

# **The independence of South African judges: A constitutional and legislative perspective**

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## **1 Introduction**

Addressing the Cape Law Society a few weeks before his death, the former Chief Justice of the Republic of South Africa had this to say:

“Judicial independence is a requirement demanded by the Constitution, not in the personal interests of the judiciary, but in the public interest, for without that protection judges may not be, or be seen by the public to be, able to perform their duties without fear or favour.”<sup>1</sup>

Conceptually, judicial independence has been defined in various ways by legal theorists and philosophers. Admittedly, the principle is very extensive and complex, and this creates enormous definitional difficulties. However, the common thread that runs through the various definitions is an acknowledgment that judicial independence exists at two levels: Firstly, at an individual level – the ability of a judge to impartially and independently apply his or her mind to a matter without undue influence; and secondly at an institutional level – the ability of the judiciary to control the administration and appointment of court staff.

The principle of judicial independence is a fundamental and widely cherished element of democracy. As a result, it features quite prominently in many international legal instruments.<sup>2</sup> It is also protected and guaranteed by the South African Constitution<sup>3</sup> and pertinent statutes. Considering whether that protection is sufficient in the South African context, is the basis of this article. In making that determination, we begin from the premise that judicial independence entails the ability of a judge to make a decision without undue influence and interference from internal and external forces. Moreover, the judge must have security of tenure and financial security in order to guard against bribery and related interference and corrupt conduct. Furthermore, the judiciary must manage its own administrative functions and activities. In essence, a judiciary that does not have individual and institutional independence falls short of the core requirements of judicial independence.

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<sup>1</sup> See de Vos, Constitutionally Speaking blog “Arthur Chaskalson on independence of legal profession”, available at: <http://constitutionallyspeaking.co.za/arthur-chaskalson-on-independence-of-legal-profession/>.

<sup>2</sup> See, for example, s 10 of the Universal Declaration of Human Rights, s 14 of the International Convention on Civil and Political Rights, article 6(1) of the European Convention on Human Rights, article 25(1) of the American Convention on Human Rights, and article 26 of the African Charter.

<sup>3</sup> The Constitution of the Republic of South Africa (1996).

Although judicial independence exists at an individual and institutional level, from a conceptual perspective this article deals with individual independence. The particular question addressed in this article, is whether the existing legislative mechanisms in South Africa sufficiently protect the impartiality of the bench and insulate judges from improper influence in their adjudicatory tasks – consistently with section 165(4) of the Constitution. This is relevant, given recent assertions that judicial independence has been compromised on several occasions. In addressing this important question, an analysis is made of the impartiality of judges, their appointment, security of tenure, complaints and disciplinary proceedings, removal of judges, and remuneration. Some challenges to judicial independence in South Africa – largely relating to impartiality and bias – are identified and discussed.

## 2 Impartiality

Impartiality is generally understood to refer to the “state of mind or attitude of a judge or tribunal in relation to the issue and parties in a particular case.”<sup>4</sup> Central to the concept of impartiality is the absence of bias, whether actual or perceived. The opposite of impartiality, therefore, is bias. The question that arises then is how bias is determined. In *S v Collier*<sup>5</sup> where the accused insisted on being tried by a black magistrate and the presiding white magistrate refused to recuse himself, it was held on appeal that:

“Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision ... the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true ...”<sup>6</sup>

In essence, the court was seeking an objective determinant for bias which goes beyond frivolous issues. What must be determined is the objective state of mind or attitude that an adjudicator has towards a particular matter. However, it is equally important that a balance is struck between recusal on the grounds of bias, and a judge’s obligation to dispense justice. For example, the courts have observed that:

“Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.”<sup>7</sup>

In developing the test for bias, the Constitutional Court has held that:

“...the correct approach to recusal is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably

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<sup>4</sup> *Valente v The Queen* [1985] 2 S.C.R. 673 at 674.

<sup>5</sup> 1995 (2) SACR 648.

<sup>6</sup> 1995 (2) SACR 648 650 E-H.

<sup>7</sup> *Re J.R.L.: Ex parte* C.J.L. (1986) 161 CLR 342 352.

apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to the persuasion by the evidence and submissions of counsel. Central to the assessment of reasonable apprehension is that the reasonableness of the apprehension must be assessed in light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience.”<sup>8</sup>

Thus, from the above considerations, the test to determine bias can be summarised as follows: a) there must be a “reasonable apprehension”, b) the “reasonable apprehension” ought to be held by an objective and well informed person, c) the apprehension must be that the judge will not be impartial in adjudicating the matter, and d) this “apprehension must be made in light of the oath of office taken by the judges.” The presumption is that a judge is impartial in his/her adjudicative responsibility – hence, the person who alleges the bias must prove it in terms of established jurisprudence. The objective test is exacting on the person who wishes to prove it. Actual bias or the suspicion thereof impugns negatively on the administration of justice and may affect public confidence in the justice system. Thus, litigants should not be allowed to question it unnecessarily.

