CONSTITUTIONAL COURT OF SOUTH AFRICA

[2012] ZACC 4
Case CCT 41/11

In the matter between:

JUDGE PRESIDENT MANDLAKAYISE JOHN HLOPHE	Applicant
and	
PREMIER OF THE WESTERN CAPE PROVINCE	Respondent

and

Case CCT 46/11

In the matter between:

JUDGE PRESIDENT MANDLAKAYISE JOHN HLOPHE	Applicant
and	
FREEDOM UNDER LAW	First Respondent
ACTING CHAIRPERSON: JUDICIAL SERVICE COMMISSION	Second Respondent
JUDICIAL SERVICE COMMISSION	Third Respondent
CHIEF JUSTICE PIUS NKONZO LANGA	Fourth Respondent
DEPUTY CHIEF JUSTICE DIKGANG MOSENEKE	Fifth Respondent
JUSTICE THOLAKELE HOPE MADALA	Sixth Respondent
JUSTICE JENNIFER YVONNE MOKGORO	Seventh Respondent
JUSTICE CATHERINE MARY ELIZABETH O’REGAN	Eighth Respondent

JUSTICE ALBERT LOUIS SACHS	Ninth Respondent
JUSTICE SIRRAL SANDILE NGCOBO	Tenth Respondent
JUSTICE THEMBILE LEWIS SKWEYIYA	Eleventh Respondent
JUSTICE JOHANN VAN DER WESTHUIZEN	Twelfth Respondent
JUSTICE ZAKERIA MOHAMMED YACOOB	Thirteenth Respondent
JUSTICE BAAITSE ELIZABETH NKABINDE	Fourteenth Respondent
JUSTICE CHRISTOPHER NYAOLE JAFTA	Fifteenth Respondent
JUSTICE FRANKLIN KROON	Sixteenth Respondent

and

CENTRE FOR APPLIED LEGAL STUDIES	First Amicus Curiae
GENERAL COUNCIL OF THE BAR	Second Amicus Curiae
LAW SOCIETY OF SOUTH AFRICA	Third Amicus Curiae
BLACK LAWYERS ASSOCIATION	Fourth Amicus Curiae

Heard on : 29 November 2011

Decided on : 30 March 2012

JUDGMENT

THE COURT:

[1] The applicant in these two applications for leave to appeal to this Court is the Judge President of the Western Cape High Court. He seeks leave to appeal against two judgments of the Supreme Court of Appeal. Both judgments[1] concern a decision made by the Judicial Service Commission (JSC) on 15 August 2009 (JSC decision) in relation to a complaint of judicial misconduct by certain Constitutional Court Justices against the applicant and a counter-complaint by him against the same Constitutional Court Justices. The two judgments were delivered by separately constituted benches of the Supreme Court of Appeal.[2]

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[1] *Acting Chairperson: Judicial Service Commission & Others v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA) (Premier's SCA challenge). *Freedom Under Law v Acting Chairperson, Judicial Service Commission & Others* 2011 (3) SA 549 (SCA) (Freedom Under Law's SCA challenge). Both judgments were delivered on 31 March 2011.

[2] Section 12 of the Supreme Court Act 59 of 1959 provides:

> "**Constitution of [the Supreme Court of Appeal]**
>
> (1) The quorum of the [Supreme Court of Appeal] shall, subject to the provisions of subsection (2), be five judges in all criminal and civil matters: Provided that—
>
> (a) an application under subsection (2) of section four shall be heard and determined by the [President] and two judges of appeal;
>
> (b) on the hearing of an appeal, whether criminal or civil, in which the validity of an Act of Parliament (which includes any instrument which purports to be and has been assented to by the State President as such an Act) is in question, eleven judges of the [Supreme Court of Appeal] shall form a quorum;
>
> (bA) the [President] or, in his or her absence, the senior available judge of the [Supreme Court of Appeal] may direct that an appeal in a criminal or civil matter be heard before a court consisting of three judges;
>
> (c) whenever it appears to the [President], or in his absence, the senior available judge of the [Supreme Court of Appeal] that any matter, not being an appeal referred to in paragraph (b), should in view of its importance be heard before a court consisting of a larger number of judges, he may direct that the matter be heard, or if the matter is already being heard, that the hearing be discontinued and commenced anew before a court consisting of so many judges as he may determine."

