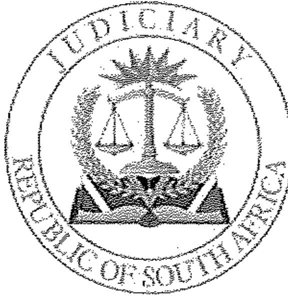

JUDICIAL CONDUCT COMMITTEE

Ref no: JSC/1040/22

In the matter between:

KATHY BARNARD **COMPLAINANT**

and

JUDGE ANTON VAN ZYL **RESPONDENT**

as well as

Ref no: JSC/1124/22

JUDGE PRESIDENT THOBA POYO-DLWATI **COMPLAINANT**

and

JUDGE ANTON VAN ZYL **RESPONDENT**

Rulings: Jafta J (majority)

Mabindla-Boqwana JA (dissenting)

Saldulker JA (concurring)

Decision: Complaints are remitted to the Acting Chairperson for an inquiry to be urgently conducted in terms of section 17 of the Act.

Date: 26 July 2024

RULING IN TERMS OF SECTION 16 OF THE JSC ACT

JAFTA J (SHONGWE JA and SALDULKER JA concurring)

Introduction

[1] These complaints were referred to us by the Acting Chairperson of this Committee. This was done in terms of section 16(1) of the Judicial Service Commission Act[1] (Act) which obliges her to refer complaints to the Committee under certain circumstances. If the Chairperson is satisfied that in the event of a complaint being established, the Judicial Service Commission (Commission) is likely to find that the Judge against whom the complaint is lodged suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, she must refer such complaint to this Committee.

[2] The referral requires the Committee to determine whether the complaint in question should be investigated by a Tribunal. If so, a recommendation to that effect must be made by the Committee to the Commission. In determining whether a complaint should be investigated by a Tribunal, the Committee must consider whether such complaint, if established, would *prima facie* prove incapacity or gross incompetence or gross misconduct.[2] If not, the Committee may not recommend that the complaint be investigated by a Tribunal.

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[1] Act 20 of 2008.

[2] Section 16(4) of the Act provides: At the meeting referred to in subsection (2), the Committee must consider whether the complaint, if established, will prima facie indicate incapacity, gross incompetence or gross misconduct by the respondent, whereupon the Committee may -

(a) refer the complaint to the Chairperson for an inquiry referred to in section 17 (2); or

(b) recommend to the Commission that the complaint should be investigated by a Tribunal.

[3] Notably, the Act confers exclusive powers to make recommendations of that kind to this Committee. This means that whenever an opinion is formed that a complainant ought to be investigated by a Tribunal, the complaint must be referred to the Committee for it to make the necessary recommendation. This applies even where the complaint was the subject of an inquiry in terms of section 17 of the Act.[3] However, inquiries under this section are limited to non-impeachable complaints.

[4] All impeachable complaints must be investigated by a Tribunal. These are complaints concerning the grounds for removal from office that are listed in section 177 of the Constitution. This is what section 19 of the Act demands.[4] Therefore, a recommendation by this Committee to the effect that a complaint must be investigated by a Tribunal constitutes the first step in the process of impeaching a Judge under section 177 of the Constitution.

First complaint

[5] The first complaint was lodged by Ms Kathy Barnard in October 2022. She alleges that the relevant case was heard by Judge Anton Van Zyl on 03 September 2020 and that judgment was reserved. She states that at the time of lodging the complaint, the judgment had been outstanding for two years. She laments the fact

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[3] Section 17 mandates the Chairperson or a designated member of the Committee to determine the merits of a complaint.

[4] Section 19(1) of the Act reads: whenever it appears to the Commission –

(a) on account of a recommendation by the Committee in terms of section 16(4)*(b)* or 18(4)*(a)*(iii), *(b)*(iii) or *(c)*(iii); or

(b) on any other grounds, that there are reasonable grounds to suspect that a judge-

(i) is suffering from an incapacity;

(ii) is grossly incompetent; or

(iii) is guilty of gross misconduct, as contemplated in section 177 (1)(a) of the Constitution, the Commission must request the Chief Justice to appoint a Tribunal in terms of section 21.

that she is unable to take decisions about her property whilst the judgment is outstanding.

Second complaint

[6] The second complaint was filed by Judge-President Thoba Portia Poyo-Dlwati of the KwaZulu-Natal Division of the High Court. The complaint was lodged in July 2023 and was supported by a short affidavit of four paragraphs, deposed to by the Judge-President. The complaint was lodged against Judge Anton Van Zyl.

[7] In her affidavit, Poyo-Dlwati JP alleges:

"I am duly authorised to depose to this affidavit. In terms of the Judicial Code of Conduct, Judges are required to deliver judgments within three months from the date of hearing of the matters. This time period can be extended provided that the Judge concerned makes arrangements with the Judge-President of the Division.

In the matters at hand retired Judge Anton Van Zyl has failed to deliver timeously various judgments. I attached hereto a schedule reflecting his outstanding judgments. I am therefore lodging a complaint of contravention of the Judicial Code of Conduct and the Norms and Standards by Judge Van Zyl as I have not received any explanation about the cause of the delay in all these judgments".

[8] The schedule referred to reveals that in the matter of Allan Gray v Chairperson of the KZN, case number 4426/2011, judgment was reserved on 12 December 2012. In Redefine (Pty) Ltd v D Van der Merwe, judgment was reserved on 04 June 2013 and in Umpheme Developments v Ulundi Local Municipality, judgment was reserved on 03 November 2017. In 2020 the same Judge reserved two judgments which form part of the complaint. In Marsing Co-Africa v AR Redefines, case

number 1444/2019 the judgment was reserved on 02 June 2020 and in JCR Morgans v The MEC, judgment was reserved on 10 November 2020.

[9] During 2021 Judge Van Zyl reserved three judgments which he failed to deliver and were still outstanding when the complaint was lodged. These judgments were reserved in May, August and October 2021. The delay in those matters ranged between 15 and 20 months.

[10] It is important to note that as in July 2023 when the complaint was lodged, Judge Anton Van Zyl was already retired. But Poyo-Dlwati JP's short affidavit does not state the date on which his retirement commenced. However, it is troubling that the Judge has apparently failed to render the judgments he owed despite being on retirement. On the undisputed allegations on record, those judgments were still outstanding when these complaints were considered by this Committee. What is deeply concerning is the fact that Judge Anton Van Zyl did not furnish a response to serious allegations raised against him even after this Committee had directed that the complaints be served again on him and invited him to respond.

[11] It is also significant to observe that none of the complainants alleges that the Judge suffers from incapacity or is grossly incompetent or is guilty of gross misconduct, envisaged in section 177 of the Constitution. But the absence of such allegation is not fatal to the complaints. What needs to be determined in this regard is whether the allegations in the complaints, if established, may reasonably sustain any of the grounds for removal from office listed in section 177 of the Constitution.

The issues

[12] This Committee deals with referrals such as the present in terms of section 16(4) of the Act which provides:

"At the meeting referred to in subsection (2), the Committee must consider whether the complaint, if established, will prima facie indicate incapacity, gross incompetence or gross misconduct by the respondent, whereupon the Committee may –

(a) refer the complaint to the Chairperson for an inquiry referred to in section 17(2); or

(b) recommend to the Commission that the complaint should be investigated by a Tribunal".

[13] Under the provision, the Committee is required to consider whether a complaint would, if established, *prima facie* show incapacity, gross incompetence or gross misconduct contemplated in section 177 of the Constitution. If this test is met, the Committee may recommend to the Commission that the complaint in question must be investigated by a Tribunal. This is so because a Tribunal may only be established to investigate the existence of grounds for impeaching Judges. Its investigation is pivotal to the impeachment process. Moreover, such an investigation may be undertaken only if the ultimate purpose is to remove a Judge from office.

[14] If removal from office is not the goal, any investigation undertaken by a Tribunal would be inconsistent with the Constitution and consequently be invalid. In fact, all what is done to pursue a purpose other than the removal of a Judge from office would be invalid by reason of being irrational. We will elaborate on this point later.

[15] Therefore, apart from determining whether there is a *prima facie* proof of the grounds for impeachment, this Committee must be satisfied that there is a reasonable possibility of the investigation by a Tribunal resulting in the removal from office of

the Judge who is the subject of the investigation. If the complaint shows that, although the allegations may sustain the grounds for impeachment, the Judge concerned cannot be removed from office, it would not be proper for the Committee to recommend that the complaint be investigated by a Tribunal. Such a recommendation would suffer from irrationality.

