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When Expedience Trumps the Rule of Law: *Hlophe v Premier: Western Cape and Others 2012 (6) BCLR 567 (CC)*

Introduction

At the outset, let me declare a professional role that I played in the early stages of what has become an unedifying muckraking among senior members of the judiciary. I led a team that represented the Judge President at the Judicial Service Commission ("the JSC") in 2009. At issue was a collective complaint by all the Justices of the Constitutional Court against the Judge President, alleging that he had attempted improperly to influence the Court in a case involving he who is now, for his many sins, President of the country.

In its decision, the JSC found that the Judge President's conduct, while *"unwise, ill-considered, imprudent and not thought through"*, none the less did not constitute impeachable conduct.

An NGO called Freedom under Law (buoyed by the ebullient rhetoric of a former Justice of the Constitutional Court particularly in

matters concerning the Judge President) felt aggrieved by this decision as it wanted the JSC to investigate the complaint against the Judge President thoroughly, including allowing the testing of evidence through cross-examination of the Judge President. So, it proceeded to the High Court, failed, and then to the Supreme Court of Appeal which set aside the decision of the JSC.

Not to be outdone, the Premier of the Western Cape spotted an opportunity to joust at the sword and mounted a steed in the form of the principle of legality. In lay parlance, she claimed that the JSC was not properly constituted when it made the decision to, as it were, acquit the Judge President. The Supreme Court of Appeal obliged her.

Since the JSC is a constitutional body (established by s 178 of the Constitution) and its decision as regards the fitness or otherwise of a judge is a decision that is rooted in the Constitution (pursuant to s 177(1)(a) read with 178(6) thereof) the Judge President sought succour from the wounding observations of the Supreme Court of Appeal[1] in what he hoped would be the palliative jurisprudence of the Constitutional Court, otherwise constituted than by its permanent members who were

[1] At the hearing of the appeal, one of the SCA Justices had asked rhetorically whether the Judge President was a crook.

(and continue to be) his adversaries in a gross misconduct complaint to the JSC.

One would have thought it a basic requirement of the rules of natural justice, that those Constitutional Court Justices who had lodged a complaint of gross misconduct against the Judge President would *automatically disqualify* themselves from hearing his appeal. But the Judge President's hope proved a forlorn hope in this regard. A Constitutional Court bench, including three of the Justices who had lodged a complaint of gross misconduct against him, considered his application for leave to appeal and refused it.[2]

The effect of this judgment is that the merits of the gross misconduct complaint by the Justices of the Constitutional Court against the Judge President may have to be investigated, again, by the JSC. If Freedom under Law has its wish, both the Justices on the one hand, and the Judge President on the other, will be subjected to robust cross-examination.

Of course, the electronic and print media would not miss the opportunity to beam and cover such a spectacle for its audience and

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[2] Because I was not on brief in that matter, and the issues it raises are not the merits of the complaint for which I was on brief, I consider it perfectly permissible within the Rules of the Bar to offer an unsolicited view on this case.

readership – not to mention the increased advertising revenue that it would gain from the popularity of such judicial muckraking.

But for our purposes tonight, the rub lies not in the media's motives in broadcasting or covering a public judicial spat. It lies rather in judges of the highest court deciding the fate of another senior judge in circumstances where they have a direct and substantial interest in the outcome of their own complaint that they have now sent back to the JSC, effectively for trial. *Nemo iudex in sua causa debet*[3] seems to have meant little in this context.

By way of sporting analogy, let us call the Judge President's application for leave to appeal and appeal in the Constitutional Court the *"qualifying round"*, and the trial at the JSC the *"knock-out stage"* of a competition. By what Rule of Law did the Constitutional Court, comprising in its number three Justices who want the Judge President impeached (or knocked out of the competition), manage to play referee in the qualifying round match in order to be player at the knock-out stage against the same guy? None, I would suggest to you.

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[3] No one may be judge in one's own cause or, as the sporting among us would put it, you cannot be a player and a referee in the same match.

The Conundrum

I have read many judgments in my existence. I have written many judgments as an Acting Judge of the High Court and of the Labour Court. In some I have granted applications for leave to appeal. In others I have refused such applications. Not one of my judgments has thus far been set aside on appeal. Having thus shamelessly blown my horn, I can tell you this: Every lawyer worthy of his or her robe knows that the most basic consideration in applications for leave to appeal is prospects of success on appeal. The standard is whether there are reasonable prospects of another Court reaching a different conclusion. If the prospects are poor, the judge will not grant leave. If they are reasonable, leave will be granted.