### **3 Judicial Appointments**

Historically, judges were traditionally drawn from the senior ranks of the bar. The procedure was that “the Judge President of the court concerned would assess the needs of the division, identify a possible candidate with the requisite qualities, and make a recommendation to the Minister of Justice. If the Minister concurred, the recommendation would be forwarded to the President for endorsement.”<sup>9</sup> However, this position has changed significantly. The process followed in the appointment of judges is now prescribed by the Constitution.

The body tasked with the responsibility of facilitating the appointment of judges is the Judicial Service Commission (JSC). The JSC is established in terms of section 178 of the Constitution and the Judicial Service Commission Act.<sup>10</sup> The JSC consists of the Chief Justice, the President of the Supreme Court of Appeal, one judge president designated by the judge presidents, the Minister of Justice or an alternative designated by the minister, two practising advocates nominated from within the advocates’ profession and appointed by the president, two practising attorneys nominated from within the attorneys’ profession and appointed by the president, one teacher of law designated by teachers of law at South African universities, six members of the National Assembly chosen by it (of whom at least three are members of opposition parties represented in the National Assembly), four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of six provinces, and four persons designated by the president as head of the national executive – after consulting the leaders of all the parties in the National Assembly.<sup>11</sup>

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<sup>8</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (7) BCLR 725 (CC) 48.

<sup>9</sup> Van De Vijver (ed) *The judicial institution in Southern Africa: A comparative study of common law jurisdictions* (2006) 122.

<sup>10</sup> Act 9 of 1994.

<sup>11</sup> s 178(1) (a) - (j).

Additionally, “when considering matters relating to a specific High Court, the Commission is joined by the Judge President of that court and also by the Premier of the Province concerned.”<sup>12</sup>

The appointment of judges by the JSC has not, however, been without controversy. In *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province*,<sup>13</sup> the Premier of Western Cape Province challenged the validity of the JSC proceedings concerned, based on three issues. Firstly, when the JSC convened and took the relevant decision, she was not present because she had not been notified – which meant that she could not comply with her obligation to attend as required by section 178(1)(k) of the Constitution. Secondly, only ten members of the JSC participated, when on the JSC's own interpretation of section 178(1)(k), the JSC should have been composed of thirteen members. And thirdly, the decisions of the JSC were not supported by a majority of the members, as required by section 178(6) of the Constitution. It was held that the evidence in respect of the complaint did not justify a finding that the judge president was guilty of gross misconduct, and that the matter was accordingly finalised. It was further held that the evidence in support of the counter-complaint did not support a finding that the Constitutional Court justices were guilty of gross misconduct, and that the matter was accordingly finalised. The court also found that none of the judges against whom complaints had been lodged was guilty of gross misconduct. With regard to section 178(1)(k) of the Constitution, the court made it clear that “the Premier of the province forms part of JSC ... when complaints against high court judges of the province are considered.” Thus, the Premier of the Western Cape ought to have been invited when the JSC convened over the complaint about the Western Cape Judge President. As far as section 178(6) is concerned, it was held that decisions must be supported by a majority of the members of the JSC – which, in terms of section 178(6), means “majority of members entitled to be present, not majority of the members present.”<sup>14</sup> This therefore meant that the JSC was not properly constituted when it took such decisions, and this consequently nullified prior decisions made. The court was left with no other option but to set aside the decisions of the JSC.

With regard to the JSC, provision is made for the Chief Justice and the President of the Supreme Court of Appeal to be represented by their deputies, if necessary. Provision is also made for alternate nominations for the representative of the judge president, the advocates’ and attorneys’ professions, and the teachers of law. The JSC is therefore a body of 23 permanent members, and in some instances 25 persons. While the body is diverse, in that it consists of members of a wide spectrum from within the legal profession, it is, however, also heavily composed of political nominees. Critics have raised this as a concern, although there is nothing unconstitutional about it. It is submitted that a distinction should be made between being nominated to implement an independent task and being “appointed to act in accordance with the dictates of the executive.”<sup>15</sup> It is also important to note that democratic processes

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<sup>12</sup> s 178(1) (k).

<sup>13</sup> 2011 (3) SA 538 (SCA).

<sup>14</sup> *Idem* 20.

<sup>15</sup> *S v Van Rooyen* 2002 (5) SA 246.

dictate that the “executive participates in the appointment of judges as they represent the electorate who have a vested interest in the appointment of judges ... The drafters of the Constitution sought to ensure that persons from diverse political, social and cultural backgrounds, representing varying interest groups, would participate in the deliberations of the JSC.”<sup>16</sup> Furthermore, it should be noted that “checks and balances” allow for intrusion of one arm of government into another – to ensure that there isn’t an over concentration of power. Thus, the composition of the JSC envisages cooperation between all three arms of government, including other stakeholders such as the legal profession and academia – in the appointment of judges.

