

Report of the Portfolio Committee on Justice and Correctional Services on the Referral, by the Chief Justice of the Republic of South Africa, of a Finding of Gross Misconduct against Judge NJ Motata in terms of Section 20(4) of the Judicial Service Commission Act, 1994 (Act No 9 of 1994), read with Section 177(1) of the Constitution of the Republic of South Africa, 1996, Dated 30 November 2023

The Portfolio Committee on Justice and Correctional Services, having considered the referral by the Chief Justice of the Republic of South Africa, of a finding of gross misconduct against Judge NJ Motata in terms of section 20(4) of the Judicial Service Commission Act, 1994 (Act No 9 of 1994), read with section 177(1) of the Constitution of the Republic of South Africa, referred to it, reports as follows.

1. Introduction

1.1. In a letter to the Speaker of the National Assembly, dated 18 August 2023, Chief Justice R Zondo, as Chairperson of the Judicial Service Commission (“JSC”), referred a finding of the JSC that Judge NJ Motata is guilty of gross misconduct to the National Assembly in terms of section 20(4) of the Judicial Service Commission Act, 1994 (Act No 9 of 1994) (“the JSC Act”), read with section 177(1) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The Chief Justice highlighted the following:

1.1.1. A Judicial Conduct Tribunal (“JCT”) found Judge Motata guilty of gross misconduct and recommended that the JSC invoke section 177(1)(a) of the Constitution, which provides that a judge may only be removed from office if the JSC finds that the Judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.

1.1.2. The JSC considered the Tribunal’s report but was divided on whether Judge Motata was guilty of gross misconduct or misconduct. The majority found Judge Motata guilty of misconduct, not gross misconduct, and decided to impose a fine on Judge Motata of R 1 152 650.40, payable to the South African Judicial Education Institute.

1.1.3. Freedom Under Law (FUL) took the JSC’s decision on review to the South Gauteng High Court, Johannesburg, which found in favour of the JSC. FUL then appealed to the Supreme Court of Appeal (SCA), which upheld FUL’s appeal. The SCA remitted the matter to the JSC for it to be dealt with in terms of section 20(4) of the JSC Act.

1.2. The event that prompted complaints that ultimately led to the referral of a JSC finding of gross misconduct against Judge Motata to the National Assembly for consideration in the context of section 177 of the Constitution, relates to an incident that happened in the early hours of 6 January 2007: Judge Motata crashed his motor vehicle into the boundary wall of a residential property. Judge Motata and the owner of property became involved in a verbal confrontation. During the confrontation, Judge Motata reportedly used racial slurs, profanities, and language of a derogatory nature, all of which was recorded. Judge Motata refused to co-operate with the two female officers of the Johannesburg Metropolitan Police Department (“JMPD”) arrived at the scene. When the two female JMPD officers called for assistance, the two male officers, who responded, encountered similar resistance, but eventually managed to arrest him. Judge Motata was subsequently charged with two counts of criminal misconduct, that of contravening section 65(1)(a) of the National Road Traffic Act, 1996, by driving a motor vehicle under the influence of alcohol; and contravening section 67(1)(a) of the South African Police Service Act, 1995, of defeating and obstructing the ends of justice by resisting arrest.

2. Removal process

2.1. Section 177 of the Constitution

2.1.1. Section 177 of the Constitution provides for the removal of a judge, setting out a three-stage process, as follows:

“177. (1) A judge may be removed from office only if—

- (a) *the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and*
- (b) *the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.*
- (2) *The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.*
- (3) *...".*

2.2. **Judicial Services Commission Act 9 of 1994**

2.2.1. The JSC Act provides for oversight of judicial conduct and the accountability of judicial officers and sets out the process that must be followed when a complaint is laid against a judicial officer. The Act distinguishes between impeachable offences, serious non-impeachable offences, and lesser offences. An impeachable offence being one that involves incapacity, gross incompetence, or gross misconduct on the part of a judicial officer, as envisaged in section 177(1) of the Constitution.

2.2.2. Section 20(4) of the JSC Act provides that if the JSC (having followed its own internal inquiry processes as mandated by the Constitution and regulated by the Act) finds that a judicial officer is guilty of gross misconduct, the JSC must submit that finding, together with the reasons and a copy of the JCT's report, including any relevant material, to the Speaker of the National Assembly.

3. **Role of the National Assembly**

3.1. Section 177 of the Constitution clearly distinguishes between the powers and functions of the JSC and the National Assembly in the process regarding the removal of a judge from Office:

3.1.1. In terms of section 177(1)(a), the JSC is responsible for making the finding as to whether a judge is guilty of gross misconduct.

3.1.2. In terms of section 177(1)(b), the National Assembly is tasked with determining whether a judge who has been found guilty of gross misconduct should be removed from office.

3.2. That section 177(1) of the Constitution does not allocate the task of making a finding as to whether a judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct to the National Assembly implies that it is not constitutionally mandated to perform this task.