The Constitutional Court managed to avoid dealing with the application for leave to appeal in this normal way, electing rather to invoke the parties' acquiescence in its deciding the application without considering prospects of success on the merits. Alive to the conundrum it was about to navigate, it chose the Pontius Pilate route in these words:

> *"The parties agree that it is necessary for us to consider the applications…. 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"[4]

What then follows is reasoning that I find altogether strange and unconvincing. The Constitutional Court, clearly in a spot of bother, decided to refuse leave to appeal on the basis of what it says is a consideration of a difficult balance between its obligation to provide finality in the matter on the one hand, and procedural fairness and, thereby, the avoidance of injustice to the Judge President on the other. In its own words:

"[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

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4 See paras [44] and [45]

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."

And thus the curtain fell for the Judge President. Ironically (and perhaps even sardonically in light of the Justices of the Constitutional Court being complainants against the Judge President in pending impeachment proceedings at the JSC) this reasoning was ostensibly made to save him from an injustice!

An Unhappy Reasoning

The reasoning is, with respect, not the best.

Refusing leave to appeal did not bring the matter to finality. On the contrary, by sending the matter back to the JSC for trial, the Constitutional Court paved the way for a public spectacle that can only do harm not only to the institution that is the Constitutional Court but also to the JSC. It is in fact the JSC's decision that brought the matter to finality. One of the Justices who is alleged to have endured the Judge President's

attempts at influencing him improperly said he considered the matter finalised by the JSC and that *"it would not be wise for anyone to reopen the matter"*. In this regard he said:

> *"I think the matter has done so much damage to the judiciary, and to this Commission as an institution as well, and I think even if one doesn't agree with the outcome, one has to bear in mind that dragging it causes more damage to the institutions, leaving aside the individuals involved. Individuals may come and go but doing damage to the institutions is something that I find unfortunate."*

When the Constitutional Court decided to hear the Judge President's application for leave to appeal in March this year, the Justice who expressed this concern about dragging the matter on was already a serving member of that Court. Did the other Justices confer with him about the damage that he said dragging this matter would do to the judiciary and the JSC? If they did, it appears they did not think much of that concern.

Another Justice, who was acting in the Constitutional Court at the time of the lodging of the complaint, expressed this view after the JSC's decision: *"I think in the interests of the judiciary as a whole, of the Constitutional Court and of Judge Hlophe, the chapter must be regarded as closed"*. Again, the Constitutional Court appears to have ignored this view. Yet it says when referring the matter back to the JSC for trial, it

does so in the interests of finality. Clearly, its decision to reopen the matter does not seem to have the backing of all its members.

What's more, in papers filed at the Constitutional Court for this application for leave to appeal, a panoply of Legal Counsel retained to make legal history debated what they regarded as the vagaries of permitting a bevy of Acting Justices, appointed by he in whose favour the Judge President had been accused of improperly seeking to influence the Constitutional Court, decide such an important case. This appears to be the subtext of the Court's judgment when it invokes judicial independence and separation of powers in order to avoid confronting that question head-on.[5] Instead, the Court elected to give a narrow interpretation to the constitutional provision that talks about the appointment of acting judges.[6]

The section says:

> *"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."*

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5 Para [41]

6 Section 175(1) of the Constitution

The Constitutional Court says this section does not envisage the appointment of Acting Justices in the event of Justices of that Court recusing themselves. It says a judge who recuses himself is not *"absent"*; nor does the recusal bring about a *"vacancy"* within the meaning of the section. Blaming this on what it terms the *"language, context and the scheme of the Constitution"*[7], it arrives at this conclusion after what I regard as a tortuous form of reasoning which goes something like this:

"Absence" of a Judge Within the Meaning of s 175(1)

The Constitutional Court says although a recusal creates a *"physical absence"* from a particular case, it does not preclude a Constitutional Court Justice from performing *"the rest of her judicial duties"*[8] which she is required to perform. And since the act of a recusal is a performance of a judicial duty, its effect cannot therefore be considered to be an *"absence"*.[9] In other words, a Judge who recuses himself or herself from a particular case is not absent from the Court.

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7 Para [33]
8 The Constitutional Court did not specify what it means by *"the rest of her duties"*.
9 Para [34]

But this reasoning fudges the issue. The issue is not whether or not the Judges concerned are absent *from the Court building* and are unable to hear and consider *other cases*. Rather it is whether they are absent *from this case* and are unable to sit in, hear and consider *this case*.

As it happens, the Deputy Chief Justice, Justice Nkabinde and Justice Jafta recused themselves as they appreciated that they could not sit in this case. This created a quorum problem as there were only 7 Justices available to hear the case. The Constitution requires that at least 8 Justices constitute a quorum.[10] Justice Zondo was then appointed as Acting Justice to make up the quorum.[11] From this it is clear that Acting Justices could have been appointed to hear the case in the place of the 3 remaining Justices[12] who lodged a complaint of gross misconduct against the Judge President.