The appointment of judges is vested in the state president, as head of the national executive. Under Section 174(3) of the Constitution, the president appoints the Chief Justice and Deputy Chief Justice. This is after consultation with the JSC, which interviews the nominees for these positions and the leaders of parties represented in the National Assembly. Similarly, he consults the JSC before appointing the President and Deputy President of the Supreme Court of Appeal.<sup>17</sup> In terms of section 174(4), the president appoints (from a list prepared by the JSC) the judges of the Constitutional Court, after consultation with the Chief Justice and leaders of parties represented in the National Assembly. The list must have three names more than the number of vacancies to be filled. The president must advise the JSC if any nominees are unacceptable – and must give reasons. The JSC then supplements the list with further nominees, and the president must make the remaining appointments from the list so supplemented.<sup>18</sup> Section 174(5) provides that – at all times – the Constitutional Court must have at least four members who were serving as judges at the time of their elevation to the court and under section 175(6), appointments of all judges must be made on the advice of the JSC.

Section 174(1) of the Constitution states that “any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer ...” This statement is qualified by section 174(2), which stipulates that “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”. Although the courts have yet to pronounce on the meaning of this section, it has been suggested that it was included in the Constitution “in an attempt to correct the imbalances in the composition of the judiciary”.<sup>19</sup> In expressing the importance of diversity in the judiciary, the JSC has stated that it “is a quality without which the court is unlikely to be able to do justice to all the citizens of the country. The court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection.”<sup>20</sup> As a result of section 174(2), the racial and gender composition of the judiciary has been radically changed. For example, according to the Department of Justice and

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<sup>16</sup> *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115.

<sup>17</sup> See s 174(3) of the Constitution.

<sup>18</sup> s 174(4).

<sup>19</sup> AfriMAP and Open Society Foundation for South Africa “South Africa justice sector and the rule of law: A discussion document” (2005) 92, available at: <http://www.afriMAP.org/english/images/report/sa-eng-part-2-chapter-4.pdf> (accessed 2012-11-19).

<sup>20</sup> *Ibid.*

Constitutional Development, “in 1994 there were only three black people and nine women serving as judges. By 2011 there were 136 black people and 61 women out of 225 judges”.<sup>21</sup>

On the face of it, section 174(2) appears to be achieving its purpose in ensuring the judiciary is “broadly reflective of the gender and racial composition of South Africa”. However, despite the seeming benevolent intentions of the provision and progress that has been made, section 174(2) has been the subject of intense criticism and debate. For example, the JSC has been criticised over its failure to appoint enough women candidates.<sup>22</sup> Some of these debates have also been occasioned by the JSC’s failure to appoint certain experienced white candidates<sup>23</sup> – while preferring to appoint less experienced black candidates. These omissions have raised concerns that the “JSC is giving too much weight to race and not enough to whether candidates are fit, proper and appropriately qualified.”<sup>24</sup> The question that still remains is whether section 174(2) seeks an appropriate demographic representation of the judiciary, or whether it is only a guide in the appointment process. In an attempt to elucidate on how this section ought to be interpreted, the former constitutional court judge, Justice Kriegler, has submitted that:

“The constitutional mandate instructs the Judicial Service Commission in section 174(1) to appoint people that are appropriately qualified. That’s a precondition. That’s a mandatory requirement. And then subsection (2), as a rider to that, says: and in doing that, have regard to the racial and gender balance on the Bench. And it’s for obvious reasons that the Constitution, while mentioning the transformational criterion in subsection (2), demands in subsection (1) as the primary and essential requirement that appointees be appropriately qualified. Now these two essential factors, the one absolute and the other discretionary, have been turned on their heads.”<sup>25</sup>

It is clear from this statement that Justice Kriegler’s favoured interpretation is that section 174(2) is merely a guide, and not a prerequisite for appointment. Justice Kriegler’s interpretation is narrow. Black people and women are previously disadvantaged; it stands to reason that section 174(2) cannot be read in isolation of section 9(2) of the Constitution and the Employment Equity Act,<sup>26</sup> which seek to address the imbalances of the past through affirmative action measures. Therefore, section 174(2) embraces the principle of substantive equality, which can be described as equality of outcome, as it requires a consideration of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld. The Constitutional Court has described the notion of substantive equality, to mean:

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<sup>21</sup> Andries Nel, Deputy Minister of Justice and Constitutional Development “We must look into our national soul to make sure it lives forever” *Sunday Independent*, 2012-03-04, available at: <http://www.justice.gov.za/docs/articles/20120304-dm-transformation.html> (accessed 2012-11-19).

<sup>22</sup> Adila Hassim “JSC: A few good women needed” *Mail & Guardian*, 2012-11-30, available at: <http://mg.co.za/article/2012-11-30-00-jsc-a-few-good-women-needed> (accessed 2012-12-03).

<sup>23</sup> Steven Budlender SC in 2004, and Jeremy Gauntlett SC in 2012.