[16] Here it is alleged that Judge Anton Van Zyl who will be the subject of such investigation is retired from active service. The question that arises sharply is whether that Judge can still be removed from judicial office under section 177 of the Constitution. The answer to this question lies in the proper interpretation of this section.

[17] It appears to us that the latter issue should be determined first because even if we conclude that, if established, the complaints may sustain grounds for impeachment, any investigation by a Tribunal will be futile if the Judge concerned cannot be removed from office. The entire process would amount to a waste of time and scarce resources.

Proper approach to interpreting the Constitution

[18] The Constitutional Court has adopted various principles applicable to the interpretation of the Constitution, the supreme law of the Republic. In the search for the true meaning of section 177 of the Constitution, we will invoke four of those principles. The first one is that the language of the Constitution must be respected.[5] This entails that we must maintain fidelity to the language employed in the Constitution and assign meaning to each and every word used. According to this

[5] *S v Zuma* 1995 (2) SA 642 (CC) at paras 17-18.

principle, there is no room for taking words of the Constitution as being redundant or superfluous.

[19] The second principle is that provisions of the Constitution must be given a generous and purposive meaning.[6] This means that once the purpose of a provision under interpretation has been established that provision must be given a meaning that advances the achievement of the purpose in question, as opposed to an interpretation that frustrates that purpose. However, the generous construction applies in the main to provisions of the Bill of Rights.

[20] The third principle is that a provision in the Constitution should be interpreted in the context of other related provisions so as to read various provisions harmoniously.[7] Sections of the Constitution should not be taken individually and be construed separately from the other relevant provisions. This is because many provisions in the Constitution are inter-related and inter-connected.

[21] The fourth principle is that where a particular word appears in various provisions it must be given the same meaning unless there is a clear indication to the contrary.[8] Ordinarily the drafters of the Constitution are presumed to have used such a word in the same sense. If they had intended that in one provision the word must carry a different meaning, there must be a clear indication of that change of mind.

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[6] *Department of Land Affairs v Goedgelegen Tropical Fruit* 2007 (6) SA 199 (4) at paras 51-52.
[7] *S v Rens* 1996 (1) SA 1218 (CC); *Doctors for Life Assembly and Others* 2000 (6) SA 416 (CC) at para 48 *and New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) at paras 18 and 20.
[8] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11 at para 52.

[22] These principles constitute the backdrop against which section 177 of the Constitution is to be interpreted. It is now convenient to do so.

Meaning of section 177 of the Constitution

[23] Section 177 of the Constitution provides:

(1) "A judge may be removed from office only if-

(a) The Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) The National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)."

[24] The opening words of the section declare unequivocally that a Judge may be removed from office only if the conditions listed in subsection (1) are satisfied. The first condition is that the Commission must find that the Judge to be removed "suffers from incapacity, is grossly incompetent or is guilty of gross misconduct". Manifestly, this is an indication that the finding by the Commission must relate to the suffering of incapacity and gross incompetence which are extant at the time of making the finding. With regards to gross misconduct, there must be a finding of guilt of gross misconduct.

[25] It is apparent that what the Commission is called upon to do is to make a factual finding with regard to the Judge concerned. However, section 177 does not spell out how the Commission may go about in investigating the facts. This is

regulated by the Act which outlines the procedure to be followed in the process of such investigation and authorises the establishment of the body to undertake the investigation.

[26] The second condition laid down by section 177 is that the removal of a Judge from office must be called for by the National Assembly. It is the National Assembly that is first and foremost charged with the responsibility of deciding that the Judge in question should be removed from office, based on the positive factual finding made by the Commission. Section 177(1)(b) proclaims expressively that it is the National Assembly that "calls for that Judge to be removed".

[27] Therefore, the roles played by the Commission and the National Assembly on the process for the removal are clearly demarcated. The Commission makes a factual finding and the National Assembly determines whether the Judge should be removed from office. Once the decision to remove is reached in the National Assembly, it must be put to a vote and the Judge may be removed only if that decision garners a two thirds majority vote.

[28] However, the removal is not effected by the National Assembly under section 177, it is the President who is empowered to remove a Judge. This makes sense because in terms of the Constitution all Judges are appointed by the President.[9] But the President is obliged to remove the Judge from office if the decision to remove is supported by a two thirds majority and the process for removal was proper in the sense that all legal requirements were followed.

[9] See section 174 of the Constitution.

[29] A careful reading of the language of section 177 in the context of section 174 and 176 reveals that the President appoints Judges to the judicial office in all superior courts. Section 176 determines the tenure of the office in various courts. It declares:

> (1) "A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.
>
> *(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.*
>
> (3) The salaries, allowances and benefits of judges may not be reduced".

[30] Evidently this provision tells us the periods within which Judges hold judicial office. With regard to Constitutional Court Judges, the section states that they hold office for a non-renewable term of 12 years or until they reach the age of 70 years, whichever occurs first. Once one of these two conditions occur, a Constitutional Court Judge vacates judicial office and retires unless the exception in the section applies. This exception applies only to Constitutional Court Judges who were not Judges before appointment to that Court or if they had been Judges for a period less than three years.

[31] Judges of other courts, including the Supreme Court of Appeal and the High Court, *hold office until discharged from active service in terms of legislation.* Upon this discharge, the Judges vacate office and retire. This is how section 176 of the Constitution was interpreted in *Seriti.*[10] The fact that a Judge who vacates office in this manner retains the status of a judge does not mean that he or she continues to

[10] *Seriti and Another v Judicial Service Commission and Others* 2023 (5) SA 304 (GJ) at para 19.

hold office. There is a clear distinction between that status and judicial office. This distinction was also clarified in *Seriti.*[11]

[32] The status attaches to the incumbent of a judicial office and when he or she vacates the office, he or she retains that status even while in retirement. But that status does not mean that the Judge continues to hold office. On the contrary, he or she becomes a Judge without office from the moment he or she vacates office in terms of section 176 of the Constitution. As a result, he or she cannot exercise judicial power or perform judicial functions unless reappointed back into office for a temporary period. But if he or she is guilty of gross misconduct or suffers from incapacity or is grossly incompetent, he or she would not qualify for reappointment even if he or she would otherwise have been eligible.

[33] On the other hand, judicial office is not attached to the incumbent. Instead it is institutional and is attached to the court in which such office was created, for example, the office of the Judge President. There is only one office in each division of the High Court. When the incumbent is discharged from active service and vacates it, he or she leaves it behind at the court where he or she served and a vacancy arises in that office.

[34] It bears emphasis that judicial powers and functions are inextricably attached to the office. When the incumbent Judge President vacates office, he or she can no longer exercise those powers or perform the functions. It is the successor who would be expected to do so. This applies to every judicial office.

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[11] Ibid at para 18-26.

[35] Properly construed section 176 of the Constitution informs us that Judges hold judicial office until they are discharged from active service by the President who had in the first place appointed them to that office on a permanent basis. However, this arrangement may be interrupted if the Judge concerned is removed from judicial office under section 177 of the Constitution.

[36] The word "office" appears in both sections 176 and 177. This proximity sufficiently indicates that the word was used in the same sense. This accords with the principle that a word that appears in various provisions carries the same meaning. The exception to this general rule principle does not apply here because there is no indication, clear or otherwise, that in section 177 it is employed in a different sense. When "office" in section 177 is accorded the meaning it carries in section 176, it must mean a judicial office to which a Judge was appointed on a permanent basis.

[37] The clear purpose of section 177 is to remove from office a Judge who is still holding judicial office and who is not discharged from that office by the President. It is plainly a mechanism for removal from judicial office of Judges who are not discharged from office. The term "discharged from active service" simply means termination of a permanent appointment. This is the sense in which it is used in section 176 of the Constitution. It is that appointment that forms the foundation for holding judicial office. Therefore, for a Judge to vacate judicial office, there must be a termination of his or her appointment. If the termination is not voluntarily done by the Judge resigning from office, it may be done by the President through a discharge unless section 177 of the Constitution is invoked.