[2] The complaint against the applicant was that he had sought to influence the decision of the Constitutional Court in matters pending before it. His counter-complaint was that by making a media statement regarding their JSC complaint, the Constitutional Court Justices had infringed his dignity.

[3] The JSC decision was effectively that the evidence in respect of both complaints did not justify a finding that either the applicant or the Constitutional Court Justices in question were guilty of gross misconduct and that the matters were "accordingly finalised".[3] The Supreme Court of Appeal judgments set aside the JSC decision on different grounds.[4]

[4] The applications raise issues fundamental to the integrity of our judicial process. They arise primarily because the Court as constituted for this hearing includes complainant Justices before the JSC.[5] Without their participation this Court will not be quorate and thus will be unable to consider and determine the applications.[6]

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[3] Premier's SCA challenge above n 1 at para 3.

[4] In varying degrees, as explained in [9]-[12] below.

[5] And two members of the Court were involved in an attempted mediation of the complaints. See [17] and [20].

[6] Section 167 of the Constitution provides, in relevant part:

> "(2) A matter before the Constitutional Court must be heard by at least eight judges.
>
> . . .
>
> (4) Only the Constitutional Court may—
>
> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

[5] In this judgment we will: (1) set out the relevant factual background; (2) deal specifically with the situation that developed in this Court; (3) summarise the issues that need to be decided; (4) discuss and come to a conclusion on those issues; and (5) arrive at an appropriate remedy and order.

Background

[6] In March 2008, the Constitutional Court heard argument in four matters relating to the prosecution of the current President of the Republic of South Africa and Thint (Pty) Ltd on corruption charges. Before judgment was delivered, the applicant approached two Constitutional Court Justices in their chambers. As a result of what allegedly transpired during these visits the Constitutional Court Justices on the bench at the time lodged a complaint against the applicant with the JSC. They alleged that he had attempted to influence the two Justices in the corruption cases. The applicant in turn lodged a complaint of judicial misconduct against the Justices, alleging that his constitutional rights had been violated when the Justices published a media statement about their decision to lodge the complaint.

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfill a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144."

[7] After many delays and changes in the composition of the JSC, it eventually considered the complaints, and on 15 August 2009 reached the decision that the evidence before it did not justify a finding of gross misconduct on the part of the applicant or the Constitutional Court Justices.

[8] Two separate applications were launched challenging the JSC decision, the one in the Western Cape High Court (Premier's challenge)[7] and the other in the North Gauteng High Court (Freedom Under Law's challenge).[8]

[9] The Premier's challenge was brought by the Premier of the Western Cape Province (Premier) on the basis that (1) she should have been notified of the JSC proceedings in order to allow her to participate in the proceedings in terms of section 178(1)(k) of the Constitution;[9] (2) only ten members of the JSC participated in the decision when it should

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[7] *Premier, Western Cape v Acting Chairperson, Judicial Service Commission* 2010 (5) SA 634 (WCC); 2010 (8) BCLR 823 (WCC).

[8] *Freedom Under Law v The Acting Chairperson: Judicial Service Commission and Others* Case No 63513/09 North Gauteng High Court, 10 December 2010, unreported.

[9] Section 178(1) provides in relevant part:

> "(1) There is a Judicial Service Commission consisting of—
>
> . . .
>
> (k) when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them."

have been composed of 13 members; and (3) the JSC decision was not supported by a majority, as required by section 178(6) of the Constitution.[10]

[10] The Western Cape High Court upheld each of the Premier's contentions and set aside the JSC decision. The JSC and the applicant appealed to the Supreme Court of Appeal. The Supreme Court of Appeal came to a similar conclusion to the High Court on all three grounds and dismissed the appeal.

[11] Freedom Under Law's challenge to the JSC decision in the North Gauteng High Court took a different course. Freedom Under Law sought to set aside an earlier decision of the JSC to hold a preliminary inquiry, on the basis of which it arrived at its final decision. The North Gauteng High Court dismissed a challenge to its standing, but held that it was not entitled to the relief it sought. The Supreme Court of Appeal disagreed and set aside the High Court order, replacing it with one setting aside that part of the JSC decision dismissing the complaint by the Constitutional Court Justices against the applicant, but leaving the part dismissing the applicant's counter-complaint intact.

