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.

25/9/08 D. Marais

DATE SIGNATURE

In the matter between:

HLOPHE, MANDLAKAYISE JOHN	Applicant
and	
CONSTITUTIONAL COURT OF SOUTH AFRICA	First Respondent
LANGA CJ, P N	Second Respondent
MOSENEKE DCJ, D	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

MARAIS, J:

INTRODUCTION

[1] I have read the judgment of my brother Gildenhuys J which sets out the issues before us and the order proposed by him.

[2] I am in agreement with his reasoning and conclusions save only that I do not wish to express a final view on whether the judgment of this Court could constitute *res judicata* and if so on what parties it would be binding. I wish to add certain reasons of my own for coming to the same conclusion as that reached by Gildenhuys J. The first issue with which I deal is whether this Court retains the normal discretion when dealing with alleged invasions of constitutional rights. The second issue is how, should we have such a discretion, it should in this case be exercised.

Does this Court have a discretion?

[3] It is long established and trite that when asked to grant a declaratory order a court has a discretion whether to make such order or not.

[4] The power of a High Court to make a declaratory order exists at common law and is contained in section 19(1)(a)(iii) of the Supreme Court Act of 1959. According to the *Civil Practice of the Supreme Court of South Africa* Herbstein and Van Winsen 4th edition 1053 if an applicant seeking such an order establishes the necessary basis then "*the court decides whether the case is a proper one for the exercise of the discretion conferred on it*". Weighty authority for that proposition is cited and it is unnecessary to refer to it.

[5] However, Mr Ntsebeza SC who appeared for the applicant submitted somewhat belatedly that this Court was divested of this discretion as the infringements relied upon by the applicant were infringements of his constitutional rights and thus in terms of section 172 of the 1996 Constitution of the Republic of South Africa such discretion was removed. I say "*belatedly*" because the relief sought in the Notice of Motion is inconsistent with the relief envisaged in section 172 and because initially Mr Ntsebeza conceded that this Court did have a discretion. Nothing turns on the latter change in stance.

[6] Section 172 of the Constitution provides:

> "*(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; ;and*
>
> *(b) may make any order that is just and equitable, including –*
>
> *(i) an order limiting the retrospective effect of the declaration of invalidity; and*

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2)

(a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.

(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[7] I am satisfied that the reliance on this section is misplaced and that it has no application to the matter before this Court. The application is clearly brought in terms of section 38 of the Constitution and governed by it. The first reason for this conclusion is that the relief sought is a declaration that the applicant's constitutional rights have been infringed. That fits squarely within the provisions of section 38. In an endeavour to persuade us that this Court, although asked to make a declaration of rights, did not have a discretion to exercise Mr Ntsebeza sought refuge in section 172 of the Constitution which, so he contended obliged the court to make a declaration of invalidity should it find that acts invading the applicant's constitutional right had occurred. I found it somewhat surprising that this Court should be urged to make a declaration

of invalidity in terms of section 172 when wholly different relief was sought in the Notice of Motion.

[8] In drafting the prayers of its Notice of Motion the applicant appears to have recognised that section 172 had no application and sought not a declaration of invalidity but a declaration of rights as envisaged in section 38 of the Constitution which commences with the sentence: "*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*". This, and not section 172, is plainly the section in terms of which relief in the form of a declaration of rights has to be sought and the section which governs infringements of the Bill of Rights in circumstances such as this.

[9] The contention that section 172 obliges this Court to make a declaration of invalidity is surprising also because of the sheer absurdity of the order which was apparently sought from us (without having been sought in the Notice of Motion). The declaration of invalidity sought is absurd by virtue of the sheer impracticality and unintelligibility of the order which Mr Ntsebeza contended we were obliged to make. For example, we would then have to make an order "*that the publication of a media statement by the Constitutional Court judges was invalid*". What exactly would this mean? The act complained of was done; it cannot be undone. In what sense was it "*invalid*"? Are we declaring it to have no force and effect? The applicant's very complaint is that it has a most detrimental force and effect and invades his

rights. That cannot be undone by a declaration of invalidity. It is unnecessary to give further examples.

[10]

10.1 The application being framed in terms of section 38 and not section 172(1), the applicant cannot now rely on section 172 and seek relief inconsistent with his prayers.