[38] What this means is that the section 177 procedure can be applied only if the affected Judge still holds judicial office and if the President has not discharged him or her from active service. The purpose of removal from office envisaged in section 177 cannot be attained if the Judge in question has already been discharged from office. Consequently, the process for the removal of a Judge contemplated in section 177 cannot be initiated where the Judge has already vacated judicial office.

[39] The assertion that a Judge who has vacated judicial office under section 176 of the Constitution may still be removed from office in terms of section 177 is a constitutional oxymoron. A Judge cannot be removed from an office he or she no longer holds. Section 177 contemplates the removal of a Judge who is still in office in order to prevent that Judge from exercising judicial power and performing judicial functions when he or she is no longer competent to do so.

[40] Legally speaking the consequences of such a discharge is the termination of the judicial power the Judge exercised while in the office to which he or she was appointed as part of a court. It will be recalled that the Constitution vests the judicial power of the Republic in the courts.[12] It is evident from chapter 8 of the Constitution that courts consist of Judges appointed to them.[13] In other words a discharge from judicial office terminates the affected Judge's membership of the court to which he or she was appointed. The fact that such Judge is permitted to finalise cases that commenced before him or her prior to the discharge, does not change the position that he or she has vacated office and that a vacancy has been created by his or her departure.

[12] Section 165(1) of the Constitution reads "The Judicial authority of the Republic is vested in the courts".
[13] See sections 167 and 168 of the Constitution.

[41] Similarly, the fact that some of retired Judges may be required to perform service from time to time does not mean that the retired Judge still hold judicial office. They do not for a number of reasons. First, the obligation on retired Judges to be available for service is not contained in the Constitution but is a statutory requirement. As such it cannot be invoked to interpret the Constitution. It is a principle of law that a statute cannot be used to interpret the Constitution, just as a regulation cannot be employed to interpret a statute.

[42] Second, it is by now axiomatic that legislation must be read consistently with the Constitution. Therefore, section 7 of the Employment Act which imposes the availability obligation to perform service upon retired Judges, must be read consistently with section 176 and 177 of the Constitution. For this Act to be valid, it must be interpreted in a manner that makes it consistent with section 176 which declares in unambiguous terms that Judges hold office until discharged from active service in terms of legislation.

[43] Third, section 7 of the Employment Act does not expressly say that if Judges are discharged from active service under that Act, they continue to hold office from which they may be removed as contemplated in section 177 of the Constitution. Instead, what section 7 states is that some retired Judges must be available when called upon to perform service. Service under that Act is defined to encompass being a member of a commission of inquiry or a member any institution or body established under any law. Surely some of these acts cannot be regarded as an indication that a Judge continues to be in office because they do not constitute judicial functions.

[44] Therefore, section 7 of the Employment Act merely imposes an obligation to be available when required. That obligation requires a retired Judge to be available for three months only in one year. Furthermore, the retired Judge is not obliged to perform service when called upon to do so under the section.[14] The Judge concerned may choose not to perform the service required and in that event all that can be done is to reduce his or her salary by two per cent. But if the judge agrees to perform service under the section, he or she must be appointed to act before assuming office, albeit temporarily. The holding of judicial office stems from the temporary appointment and nothing else. Absent that appointment the Judge holds no office. Where a Judge is appointed under section 7, he or she holds office for the duration of that appointment.

[45] For these reasons we conclude that the impeachment procedure envisaged in section 177 of the Constitution does not apply to retired Judges who are discharged from active service. Consequently, we cannot recommend that a Tribunal be established to investigate the present complaints. A recommendation of that kind in these circumstances would be unconstitutional and invalid.

Rationality

[46] The Constitution demands that, at a bare minimum, the exercise of public power must meet the rationality test.[15] Rationality is an integral part of the rule of

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[14] Section 7(3) of the Judges and Remuneration and Conditions of Employment Act provides "The salary of a Constitutional Court Judge or judge who contrary to subsection (1)*(a)*(i) fails to perform the minimum period of service referred to in that subsection if so requested, shall, for every full year during which he or she so fails, be reduced by two percent: provided that such reduction shall, in the aggregate, not amount to more than 10 per cent of such salary."

[15] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC).

law which, in turn, forms part of the Constitution.[16] The exercise of public power becomes irrational if there is no link between it and the purpose for which the power was conferred. We have already pointed out that the purpose of section 177 of the Constitution is removal of a Judge from office by the President. Rationality requires that all decisions that are taken in order to facilitate the achievement of that purpose must be rationally connected to that removal.

[47] This applies to every decision and every step taken in the process leading up to the removal of a Judge from office. Thus in *Democratic Alliance* the Constitutional Court pronounced:

"[B]oth the process by which the decision is made and the decision itself must be rational … The conclusion that the process must also be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision constitutes means towards the attainment of the purpose for which the power was conferred."[17]

[48] Here there can be no doubt that the recommendation that the complaints be investigated by a Tribunal would constitute the exercise of public power and that it is part of the means towards the removal from office of a Judge against whom the complaints were lodged. Consequently, there must be a rational link between the recommendation and the potential removal of that Judge from office. But since the Judge concerned no longer holds a judicial office from which he may be removed

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[16] See section 1 of the Constitution.
[17] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at paras 34 and 36.

under section 177 of the Constitution, there can never be a rational connection between the recommendation and the removal envisaged in that section.

[49] It follows that such recommendation if it were to be made, would be inconsistent with the Constitution and as a result would be invalid. The Constitution is supreme and all organs of state are bound to perform their functions in a manner that is consistent with it. No organ of state may perform its functions contrary to the Constitution. Therefore, this Committee may not issue an irrational recommendation.

[50] For all these reasons we come to the conclusion that the request for a recommendation that the complaints be investigated by a Tribunal should fail. This conclusion makes it unnecessary for us to consider whether the present complaints would, if proved, indicate *prima facie* that the Judge suffers from incapacity or is grossly incompetent or that he is guilty of gross misconduct. However, this failure to make a recommendation does not mean that the complaints should be dismissed.

Investigation of complaints in terms of section 17

[51] The structure of the Act is such that complaints are dealt with at different levels. At the first level, the Chairperson evaluates the complaint to determine if it falls to be dismissed in terms of section 15(2) of the Act. If it is, then the complaint may be referred to the relevant Head of Court to be dealt with in terms of that section. If it appears that the complaint has merit, the Chairperson must determine whether the complaint is impeachable. If not, an inquiry into the merits of the complaint must be held either by the Chairperson or a designated member of Judicial Conduct Committee. But if the Chairperson holds the view that the complaint, if established,

will show that the Judge suffers from incapacity or is grossly incompetent or is guilty of gross misconduct, she must refer the complaint to this Committee.

[52] This is the process that was followed in the present complaints. Once the complaints are referred to the Committee, it is required to deal with them in terms of section 16(4) which affords the Committee two options only. The one option is to make a recommendation that the complaint be investigated by a Tribunal. If for some reason the recommendation cannot be made, the Committee must remit the complaint to the Chairperson for an inquiry into the merits under section 17 of the Act. The Committee itself has no power to conduct such inquiries which may be held by the Chairperson or a designated member of the Committee. It follows that the present complaints must be referred back to the Acting Chairperson for an inquiry on terms of that section.

Conclusion

[53] If it is true that judgments have been outstanding since 2012, it would be deeply concerning. Some of them would have been pending for more than 10 years. It is extremely troubling that the Judge concerned has failed to furnish an explanation for the alleged delays even after the complaints were reserved on him. As it appears from Ms Barnard's complaint, the litigants' lives have been adversely affected by the delays. Consequently, a resolution of the current complaints has become urgent.

[54] Accordingly, the present complaints are remitted to the Acting Chairperson for an inquiry to be urgently conducted in terms of section 17 of the Act.

JUSTICE C JAFTA
MEMBER OF THE JUDICIAL CONDUCT COMMITTEE

MABINDLA-BOQWANA JA (dissenting) (MAYA DCJ concurring)

[55] I have had the opportunity of reading the majority ruling penned by my colleague Justice Jafta. Regrettably, I differ with its reasoning and conclusions. The majority holds that section 177 of the Constitution does not apply to judges who have been discharged from active service by the President who appointed them on a permanent basis. This approach is primarily based on the construction of the word 'office' appearing in both sections 176 and 177 of the Constitution.

