which it would be improper for the Court to make a declaratory order. The Court has a discression. Guidelines have, however, been developed within which the courts have in the past exercised their discression. For purposes of this judgment, the binding force of a declaratory order is of particular importance.

[33] Blieden J held in *Letseng Diamonds v JCI, Trinity Asset Management v Investec,* 2007 (5) SA 564 (W) at 575C-D that-

> "... it is settled law that a Court will not make a declaratory order unless there are interested parties on whom the declaration would be binding. *Ex Parte Nell* 1963 (1) SA 754 (A) at 760B where the point is made that it is not the function of a Court to give advice."

[34] The requirement that a declaratory order must become binding on all interested persons was demonstrated by Greenberg J in *Ex Parte Ginsberg,* 1936 TPD 155 at 158 as follows:

> "The jurisdiction of the Court to act under the section is limited to cases where it is asked, and has the power to give a decision which is binding on the persons concerned, i.e. as binding as if the dispute had been one in which the right was an existing right which authorised the granting of relief at the time of the institution of proceedings. This presupposes that the person approaching the Court has some right and that the persons who are subject to the reciprocal obligation are given an opportunity of being heard. It was contended on behalf of applicant that the Court was entitled to function under the section even though the only binding force of its decision rested on the doctrine of *stare decisis*. The difference between this doctrine and that of *res judicata* is clear – see *Rex v Manasewitz* (1933 AD at p 180) – and in my opinion it is the latter doctrine which is applicable to the section."

[35] The following cases provide further authority that a declaratory order should not be granted unless it will become *res judicata* between the parties

concerned: *National Director of Public Prosecutions v Mohammed NO,* 2003 (4) SA 1 (CC) at 21G, *Stadraad van Randburg v Ludorf NO & Andere,* 1984 (3) SA 469 (W) at 476I and *Hitchens v Raff & Another,* 1936 WLD 72 at 75.

Is this a proper case in which to grant the declaratory orders sought?

[36] Declaratory orders which do not accord with the requirements set by the legislature and developed by the Courts should not be granted. There are, in my judgment, a number of reasons why it would not be appropriate for this Court to make any of the declaratory orders sought in Part B of the Notice of Motion. I shall deal with each of them separately.

Public policy requires the counter-complaint to be considered by the Commission

[37] Van Dijkhorst J held as follows in *Family Benefit Friendly Society v Commissioner for Inland Revenue*, 1995 (4) SA 120 (T) at 126C:

> "When a Court has to determine whether it should exercise its discretion in favour of a declaratory order considerations of public policy come into play."

See also *Trustees, JC Poynton Property Trust v Secretary for Inland Revenue*, 1970 (2) SA 618 (T) at 619G.

[38] In terms of section 178(6) of the Constitution, the Judicial Service Commission "may determine its own procedure, but decisions of the Commission must be supported by a majority of its members". The Judicial Service Commission has made "Rules Governing Complaints and Enquiries in terms of section 177(1)(a) of the Constitution".

[39] Rule 2.1 provides as follows:

> "The Judicial Service Commission shall consider any complaint received from any source alleging incapacity, gross incompetence or gross misconduct of a judge". [Emphasis added]

Rule 2.6 is significant. It provides:

> "In order to perform its function under Section 177(1)(a) of the Constitution the Judicial Service Commission shall be entitled, *mero motu*, to investigate the capacity, competence or conduct of a Judge should it consider it necessary, whether or not a formal complaint has been received and, unless the circumstances justify any departure from the procedure set out above, shall, insofar as possible, follow the same procedure as in the event of a complaint."

[40] The Rules make it clear that the Judicial Service Commission is vested with the power, coupled with a duty, to investigate the conduct of a judge if and when considered necessary. Public policy require that it should deal with the

complaint. Compare *Veriava & Others v President, SA Medical and Dental Council & Others* 1985 (2) SA 293 (T) 310F-311F.

[41] The mere fact that the Judicial Service Commission is not a court of law is in my judgment insufficient reason for this Court to pronounce upon matters pending before the Commission. This Commission is in as good, if not a better position as this Court to do so. The Commission will have the benefit of oral evidence, which this Court does not have. Furthermore, the main complaint and the counter-complaint are so interwoven that they are best determined together and by the same adjudicating institution. I consider it to be quite contrary to the interests of justice that the Commission, as the constitutionally mandated body to determine complaints of serious judicial misconduct, should be trammeled by declaratory orders from this Court when deciding the issues before it.