[12] The effect of the Supreme Court of Appeal's judgment and order on the Premier's challenge is that the JSC must now reconsider both the Constitutional Court Justices' complaint, and the applicant's counter-complaint. The effect of its judgment in Freedom

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[10] Section 178(6) provides:

> "The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members."

Under Law's challenge is of a lesser nature: it must reconsider the Constitutional Court Justices' complaint, but not the applicant's counter-complaint.

In this Court

[13] The applicant seeks leave to appeal against both Supreme Court of Appeal judgments. The JSC has not sought leave to appeal.

[14] In relation to the Premier's challenge, the applicant contends that the Supreme Court of Appeal reached an incorrect conclusion on contextual and separation of powers grounds regarding the necessary composition of the JSC when conducting disciplinary proceedings involving a High Court Judge. He also contends that its determination of what a majority vote of the JSC means, in terms of the Constitution, is unnecessarily inflexible and wrong.

[15] As far as the Freedom Under Law challenge is concerned, the applicant contends that the Supreme Court of Appeal's judgment is, in effect, contradictory to its judgment in the Premier's challenge. The two orders, one declaring the whole of the JSC decision invalid and the other declaring only part of that decision invalid, cannot stand side-by-side. He also contests the substantive reasoning of the Supreme Court of Appeal, namely that the JSC decision that the evidence before it did not justify findings of gross misconduct was irrational.

[16] In neither of the applications for leave to appeal did the applicant raise any initial objection to this Court determining the applications for leave to appeal. It was only in the directions from this Court that the issue, whether this Court is in a position to hear and determine them, came to the fore.[11] Since those directions were issued the composition

[11] Directions issued on 30 May 2011 in matter CCT 41/11 stated in relevant part:

> "1. Seven of the eleven judges of this Court, Chief Justice Ngcobo, Deputy Chief Justice Moseneke, Justice Jafta, Justice Nkabinde, Justice Skweyiya, Justice van der Westhuizen and Justice Yacoob, were complainants in the complaint that underlies this matter.
>
> 2. A further member of the Court, Justice Mogoeng, was involved in efforts to mediate the dispute between the Justices concerned and the applicant.
>
> 3. In light of the above, the parties are directed to lodge written argument by Wednesday 15 June 2011 on the following questions:
>
> (a) Can the Court determine the merits of the dispute between the parties?
>
> (b) What is the position if eight of the eleven members of the Court consider themselves disqualified from determining the merits of the dispute, with the result that only three judges are available?
>
> (c) In this regard, does section 175(1) of the Constitution read with section 174(3), (4) and (5), contemplate—
>
> (i) the appointment of an acting judge or judges when a judge or judges of this Court recuse themselves from determining a matter; and
>
> (ii) acting appointments where the majority of the Court considers itself disqualified from considering the merits of a matter?
>
> (d) If not, would any purpose be served by granting the application for leave to appeal?
>
> (e) Is the doctrine of necessity in recusal applicable, and, if so, how and to what extent?
>
> (f) If so, what order should the Court make?"

Directions issued on 6 June 2011 in matter CCT 46/11 were identical to these, except for the cut-off date for lodging of written argument, which was set at 22 June 2011.

Further directions for both matter CCT 41/11 and CCT 46/11 were issued on 8 August 2011. They stated in relevant part:

> "1. The application for leave to appeal against the judgment of the Supreme Court of Appeal is set down for oral argument on Thursday 22 September 2011 at 10h00 on solely the following issues:
>
> (a) Since the majority of the members of the Court consider themselves disqualified from determining the merits of the dispute, with the result that only three judges are available, to what extent, if any, can or should the Court deal with the application?

of this Court as constituted for these applications has changed, but the difficulty remains live.

[17] The problem is this. Section 167(1) of the Constitution provides that this Court consists of eleven Judges.[12] The Court usually sits *en banc*, but section 167(2) provides that a matter before the Constitutional Court must be heard by at least eight Judges.[13] Six of the serving Justices currently appointed to the Court were serving as Constitutional Court Judges when the complaint against the applicant was lodged with the JSC. Three of them recused themselves from the hearing before it was argued.[14] This left the Court with a bare constitutional quorum of eight, including three Justices who were parties to the complaint lodged with the JSC against the applicant[15] and two others who had been

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> (b) Does section 175(1) of the Constitution read with section 174(3), (4) and (5) contemplate the appointment of acting judges when the majority of the members of the Court consider themselves disqualified from considering the merits of an application?
>
> (c) If the answer to (b) is No, would any purpose be served by granting the application?
>
> (d) What order should the Court make?"