[56] I take a different approach for the following reasons. This Committee is bound by the decision of the Supreme Court of Appeal (SCA) in *Freedom Under Law v Judicial Service Commission and Another.*[18] If that view is wrong, the constitutional and legislative scheme seem against a distinction between sitting and retired judges regarding the applicability of section 177 of the Constitution. That is, however, a question for the courts to decide, with the benefit of argument.

Freedom Under Law is a binding precedent

[57] *Freedom Under Law* concerned a retired judge, Judge Nkola Motata, who was discharged from active service in 2017. The Committee recommended to the Commission that complaints of racism, criminal conduct and mounting a dishonest

[18] *Freedom Under Law v Judicial Service Commission and Another* [2023] ZASCA 103; [2023] 3 All SA 631 (SCA).

defence in his criminal trial, against Judge Motata, be investigated by a Tribunal. A Tribunal was appointed in terms of section 19 of the JSC Act. It gave its decision on 12 April 2018 in which it made, inter alia, the following findings and recommendation:[19]

'58. . . . Judge Motata's conduct at the scene of his motor accident and the remarks he made were racist and thus impinge on and are prejudicial to the impartiality and dignity of the courts.

59. Similarly, the lack of integrity in the manner in which Judge Motata allowed his defence to be conducted at his trial, in our view is incompatible with or unbecoming of *the holding of judicial office.*

60. As to whether the provisions of *section 177(1)(a) of the Constitution* [are] to be *invoked,* the question to be asked is if Judge Motata is to *retain the office of a judicial officer,* would this negatively affect the public confidence in the justice system? If the answer is in the affirmative, as we suggest it is, then, in the discharge of our mandate we recommend to the Judicial Service Commission that the provisions of section 177(1)(a) of the Constitution be invoked in this instance.'[20] (Emphasis added.)

[58] The SCA in *Freedom Under Law* was concerned with whether the Commission was justified in rejecting the findings and conclusion of the Tribunal. The majority opened its judgment by referring to the words of Lord Phillips in *Re Chief Justice of Gibraltar* in which he said, inter alia,

'While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability to perform the judicial function. As Gonthier J put it at paragraph 147 of the same case:

". . . before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality,

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[19] *Report of the Judicial Conduct Tribunal in re: Judge NJ Motata.*

[20] Ibid paras 58-60.

integrity and independence of the judiciary that the confidence of individuals appearing before the judge, of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of *his office*."

That is the issue that confronts us in this appeal – namely, whether the conduct encountered here is of such a kind as to render the second respondent, Judge Nkola John Motata, incapable of performing the duties of *his office*.'[21] (Emphasis added.)

[59] It is important to note that both the Tribunal and the SCA approached the inquiry from the premise that Judge Motata was holding judicial office. Their inquiry was whether his conduct rendered him incapable of holding judicial office, as that was the standard for his removal from office. The view of the Tribunal endorsed by the SCA, that a retired judge holds judicial office, is not a matter that this Committee is free to differ with.

[60] The majority judgment in *Freedom Under Law* further held that Judge Motata's status of retirement was an irrelevant consideration to whether he could be removed.

'[80] Like the JSC, the High Court failed to consider the impact of Judge Motata's conduct on the public confidence in the independence, impartiality and integrity of the judiciary. Both failed to consider *the impact on the public of him remaining 'Judge Motata' and continuing to receive the benefits of his pension as a judge*, after he was found to have made racist statements and thereafter conducted a dishonest defence in his criminal trial and before the Tribunal. *That he had retired, as the majority and the high court seemed willing to emphasise, was thus irrelevant.*'[22] (My emphasis.)

[21] *Freedom Under Law* fn 18 para 1.

[22] Ibid para 80.

[61] The statement that Judge Motata's retirement 'was *thus* irrelevant' was not merely a conclusion based on the particular facts of Judge Motata's case – it constituted a principle which was considered based on the fact that the court was dealing with a retired judge. The issue had been emphasised by the high court and the JSC. It was therefore important for the Court to decide, and the Court decided that retirement made no difference to Motata's removal from office. In other words, the statement that his retirement 'was *thus* irrelevant' was not simply assumed or obiter. It formed part of the Court's reasoning.

[62] The rationale was the impact on the public of Judge Motata remaining a judge and continuing to receive the benefits of his 'pension' as a judge. The Court repeated the impact on the public as follows:

'[90] Judge Motata's conduct was egregious, particularly when one has regard to the cumulative consequence of both the AfriForum and Pretorius SC complaints. His behaviour at the scene of the incident was characterised by racism, sexism and vulgarity. The public watched him conduct a dishonest defence during his trial and on appeal. They watched him dishonestly accuse Mr Baird of using the k-word, only to thereafter withdraw the accusation. They watched him lie under oath to the Tribunal about his level of intoxication, as the video of him slurring his words and stumbling went viral. His conduct is inimical to his office. *For as long as he is entitled to be called "Judge Motata", the judiciary continues to be stained in the eyes of the public.*' (Emphasis added.)

[63] To emphasise the point that it viewed Judge Motata as a holder of judicial office and thus section 177 of the Constitution applicable to him, the Court reasoned further:

'[94] "Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy and founded on the rule of law". A fair minded and dispassionate observer is bound to conclude that Judge Motata *cannot properly discharge his functions.* The conduct that I have been at pains to describe is of such gravity as to warrant a finding that Judge

Motata *be removed from office. There is no alternative measure to removal that would be sufficient to restore public confidence in the judiciary.* This means that the conclusion reached by the JSC to "reject the Tribunal's recommendation" and that "Judge Motata's conduct did not constitute gross misconduct", falls to be rejected. Consequently, the recommendation by the Tribunal that the *"provisions of section 177(1)(a) of the Constitution be invoked", must stand.* Accordingly, the matter will be remitted to the JSC. It is not being remitted, however, for the JSC to consider the report of the Tribunal in terms of section 20(1) or to make a finding under section 20(3), but for it to be dealt with in terms of section 20(4) of the JSC Act.' (Emphasis added.)

[64] The Court endorsed the Tribunal's recommendation that section 177(1)*(a)* be invoked. Accordingly, on proper interpretation of its judgment, while the SCA majority did not embark on a detailed analysis of the applicability of section 177(1)*(a)* to retired judges, it clearly construed section 177 as applicable to a retired judge as a holder of judicial office. Informing that view was the impact on the public of the retired judge remaining a judge and continuing to receive the benefits of a judge. The doctrine of precedent demands that we abide by the SCA's decision.

[65] The Constitutional Court in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*[23] cautioned that:

'*Stare decisis* is . . . not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'[24]

[66] It further held:

'It is tempting to avoid a decision by higher authority when one believes it to be plainly wrong. Judges who embark upon this exercise of avoidance are invariably convinced that they are "doing

[23] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC).

[24] Ibid para 28.

the right thing". Yet, they must bear in mind that unwarranted evasion of a binding decision undermines the doctrine of precedent and eventually may lead to the breakdown of the rule of law itself. If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to say this should be done in a manner which shows courtesy and respect. Not only because it relates to a higher court but because collegiality and mutual respect are owed to all judicial officers, whatever there standing in the judicial hierarchy.'[25]

[67] I make a few observations in relation to the issues raised in the riposte penned by my colleague, Justice Saldulker. I agree that *Pretoria City Council v Levinson* (*Levinson*)[26] is the locus classicus on what constitutes the *ratio decidendi* of a judgment. Its exposition was approved in many decisions including *True Motives 84 (Pty) Ltd v Mahdi and Another* (*True Motives*)[27] and *Turnbull-Jackson v Hibiscus Coast Municipality and Others* (*Turnbull-Jackson*).[28] It must be noted as observed in *True Motives,* that the Court in *Levinson* '[did] not seem to have thought *Collett*'s reasons/ratio distinction convincing, for [it] waived it aside as depending 'mainly on the meaning attached to those words in their context by the users'.[29]

[68] In *Turnbull-Jackson,* the Constitutional Court crucially highlighted that:

'The doctrine of precedent decrees the *ratio decidendi* of a judgment, and not *obiter dicta*, have binding effect. The fact that *obiter dicta* are not binding does not make it open to courts to free themselves from the shackles of what they consider to be unwelcome authority by artificially characterising as *obiter* what is otherwise binding precedent. Only that which is truly *obiter* may