In any event, it has been recognized by our courts that the recusal of a judicial officer results in his *"absence"* from the matter. In *Attorney-General Transvaal v Assistant Magistrate and Others* 1960 (1) SA 491

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10 Section 167(2)

11 See *Judge President Hlophe v Premier of the Western Cape Province; Judge President Hlophe v Freedom under Law and Others (Centre for Applied Studies and Others as Amici Curiae)* 2012 (1) BCLR 1 (CC) at paras [7] & [8]. Although para [9] of the judgment seems to suggest that Acting Justice Zondo was appointed in order to fill the vacancy created by the retirement of Chief Justice Langa, it is clear from para [7] that the quorum arose when the Deputy Chief-Justice recused himself.

12 Justice Skweyiya, Justice Van Der Westhuizen and Justice Yacoob.

(T), it was held (per Galgut J and Maritz JP) that a magistrate's recusal resulted in his being *"absent"* within the meaning of section 186(4) of the Criminal Procedure Act, 56 of 1955. This decision was referred to with approval in *S v Sindane* 1962 (4) SA 79 (N), where Harcourt J (with Wessels J concurring) dealt with the phrase *"in the absence of the judicial officer who convicted the accused"*, and held that the *"sensible interpretation"* to give to the phrase was that it referred to circumstances in which the judicial officer in question *"cannot continue to hear the case"*. Such circumstances include those in which a magistrate had *"recused himself"*.[13]

Related to s 175(1) is whether the doctrine of necessity is applicable and can be invoked in the circumstances of this case. The Constitutional Court deftly avoided that question by pointing out that the parties, including the Judge President, consented to it hearing the application for leave to appeal without delving into the merits of the appeal and then dismissed the leave to appeal application. How it could lawfully have done that without considering prospects of success on appeal is still to me a mystery that it may still clarify if a similar issue arises in future.

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13 At 80 F–H

The doctrine of necessity entails that *"wherever it becomes necessary for a judge to sit even where he has an interest – where no provision is made for calling another in, or where no one else can take his place – it is his duty to hear and decide, however disagreeable it may be"*.[14] The difference between the position in the United States and that in South Africa is that we have a constitutional provision that allows for the appointment of Acting Justices. The United States does not. So, the proviso that necessitates a disqualified Judge nonetheless hearing a case in which he has an interest, "*where no provision is made for calling another in, or where no one else can take his place"*, does not apply in South Africa because there is indeed such a provision in our Constitution. It is found in s 175(1).

Section 175(2)

Then the Constitutional Court says under s 175(2) of the Constitution, acting judges may be appointed to other Courts without a vacancy or absence of a permanent judge in those Courts having arisen.[15]

This observation seems to justify the appointment of Acting Justices, even in the absence of a vacancy, than to refute it.

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14 *United States v Will* 449 U.S. 200 (1980) at 214

15 Para [36]

Other Comparative Provisions

Then the Constitutional Court says there is no justification for giving a different meaning to the word *"absent"* in s 175(1) than the ordinary meaning of *"physically absent"* that the word bears in s 90 and s 98 of the Constitution.[16]

Section 90 says an Acting President takes up that mantle when the President is out of the country, or is unable to fulfil the duties of a President, or when a vacancy has occurred in that office.[17] Section 98 says the functions of one cabinet member may be assigned by the President to another cabinet member if the first member is absent or unable to perform his functions.[18]

It is not clear to me how these provisions are comparable to a constitutional provision for the appointment of Acting Justices to the Constitutional Court. In any event, the Constitutional Court says in paragraph [34] that recusal creates *"physical absence"* from a particular case. That being so, the recusal of the Deputy Chief-Justice created his *"physical absence"* from the case and Acting Justice Zondo was

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16 Para [37]

17 The cynical could argue (perhaps not without some justification) that there has been a virtual vacancy in the Office of the President since 2009.

18 Para [37]

appointed to make up the quorum. Similarly, the recusal of Justices Skweyiya, Van Der Westhuizen and Yacoob would have created *"physical absence"* and Acting Justices could have been appointed in their stead.

The Scope of s 175(1)

The Constitutional Court says s 175(1) is intended to deal with normal instances of vacancies and physical absence caused by ill-health, retirement, death, and periods of leave.[19]

There is no justification for this narrow construction of the section. Recusal from a case creates physical absence from that case within the meaning of the section. There is no reasonable basis for limiting the meaning of *"absence"* to the categories identified by the Constitutional Court. On the Constitutional Court's own say-so, it was by the Deputy Chief Justice's recusal from this case that his physical absence gave rise to a quorum problem that was filled by an Acting Justice.