The applicant elected to lodge his counter-complaint with the Commission

[42] The applicant lodged his counter-complaint with the Judicial Service Commission before the commencement of these proceedings,. The complaint and the counter-complaint involve virtually the same issues. The Commission has not yet heard the complaint or the counter-complaint. Both are still pending. Both relate to judicial misconduct.

[43] The applicant did not, before instituting these proceedings, withdraw his counter-complaint, nor did he advance any reason why it should not proceed before the Judicial Service Commission. On the contrary, he stated in his affidavit that he did not bring these proceedings "to stall the finalization of the complaint" against him, and he declared himself "ready and willing" to have the Judicial Service Commission deal with the complaint against him. The applicant elected to have his counter-complaint heard by the Judicial Service Commission, and he is bound by that election.

[44] It does not appear from the applicant's founding affidavit that he claims to have any interest in the matter other than the impact which the declaratory orders might have on the proceedings pending before the Judicial Service Commission. The applicant states, in paragraph 37 of his replying affidavit, that if he succeeds in the application before us, he foresees that the counter-complaint will revert to the Judicial Service Commission for a decision, *taking into account this Court's pronouncement*. If that is what the applicant anticipates, the issues between the parties will have to be adjudicated twice: once by this Court to determine whether there was a violation of the applicant's rights and once again by the Commission to determine whether any violation which this Court may have found, is serious enough to constitute gross judicial misconduct. That cannot be in the interests of justice.

The declaratory orders might usurp the functions of the Commission

[45] Should any declaratory orders which might be granted by this Court become *res judicata* in the proceedings before the Commission, the Commission will be bound by the orders, even if the Commission, after hearing oral evidence, might come to different conclusions. Such a possibility militates against this Court making any declaratory orders. On the other hand, if the declaratory orders would not become *res judicata*, they should not be granted.

[46] In the case of *Netto v Clarkson & Another,* 1974 (1) SA 61 (D & CLD), a school principal had to decide on alleged misconduct by a pupil and her possible suspension. Before the school principal finally made a decision, an application was lodged in the High Court for an order declaring that the pupil was, objectively speaking, guilty of grave misconduct. Miller J refused to give a declaratory order and said in his judgment (at 70A-F):

> "I cannot accept, therefore, that the objective existence of the fact of grave misconduct is ordinarily justifiable in a court of law. A finding by a principal that there was grave misconduct could be attacked in a court of law only on the well-established grounds referred to by CORBETT J, in the extract from his judgment [in *South African Defence and Aid Fund v Minister of* Justice, 1967 (1) SA 31 (C) at 34-35] quoted above. There is therefore no substance in the suggestion that it would be within the province of this Court, as a prelude to the possible exercise by the first respondent of her discression to suspend the pupil concerned, to make a declaratory order to the effect that the pupil was, objectively speaking, guilty of grave misconduct within the meaning of those words in

section 25. Were the Court to do so, it would be usurping the functions of the principal or, at best (or possibly at worst), acting in an advisory capacity towards her.

Nor is this a case in which it would be proper, even if permissible, for the Court at this stage to make any declaratory order or to express any opinion, whether at the instance of the respondents or of the applicant, regarding the girl's conduct. The [past] suspension decreed by the first respondent is admittedly a nullity and is, by consent of the respondents, to be declared such by the Court. The first respondent has therefore not yet made the decision which the law requires her (not the Court) to make in the first instance ..."

The declaratory orders should not be granted as prelude to a damages claim

[47] If the declaratory orders in prayers 3 to 7 of part B of the notice of motion are sought in order to pave the way for a damages claim against the complainant judges, it will result in a twofold process, which in my view is sufficient reason not to grant the orders.

[48] In *Naptosa & Others v Minister of Education, Western Cape* 2001 (2) SA 112 (C), a group of educators sought a declaratory order that they were entitled to certain financial benefits which the Department of Education withheld from them in the past. They elected not to bring claims sounding in money for the benefits they should have received. Conradie J (as he then was) held as follows:

"Instead of bringing claims sounding in money for benefits which they should have received but did not receive, the applicants claim a declaratory order that they are for 1998 and 1999 entitled to all benefits afforded to educators. This is not, in the circumstances, an appropriate remedy (at 125F).

The teachers cannot in a legal sense be said to be 'interested' in an outcome which leaves their rights so vague and undetermined. Moreover, an order in the terms sought would, in the circumstances of this case offend against the rule that a litigant is obliged to claim all available relief in the same action (at 125J-126A)."

See also *Bresgi v Lazersohn* 1939 AD 445 at 451-452.