10.2 It in any event seems clear that section 172 read as a whole was not intended to apply to conduct of the nature complained of, as demonstrated by the absurd results of applying section 172(1) in this case and also by the wording of section 172 as a whole which appears to relate to legislation and conduct of officials performing official tasks (see section 172(2) and the remedies provided in section 172(1) and (2)).

[11] The principle that a court exercises a discretion in deciding whether to grant declaratory orders for invasions of constitutional rights was laid down by Didcott J in *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at paras 15-17. Didcott J was dealing with section 98(5) of the 1993 Constitution but his judgment is at least persuasive authority for the proposition that in regard to the exercise of a discretion in deciding to grant declaratory orders for invasions of constitutional rights applies in terms of the present Constitution and in particular section 38 thereof.

[12] Of further significance in the *J T Publishing* case Didcott was dealing with section 98(5) of the 1993 Constitution and said:

> *"Section 98(5) admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to his wholly abstract, academic or hypothetical nature should it have in a given case, and going into it can produce no concrete or tangible result ..."*

[13] The significance of this is that despite the fact that he was dealing with a very similar provision to that relied upon for the applicant Didcott J found that such a provision did not oblige the court to even consider whether a law was inconsistent with the Constitution, but could instead exercise a discretion not to decide such question at all.

[14] In short what Didcott J decided was that not only did a section of the Constitution, the relevant wording of which was identical to the one relied upon by the applicant not deprive the court of its discretion when considering the issue of a declaratory order, but that in addition the court had no obligation to pronounce on the invalidity of a law.

[15] I accordingly conclude that section 172 of the Constitution does not apply in this case, which is governed by section 38. I further conclude that this Court retains the normal discretion exercised by a court when called upon to issue a declaratory order.

The exercise of our discretion

[16] On or about 10 June 2008 the applicant filed a complaint against the judges of the Constitutional Court who are cited in these proceedings as respondents. It is virtually common cause that the subject-matter of the complaint lodged with the JSC is effectively identical to the unlawful or unconstitutional conduct alleged against the first to fourteenth respondents in this application.

[17] In the present proceedings the applicant complains of the release of a media statement by the respondents of allegations of gross misconduct without having heard the applicant, that the manner of laying the complaint and the stage at which the media release was issued was unlawful, violated the applicant's constitutional right to human dignity, his right to privacy, his right to a fair hearing, his right to equality, and his right of access to courts.

[18] These complaints are echoed in the complaint against the respondents to the JSC where the applicant complains that:

> "*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 Services 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 courts (section 34 of the Constitution).*"

[19] The stance taken by the fifteenth respondent (Acting Chairperson of the JSC and President of the Supreme Court of Appeal of South Africa) appears from his affidavit in which he maintains:

> "5. *The JSC is presently seized of the respective complaints lodged by the other parties to this application. In terms of s. 177(1)(a) of the Constitution it is the duty and function of the JSC to determine those complaints and the complaints have submitted to the jurisdiction of the JSC in that regard. This applies to both the applicant and the judges of the Constitutional Court who have filed complaints against each other as well as detailed responses to each other's complaint.*
>
> 6. *The function and jurisdiction of the JSC is to be the sole adjudicator of any complaint which alleges that a judge has been guilty of gross misconduct, and to determine whether or not the complaint is justified.*"

[20] Fifteenth respondent adds:

> "*The JSC is a specialist body created by the Constitution and thereby assigned the task of acting as the tribunal which decides the issues raised by such complaints.*"

Fifteenth respondent then states:

> "8. *The JSC wishes to make it clear that because of its constitutionally established role as adjudicator in relation to the pending complaints involved it has no wish or intention in this application to comment on or discuss the merits of the rival factual versions put forward by the complainants and which are the subject of the pending complaints before it. It also considers it unnecessary and undesirable, with respect, for the purposes of disposal of this application, to deal with factual allegations made in the founding affidavit with regard to the JSC itself.*"

The fifteenth respondent continues:

"9. *In their papers before the JSC the respective complainants have set out in detail the facts on which they rely. The founding affidavit in this matter covers virtually all of the factual ground included in the complaint to the JSC by the applicant. Insofar as the application goes beyond the scope of that complaint it does so in a limited respect by alleging that the judges of the Constitutional Court acted 'as a Court'. That allegation will necessitate examination and analysis of the parties' respective factual accounts which they have already given in their papers lodged with the JSC. 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 JSC 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 JSC 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 JSC, involve the hearing of oral evidence.*

10. *By reason of what is stated in the preceding paragraph it is submitted that the facts used in support of the application are essentially the same as those which have been placed before the JSC. Insofar as the application raises the issue of the Constitutional Court judges having acted 'as a Court', no material facts are relied on additional to those that are already in dispute before the JSC and require resolution by the latter. If the applicant's version were to prevail before the JSC he would not have been guilty of gross misconduct. Moreover, the success of his own complaint would not be dependent upon whether the Constitutional Court judges acted 'as a Court'.*

11. ...

12. *As regards the declaratory relief sought in Part B, this is by its nature discretionary in law and this Honourable Court will have regard, it is submitted, to the fact that the rights which the applicant seeks respectively to assert and protect by means of this application are capable of assertion and protection before the JSC, and have already been advanced in the latter forum."*

[21]

21.1 Fifteenth respondent then maintains:

> "*14. Apart from the aforegoing aspects it is submitted that it is within the competence and duty of the JSC to investigate allegations of gross misconduct by a judge even if no formal complaint is made or an intended complaint is formally defective. As already indicated, whether the complaint by the judges of the Constitutional Court is substantively defective for want of credibility or otherwise is already an issue before the JSC.*
>
> *15. It is accordingly contended by the JSC that the application cannot competently, in law, deprive the JSC of its constitutional jurisdiction and duty to proceed with the hearing of oral evidence as already decided on by it, as part of its lawful process of determining the complaints currently pending before it.*"

21.2 I am in respectful agreement with the statements by Howie (P) which I have quoted.

[22] In his founding affidavit the applicant adopted the stance that if this Court were to uphold his complaints then that would put an end to the proceedings against applicant in the JSC. In my view this suggestion is far-fetched and without merit. It is unnecessary to discuss it further because the applicant during the court proceedings did *volte face* and maintained that he was more than willing that the proceedings before the JSC should continue and that any declaratory order which this Court would issue would have little or no effect on the JSC proceedings and would certainly not nullify the proceedings before the JSC insofar as they involved the complaint against the applicant.

[23] In dealing with the previous stance of the applicant the first respondent, the Chief Justice of South Africa had the following to say:

> "*66.1 In my respectful submission, it is quite contrary to the interests of justice that the JSC, as the constitutionally mandated body to determine complaints of gross misconduct, should be prevented from performing its duties.*
>
> *66.2 I further respectfully submit that even if the applicant's contentions in the present matter are correct and that his rights have been unjustifiably violated, it does not follow that this would be an end of the complaint against him. As I understand the applicant's contention, he takes the view that even if he is guilty of gross misconduct, the JSC cannot determine the issue and he is free to continue to exercise judicial authority. I find this contention remarkable. It will be addressed in argument.*"

[24] I am in respectful agreement with these comments and in my view the issue of a declarator in this case could not have the effect initially envisaged by the applicant of putting an end to the complaint against him. That was however the basis on which the applicant came to court and sought the declarators contained in the Notice of Motion. This is emphasised by the fact that the applicant initially sought an interim interdict against the JSC from proceeding with the hearing of the complaint by the judges of the Constitutional Court pending the outcome of the hearing of the proceedings for a declarator.

[25] The applicant now seeks to justify the seeking of declarators in respect of the same complaints as are before the JSC in applicant's complaint against the respondents on the ground that this Court has the power to issue a declarator making it clear that the applicant's rights have been invaded

whereas the JSC before whom the same complaints are pending has no such power.

[26] Prior to the bringing of this application the applicant thus subjected to the jurisdiction of the JSC the same complaints and issues as have arisen in this application and fall to be decided. We are thus being asked, by way of declaratory orders to pre-empt the decisions of the JSC on matters which it is tasked to decide and which the applicant has placed before them for decision.