<sup>24</sup> Steward “Criteria for the appointment of Judges”, available at: [http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=print\\_article&news\\_id=116265&cause\\_id=2137](http://www.fwdeklerk.org/cgi-bin/giga.cgi?cmd=print_article&news_id=116265&cause_id=2137) (accessed 2012-12-08).

<sup>25</sup> *Ibid.*

<sup>26</sup> 55 of 1998.

“This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.”<sup>27</sup>

Accordingly, section 174(2) ought to be viewed as a measure seeking “remedial or restitutionary equality”<sup>28</sup> within the judiciary, and enjoins the JSC in the appointment process of judges. It is therefore submitted that from this perspective, section 174(1) ought to be read together with section 174(2). While section 174(1) of the Constitution requires that candidates for appointment are appropriately qualified and fit and proper, section 174(2) seeks to ensure that previously disadvantaged persons are given the opportunity if they are adequately qualified and are fit and proper. Moreover, it is submitted that a judiciary that is broadly reflective of the gender and racial composition of society bodes well for public confidence in it.

In the case of *JSC v Cape Bar Council*<sup>29</sup> the court had to deal with two substantive issues. The first was whether the JSC was properly constituted (the president of the SCA and his deputy were absent) when it interviewed candidates for vacancies in the Western Cape High Court, and, if not, whether that resulted in the invalidity of the decisions taken at the meeting.<sup>30</sup> The second issue was whether, in the circumstances, the decision of the JSC not to recommend any of the candidates to fill in the two remaining vacancies was irrational and therefore unconstitutional.<sup>31</sup> Regarding the first issue, in reaching its conclusion, the court was bound by its previous pronouncement in *Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province*,<sup>32</sup> where it held that the JSC cannot take valid decisions in matters that relate to a court in a particular province – without the presence of the premier. The court considered that the “position can be no different with matters that relate to the absence of the President of the Supreme Court of Appeal or his deputy”.<sup>33</sup> It therefore held that the absence of the President of the Supreme Court of Appeal, or, alternatively, his deputy – rendered the decisions taken on the day regarding six unsuccessful candidates invalid, as the JSC was not properly constituted.<sup>34</sup> Regarding the second issue, the court was of the view that firstly, since the JSC is under a constitutional obligation to act rationally and transparently in deciding whether or not to recommend candidates for judicial appointment, it follows that, as a matter of general principle, it is obliged to give reasons for its decision not to do so. The court further held that “where the undisputed facts gave rise to a *prima facie* inference that the decision not to recommend any of the suitable candidates was irrational, the failure by the JSC to adhere to

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<sup>27</sup> *Minister of Finance & Others v Van Heerden* 2004 6 SA 121 CC 27.

<sup>28</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 CC 60.

<sup>29</sup> *JSC v Cape Bar Council* (n 16 above) 115.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> 2011 (3) SA 538 (SCA).

<sup>33</sup> *JSC v Cape Bar Council* (n 16 above) par 30.

<sup>34</sup> *Idem* 36.

its general duty to give reasons inevitably leads to confirmation of that *prima facie* inference”.<sup>35</sup>

There are two very important pronouncements made by the court in this case, which related to the operation of the JSC. The first is that the JSC ought to be properly constituted when it makes decisions, and that the composition of the JSC shall be determined by the purpose for which it has convened. Secondly, the JSC ought to act rationally and lawfully. Rationality encompasses giving reasons to an unsuccessful candidate. This is because the “JSC is under a constitutional obligation not to act in an irrational and arbitrary manner; the importance of reasons is that they assist to rationalise the exercise of power and decision making and provides the aggrieved party an opportunity to rebut the defence of the decision maker”.<sup>36</sup>

The appointment of judges is crucial to the independence of the judiciary. By stipulating clear procedures to be followed in their appointment, the Constitution ensures that appointments are done in a transparent manner and for the correct reasons. The process also seeks to ensure that judges who are appointed are people of ability, who are fit and proper. Moreover, the appointment processes also ensure that the constitutional imperatives of transformation are taken into account. The Constitution, through the JSC, therefore ensures that judges aren’t appointed arbitrarily for inappropriate reasons. This is particularly important in a constitutional democracy, such as South Africa, as judges are the guardians of the Constitution.

#### **4 Security of Tenure**

Another important feature of judicial independence is security of tenure. The Constitution provides that “a judge of the Constitutional Court holds office for a non-renewable term of 12 years or until reaching the age of 70 years, whichever one comes first”.<sup>37</sup> Judges of other courts “hold office until they are discharged from active service in terms of an Act of Parliament”.<sup>38</sup> The Judges Remuneration and Conditions of Employment Act<sup>39</sup> governs this position. Section 3 of the Act is similar to section 176(1) of the Constitution, in providing that a judge of the Constitutional Court is to be discharged from active service either on reaching the “age of 70 years or after completing a 12 year term of office on the Constitutional Court, whichever occurs first”.<sup>40</sup> Furthermore, the Act also provides that the president may discharge a judge from active service on the Constitutional Court for incapacity through ill health, or at the judge’s own request for a reason the president deems sufficient.<sup>41</sup>

There are, however, further qualifications relating to the tenure of judges in the Constitutional Court. If, at the “end of the 12 year term on the Constitutional Court the judge has not

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<sup>35</sup> *Idem* (n 16 above) par 51.