[12] Section 167(1) provides:

> "The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges."

See *Judge President Hlophe v Premier of the Western Cape Province; Judge President Hlophe v Freedom under Law and Others (Centre for Applied Legal Studies and Others as Amici Curiae)* [2011] ZACC 29; 2012 (1) BCLR 1 (CC) (*Hlophe*), where the developments and changes in the composition of this Court since the applications were lodged are explained more fully. Three Judges recused themselves from the proceedings. Jafta J and Nkabinde J (the two Judges whom the applicant allegedly sought to influence) as well as Moseneke DCJ. They are the only remaining serving Justices who also testified before the JSC in the proceedings that are the subject matter of the applications for leave to appeal.

[13] Above n 6. See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 at para 9.

[14] *Hlophe* above n 12.

[15] And who are also accused of judicial misconduct by the applicant in his counter-complaint.

involved in attempted mediation. If these Judges are disqualified from hearing the applications for leave to appeal because of their perceived or actual interest in the outcome of the matter, there would be no quorum for this Court to hear and determine the matters.

[18] It was this potential conundrum that the parties and admitted friends of the court[16] were initially asked to address in written and oral argument.[17]

[19] It is fair to say that their responses crystallised the broad issue for decision into the question whether it was necessary for this Court, as presently constituted, to hear and determine the applications for leave to appeal.

[20] In directions issued subsequent to the oral hearing, the parties' attention was drawn to correspondence between the Chief Justice and Freedom Under Law, and they were directed to indicate whether any of them sought the recusal of the Chief Justice from the matter in view of that correspondence. In a separate letter, their attention was also drawn to the position of Zondo AJ in relation to his involvement in the attempted mediation of

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[16] The General Council of the Bar, the Law Society of South Africa, Advocates for Transformation, the Black Lawyers' Association and the National Association of Democratic Lawyers were invited by the Court to submit written argument on the issues set out in n 11 above. However, only the General Council of the Bar, the Law Society of South Africa, and the Black Lawyers' Association submitted written argument and made oral submissions on the day of the hearing. The Centre for Applied Legal Studies successfully applied for admission as amicus curiae, submitted written argument and made oral submissions on the day of the hearing.

[17] See above n 11.

the dispute whilst he was Judge President of the Labour Appeal Court. None of the parties sought the recusal of either of them.

[21] The result of all of this is that all the parties accept that it is necessary for us to make a determination in relation to the issues raised in the applications.

Issues

[22] The material issues for determination are—

(a) whether Acting Judges may be appointed to the Constitutional Court in terms of section 175 of the Constitution to hear the application for leave to appeal and the appeal; and, if not,

(b) whether we should adjudicate upon the substantive merits of the applications for leave to appeal.

[23] These issues must be determined with due regard to the constitutional and legal context that governs the various interests at stake in these matters.

Constitutional framework

[24] The Constitution vests the judicial authority of the Republic in the courts.[18] The independence of the courts is guaranteed and subject only to the Constitution and the law,

[18] Section 165(1).

which must be applied impartially and without fear, favour or prejudice.[19] This Court is the highest court in all constitutional matters;[20] it may decide only constitutional matters and issues connected with decisions on constitutional matters;[21] and it makes the final decision on whether a matter is a constitutional one or is an issue connected to a constitutional matter.[22] The Judges of the Constitutional Court are appointed by the President in accordance with the provisions of the Constitution.[23] The President may, on the recommendation of the Minister of Justice and Constitutional Development acting with the concurrence of the Chief Justice, appoint a woman or a man to be an Acting Judge of the Constitutional Court if there is a vacancy or if a Judge is absent.[24]

[25] In terms of section 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[26] In terms of section 167(6) of the Constitution, litigants only have a right to consideration of any application for leave to appeal. They do not have an automatic right

[19] Section 165(2).

[20] Section 167(3)(a).

[21] Section 167(3)(b).

[22] Section 167(3)(c).

[23] Section 174(3) and (4). See also *Justice Alliance of South Africa v President of the Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (*Justice Alliance*).