[27] The argument in favour of our granting declaratory orders having that effect is that the JSC is not a court and does not have the power to issue such declaratory orders. That is indeed so but it provides no reason why we should exercise our discretion to grant declaratory orders when the same issues are already before a tribunal and which has the duty and the authority to rule on the complaints as a whole and make any necessary findings of fact, particularly where the applicant himself laid the complaint and subjected it to a decision by the JSC.

[28] In respect of the contention that it was appropriate for the applicant to seek declaratory orders as this relief is not available from the JSC, I am unable to find a real difference between the effect of declarators issued by this Court and findings made by the JSC and communicated to the public. Both will serve the purpose (should they favour the applicant) of, as far as possible, undoing the harm done to the applicant and his reputation.

[29] We must ask ourselves what is the effect of our making a ruling by way of a declaratory order on the proceedings of the JSC. There are two possibilities. The first is that our declaratory order or orders constitute *res judicata* and thus effectively deprive the JSC of its duty to determine whether there is substance in the complaints against the respondents. The strangest situation would then arise in deciding on whether to impeach the respondents, if we have found any of the applicant's complaints to be valid. The JSC would have to consider whether the conduct which we have found constitutes serious misconduct and therefore warrants impeachment. The piecemeal decision of issues arising from the complaints by dividing such decisions between two tribunals is utterly undesirable. This is a consideration apart from and in addition to the consideration that we are entering upon the territory of the JSC by deciding matters which they are tasked with deciding. Such a two-stage process is not only undesirable but unnecessary and presents difficulties in practice as the operation of the previous two-tier system in respect of minimum sentences recently demonstrated.

[30] Mr Maleka SC for the JSC submitted:

> "*14. There is a clear connection between the complaint and the counter-complaint. Both relate to the same parties, and also to their conduct. The connection is significant to the issue of the jurisdiction of the JSC, and also the desirability granting declaratory orders which could have the effect of constraining the jurisdiction of the JSC to properly investigate the complaint and counter-complaint.*"

[31] I am in agreement with this submission which further highlights the undesirability of this Court making any order which intrudes upon the decision-making process of the JSC.

[32] Should the JSC be bound by our factual findings on which we base any declarators that we might issue, then they have to proceed to the next stage of the inquiry which is to evaluate the seriousness of the conduct that we have found, to decide whether there has been gross misconduct warranting impeachment. The JSC will then have to make a value judgment based on our factual findings. There may be further factors on which the JSC wishes to make findings which are intimately related to the factual findings made by us. The question will then arise whether those findings can be added to our findings or whether the JSC is not entitled to build on our findings. This will be a difficult line to draw and is a further reason why we should not put the JSC in that position. Such a situation could well be a fertile ground for further litigation with courts being asked to rule on the precise effect of our findings on the hearing before the JSC. Given that a speedy resolution of the complaints before the JSC is highly desirable in the public interest and that of the judiciary, this is a further reason for this Court not to issue any declaratory orders in respect of matters which fall to be decided before the JSC.

[33] Should on the other hand our findings not be *res judicata* and the JSC is not bound by them then we will have two tribunals inquiring into the same conduct. The JSC inquiry will be more comprehensive in that oral evidence and presumably cross-examination will be allowed. That places the JSC in a

far better position to make any factual findings for example, as pointed out by Howie JP on whether the Constitutional Court judges acted "*as a Court*". It is obvious that the JSC has a considerable advantage over this Court in arriving at a correct decision on contested issues, our findings being constrained by the rules relating to decisions on disputes of fact in opposed applications, whereas the JSC can in effect conduct a proper trial and not be subject to the same constraints as this Court is.

[34] It is inherently undesirable that two tribunals inquire into the same conduct, this being a waste of time, money and expertise. But more than that the two tribunals particularly where there are different methods of arriving at a decision might come to different conclusions. This in itself is undesirable but even more undesirable is that this is a high profile matter and the public perception has to be taken into account. The judiciary would inevitably be subject to a loss of confidence in the public eye should there be such different results, as the public will be unable to understand the effect of different methods of deciding the same dispute. The public would simply say that judges cannot agree on what occurred and that will leave them in the dark in a matter of this public moment and exposure. This is highly undesirable.