<sup>36</sup> *Idem* (n 16 above) par 44.

<sup>37</sup> s 176(1) of the Constitution.

<sup>38</sup> s 176(2).

<sup>39</sup> 47 of 2001.

<sup>40</sup> s 3(1)(a).

<sup>41</sup> s 3(1)(b) and (c).

completed a total of 15 years' active service, the judge's term is extended until 15 years' active service has been completed".<sup>42</sup> If – at the age of 70 years – the judge has not completed 15 years of active service, then the term on the Constitutional Court is extended until either the 15-year mark has been reached, or the judge is 75 years of age – whichever occurs first.<sup>43</sup> Section 3(2)(a) of the afore-mentioned act also provides for a “discharge from active service on reaching the age of 70 years, or on completion of 10 years of active service, whichever comes first” A judge who has reached the age of 65 years and has completed 15 years' active service and who wishes not to continue, may notify the minister accordingly, and be discharged by the president.<sup>44</sup>

In the case of *Justice Alliance of South Africa v President of South Africa*<sup>45</sup> the Constitutional Court had to determine whether section 8(a) of the Judges Remuneration and Conditions of Employment Act was consistent with section 176(1) of the Constitution. This required the Court to consider firstly, whether section 8(a) of the Act delegates the power to extend tenure to the president; if so, whether delegation is permitted by section 176(1) of the Constitution; and, if so, whether the delegation was validly done and whether section 176(1) authorises a differentiation of terms of office of judges of the Constitutional Court.<sup>46</sup>

In addressing the first issue, which related to delegation, the court held that “section 8(a) [of the Act] grants the President an executive discretion to extend or not extend the term of office of the Chief Justice who is approaching the end of his or her term”.<sup>47</sup> Furthermore, the court held that “section 176(1) [of the Constitution] explicitly states that an Act of Parliament must [actually] extend the term. Thus, the extension by the President does not qualify as an Act of Parliament as required by the Constitution as it lacks the specific features of an Act of Parliament”.<sup>48</sup> The court considered that “had it been contemplated that the power in section 176(1) be delegable, the intention to do so would have been made clear by the drafters of the Constitution”. The court also held that what is also problematic about section 8(a), is that “it usurps the legislative power granted only to Parliament which therefore constitutes an unlawful delegation”.<sup>49</sup> Moreover, another important consideration to be made in assessing the constitutional compliance of delegation, the court held, “is the constitutional imperative of judicial independence”.<sup>50</sup> The court was further of the view that the open-ended discretion in section 8(a) “may raise a reasonable apprehension or perception that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the executive”.<sup>51</sup> The court therefore concluded that the provisions of section 8(a) amount

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<sup>42</sup> s 4(1).

<sup>43</sup> s 4(1).

<sup>44</sup> s 3(2)(b).

<sup>45</sup> 2011 (5) SA 388 (CC).

<sup>46</sup> *Idem* par 41.

<sup>47</sup> *Idem* par 52.

<sup>48</sup> *Idem* par 58.

<sup>49</sup> *Idem* par 62.

<sup>50</sup> *Idem* par 66.

<sup>51</sup> *Idem* par 68.

to an impermissible delegation, and are invalid as they are inconsistent with the provisions of section 176(1) of the Constitution.

Regarding the issue of whether section 176(1) authorises a differentiation of terms of office of judges of the Constitutional Court, it was held that non-renewability is the bedrock of security of tenure, and a protective mechanism against judicial favour in passing judgment. Amongst other things, the importance of non-renewability is that it “fosters public confidence in the institution of the judiciary as a whole as its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal”.<sup>52</sup> The court also held that the “singling out of the Chief Justice alone, amongst the members of the Constitutional Court is incompatible with section 176(1) as this section does not permit singling out of any one Constitutional Court judge on the basis of his or her individual identity or position within the Court”.<sup>53</sup> The court further stated that “incumbency of the office of the Chief Justice or Deputy Chief Justice makes no difference and confers no special entitlement to extension<sup>54</sup> as to create a special category for the extension of the term of office of the Chief Justice or Deputy Chief Justice would be to single out one judge”. Therefore the court was of the view that “incumbency of an office is irrelevant to the delineation of the members of the Constitutional Court in section 176(1)”. The court thus concluded that “section 8(a) is invalid on the basis of the differentiation it effects”.<sup>55</sup>

This judgment highlights the relevance of non-renewability of tenure to judicial independence. The position taken by the court is that the terms of office of constitutional court judges should be fixed in order to provide stability and consistency in the functioning of the court, and to prevent any perception of bias or a lack of independence in the judiciary. In essence, the decision underscores security of tenure as an important element of judicial independence, and demonstrates the vigilance of South African courts – particularly the Constitutional Court – in enforcing such security and protecting judicial independence.