[25] Ibid para 30.
[26] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 307.
[27] *True Motives 84 (Pty) Ltd v Mahdi and Another* [2009] ZASCA 4; 2009 (4) SA 153 (SCA) paras 103-105.
[28] *Turnbull-Jackson v Hibiscus Coast Municipality and Others* [2014] ZACC 24; 2014 (6) SA 592 (CC).
[29] *True Motives* fn 27 para 103.

not be followed. But, depending on the source, even *obiter dicta* may be of potent persuasive force and only departed from after due and careful consideration.'[30]

[69] The Court based this remark on what was said in *Durban City Council v Kempton Park (Pty) Ltd*:

'The proposition which Mr. *Milne* regards as *obiter* thus represents the learned Judge of Appeal's reason for his decision of an issue raised on the appeal. It may be, as Mr. *Milne* says, that the decision of the appeal itself would have been the same even if that particular issue had been decided differently, but I doubt whether that fact (if it is a fact) would entitle us to regard the relevant portion of the judgment as *obiter*. But however that may be, I am prepared to regard the passage as having no *status* other than that of an expression of opinion by one Judge of Appeal concurred in by four others. Even so, its persuasive value would be irresistible. I am not prepared to dissent from it.'[31]

[70] The Court in *Turnbull- Jackson* made this further observation:

'*Levinson* does not appear to have been concerned with multiple, but central bases, for determining a dispute or an issue in a dispute. Therefore, one must be careful not to regard its authority as fitting all scenarios. It happens fairly frequently that a court will give more than one basis for determining an issue, each of which bases is dispositive. Do the second and subsequent bases become *obiter* purely because the first – standing all by itself – is dispositive of the dispute; or vice versa? I think not. The answer must still lie in whether each of the many prongs of the court's reasoning is central to the resolution of the issue under consideration. If the additional bases are central to the reasoning, not subsidiary and not mere reasoning on the facts, they are as much part of the *ratio decidendi* as the first basis.'[32]

[30] *Turnbull* fn 28 para 56.
[31] *Durban City Council v Kempton Park (Pty) Ltd* 1956 (1) SA 54 at 59D-F.
[32] *Turnbull* fn 28 para 62.

[71] Paragraph 80 of the judgment in *Freedom Under Law* should not be construed in isolation of the rest of the judgment. Read in context, the statement by the Court in that paragraph, was essential to the resolution of the issues under consideration. As appears from the last sentence of that paragraph, the fact that the judge had retired was placed in issue by the JSC and emphasised by the high court. In light of that, it was necessary for the Court to pronounce on whether retirement of the judge was relevant to the finding of gross misconduct, which would trigger his removal in terms of section 177 of the Constitution. Had the Court found the judge's retirement relevant, it would have come to a different conclusion. In other words, the outcome would have been affected.

[72] The statement in paragraph 80 did not merely entail reasoning on the facts, nor was it a peripheral remark in the course of the Court's penultimate conclusion in paragraph 94 of the judgment. It was important. The length of the paragraph is not relevant to whether it was pivotal to the issue at hand. It is important to remind ourselves that several reasons that a judge mentions in his or her judgment combine to bring about the result.

'The judge mentions them all because they all have led to [his/her] conclusion. [He/she] does not ordinarily analyse [his/her] mental processes so as to ascertain and disclose whether [he/she] would have reached the same conclusion in the absence of one or more of the reasons, though exceptionally [he/she] may attempt to do so. Yet whenever [he/she] furnishes several major reasons for [his/her] judgment, without relegating any of them to a supererogatory position, each is a *ratio decidendi*.'[33]

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[33] *Fellner v Minister of Interior* 1954 (4) SA 523 (A) at 548F-G.

[73] It will be recalled that in the penultimate paragraph of the judgment (paragraph 94), the Court concluded that Judge Motata's conduct was of such gravity as to warrant a finding that he be removed from office; further, that the recommendation by the JSC be rejected and the recommendation by the tribunal that 'the provisions of section 177(1)*(a)* of the Constitution be invoked', stand.

[74] I, therefore, conclude that the fact that a retired judge was the subject of *Freedom Under Law*, the expression made by the SCA, not only in regard to the relevance of his retirement, but his gross misconduct, triggered the application of section 177 and gave rise to a principle – that a retired judge can be removed from office in terms that section. This means that until such time the SCA or the Constitutional Court corrects this position, all lower courts or quasi-adjudicative bodies like this Committee must treat section 177 as applying to retired judges in the same way as judges in active service.

[75] Assuming that the judgment of the SCA can be regarded as *obiter* on this issue (which I do not believe it is), its potency, coming from the second most senior court in the land, is such that it cannot be departed from lightly. Even if the decision of the appeal itself would have been the same, with or without the issue of retirement, its value is so commanding that it should not be dissented from.

[76] Even if I am wrong on the issue of precedent, I take the view that the Committee should defer to the courts, to allow for full and proper participation in this matter. I would, however, make a few observations on the view taken by the majority; that retired judges cannot be removed. The distinction sought to be made by the majority between retired judges and judges in active service seems to be

against the constitutional and legislative scheme applicable in regulating and considering complaints against judges, including retired judges.

[77] The starting point is section 177 of the Constitution. It provides that a judge may be removed from office only if the JSC finds 'that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct'; and the National Assembly calls for the removal of the judge by the adoption of a resolution supported by a vote of at least two thirds of its members.

[78] In *S v Mhlungu*,[34] Mahomed J observed that the Constitution must be interpreted purposively and generously, consistent with the international culture of constitutional jurisprudence which had developed:[35]

'. . . to avoid what Lord Wilberforce called

"The austerity of tabulated legalism" (*Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319 at 328H).

This is because:

"A Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government." (*Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 at 418).'[36]

[79] As Sutherland DJP put it in *Seriti and Another v Judicial Service Commission and Others*,[37] the Constitution was not intended to be the sole source of regulation

[34] *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).
[35] Ibid paras 8 and 9.
[36] Ibid para 8.
[37] *Seriti and Another v Judicial Service Commission and Others* [2023] ZAGPJHC 332; 2023 (5) SA 304 (GJ).

of the Judiciary. The Constitution and relevant national legislation form the regulatory scheme.[38] Sections 174, 175, 176, 177 and 180, which respectively provide for the appointment of judges, set out the terms of office and remuneration of judges, lay down grounds upon which a judge may be removed from office and permit the provision by national legislation for any matter concerning the administration of justice not dealt in the Constitution. Invoking them is not tantamount to using legislation to interpret the Constitution.

[80] The Constitution does not define the word 'office'. In *Seriti*, the word was central to the debate, as borne out by the judgment. The argument there was that a judge ceases to be a judge when he or she retires because section 176 of the Constitution states that judges hold office until they are discharged from service. The reasoning adopted by Sutherland DJP in his judgment in the matter is instructive. He found that South Africa had made a policy choice to adopt 'the judge for life' concept.

'[24] Central to the applicant's thesis is a repudiation of the notion that a person, upon appointment as a judge, is a judge for life. *The choice of making a person a judge for life is bound up with the expectations of the character of judgeship* and especially the independence that a judge is required to assert in the South African context. That a judge should, for example, be free from financial anxiety is a self-evident necessity if a guarantee of independence is to be a reality. Hence, section 176(3) forbids a reduction in salary. In the JRCS Act, the definition of judge, cited above, contemplates persons who are and who were holders of judicial office. The definition plainly addresses a transitional process in which the judges who held office during the pre-constitutional era had their vested rights to post-retirement benefits preserved. Even had section 11(3)(a)(iii) not

[38] Ibid para 14.

expressly asserted the concept of "judge for life", *the concept is inextricably embedded in the legislative scheme created by the enactments.*'[39] (My emphasis.)

[81] The next passage settles the point as follows:

'[25] The utilisation of the concept of a "*discharge from active service*" rather than a "*termination of office*" is significant nomenclature because it points to a continuing judicial identity even when performing no judicial functions. The remuneration payable after discharge is a salary, not a pension. Moreover, further service after such discharge is possible, either compulsorily or voluntarily, subject to various conditions. Only resignation severs the relationship with the Judiciary. However, the consequences of a resignation in regard to accountability for misconduct committed whilst in active service need not be considered in this judgment.'[40] (My emphasis.)