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19 Para [38]

Invoking the Interim Constitution

Then the Constitutional Court invokes the interim Constitution. It says, viewed from the prism of s 99(9) of the Interim Constitution which dealt with the appointment of Acting Judges,[20] the word *"absent"* in the Constitution (as a whole) should be interpreted narrowly to mean *"physically absent"* and not include temporary incapacity.[21]

But the Constitutional Court has itself said (at para [34]) a recusal creates *"physical absence"* from a particular case. It is with that absence that the Court should concern itself with.

Threat to Judicial Independence

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20 Section 99(9) of the interim Constitution provided as follows:

> "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 Constitutional Court, including acting judges, shall be judges who have been appointed from among the judges of the Supreme Court" (emphasis in the text of the Concourt judgment)

21 Paras [39] & [40]

The Constitutional Court then says potential danger to judicial independence and the separation of powers is ever present in the appointment of individual Judges to hear a specific case.[22]

But this remark assumes (without apparent justification) that pliant Judges may be appointed by the President as Acting Justices to decide the merits of the appeal between the Judge-President on the one hand, and Freedom under Law and the Western Cape Premier on the other, in a particular predetermined way. This ignores the presumption of impartiality in a Judge about which Ngcobo CJ famously said the following:[23]

> *[31] The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice'. Their oath of office requires them to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This presumption therefore flows directly from the Constitution.*

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22 Para [41]

23 *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) at paras [31] and [32]

> *[32] As is apparent from the Constitution, the very nature of the judicial function requires judicial officers to be impartial. Therefore, the authority of the judicial process depends upon the presumption of impartiality. As Blackstone aptly observed, "(t)he law will not suppose a possibility of bias or favour in a judge, who [has] already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". And, as this court observed in SARFU II, judicial officers, through their training and experience, have the ability to carry out their oath of office, and it 'must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions'. Hence the presumption of impartiality."*

So, there was no potential danger to judicial independence and the separation of powers if Acting Justices were appointed to hear the merits of the appeal in this case. The Constitution confers the power to appoint Constitutional Court Acting Justices on the President. South Africans (wisely or otherwise) invested their trust in the President to exercise that power with integrity. It is not the province of the Constitutional Court to question that trust by invoking alleged danger to judicial independence. Either the conferment of the power to appoint Acting Justices in the Constitutional Court gives rise to a potential danger to judicial independence or it does not. That danger should not depend upon the identity of the President exercising the power to appoint Acting Justices to the Constitutional Court.

What's more, the Constitutional Court cannot assume (as it seems to have done) that whichever Acting Justices are appointed by the President to hear the case will not do so impartially.

Automatic Disqualification

But in all its reasoning, the Constitutional Court misses one fundamental point. The circumstances of this case called not for a recusal of the Justices who want the Judge President removed as a judge.[24] The circumstances of this case gave rise *inevitably* to *automatic disqualification* of those Justices. This principle, and the circumstances giving rise to it, were explained by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No2)* [1999] 1 All ER 577 (HL) in these terms (at 586):

> *"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a*

[24] Justices Skweyiya, Van Der Westhuizen and Yacoob

> *suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.*
>
> *In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias."*

The 3 Justices of the Constitutional Court who were part of the bench that sat in judgment of the Judge President's application for leave to appeal had approached the JSC and lay a complaint against the Judge President that he attempted improperly to influence the Constitutional Court. By adjudicating the Judge President's application for leave to appeal, and refusing it, they ensured that their own complaint against the Judge President will be re-opened by the JSC (despite Justice Jafta – one of their number – saying he considered the matter finalised by the JSC and that *"it would not be wise for anyone to reopen the matter"*); they ensured that the Judge President may be removed as a judge on the strength of their evidence against him.

In these circumstances, the 3 Justices should have realised that they would be *"sitting as judges in [their] own cause"* and were thus

automatically disqualified from hearing the application. The Judge President's acquiescence in their hearing the application for leave to appeal did not absolve them from exercising their own judgment and disqualify themselves for the same reason that Justice Nkabinde, Justice Jafta and the Deputy Chief Justice withdrew from hearing the case. Whether the Judge President was satisfied that they would not be biased against him is irrelevant because they are a*utomatically disqualified* and apprehension of bias enquiry does not even come into it.

But to disqualify themselves automatically would have been to acknowledge that lodging a collective complaint as Justices of the Constitutional Court (and not as individuals) was a recipe for a potential constitutional crisis. Because they denied this on affidavit, it would not do to disqualify themselves on the ground that they were seriously conflicted. So, they didn't. Expedience trumped the Rule of Law and, at least ostensibly, a crisis was averted.

Conclusion

So, in conclusion, I leave you with this question: When expedience trumps the Rule of Law at the highest judicial level in a case like this, to whom does the ordinary citizen turn?

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