[24] Section 175(1).

of appeal.[25] Leave must be granted if the Court concludes that it is in the interests of justice to do so.[26]

[27] There is no dispute that the issues relating to the composition and processes of the JSC are constitutional matters of import. The composition of the JSC is determined by section 178(1) of the Constitution.[27] The powers and functions assigned to it in the

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[25] Section 167(6) reads in relevant part:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> . . .
>
> (b) to appeal directly to the Constitutional Court from any other court."

Rule 19 of the Constitutional Court Rules deals with appeals. In particular, Rule 19(6)(a) notes that "[t]he Court shall decide whether or not to grant the appellant leave to appeal".

[26] *S v Pennington and Another* [1997] ZACC 10; 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC) (*Pennington*).

[27] Section 178(1) reads:

> "(1) There is a Judicial Service Commission consisting of—
>
> (a) the Chief Justice, who presides at meetings of the Commission;
>
> (b) the President of the Supreme Court of Appeal;
>
> (c) one Judge President designated by the Judges President;
>
> (d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
>
> (e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
>
> (f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
>
> (g) one teacher of law designated by teachers of law at South African universities;
>
> (h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
>
> (i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
>
> (j) four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

Constitution and national legislation,[28] fall into three main categories: (a) the process of appointing Judges;[29] (b) disciplinary matters involving Judges;[30] and (c) advice to the national government on any matter relating to the judiciary or the administration of justice.[31] The JSC may determine its own procedures, but its decisions must be supported by a majority of its members.[32]

[28] Of particular importance here is section 177(1)(a), which provides that a Judge may be removed from office only if—

> "the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct".

[29] The evaluation and resolution of the issues in the applications must thus take place in the following context. This Court is the final and highest court in relation to the constitutional matters that form the subject matter of the applications for leave to appeal. The Court, as constituted for these applications, includes members who may have been perceived to have an interest in the outcome of the proceedings before the JSC. All the parties, however, consider it necessary for the Court, as presently constituted, to dispose

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(k) when considering matters relating to a specific High Court, the Judge President of that Court and the Premier of the province concerned, or an alternate designated by each of them."

[28] Section 178(4).

[29] Section 174(3), (4)(a), (4)(c) and (6).

[30] Section 177(1)(a) and (3).

[31] Section 178(5).

[32] Section 178(6), quoted above at n 10.

of the matter. The constitutional matters relate to procedural aspects of the functioning of the JSC, not to its substantive power to investigate and make findings in relation to judicial misconduct. And lastly, it is a fundamental right of everyone under the Constitution to have legal disputes decided in the courts or, where appropriate, by an independent and impartial tribunal or forum.

Can Acting Judges be appointed?

[30] Against this constitutional background, and bearing in mind the potential disqualifications of members of the Court, it is necessary to determine whether the Constitution permits the appointment of Acting Judges who could adjudicate the merits.

[31] Section 175(1) of the Constitution provides:

> "The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice."

[32] In oral argument counsel for the applicant explicitly acknowledged that the acting appointment option was the "first prize" they sought. If this was not a legitimate solution or remedy, counsel urged this Court, without qualification, to decide the applications for leave to appeal. Counsel for the Black Lawyers Association (BLA) supported the applicant's argument on the propriety of appointing Acting Judges under section 175(1). The other parties represented at the hearing did not support the appointment of Acting

Judges as a proper or legitimate outcome. They were somewhat more circumspect in their submissions on the manner in which we should dispose of the applications for leave to appeal if the acting appointment option was not accepted.

[33] It is by now settled that constitutional provisions must be interpreted according to their purpose, gleaned from the language read in the context of the Constitution as a whole.[33] Language, context and the scheme of the Constitution all show that ad hoc acting appointments to cater for exceptional cases like these confronting us here are not permissible.

[34] Section 175(1) provides for the appointment of an Acting Judge of the Constitutional Court if there is a vacancy or if a Judge is absent. It was not argued that recusal from a particular case by a member of this Court creates a vacancy under the section, but it was argued that the recusal does render the Judge "absent". The ordinary meaning of the word "absent" carries some ambiguity. It may mean merely "physically absent".[34] It could reasonably be argued that a recusal creates a "physical absence" for the purposes of a particular case. However, any possible ambiguity is removed when we consider that the recusal from a particular case does not preclude Constitutional Court

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[33] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at paras 43 and 45; *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 123; *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 172; *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at paras 15, 45 and 105; and *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 10.

