



CONSTITUTIONAL COURT OF SOUTH AFRICA

Baaitse Elizabeth Nkabinde and Another v Judicial Service Commission and Others

CCT 122/16

Date of judgment: 24 August 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 24 August 2016, the Constitutional Court handed down its judgment in an application brought by two of its members, Justice BE Nkabinde and Justice CN Jafta, for the rescission of an order made by the Court on 16 May 2016.

After the coming into operation of the Judicial Service Commission Amendment Act, 2008 (amending the Judicial Service Commission Act, 1994) (JSC Act) the Judicial Service Commission (JSC) referred to the Chief Justice, as Chairperson of the Judicial Conduct Committee, a complaint that the applicants and other Justices of the Constitutional Court lodged with the JSC in 2008 against Judge President Hlophe for consideration. The complaint was that Judge President Hlophe had tried to unduly influence the applicants in regard to the outcome of certain cases relating to President Zuma in which the Constitutional Court was to hand down judgments. The Chief Justice established a Judicial Conduct Tribunal (Tribunal) to conduct an inquiry into the complaint. He appointed Judge Labuschagne, as President of the Tribunal, as well as two other members of the Tribunal. The applicants were required to testify in the Tribunal to substantiate the complaint.

In 2013 the applicants instituted a review application in the Johannesburg High Court to have that Court set aside the JSC's decision to refer the complaint to the Chief Justice and to have section 24 of the JSC Act declared unconstitutional. Section 24 gives power to the President of the Tribunal to appoint a prosecutor under the National Prosecuting Authority to lead evidence in the Tribunal. The review application was opposed by JSC. A Full Bench heard the application and dismissed it with costs. That Court also dismissed the applicants' application for leave to appeal. The applicants then applied to

the Supreme Court of Appeal for leave to appeal. That Court dismissed their appeal on the merits but set aside the costs order against them.

The applicants lodged an application with this Court for leave to appeal against the decision of the Supreme Court of Appeal. The JSC opposed that application. On 16 May 2016 this Court made an order dismissing the application on the basis that the Court did not have a quorum as a result of the Justices who were disqualified from sitting in the matter. This means that, in dismissing the application the Court was not making a pronouncement on the merits of the application. It was simply dismissing it because it could not constitutionally adjudicate it on the merits and could also not leave the application pending indefinitely. This basis for dismissing an application for leave to appeal where this Court does not have quorum was used to dismiss Judge President Hlophe's application for leave to appeal to this Court.

The applicants apply for the rescission of the order of 16 May 2016 on the basis that it was made erroneously and in their absence. There are two grounds upon which they rely in support of their application. The first is that this Court was obliged to have raised with them the issue of the disqualification of some of the Justices of this Court to enable them to make written submissions before this Court could dismiss their application. The second is that the Justices who were disqualified from sitting in the matter participated in making the order and this was an irregularity.

In its judgment this Court has held, firstly, that the Rule under which the applicants brought their application for rescission (Rule 42(1)(a) of the Uniform Rules of Court read with Rule 29 of the Rules of the Constitutional Court) is not applicable to decisions made by this Court in applications for leave to appeal at Conference without a public hearing. The Court reasoned that this is so because the requirement in that Rule that the order sought to be rescinded must have been made in the party's absence is meant for situations where a litigant otherwise has a right to be present in Court when the Court considers or adjudicates a matter in which he or she is a party. The Court pointed out that, since it considered the applicants' application at Conference, the Rule was not applicable. The procedure that the Court followed in dealing with the application is the same procedure that is normally used to deal with many other litigants' applications for leave to appeal. The Court said that this ground alone was sufficient to dismiss the applicants' application.

The Court held that in any event there was no merit in the applicant's contention that it should have raised the issue of the disqualification of some of the Justices with the applicants before deciding their application. The Court stated that Rule 19(3) of its Rules permits a party applying for leave to appeal to include in his or her affidavit any argument he or she wishes to place before the Court in regard to any issue. It also pointed out that Rule 19(6) authorises the Court to summarily deal with applications for leave to appeal without oral argument and without any written argument other than written argument included in the affidavits. This is the procedure the applicants' should have followed but they elected not to do so.

The Court also rejected the applicants' contention that the disqualified Justices were not entitled to participate in the decision to dismiss their application on 16 May 2016. The Court pointed out that the principle established in the *Hlophe* matter entitled those Justices to be party to the order dismissing the applicants' application.

In conclusion, the Court emphasised that it is in the interests of justices that the matter of the complaint against Judge President Hlophe be brought to finality without any further delay. The Court noted that the events that gave rise to that complaint occurred in 2008 and eight years later the matter has not be finalised.