[49] *In casu*, if the applicant intends to rely on the declaratory orders to support a compensation claim against the complainant judges, it is, for the reasons set forth in the *Naptosa* judgment, not an appropriate remedy. The applicant must, if that is his intention, institute a claim sounding in money.

The declaratory orders do not fit the framework of common law

[50] The applicant asks for declaratory orders, *inter alia* to the effect that the publication in the media of allegations of gross misconduct against him violated his right to dignity and other related personality rights provided under the Constitution. These personality rights are, in the circumstances of this case, protected by the law of defamation. Mokgoro J said in *Dikoko v Mokhatla* 2006 (6) SA 214 (CC) at 258F-G, par [62]:

"The law of defamation is based on the *actio injuriarum*, a flexible Roman-law remedy which afforded the right to claim damages to a person whose personality right had been impaired by another. The action is designed to afford personal satisfaction for an impairment of a personality right and became a general remedy for any vexatious violation of a person's right to his dignity and reputation."

See also *Khumalo & Others v Holomisa* 2002 (2) SA 401 (CC) at 418F-419D (para [27] and para [28] of the judgment).

[51] The Constitutional Court judges published a statement that they lodged a complaint with the Judicial Service Commission, alledging that the applicant attempted to improperly influence a pending decision of the Constitutional Court. On the face of it, the allegation is calumnious and therefore presumed to be unlawful. The authors of the statement can rebut the inference of unlawfulness by showing that the publication of the statement:

- was true and to the public benefit;
- constituted fair comment;
- was made on a privileged occasion; or
- was reasonable, having regard to all the circumstances of the case.

The last defence was introduced by the Supreme Court of Appeal in *National Media Ltd & Others v Bogoshi*, 1998 (4) SA 1196 (SCA) at 1212G-1213A.

[52] It is factually true that a complaint was lodged against the applicant. There is no constitutional right not to be named as an accused in a disciplinary enquiry. Consequently, the media statement naming the applicant might not infringe any of the applicant's personality rights.

[53] In a case comparable to the application before us, *Thint Holdings (Southern Africa) (Pty) Ltd & Another v National Director of Public Prosecutions* [2008] ZACC 14, it was argued that the issuing of a letter of request in terms of the International Co-Operation in Criminal Matters Act No 75 of 1996 violated Mr Jacob Zuma's dignity. The argument was rejected by the Constitutional Court in the following terms:

> "[50] Diginity is indeed an important right and value in our Constitution. Like any other right in the Bill of Rights, it may be limited subject to section 36 of the Constitution. The right to dignity, however, does not necessarily extend to the right not to be named as a suspect, once there is a reasonable suspicion that a crime has been committed.
>
> [51] There is currently no jurisprudence on the conflict between the right to dignity and the state's duty to fulfill its mandate in terms of section 179 and 205 of the Constitution. But there is much on the issue of the conflict between the rights to free expression and to dignity. However, that jurisprudence is of no use to Mr Zuma. One of the primary defences against defamation, viewed as an injury to one's dignity, is the defence of truth. That Mr Zuma is suspected of alleged corruption is the truth; it does not signify his guilt. His right to be presumed innocent under section 35(3)(h) remains untrammeled. What the NDPP has done is therefore no more than to communicate the objective fact that Mr Zuma is a suspect in an criminal matter. By analogy, this defence

> of truth could in principle apply and protect the NDPP from any interference in his constitutionally mandated function. As O'Regan J held in *Khumalo v Holomisa*, 'no person can argue a legitimate constitutional interest in maintaining a reputation based on a false foundation'. Similarly, there is no right not to be named as a suspect in a criminal matter." [Footnotes omitted]

[54] The haste with which the complaint was published, the lack of detail and the failure to obtain a response from the applicant before publication do not, by itself, invade any personality right of the applicant. It could, at best, be a factor showing that, if the complaint is not true, its publication was unreasonable. It might also constitute judicial conduct on the part of the complainant judges. That is for the Judicial Service Commission to decide. This Court should not do so.

[55] If it should appear that there was in fact an improper attempt on the part of the applicant to influence the Constitutional Court's pending judgments in the Zuma/Thint cases and that it was in the public interest to disclose the attempt, or that the issue of the press release informing the public of the alleged attempt was reasonable in the circumstances, the complainant judges will not be guilty of violating the applicant's right to dignity or other related personality rights protected by the Constitution. *Cf* the judgment of O'Regan J in *Khumalo & Others v Holomisa*, 2002 (5) SA 401 (CC) at 424H-I, para [44]. A person cannot argue a legitimate constitutional interest in maintaining a reputation based on a false foundation. See the *Khumalo* judgment at 421D, para [35].