## **5 Complaints, Disciplinary Proceedings and Removal of Judges**

Complaints and disciplinary proceedings against judges, and procedures for their removal from office are intrinsically interrelated and sensitive issues. Their sensitivity stems from the general view that any complaints, disciplinary action and removal of judges ought to be dealt with in terms of a clear legislative framework. What gives rise to this view is the desire to insulate any such proceedings from abuse or manipulations – be it political or otherwise. It is therefore important to ensure that clear, objective standards are established. In the South African context, section 180 of the Constitution states that “national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including procedures for dealing with complaints about judicial officers”.

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<sup>52</sup> *Idem* par 73.

<sup>53</sup> *Idem* par 85.

<sup>54</sup> *Idem* par 94.

<sup>55</sup> *Idem* par 95.

The complaints' procedure against judges is governed by the Judicial Services Commission Act.<sup>56</sup> The preamble of the Act spells out the purpose of the Act as, *inter alia*, "to provide procedures for dealing with complaints about judges; to provide for the establishment of a Judicial Conduct Tribunal to inquire into and report allegations of incapacity; gross incompetence or gross misconduct against judges; and to provide for matters connected therewith."

Section 14(1) of the Act provides that any person may lodge a complaint against a judge, and that the grounds for this are incapacity giving rise to a judge's inability to fulfil his duties in accordance with prevailing standards. According to section 14, gross incompetence or gross misconduct, as envisaged in s 177(1)(a) of the Constitution, includes but is not limited to "any wilful or grossly negligent breach of the Code of Judicial Conduct [and] any wilful or grossly negligent conduct...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."<sup>57</sup> The Act also recognises the existence of "lesser complaints."<sup>58</sup> Section 15(2) of the Act stipulates that a complaint that "does not fall within the parameters of any of the listed grounds, and that is solely related to the merits of a judgement or order, that is frivolous or lacking in substance or that is hypothetical may be dismissed."

Section 17(2) of the Act states that an inquiry into serious, but non-impeachable complaints "must be conducted in an inquisitorial manner and there is no onus on any person to prove or disprove any fact during such investigation", while section 17(3)(a) requires that the respondent in the matter ought to be invited to "respond in writing or any other manner specified and within a specified period to the allegations". Subsequently, the complainant must have the opportunity to comment on the response of the respondent within a specified period of time.<sup>59</sup> If it is found there is no reasonable likelihood that a formal hearing on the matter will contribute to determining the merits of the complaint, the complaint must be dismissed, or it must be found that the complaint has been established and that the respondent has behaved in a manner unbecoming of a judge, and remedial steps imposed.<sup>60</sup> Under section 17(4)(c), it may also be recommended to the JSC that the complaint should be investigated by a tribunal. Conversely, if it is found that a formal hearing is required in order to determine the merits of the complaint, this must be done within a reasonable time.<sup>61</sup> Upon conclusion of the formal hearing, the complaint must either be dismissed or it must be "found that the complainant has established that the respondent has behaved in an unbecoming manner for a judge and impose remedial relief referred to in terms of the Act or recommend to the Committee to recommend to the Commission that the complaint should be investigated by a Tribunal."<sup>62</sup> Section 17(8)(a)–(g) of the Act contemplates that one or a combination of

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<sup>56</sup> Act 9 of 1994.

<sup>57</sup> s 14(4)(b) and (e).

<sup>58</sup> s 15.

<sup>59</sup> s 17(3)(c).

<sup>60</sup> s 17(4)(b).

<sup>61</sup> s 17(5)(a).

<sup>62</sup> s 17(5)(c)(iii)

remedial steps may be imposed in respect of the respondent, including: apologising to the complainant in a specified manner, a reprimand, a written warning, compensation, appropriate counselling, and attendance of a specified training course.

Impeachable complaints about judges are conducted in terms of Section 16(1) of the Act, and sections 21 to 34 deal with the establishment of the Judicial Conduct Tribunal – whose objectives are to “collect evidence; conduct a formal hearing; make findings of fact; making a determination on the merits of the allegations; and to submit a report containing its findings to the Judicial Service Commission”.<sup>63</sup> Section 26(2) directs the tribunal to conduct its enquiry “in an inquisitorial manner and there is no onus on any person to prove or disprove any fact before a Tribunal”.<sup>64</sup> It’s also important to note that “when considering the merits of any allegations against a judge, the Tribunal must make its determinations on a balance of possibilities”,<sup>65</sup> and must keep a record of its proceedings.<sup>66</sup> Section 2(1) states that the tribunal must be appointed by the Chief Justice whenever requested to do so by the JSC. The composition of the tribunal is governed by section 22(1), to comprise two judges, one of whom must be designated by the Chief Justice as the Tribunal President, and one other person who is not a judicial officer. Furthermore, at least one member of every tribunal must be a woman.<sup>67</sup>

The circumstances and procedure for the removal of a judge from office are unequivocally spelt out under section 177 of the Constitution, which 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 that judge to be removed by a resolution adopted with a supporting vote of at least two thirds of its members.<sup>68</sup> Thereafter, the president must remove the judge concerned from office.<sup>69</sup> In effect then, the body tasked with making a finding that a judge is guilty of incapacity, gross incompetence or gross negligence, is the Judicial Conduct Tribunal.