[82] Construing 'office' as synonymous to 'active service' does not give us a business-like result. First, as observed in the passage from *Seriti* mentioned above, the legislature has not used 'termination from office' because the office of the judge continues. Section 176 is concerned with the duration of being 'in active service'.[41] What that duration is, is found in legislation. Further, the insertion of 'active' before the word 'service'[42] informs that a judge who is discharged remains 'in service' but

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[39] Ibid para 24.
[40] Ibid para 25.
[41] In terms of section 1 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001, '*active service*' means 'any service performed as a Constitutional Court judge or judge in a permanent capacity, irrespective of whether or not such service was performed prior to or after the date of commencement of this Act, and includes any continuous period—

(a) of longer than 29 days of such service in an acting capacity prior to assuming office as a Constitutional Court judge or judge in a permanent capacity if such service was performed before the date of commencement of this Act; and

(b) of such service in an acting capacity prior to assuming office as a Constitutional Court judge or judge in a permanent capacity if such service was performed after the date of commencement of this Act'.

[42] '*service*' means –

'*(a)* service as a judge of the Supreme Court of Appeal or a High Court as contemplated in the Supreme Court Act, 1959 (Act No. 59 of 1959), in the same or a higher office held by the judge concerned on discharge from active service, or, with the approval of the judge concerned, service in a lower office;

(b) service as a chairperson or a member of a commission as contemplated in the Commissions Act, 1947 (Act No. 8 of 1947);

(c) service as a chairperson or a member of a body or institution established by or under any law; or

he or she is not 'active' in service. This conforms with the policy choice taken by our country that a retired judge may be recalled.[43] A retired judge remains appointed in terms of the appointment made by the President. When they are recalled in terms of section 7 of the Remuneration Act, the President does not re-appoint them. Performance of their service is done with the approval of the Minister after consultation with the head of court.[44] Their re-appointment for temporary service is premised on the retired judge having remained fit and proper unless determined not to be so. Consequently, the interpretation that section 177 would apply to a retired judge only when they are recalled to perform temporary duties in a court is, in my view, untenable.

[83] This position is further strengthened by the fact that, once retired, a judge continues to be paid 'a salary' as opposed to 'a pension'. A judge may also serve in commissions, institutions or bodies in his or her capacity as a judge.[45]

[84] The concept 'office' is wider than 'incumbent', it is about 'the institution'. That holds for both judges in active service and those that have retired. Office is not 'a position'. So, if it is about the institution and not the incumbent, the issue of a vacancy created by retirement, plays no role in the construal of the concept of office, in my view.

(d) any other service which the Minister may request him or her to perform.'

[43] '7. Performance of service by Constitutional Court judges and judges discharged from active service (1)*(a)* A Constitutional Court judge or judge who has been discharged from active service, except a Constitutional Court judge or judge who has been discharged in terms of section 3(1)*(b)* or *(c)* or (2)*(b)*, *(c)* or *(d)*, who— (i) has not attained the age of 75 years *must*, subject to paragraph (c), *be available to perform service until he or she attains the age of 75 years, for a period or periods which, in the aggregate, amount to three months a year*: Provided that such a Constitutional Court judge or judge may voluntarily perform more than three months' service a year, if his or her services are so requested; or (ii) has already attained the age of 75 years, may voluntarily perform further service, if his or her services are so requested…'(Emphasis added.)

[44] See section 7(1)*(b)*(A) of the Remuneration Act.

[45] See definition of 'service' in fn 42 above.

[85] A point is made in the majority ruling that, the purpose of removal from office envisaged in section 177 cannot be attained if the Judge in question has already been discharged from service. The difficulty with that reading is that the provision does not refer to removal from 'active service' but from 'office'. Effectively, on the majority's interpretation of the Constitution, a retired judge will remain 'in service', albeit not active, however grave their conduct. They will remain representative of the judiciary as an institution. The majority says that, that judge will not be eligible for a recall to perform judicial function. But what would have been the basis of their disqualification, if not through the process of removal?

[86] A further point to be made is that the majority approaches the matter from the premise that recommendation for referral to a Tribunal is the beginning of a process that must culminate in impeachment. That is not necessarily so. The objects of the Tribunal are listed in section 26 of the JSC Act, which are focused on an enquiry, making findings and reporting to the JSC. Section 20 of the JSC Act obliges the Commission to consider the report of a Tribunal and following its consideration of the report and written representations made by the respondent Judge, and, if applicable, the applicant (complainant), makes its own findings as to whether the respondent Judge is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct.

[87] If the Commission finds that the respondent Judge indeed suffers from an incapacity or is grossly incompetently or is guilty of gross misconduct, it is required to submit its finding and reasons therefor and the copy of the report of the Tribunal to the Speaker of the National Assembly. If the Commission finds incompetence or

misconduct that may be cured by an appropriate corrective measure or a remedial step or steps contemplated in section 17(8), respectively, it will make a finding that the respondent Judge be subjected to the corrective measure or impose the remedial step or steps and inform the respondent, and if applicable, the applicant, of that finding and reasons therefor. Clearly, the Commission is not bound by the findings and does not merely rubberstamp the report of the Tribunal.

[88] The JSC Act applies to all judges. Its constitutionality has not been placed in question. In terms of its section 7(1)*(g)*, a 'judge' includes a judge who has been discharged from active service in terms of the Remuneration Act. The constitutionality of these provisions was placed in issue without success in *Seriti* on the ground that it is inconsistent with section 176 of the Constitution. There, Sutherland DJP held:[46]

'Section 176 of the Constitution does not purport to define who is a judge. The tenor of section 176 is to regulate the *duration* of office, not the *standing* of judgeship. The scheme of the chapter proceeds logically, to deal with: (1) appointments in section 175; then, (2) naturally occurring vacation of office in section 176; and (3) involuntary removals from office in section 177.

. . .

Some reference was made to other jurisdictions in which a judicial officer enjoys the status of judge only for the duration that the person exercises judicial office. That is a policy choice. Such examples do not assist the task of interpreting our own laws: the very question posed to the court is whether South African law has, in the text of the relevant enactments, chosen to hold a person who has been appointed to judicial office and has been, in the language used throughout the enactments, "discharged from active service" accountable *qua* judge thereafter. This Court is not troubled to consider the merits of the policy choice itself, but merely has to decide which policy choice our law has made.'

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[46] Ibid paras 19 and 23.

[89] The second feature to be observed from the JSC Act is that where provisions differ in their treatment of judges in active service and those discharged from active service, the Act says so explicitly. For instance, section 11 of Part II provides:

'(1) A judge performing active service –

(a) may not *hold or perform any other office* of profit; and

(b) may not receive in respect of any service any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge:

Provided that such a judge may, with the written consent of the Minister acting in consultation with the Chief Justice, receive royalties for legal books written or edited by that judge.

(2) *A judge who has been discharged from active service* may only with the written consent of the Minister, acting after consultation with the Chief Justice, *hold or perform any other office* of profit or receive in respect any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge. (Emphasis added.)

[90] Part III dealing with the consideration of complaints by the Committee contains no such distinction. Complaints are initiated in terms of section 14(1) of the JSC Act against all judges (in active service and discharged therefrom) with the Chairperson of the Committee. The Chairperson decides whether a complaint should be dealt with either in terms of sections 15, 16 or 17 (section 14 (2)).

[91] A complaint against a judge must be based on one or more grounds including:

'*(a)* Incapacity giving rise to a judge's inability to perform the functions of judicial office in accordance with prevailing standards, or gross incompetence, or gross misconduct, as envisaged in section 177(1)*(a)* of the Constitution;

(b). . .

(c). . .

(d). . .

(e) Any other wilful or grossly negligent conduct, other than conduct contemplated in paragraph *(a)* to *(d)*, that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.'

[92] Less serious complaints may be summarily dismissed in terms of section 15. Complaints that are likely to lead to a finding by the Commission that a judge suffers from an incapacity, is grossly incompetent or is guilty of misconduct must be referred by the Chairperson to the Committee in order for it to consider whether it should recommend to the Commission that the complaint should be investigated and reported on by a Tribunal.[47]

[93] The Committee must consider whether the complaint, if established, will *prima facie* indicate incapacity, gross incompetence or gross misconduct by the judge, whereupon the Committee may refer the complaint to the Chairperson for an inquiry in terms of section 17(2) or recommend to the Commission that the complaint should be investigated by a Tribunal.[48]

[94] Section 17 provides for an enquiry into serious but 'non-impeachable' complaints by the Chairperson or member of the Committee. It is inquisitorial in nature and there is no onus on any person to prove or disprove any fact during such investigation. Pursuant to several steps, the complaint determined in terms of this section may either be dismissed, remedial steps imposed, or a recommendation may be made to the Committee to recommend to the Commission that the complaint be investigated by a Tribunal. A formal hearing may be held if the Chairperson is

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[47] Section 16(1) of the JSC Act.
[48] Section 16(4) of the JSC Act.

satisfied that it is required to determine the merits. The remedies same as those articulated above may be imposed at the outcome of the hearing.[49]

[95] The remedial steps that may be imposed in terms of section 17(8) are:

(a) an apology to the complainant in a manner specified;

(b) a reprimand;

(c) a written warning;

(d) any form of compensation;

(e) appropriate counselling;

(f) attendance of a specific course; and

(g) any other corrective measure.