[56] Should this Court decide on the papers before us, without the benefit of oral evidence, that there was a violation of the applicant's personality rights, it will imply a rejection of the defences raised by the judges. If such a finding by this Court becomes *res judicata*, it might prevent the Judicial Service Commission from reaching a different conclusion, or at least a have a significant impact on the Commission's investigation, of both the counter-complaint and the complaint.

Unfair treatment by itself does not warrant any of the declaratory order

[57] It has been submitted by Mr Ntsebeza in his argument before us that the applicant was treated unfairly. In particular, Mr Ntsebeza submitted-

- That the complainant judges should have given the applicant an opportunity to explain himself before lodging the complaint and releasing the press statement;
- That the complaint and the press statement contain insufficient details of the alleged attempted improper influence to inform the applicant what the complaint is all about and to enable him to respond to enquiries from the media;
- That the applicant has been given insufficient time after the compliant was lodged to consider the complaint and to work out his response to the media.

[58] Whatever misgivings this Court might have in respect of these and similar issues, unfair treatment which does not violate a statutory or common law right of the applicant, does not warrant the declaratory orders which the applicant seeks. Furthermore, it might be found that there were good reasons for the manner in which the matter was handled by the Constitutional Court judges.

Did the complainant judges act as a Court when lodging the complaint

[59] Each of the prayers in Part B of the Notice of Motion, except prayer 9, is based on the premise that the Constitutional court judges acted as a Court when the complaint against the applicant was lodged and the media statement was issued on 30 May 2008. The second respondent stated in his answering affidavit that the premise is "manifestly wrong" and that the judges (and not the Constitutional court) are the complainants. The judges are all party to the complaint because "every judge of the Constitutional court has a manifest interest and duty in dealing with an improper attempt to influence any other judge" (para 5.6 of the answering affidavit).

[60] The headings of both the complaint and the press release make it clear that they emanate from the JUDGES OF THE CONSTITUTIONAL COURT. Yet there are some isolated statements in the documents before us which could give the impression that the complaint was lodged by Constitutional Court acting as a Court. The issue is one of fact.

[61] Howie P, who filed an affidavit on behalf of the Judicial Service Commission, stated the following:

> "That allegation [that the judges of the Constitutional court acted as a Court] will necessitate examination and analysis of the parties' respective factual accounts which they have already given in their papers lodged with the JUDICIAL SERVICE COMMISSION. In the circumstances, it is respectfully submitted that this Honourable Court will have regard to the consideration that the allegation that the judges concerned acted *'as a Court'* is essentially an issue of fact which the JUDICIAL SERVICE COMMISSION in any event in the proceedings pending before it has the jurisdiction and power to determine based on the factual allegations before it. As has already been determined by the JUDICIAL SERVICE COMMISSION at a meeting held on 5 July 2008 those proceedings will, by reason of conflicts of fact in the respective complainants' versions lodged with the JUDICIAL SERVICE COMMISSION, involve the hearing of oral evidence."

[62] I agree that the capacity in which the judges acted when lodging the complaint is an issue of fact. It is one of the issues in the proceedings before the Judicial Service Commission. The Commission has the jurisdiction and the power to determine it. The Commission has already decided that the proceedings before it will involve the hearing of oral evidence. In my view the issue is best decided by the Judicial Service Commission.

Conclusion

[63] I proceed to consider the various prayers and what relief (if any) can properly be granted under each of them. All the prayers except the last one is based on the premise that the complainant judges acted "as a court" when lodging the complaint and releasing the media statement. Whether or not they did act as a court is an issue of fact. Mr Ntsebenza submitted that even if the judges did not act as a court, it is still open for this Court to conclude that the judges in their individual capacities violated the applicant's constitutional rights.

[64] The first prayer is based on an alleged violation by the judges of the judicial authority of the Constitutional Court as conferred on it by section 165 of the Constitution. As I understand the prayer, it is based on the premise that the judges became litigants by turning the Constitutional Court and themselves into complainants. Consequently, they can no longer adjudicate over the applicant's case in the event of the case coming before the Constitutional Court. There is no suggestion, however, that the complainant judges are prevented from participating in other Constitutional Court cases.

[65] In my judgment, there is nothing in law which prevents judges from being complainants. The possibility that if this matter should ever come before the Constitutional Court, the complainant judges would have to recuse themselves, is

insufficient reason to negate their right (which might also be a duty) to take on the role of complainant.