It is submitted that the Judicial Services Commission Act creates a clear legislative framework that ought to be followed in matters pertaining to complaints, disciplinary procedures, and the removal of judges. As mentioned above, a judge can only be removed from office by the president after a two thirds majority resolution adopted by the National Assembly. In other words, until such a resolution is adopted by the National Assembly, a judge may not be removed from office – despite an adverse finding by the tribunal. It is to be noted that the establishment of the tribunal by the Act closes a lacuna, as the task of disciplining judges previously lay with the JSC – without any clear procedures established about how complaints ought to be dealt with. It is submitted that the possible reason for the onerous two thirds majority vote in the National Assembly are, firstly, the principle of

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<sup>63</sup> s 26(1)(b).

<sup>64</sup> s 26(2).

<sup>65</sup> s 26(3).

<sup>66</sup> s 26(4).

<sup>67</sup> s 22(2) of the Constitution.

<sup>68</sup> s 177(1)(b).

<sup>69</sup> s 177(2).

security of tenure which is premised on the principle that a judge's tenure is secure and may only be removed in exceptional circumstances. Secondly, this is consistent with the principle of checks and balances which ensure that the power to remove judges doesn't solely rest with the judiciary. The importance of this is that it removes overconcentration of power in the judiciary regarding the removal of judges.

## 6 Remuneration of Judges

Although the salaries, allowances and benefits of judges and acting judges are governed by the Judges Remuneration and Conditions of Employment Act,<sup>70</sup> in terms of the Constitution, "the salaries, allowances and benefits of judges may not be reduced".<sup>71</sup> Ultimately, the president determines the annual salary of judges, but parliament has the right to debate and reject the terms of the president's proclamation.<sup>72</sup> It's also interesting to note that, once discharged from active service, a judge is entitled to a life-time salary, which is adjusted in terms of the Judges Remuneration and Conditions of Employment Act.<sup>73</sup> This depends on the judge's manner of discharge and period of service. Moreover, in addition to the lifetime salary, a gratuity is also received on retirement.<sup>74</sup>

It is important that judges are well remunerated. This is because if this does not happen, they may become susceptible to illicit financial inducements from parties who may want to influence them in a particular manner. Thus, ensuring that judges are well remunerated seeks to protect them from corrupt behaviour. A well-paid judge may find it easier to confidently resist corrupt inducements.<sup>75</sup> Secondly, in order to attract the best candidates to the judiciary, it is imperative that they are remunerated competitively. Lastly, the reason for the general principle that judges' salaries should not be reduced is to guard against the possibility of any government attempts to influence or put pressure on judges through salary reductions.

## 7 Challenges

Although the foregoing discussion shows that constitutionally and legislatively speaking, judicial independence seems to be fairly protected, some incidents have appeared to compromise such independence. One example was the appointment, in February 2010, of Advocate Mpshe – a former Acting National Director of Public Prosecution – as an acting judge in the North West Province, by the Minister of Justice and Constitutional Development in terms of section 175(2) of the Constitution. Advocate Mpshe's appointment was met with much consternation because of perceived past political affiliations and possible bias in favour

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<sup>70</sup> 47 of 2001.

<sup>71</sup> s 176(3) of the Constitution.

<sup>72</sup> ss 2(1) and 2(2) of the Judicial Services Commission Act (n 57 above) . For judges' salaries, as of 1 April 2012, see: Proc 60/GG 35744 of 1 April 2012.

<sup>73</sup> s 5 of the Act.

<sup>74</sup> s 6.

<sup>75</sup> *De Lange v Smuts NO and Another* 1998 (3) SA 785(CC) 72.

of the government.<sup>76</sup> Another example was the appointment of Judge Heath as the Head of the Special Investigative Unit (SIU).<sup>77</sup> In dealing with this issue, the Constitutional Court held that Judge Heath's appointment to head of the SUI could result in a public perception that judges were functionally associated with the executive and therefore unable to control the power of that executive with the detachment and independence called for by the Constitution. This in turn would undermine the separation of powers and the independence of the judiciary. Therefore, the appointment of a judge to head the SIU could not be supported and was thus invalid.<sup>78</sup>

The above two examples are analogous in terms of representing insidious attempts to erode the separation of powers and the judiciary's independence. If the sanctity of these constitutional principles is to remain, it is imperative that any such attempts are resisted.