[96] These remedies do not seem to apply in respect of conduct that is described in *Re Chief Justice of Gibraltar* as: that which is manifestly and totally contrary to the impartiality, integrity and independence of the judiciary and that undermines the confidence of the public in the judiciary, such that the judge concerned cannot continue to hold judicial office. They seem to apply in relation to misconduct which is not gross. Thus, where a retired judge, like a judge in active service, is likely to be found guilty of gross misconduct there is no other path available in terms of the JSC Act for the determination of that kind of conduct, other than an investigation by the Tribunal. I have taken time to go through this analysis to demonstrate the anomaly that would arise if a complaint of gross misconduct against a retired judge were to be adjudicated under section 17(2). The JSC Act does not create that path, nor does it envision a 'third way'. It seems to me that referring complaints of gross misconduct to a section 17(2) inquiry would create an incongruence with the purpose

[49] Section 17(1) to (6) of the JSC Act.

of the section which is aimed at dealing with conduct not extending to the level of 'gross' misconduct. This is not what the legislature had in mind, in my opinion.

[97] But, as I have said, the Tribunal in the *Judge Motata* matter and the SCA in *Freedom Under Law* took the view that a retired judge is a holder of judicial office and this Committee is bound by that precedent. It is therefore not open to this Committee to determine whether section 177 applies to retired judges. Again, that question, which, incidentally, none of the parties in this matter raised, is best suited for the courts to decide with the benefit of submissions from interested parties.

[98] Therefore, as matters presently stand, the Committee may recommend referral of the complaints lodged against a retired judge to the Tribunal if it considers that a complaint, if established, will *prima facie* indicate gross misconduct.

Should Judge Van Zyl's complaint be referred to section 17(2) or the Tribunal?

[99] The complaints against Judge Van Zyl were lodged in terms of section 14 of the JSC Act. They relate to his failure to deliver judgments that he reserved while he was in active service as a judge of the KwaZulu-Natal Division of the High Court, Pietermaritzburg on 12 December 2012, 04 June 2013, 03 November 2017, 12 June 2020, 10 November 2020, 21 May 2021, 04 August 2021, and 01 October 2021, respectively and were still outstanding when he retired.

[100] On 15 February 2024, while the ruling of this Committee in this matter was pending, the Committee received a letter from Judge President Poyo-Dlwati of the KwaZulu-Natal Division of the High Court. The letter advised that Judge Van Zyl had delivered five of his outstanding judgments on 5 February 2024. The judgments

remaining were those reserved on 12 December 2012, 21 May 2021 and 4 August 2021. This development, however, does not detract from this Committee's obligation to determine the matter in terms of section 16(4) of the JSC Act.

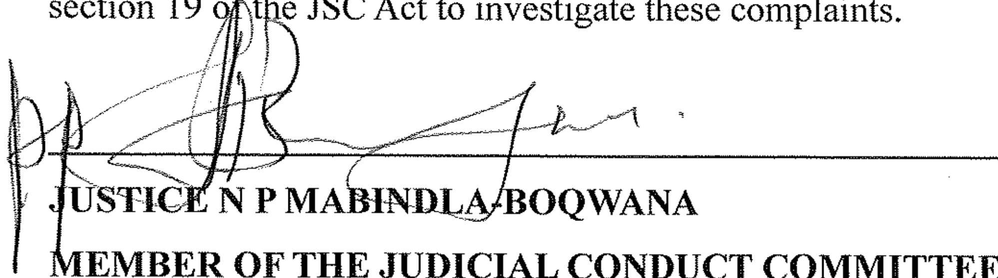
[101] Ordinarily, the fact that a judge has outstanding judgments should not likely lead to a finding of gross misconduct or gross incompetence, without more. The question is whether *prima facie* the threshold of gross misconduct or gross incompetence is likely to be met regarding the complaints.

[102] Several considerations arise. Judge Van Zyl went on retirement while the reserved judgments were outstanding and it is particularly concerning that, when the complaints were lodged, he was already retired. As indicated, some of these judgments, including the one reserved as far back as 2012, remain outstanding. The Judge neither offered an explanation for this lapse nor gave the Committee the elementary courtesy of a response to the serious allegations against him when afforded an opportunity to do so. He was urged several times by Judge President Poyo-Dlwati to deliver them, to no avail, until recently when he delivered only some of them. Ms Barnard and the other complainants have waited for an unduly long time for the outcome of their cases.

[103] The peculiar facts of this case, including the delay of more than 10 years in handing down the judgments, with absolutely no explanation proffered, is not only an indication of tardiness but also dereliction of duty. This goes beyond the usual case of a judge occasionally having reserved judgments arising, for example, from a heavy workload. For many years Judge Van Zyl showed no appreciation of the negative impact that the delay had on the affected litigants and the seriousness of the

complaints against him. He ignored not only the attempts made by the Judge President and the litigants, but also the Committee's request to him to file a response. The period of delay and the number of judgments not handed down during that time lead to the conclusion that, the complaint, if established, will *prima facie* indicate gross misconduct by Judge Van Zyl.

[104] On the cumulative facts of this particular case, I would have proposed that the Committee recommend to the Commission that a Tribunal be appointed in terms of section 19 of the JSC Act to investigate these complaints.



JUSTICE N P MABINDLA-BOQWANA
MEMBER OF THE JUDICIAL CONDUCT COMMITTEE

SALDULKER JA (JAFTA J and SHONGWE JA concurring)

[105] I have had the benefit of reading with considerable interest the ruling prepared by my colleague Mabindla-Boqwana (the dissent). Regrettably I cannot agree with all the points it makes for the following reasons.

[106] The dissent is anchored on two main pillars. The first is that the decision of the Supreme Court of Appeal (the SCA) in *Freedom Under Law*[50] constitutes binding authority on the question whether a retired Judge may be removed from

[50] *Freedom Under Law v Judicial Service Commission and Another* [2023] ZASCA 103; [2023] 3 All SA 631 (SCA).

office under section 177 of the Constitution.[51] The second is that the interpretation of that section and other relevant provisions of the Constitution which says the removal of a Judge from office does not apply to a retired Judge leads to an anomaly or incongruity in section 17 of the Judicial Service Commission Act (the Act).

[107] I will address each point separately and will begin with the binding precedent point.

Precedent

[108] At the outset I must point out that the SCA in *Freedom Under Law* did not explicitly consider whether a retired Judge holds a judicial office from which he or she can be removed in terms of section 177 of the Constitution. Had that been done and if that Court had construed the relevant provisions of the Constitution to come to the conclusion that a retired Judge is removable from office, it could have made precedent.[52] As this did not happen, it is necessary to consider how the dissent tells us that the precedent arose.

[109] Heavy reliance is placed on paragraph 80 of the SCA Judgment which reads:

'Like the JSC, the high court failed to consider the impact of Judge Motata's conduct on the public confidence in the independence, impartiality and integrity of the judiciary. Both failed to consider the impact on the public of him remaining "Judge Motata" and continuing to receive the benefits of his pension as a Judge, after he was found to have made racist statements and thereafter conducted a dishonest defence in his criminal trial and before the Tribunal. That he had retired, as the majority and the high court seemed willing to emphasis, was thus irrelevant.'

[51] Dissent at para 3-11

[52] *Ex Parte Minister of Safety and Security: in re S v Walters* 2002 (2) SACR 105 (CC) at paras 60-61.