[34] *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) at 440H-441A.

Judges from continuing to perform duties of their office. A recused Judge remains required to perform the rest of her judicial duties. The action of recusal is the performance of a judicial duty. The effect of a recusal therefore cannot be considered to be an absence.

[35] This argument is strengthened by a comparison with the wording of other sections in the Constitution allowing for acting or temporary appointments to other constitutional offices.

[36] The circumstances in which Judges are appointed to other courts are not as tightly defined. In terms of section 175(2) Acting Judges may be appointed to other courts without the requirements that there must be a vacancy or that permanently appointed Judges must be absent. This suggests that considerations other than post vacancies or physical absences of appointed Judges might justify the appointment of Acting Judges to those courts.[35]

[37] The constitutional provisions concerned with the acting or temporary filling of executive posts at the national and provincial levels of government all provide for acting or temporary filling of those posts or the exercise of functions either in the absence of the office holders or, explicitly, where they are otherwise unable to fulfil or exercise those

[35] For example to clear accumulated backlogs in case rolls.

duties or functions.[36] Clearly "absent" in those sections bears the ordinary meaning of "physically absent" since specific provision is made for situations where the temporary incapacity to fulfil official duties exists as opposed to physical absence. There is no justification for giving a different meaning to "absent" in section 175(1) than the ordinary meaning of "physically absent" the word bears in these sections. To the contrary, the

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[36] Section 90 in relevant part provides:

> "**Acting President**
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> (1) When the President is absent from the Republic or otherwise unable to fulfil the duties of President, or during a vacancy in the office of President, an office-bearer in the order below acts as President:
>
> (a) The Deputy President.
>
> (b) A Minister designated by the President.
>
> (c) A Minister designated by the other members of the Cabinet.
>
> (d) The Speaker, until the National Assembly designates one of its other members." (Footnote Omitted.)

Section 98 provides:

> "**Temporary assignment of functions**
>
> The President may assign to a Cabinet member any power or function of another member who is absent from office or is unable to exercise that power or perform that function."

Section 131 provides in relevant part:

> **"Acting Premiers**
>
> (1) When the Premier is absent or otherwise unable to fulfil the duties of the office of Premier, or during a vacancy in the office of Premier, an office-bearer in the order below acts as the Premier:
>
> (a) A member of the Executive Council designated by the Premier.
>
> (b) A member of the Executive Council designated by the other members of the Council.
>
> (c) The Speaker, until the legislature designates one of its other members."

Section 138 provides:

> **"Temporary assignment of functions**
>
> The Premier of a province may assign to a member of the Executive Council any power or function of another member who is absent from office or is unable to exercise that power or perform that function."

wording of these sections shows that where something other than physical absence prevents the exercise of official duties, explicit provision for that eventuality is made.[37]

[38] Recusal leading to a lack of a necessary quorum in this Court is an exceptional occurrence. Vacancies of Constitutional Court posts resulting from retirement, possible ill-health and death are not. Nor are temporary physical absences of Justices of the Court, caused by periods of leave, personal circumstances or some illness unusual. Viewed in a general context, it is clear that the purpose of section 175(1) is to deal with these normal instances of vacancies and physical absences.

[39] The conclusion that "absent" should be interpreted to mean "physically absent" is fortified when regard is had to section 99(9) of the interim Constitution which regulated the appointment of Acting Judges:

> "Whenever a judge of the Constitutional Court *is absent or unable to perform his or her functions, or if a vacancy among the judges of the Constitutional Court arises*, the President may, on the recommendation of the Minister responsible for the administration of justice made in consultation with the President of the Constitutional Court and the Chief Justice, appoint any person qualified in terms of subsection (2), as an acting judge of the Constitutional Court for the period of absence or inability of the judge concerned or until the vacancy is filled: Provided that at all times at least four judges of the

[37] There is thus no textual justification to dislodge the interpretational presumption that the same words and phrases in the Constitution bear the same meaning. See *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 632; 1999 (7) BCLR 771 (CC) at para 47 where this Court noted that the legislature is presumed to use language consistently.

> Constitutional Court, including acting judges, shall be judges who have been appointed from among the judges of the Supreme Court."[38] (Emphasis added.)

[40] The exclusion of "or unable to perform his or her functions" from the final text of the Constitution suggests that the word "absent" in the Constitution should be interpreted narrowly to mean physically absent and not include temporary incapacity.