The best (or worst) example of a challenge to judicial independence in South Africa, is perhaps what we shall generically refer to as the 'Hlophe saga'. The breadth and depth of this paper do not lend themselves to a detailed account of this saga. Suffice to say, it is a vexed and controversial issue which continues to cast a dark shadow over the independence of the judiciary in South Africa. The saga originated from a series of events which began in 2008, with judges of the Constitutional Court claiming that the Cape Judge President John Hlophe tried to improperly influence two of them to rule in favour of Jacob Zuma – who was not yet president of South Africa – and who was facing corruption charges at the time. Hlophe subsequently instituted a counter complaint against the Constitutional Court judges on the basis that they issued a statement to the media regarding their complaint, without giving him an opportunity to defend himself. The drama that followed resulted in a disciplinary committee of the JSC dismissing the complaint against Judge Hlophe in 2009, and the question to be asked is whether such dismissal amounted to an abdication of the JSC's constitutional responsibility, and whether such abdication constitutes a threat to judicial independence. The counter-complaint lodged by Hlophe against the judges of the Constitutional Court is, however, deliberately omitted from this discussion, as the Supreme Court of Appeal (SCA) has on two occasions held that the JSC acted lawfully in dismissing the complaint.<sup>79</sup> More than six years have passed and the dispute remains unresolved. Two months ago, the Johannesburg High Court dismissed an application brought by Constitutional judges Bess Nkabinde and Chris Jafta against the JSC. At the time of writing, there is no certainty where the dispute goes from here.

The view we express, however, is that the failure of the JSC as an institution constitutes a threat to judicial independence. The amount of damage the Hlophe saga may have potentially caused is unknown. Anecdotal evidence seems to suggest that the JSC, as an institution, may have suffered great harm. For example, in 2009, Judge Nugent of the SCA withdrew his

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<sup>76</sup> See: "DA reiterates objection to Mpshe appointment", *Mail & Guardian*, 2010-02-18, available at: <http://mg.co.za/article/2010-02-18-da-reiterates-objection-to-mpshe-appointment>.

<sup>77</sup> Established in terms of Special Investigating Units and Special Tribunals Act 74 of 1996.

<sup>78</sup> *South African Personal Injury Lawyers v Heath* 2001 (1) SA 883, par 46

<sup>79</sup> *Langa CJ and Others v Hlophe* 2009 (8) BCLR 823 (SCA), and *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* (2011 (3) SA 549 (SCA).

application with the JSC as a candidate for a vacancy in the Constitutional Court – citing as the reason for the withdrawal, his lack of trust in the JSC as a result of the manner in which the body had handled the Hlophe saga. He further suggested that the low number of candidates applying for positions in the Constitutional Court in recent times may be influenced by the lack of confidence in the body to dutifully dispose of its mandate.<sup>80</sup> It may therefore be concluded that the abdication of responsibility by the JSC in fact constitutes a threat to judicial independence.

## **8 Conclusion**

This paper sought to explore whether or not – and the extent to which – judges in South Africa are independent. An analysis of constitutional and legislative measures which seek to insulate judges from improper influence was undertaken. Five major conclusions were reached in this regard. Firstly, in terms of South African jurisprudence, the presumption is that a judge is impartial. Should there be any suspicion or allegation of bias, the burden of proof falls on the party alleging the bias to prove it. Secondly, the Constitution establishes mechanisms for the appointment of judicial officers and stipulates clear procedures to be followed in this process. The JSC plays an important oversight role in ensuring that judges are appointed in terms of the objective criteria stipulated by the Constitution. Thirdly, the legislative framework adopted to ensure the security of tenure of judges, provides that a judge's term of office is predetermined and is non-renewable. Fourthly, the legislative framework adopted in terms of complaints, disciplinary proceedings and the removal of judges, is quite elaborate. It also establishes a Judicial Conduct Tribunal whose responsibility is to deal with such complaints. The legislative framework also distinguishes between impeachable complaints and serious but non-impeachable complaints. It further deals with the removal of judges. Fifthly, the legislative framework relating to the remuneration of judges is agreeable to the general principle that judges ought to be well paid and that their salaries may not be reduced. This is with the view that this would remove the likelihood of improper financial inducements or pressure having an effect on judges' decisions.

It may therefore be concluded that, generally speaking, the constitutional and legislative framework adopted by South Africa sufficiently insulates judges from improper influence. However, there are a number of challenges in practice. These relate particularly to judicial appointments and how the JSC has handled certain matters. The on-going Hlophe saga referred to above is an important example of this. These challenges could be construed as threats to judicial independence, and need to be debated, and also comprehensively and properly addressed.

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<sup>80</sup> See: "Concourt candidate riles commissioners", *IOL News*, 2012-06-10, available at: <http://www.iol.co.za/news/crime-courts/concourt-candidate-riles-commissioners-1.1315509>.