3.3. In the matter of *Hlophe v JSC and Others* [2022] ZAGPJHC 276 at paras 152 to 155 ("the *Hlophe* judgement"), the South Gauteng High Court, Johannesburg, clarified the distinctive roles set out in section 177 of the Constitution and the proper parameters of those roles:

3.3.1. *"The structure of section 177 (1)(a) plainly provides that a judge can be removed if the JSC finds that the judge is guilty of gross misconduct. That finding is a jurisdictional precondition to the National Assembly contemplating a resolution to remove a judge. The decision as to whether misconduct occurred is that of the JSC alone".*

3.3.2. *"There is no provision in section 177 for a re-hearing of the complaint by the National Assembly".*

3.3.3. *"...[T]he Constitution ... assigns different roles to the JSC and to the National Assembly, not overlapping roles. Also, neither the National Assembly nor the JSC are subordinate to one another. The JSC is vested with the power to make a decision based on the norms of judicial ethics. The National Assembly makes a political decision.*

3.3.4. *"The inescapable consequence of the two institutions having different decisions to make is that there is no scope for the National Assembly to enquire into whether the judge referred to it has committed gross misconduct... the National Assembly*

receives that finding as a fact and deliberates thereupon, not to reconsider it, but to decide what to do based on it”.

3.3.5. “... [W]hen Parliament passes a resolution on the matter, it does not have to re-hear the matter. It would have sufficient documentation before it to make a decision”.

3.4. Guided by the High Court’s interpretation of section 177 of the Constitution, the Committee developed steps (set out below at paragraph 4.4) to allow for sufficient engagement with the affected judge and deliberations to empower its members to make an informed political decision about the remedy determination as a consequence of the JSC’s finding.

4. **Committee process**

4.1. The matter was referred to the Committee for consideration and report on 25 August 2023.

4.2. The Committee met on 20 September 2023 to discuss how it should proceed with the matter.

4.3. Regarding the procedure to be followed, the Committee noted the clarity provided by the *Hlopho* judgement on the specific roles assigned to the JSC and the National Assembly (and by extension the Committee) in giving effect to section 177 of the Constitution, neither of which is subordinate to the other:

4.3.1. There are different tasks to be performed by the JSC and the National Assembly respectively. The finding as to whether a judge is guilty of gross misconduct is a responsibility assigned to the JSC in accordance with section 177(1)(a) of the Constitution. The remedy determination, however, falls to the National Assembly, as it is tasked with determining whether a judge who has been found guilty of gross misconduct should be removed as per section 177(1)(b) of the Constitution.

4.3.2. The National Assembly’s role is not to re-hear the matter (that is a question of merit already settled at the JSC finding stage).

4.3.3. In making its determination, the National Assembly makes a political decision.

4.4. To give expression to this section 177 interpretation, the Committee agreed to the following steps when applying its mind to the required political decision regarding the remedy determination:

4.4.1. The Committee must note the finding of gross misconduct (referred to the National Assembly in terms of section 20(4) of the JSC Act) as a legal fact.

4.4.2. The Committee may call for a presentation by (an official of) the JSC to provide an overview of the JSC’s process. However, this step is merely informative to provide contextual understanding of the process that unfolded and is not an absolute requirement for purposes of the section 177(1)(b) responsibility that falls to the National Assembly.

4.4.3. The Committee must invite written representations from the affected judge addressing any extenuating circumstances they wish to place before the National Assembly that they regard as relevant to the still required remedy decision only.

4.4.4. The Committee must deliberate on whether it wants to recommend, as a political decision, to support the removal of the affected judge.

4.4.5. The Committee must report on its political decision as to the recommendation of remedy for resolution by the National Assembly.

4.5. In giving expression to paragraph 4.4.2, the Committee wrote to the Chief Justice to invite the JSC to provide it with an overview of the procedural aspects relating to the removal process. The Committee noted the Chief Justice’s reply, dated 12 October 2023, in which he

suggested that the Committee should make a written request for any information it needs and the JSC would then provide the information in writing.

- 4.6. The Committee wrote to Judge Motata in a letter dated 4 October 2023, inviting him to place any extenuating circumstances that he wished the Committee to consider when it deliberates on the matter. The Committee had agreed that the representations should be in writing only and should reach it by 27 October 2023.
- 4.7. In reply, the Committee received a letter from Judge Motata, dated 12 October 2023, requesting that he be given until 30 November 2023 to submit his written representations to the Committee. The Committee agreed to give Judge Motata until 15 November 2023 to do so.
- 4.8. The Committee received further correspondence from Judge Motata, dated 10 November 2023, in which he raises the following arguments:
 - 4.8.1. The JSC did not make any decision which could be referred in terms of the JSC Act to the National Assembly for further processing for purposes of section 177 of the Constitution. Absent a clear finding of the JSC, the National Assembly (and by implication the Committee) lacks jurisdiction to entertain the matter.
 - 4.8.2. If the National Assembly nevertheless entertains the matter, such a step would amount to double jeopardy, as Judge Motata has already paid a fine in the amount of R1 152 650.40 to the South African Judicial Education Institute (SAJEI) in compliance with the pre-judgement misconduct finding of the JSC.
- 4.9. The Committee then wrote to the Chief Justice requesting that the JSC clarify the issues raised by Judge Motata, namely whether it indeed regards the SCA's ruling of gross misconduct as having been made the decision of the JSC which was then referred for consideration to the National Assembly.
- 4.10. The Chief Justice replied, in a letter to the Speaker of the National Assembly, in which he attached the resolutions of the meeting of the JSC sitting without the members of the National Assembly ("the small JSC"), dated 17 November 2023. The small JSC confirmed that it regarded the order of the SCA as effectively setting aside the JSC's previous misconduct finding against Judge Motata and replacing it with a finding of gross misconduct. It is this finding of gross misconduct against Judge Motata that has been referred to the National Assembly for further processing and, consequently, referred to the Committee for consideration and report.