[41] The textual interpretation dealt with above finds further support in the context of the Constitution as a whole. Constitutional provisions relating to the appointment of Judges must be interpreted with due regard to the constitutional imperatives of separation of powers and entrenchment of judicial independence.[39] The potential danger to judicial independence and the separation of powers is ever present in the appointment of individual Judges to hear a specific case and we must be mindful of this.

[42] Accordingly it is not possible to interpret "absent" in section 175(1) as covering a situation where Constitutional Court Judges recuse themselves from hearing a specific matter.

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[38] Constitution of the Republic of South Africa Act 200 of 1993.

[39] See *Justice Alliance* above n 23.

Leave to appeal – consideration by this Court?

[43] With the option of the appointment of Acting Judges under section 175(1) not available, the applications for leave to appeal must be dealt with in another way by this Court. It is convenient to recap the road travelled thus far.

[44] The applications for leave to appeal raise constitutional issues. This Court is the court of final instance on constitutional matters and aspects incidental to these matters. In terms of section 167(6) the Court is obliged to create a procedure to consider applications for leave to appeal to it from other courts.[40] The Rules of the Court provide for this.[41] The parties agree that it is necessary for us to consider the applications.

[45] But consideration of the applications for leave to appeal, by virtue of the concession by the parties that it is necessary for us to determine them, does not mean that we should determine the outcome of the applications as we would normally have. We should do so only to the extent that it is necessary to avoid injustice.[42]

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[40] *Pennington* above n 26 at para 25.

[41] Rule 19.

[42] See *Laws v Australian Broadcasting Tribunal* (1990) 93 ALR 435 (HC) at 454 (Australia) and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1998] 1 SCR 3 at 11-4 (Canada).

[46] A balance needs to be struck between the Court's obligation to provide finality in this matter (as it would be intolerable to have a case pending indefinitely) and possible injustice to the applicant. These factors weigh heavily in determining the extent to which it is in the interests of justice to enter into the merits, and thus whether to grant leave to appeal.

[47] All the parties were in agreement that this matter cannot remain pending. There is a need for finality. This was not disputed. In determining the extent to which we should consider the merits, regard must be had to whether substantial injustice will be done to the applicant should this Court refuse to grant leave to appeal. The underlying right which the applicant seeks to protect on final instance to this Court is, importantly, a procedural one: the rejection of that right will result in the continuance of a process only and will not result, without more, in a finding against him on the substance of the complaint. What is more, the applicant has had the benefit of an appeal. These considerations mitigate the threat of injustice.

[48] In addition, although the parties have consented to the conflicted Judges' sitting in the present matter, regard must still be had to the fact that they would ordinarily have to recuse themselves. For this reason, this Court should deny leave to appeal to preserve the fairness of its own processes.

Costs

[49] Although the applications for leave to appeal stand to be dismissed, the applicant raised important and arguable constitutional issues. In accordance with established practice there will be no order as to costs.

Order

[50] It is ordered:

1. Leave to appeal in applications CCT 41/11 and CCT 46/11 is refused.
2. There is no order as to costs.

CORAM: Mogoeng CJ, Cameron J, Froneman J, Khampepe J, Skweyiya J, van der Westhuizen J, Yacoob J and Zondo AJ.

For the Applicant:	Advocate T Masuku, Advocate MK Mathipa and Advocate TS Sidaki instructed by Xulu Liversage Inc.
For the Respondent in CCT 41/11:	Advocate SP Rosenberg SC, Advocate A Katz SC and Advocate N Mayosi instructed by Fairbridges Attorneys.
For the First Respondent in CCT 46/11:	Advocate T Bruinders SC, Advocate N Fourie and Advocate L Sisilana instructed by Bowman Gilfillan Inc.
For the First Amicus Curiae:	Advocate A Bham SC, Advocate S Budlender and Advocate I Goodman instructed by the Centre for Applied Legal Studies.
For the Second Amicus Curiae:	Advocate PJ Pretorius SC and Advocate I de Vos instructed by the General Council of the Bar of South Africa.
For the Third Amicus Curiae:	Mr KP Seabi instructed by the Law Society of South Africa.
For the Fourth Amicus Curiae:	Advocate R Padayachee SC and Mr S Kunene instructed by the Black Lawyers Association.