[35] Irrespective of whether our ruling would be *res judicata* or not there is a further factor to be considered. In deciding whether to rule on the applicant's complaints against the Constitutional Court judges which are the basis of the declaratory orders sought, this Court has inevitably to enter the field of judicial ethics. The body constitutionally charged with inquiry into the conduct of

judges and their observance of judicial ethics is the JSC. By virtue of its constitutional powers, its status and composition it is the ultimate watchdog over the conduct of judges and judicial ethics. This is a further reason why we should decline to enter into the dispute between the applicant and the respondents and make findings.

[36] Herbstein and Van Winsen (4th edition) at p 1054-1061 give numerous examples of circumstances in which a court will and will not decide to issue a declarator. Of interest the learned authors say that a court refused to make a declaratory order "*where the court, by making a declaratory order, would in a roundabout way be assuming a jurisdiction expressly reserved for the Constitutional Court*". The authors referred to *Masuku and Another v State President and Others* 1994 (4) SA 374 (T) at 380E-381B. In that case Eloff JP at 380G refused to make a declaratory order and said: "*If I were to accede to counsel's request I would by a roundabout way be assuming a jurisdiction which is expressly stated to be that of the Constitutional Court only*".

[37] In regard to the manner in which we exercise our discretion, I again emphasise that the applicant has subjected his complaints to the adjudication of the JSC. The process was in motion and headed for an immediate hearing before the present proceedings were launched. There is thus every reason to say to the applicant "*You have chosen your forum. Proceed there*".

[38] In the immediately succeeding paragraphs I briefly summarise most of the reasons why I consider it wholly inappropriate for this Court to issue a declarator.

[39]

39.1 Before instituting these proceedings the applicant laid a complaint against the Constitutional Court Judges on exactly the same grounds as arise in this application. As Howie (P) points out in his affidavit: "*The founding affidavit in this matter covers virtually all of the factual ground included in the complaint to the JSC by the applicant*".

39.2 The JSC is thus seized of the applicant's complaint. As Howie (P) points out the applicant's complaint involves the conduct of judges (and whether such conduct amounted to gross misconduct) and "*the JSC is a specialist body created by the Constitution and thereby assigned the task of acting as the tribunal which decides the issues raised by such complaints*".

39.3 The JSC therefore is:

39.3.1 not only the constitutionally mandated adjudicator of disputes of the nature which arise before us but also

39.3.2 already seized of the dispute before us, at the instance of the applicant and

39.3.3 in a better position (by virtue of oral evidence) to be able to properly adjudicate the issues.

[40]

40.1 Should make a finding on the issues before the JSC we are intruding on its turf and *prima facie* any ruling we give (made on affidavit evidence only) will be binding on the JSC as constituting *res judicata*.

40.2 For the applicant to subject his complaints to the JSC (the proper forum) for adjudication, then to rush to this Court and ask it to rule (using the inferior tool of affidavit proceedings) on the very issues which the applicant has placed before the JSC, borders on an abuse of the process of the court. Not only:

40.2.1 has the applicant chosen his forum which will in due course rule on his complaints;

40.2.2 are we being asked pre-empt and emasculate the JSC in the proceedings before it where it is performing its constitutional task;

40.2.3 does the dual process present the difficulties and undesirable consequences which I have already pointed out at length but also

40.2.4 the dual process involves wholly unnecessary duplication of costs to obtain findings which the JSC is obliged to make.

[41] I am not in agreement with the suggestion that by refusing to enter on the turf of the JSC and to hearing of the applicant's complaint we are "*shirking*" the issues before us. We have weighty reasons not to address them. I further consider the approach that if we find an apparent violation of the applicant's rights, that we should then make a suitable declaratory order to be incorrect. This approach ignores the two-stage process and the necessity to exercise a discretion as described by Watermeyer JA in *Durban City Council v Association of Building Societies* 1942 AD 27 at 32 already referred to by my brother Gildenhuys.

[42] Having regard to the above considerations and those raised by Gildenhuys J in his judgment I hold that this Court should exercise its discretion by refusing to grant any of the declaratory orders sought by applicant. I therefore concur with the orders proposed by Gildenhuys J and would dismiss the application.

D. Marais

D MARAIS
JUDGE OF THE HIGH COURT