[66] The position might be different if the complainant was the Constitutional Court, and not the judges of the Constitutional Court. As I have said earlier in this judgment, the capacity in which the judges lodged the complaint is a factual issue on which this Court should not pronounce. Absent a finding that the judges acted as a Court when the complaint was lodged, prayer 1 cannot in my opinion be granted.

[67] Prayer 2 is for a declaration that the publication of the media statement containing untested allegations of gross misconduct against the applicant "on the basis of *ex parte* representations by two judges" is unlawful. As I have indicated, it might turn out that the applicant did in fact attempt to influence the decision of the Constitutional Court in the *Thint/Zuma* matters. By saying that, I am not at all suggesting or implying that he did so. If, however, it is found that the allegations of attempted improper influence are true and that notice thereof were published in the public interest, or if it is found that the publication was privileged or reasonable in the circumstances, the publication would not be unlawful and the rights of the applicant would not have been violated. I would be loath to decide, on the papers before us whether or not the publication of the complaint was lawful. The Commission would, after hearing oral evidence, be in a much better

position to do so. The declaratory order sought in prayer 2 should in my opinion not be granted.

[68] The third, fourth and sixth prayers relate to alleged violations of the applicant's constitutional rights to human dignity, privacy and equality. As I have demonstrated above, these rights are implemented through statutory or common law rules. I am not convinced that the applicant is entitled under a statutory or common law rule to any of the three orders. There are factual disputes which cannot be resolved on the papers before us, unless perhaps we apply the rules set forth in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,* 1984 (3) SA 623 (A) at 634E-635D. We were not urged to do so. This case is also, for the reasons which I have given earlier on, not an appropriate case to grant any of the three declaratory orders.

[69] The fifth prayer relates to an alleged violation of the applicant's constitutional right to a fair hearing by the initiation of impeachment proceedings against the applicant on the basis of *ex parte* representations by two of the complainant judges. The issue whether the judges should have given the applicant a hearing prior to lodging the complaint is an issue pending before the Judicial Service Commission. Mr Marcus, who appeared on behalf of the second to fourteenth respondents, referred us to weighty authority indicating that a hearing prior to lodging the complaint was not required in law. I will not venture any opinion on this issue.

[70] It is not clear on what "constitutional right to a fair hearing" the applicant relies for an order under prayer 5: a hearing preceding the filing of the complaint or a hearing of the complaint itself? I assume that he refers to a hearing prior to the lodging of the complaint, because a hearing of the complaint itself cannot be prejudiced by the fact that the representations on which it is based may be *ex parte* representations. It might have been unfair or even unethical not to have granted the applicant a prior hearing, but it was not shown that such unfairness or unethical conduct (if established) would amount to a violation of any statutory or common law right which the applicant might have. Nor was it shown that any right to a hearing prior to the lodging of the complaint is constitutionally entrenched. For the reasons given above it would in my view be inappropriate for this Court to make a declaratory order on the fifth prayer.

[71] The seventh prayer is for an order declaring that the lodging the complaint on the basis of *ex parte* representations by the two judges violated the applicant's constitutional right of access to courts. I fail to appreciate how the existence of a complaint can impede the applicant's access to courts.

[72] The eighth prayer is based on an assertion that it is incompetent and unlawful for the complainant judges, *acting as judges of the Constitutional Court*, to lodge a complaint against the applicant with the Judicial Service Commission. The argument, as I understand it, is that a complaint of misconduct cannot be raised through a Court decision. I am not convinced that this is correct. Mr

Ntsebeza, however, intimated that this prayer will fall away if it is found that when lodging the complaint, the judges did not act as a court. In my view, this Court should not pronounce on the issue whether or not the judges acted as a Court because that issue is pending before the Judicial Service Commission. The declaratory order should therefore not be granted.

[73] The ninth and last prayer is for an order that, should this Court be unable to deal with the relief sought in the notice of motion, the application be referred to the Constitutional Court "on an urgent basis and on the basis of direct appeal". I have some difficulty in understanding the prayer. Mr Ntsebeza explained that it is an alternative prayer. He did not press for an order in terms thereof.

[74] I respectfully agree with the conclusion reached by Mojapelo DJP that prayers 1, 4, 7 and 8 be dismissed. I cannot agree, however, that any declaratory orders should be made in respect of prayers 2, 3, 5 and 6. I would have dismiss the entire application.

Antonie Gildenhuys

A Gildenhuys
Judge of the High Court