[110] We must begin by interpreting this paragraph to determine whether the SCA in it has created the legal principle that retired Judges may be removed from judicial office under section 177 of the Constitution. When construing the paragraph, it must be read in the context of the issues the SCA was confronted with and each word employed in the paragraph must be assigned a meaning. This is what the interpretation of a written document entails in our law.[53]

[111] It is important to note that the paragraph 80 which is the subject of our interpretation consists of three sentences only. The first two of them inform us of the failures of both the JSC and the high court. The first sentence tells us that these bodies failed to take into account the impact Judge Motata's conduct had on the public confidence in the Judiciary. While the second sentence informs us that these bodies also failed to consider the impact on the public of him retaining the status of Judge and receiving pension benefits after making racist statements and conducting a dishonest defence. The last sentence concludes by declaring that his retirement was irrelevant. It is not clear to what exactly was that retirement considered to be irrelevant. But what is plain is that none of those sentences carry the meaning that, under section 177 of the Constitution, a retired Judge holds judicial office from which he or she can be removed. In fact, none creates a legal principle of sorts.

[112] One scours in vain the entire judgment of the SCA for the principle that section 177 permits removal from office of Judges who have already vacated office. There is just no such principle laid down by the SCA. This is hardly surprising because the SCA was not asked and did not consider whether in retirement Judge

[53] *New Nation Movement and Others v President of the RSA and Others* 2020 (6) SA 257 (CC) at paragraphs 164-165.

Motata continued to hold judicial office from which he could be removed. The order of the SCA was based upon the resolution of two issues. These were whether the JSC was entitled to ignore the finding of the Tribunal to the effect that gross misconduct was established and whether Judge Motata's conduct as proved by facts, amounted to gross or simple misconduct.

[113] Our law lays down the test for determining whether statements of law made in a judgment constitutes a binding authority. From as early as 1937, then the apex court in this country declared that what is binding in a judgment is a ratio decidendi which amounts to the principle to be extracted from the case.[54] However, the question that arose later was how does one go about in determining rationes decidendi because it became clear that not all reasons constitutes rationes.

[114] This issue was settled by Schrenier JA on *Levinsons*[55] where it was stated:

"[T]he reasons given in the judgment, properly interpreted, do constitute the ratio decidendi, originating or following a legal rule, provided (a) that they do not appear from the judgement itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts ... and (c) which may cover (a) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons".

[115] Therefore, in our law a ratio decidendi is made up by reasons necessary for the outcome or order issued in a particular case, provided those reasons were not

[54] *Collect v Priest* 1931 AD 290.

[55] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 307.

subsidiary to the main principle and were not merely linked to the facts of that case. This standard was affirmed by Cameron JA in *True Motives*[56] where he said:

"According to Schreiner JA's approach, the reasons given creating or following a legal rule are binding on this court provided they were not merely subsidiary to the main principle, that they were not merely linked to the incidental facts . . . and that they were necessary for the decision in the sense that along the lines that the court actually followed the results would have been different, but for the reasons".

[116] Paragraph 80 of the SCA Judgement on which reliance was placed does not satisfy this test in all its components. What was said in that paragraph merely related to the facts. But more importantly and along the actual lines followed by the SCA, that paragraph was not necessary in the sense that the SCA could have come to a different decision but for the paragraph, that is to overturn the JSC's decision that Judge Motata's conduct amounted to simple and not gross misconduct.

[117] It will be recalled that the SCA followed two lines to reach its conclusion. These were that the JSC was not entitled to ignore the Tribunal's finding to the effect that the Judge was guilty of gross misconduct and not simple misconduct, as well as that the facts proved gross misconduct. Having followed these lines, the SCA could still have reached the same decision even in the absence of paragraph 80. Consequently, the paragraph was not necessary for the decision taken by the SCA. Accordingly, it cannot be regarded as a binding authority which must be followed.

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[56] *True Motives 84 (Pty) Ltd v Mahdi and Another* [2009] ZASCA 4; 2009 (4) SA 153 (SCA) at paragraph 105.

The constitutional and legislative scheme forbids the distinction between sitting and retired Judges

[118] This is the other pillar on which the dissent relies. It is asserted that the constitutional and legislative scheme is against the distinction between "sitting" and retired Judges regarding the applicability of section 177 of the Constitution. However, other than making the point that the scheme consists of both the Constitution and legislation, the dissent does not engage the relevant provisions of the Constitution to illustrate the point that the Constitution does not tolerate such distinction. Instead, the dissent undertakes a comprehensive analysis of the JSC Act to demonstrate that the distinction creates an anomaly or incongruity arising from the application of section 17 of the JSC Act.[57]

[119] Although the dissent rightly refers to the decision of the high court in *Seriti*[58] in relation to the scheme, it overlooks what that decision outlines as the constitutional part of the scheme. That decision outlines the constitutional scheme from the appointment of Judges, their tenure of office, including the duration for which that office is held and the removal from office before that duration expires.

[120] With regard to tenure *Seriti* makes reference to section 176 of the Constitution and tells us that Judges vacate office when the duration of their appointment comes to the end unless they are removed from office in terms of section 177. This is how Sutherland DJP puts it.

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[57] Dissent at paragraphs 12-26

[58] *Seriti and Another v Judicial Service Commission and others* 2023 (5) SA 304 (GJ).

"Section 176 of the Constitution does not purport to define who is a Judge. The terms of section 176 is to regulate the duration of office, not the standing of judgeship. The scheme of the chapter proceeds logically, to deal with (1) appointments in terms of section 175; then, (2) naturally occurring vacation of office in section 176 and (3) involuntary removals from office in section 177".

[121] The "naturally occurring vacation of office in section 176" must be read and understood in the context of what that section provides. In the first place section 176 stipulates that all Judges, excluding Constitutional Court Judges, hold office until they are discharged from active service in terms of an Act of Parliament. It is upon this discharge that such Judges vacate judicial office in terms of section 176 as interpreted in *Seriti*. Moreover, this provision as read in that case means that these Judges hold office from date of appointment until they are discharged from active service.

[122] Therefore, when sections 176 and 177 are read together the following scheme emerges. Unless interrupted by a removal under section 177, a Judge holds judicial office until he or she is discharged from active service. Consequently, logic and common sense dictate that if such Judge has already been discharged from active service and has vacated the judicial office he or she held, they cannot be removed from the same office, purportedly in terms of section 177 of the Constitution. That is a constitutional impossibility.

[123] After the analysis of the JSC Act, the dissent implicitly concludes that retired Judges who commit gross misconduct would escape sanction because the remedial steps in section 17(8) of the JSC Act apply to simple misconduct. According to the dissent, this would constitute an anomaly. Therefore, along this line of thinking, the

anomaly should be avoided by applying section 177 of the Constitution to retired Judges. For a number of reasons, the argument cannot withstand scrutiny.

[124] First and foremost, the anomaly referred to arises in the JSC Act and not in the Constitution. In our law there is no principle that says the Constitution should be interpreted in a manner that avoids anomalies in legislation. There is therefore no legal basis for the interpretative approach suggested in the dissent.

[125] Second, a Judge is removed from a judicial office in terms of the Constitution and not under the JSC Act, except that the Act plays a role in the process that culminates in the removal of a Judge. And the anomaly raised in the dissent does not relate to that process. Since the removal is effected in terms of the Constitution, the anomaly in the Act is completely irrelevant to the interpretation and applicability of section 177 of the Constitution.

[126] Third, the supremacy of the Constitution principle demands that legislation must be read in a manner that is consistent with the Constitution, as it is the supreme law. The principle is not that the Constitution should be read in conformity with a statute to avoid anomalies but the other way round. Furthermore, the Constitution declares that a law that is inconsistent with it is invalid and of no force and effect. This is because all laws derive their validity and legal force from the Constitution. Therefore, the plain language of the Constitution cannot be subordinated to the JSC Act.

[127] Fourth, the singular purpose of section 177 of the Constitution is to remove from office a Judge against whom one or more of the grounds listed have been

established. If that Judge no longer holds office because he or she has already vacated judicial office under section 176, that purpose cannot be attained. It would consequently be an exercise in futility to apply section 177 to Judges who have already vacated office.

[128] In conclusion, the resolution of the question whether a retired Judge may be removed from office depends solely on the provisions of sections 176 and 177 of the Constitution. Since the points in the dissent are not located in these provisions, I cannot support them for reasons articulated here and in the main ruling.

JUSTICE H SALDULKER

MEMBER OF THE JUDICIAL CONDUCT COMMITTEE