5. **Deliberations**

- 5.1. The Committee met on 22 November 2023 to consider the content of the Judge Motata's representations.
- 5.2. *Lack of jurisdiction:*
 - 5.2.1. Judge Motata's argues that the National Assembly (and by extension the Committee) lacks jurisdiction to entertain the matter in the absence of a decision by the JSC, which could be referred to the National Assembly in terms of section 20(4) of the JSC Act for further processing in terms of section 177 of the Constitution. The Committee considered the question of whether the referral was procedurally compliant in some detail, noting as follows:
 - a) Although the phrasing of the SCA's order may appear ambiguous, the law does make allowance for the clarification or correction of orders where such may give rise to ambiguity. That no such clarity was sought but the JSC, suggests that it effectively accepted an interpretation of the reasoning set out in the judgment in accordance with the interpretation standard adopted by the SCA and the Constitutional Court, which amounts to this: "[I]n the face of ambiguity, a sensible [conclusion] is to be preferred to one which undermines the purpose

of the document or order". [*Martrade Shipping and Transport GmbH v United Enterprises Corporation and MV 'Unity'* [2020] ZASCA 120.]

- b) Further, when the letter of referral submitted by the Chief Justice is considered, the JSC appears to have given the ambiguous SCA order a sensible reading in line with the general context of the reasoning expressed in the judgment, namely that its decision has indeed been replaced by the SCA's decision of gross misconduct. As such, it is that decision (so replaced) that has been referred in terms of section 20(4) of the JSC Act for further consideration by the National Assembly in terms of section 177 of the Constitution.

5.2.2. The Committee's understanding of the impact of the SCA's decision in the *FUL* judgement was confirmed as accurate in the position set out in the communication from the Chief Justice, on behalf of the small JSC, dated 20 November 2023, which highlighted the following:

- a.) The small JSC resolved, to the extent that it may be necessary to do so for legal certainty, to ratify the submission by the Chairperson of the JSC (dated 18 August 2023) of the finding made by the SCA in the *FUL* judgement to the Speaker of the National Assembly that Judge Motata is guilty of gross misconduct.
- b.) Further, it resolved that, having elected not to appeal the decision of the SCA which not only reviewed and set aside the decision of the small JSC but also substituted the SCA's decision for that of the small JSC, it is no longer competent for the small JSC to consider whether Judge Motata is guilty of gross misconduct.
- c.) Considering the majority decision and order of the SCA, the small JSC noted that all that was required of it was to submit the matter to the Speaker of the National Assembly in terms of section 20(4) of the JSC Act.

5.2.3. The small JSC effectively confirmed that it regards the National Assembly as having the necessary jurisdiction to consider the finding of gross misconduct against Judge Motata.

5.3. *Double jeopardy:*

5.3.1. Judge Motata also raises the argument of double jeopardy as an impediment to the National Assembly proceeding with the matter of his possible removal. The Committee submits that this is an issue to be resolved between the JSC and Judge Motata and does not prevent it from proceeding with its deliberations. In this regard, the Committee noted the resolution of the small JSC that "the fine paid by Judge Motata in compliance with the decision of the small JSC (which has since been reviewed and set aside by the SCA) is a matter which has to be resolved between the JSC and Judge Motata and does not prevent the National Assembly from proceeding with its deliberations under section 177(1) of the Constitution."

6. Findings

- 6.1. The Committee notes as a legal fact the finding of gross misconduct against Judge N J Motata referred to the National Assembly in terms of section 20(4) of the JSC Act, 1994 (Act No 9 of 1994), read with section 177(1) of the Constitution.
- 6.2. Having considered the documentation before it, including the written representations from Judge Motata, and having applied its mind through deliberations, the Committee by majority finds no merit in the arguments placed before it by Judge Motata, and finds no extenuating circumstances that would support a decision on its part not to recommend that the National Assembly resolve that Judge Motata be removed from office.

7. Recommendation

- 7.1. The Portfolio Committee on Justice and Correctional Services, having considered the referral by the Chief Justice of the Republic of South Africa, of a finding of gross misconduct against Judge NJ Motata in terms of section 20(4) of the Judicial Service Commission Act, 1994 (Act No 9 of 1994), read with section 177 (1) of the Constitution of the Republic of South Africa, 1996, recommends that the National Assembly resolve to call for the removal of Judge NJ Motata from office.

Report to be considered.