



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

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Freedom Under Law v Judicial Service Commission and Another (Case no 550/2022) [2023] ZASCA 103 (22 June 2023)

Today, the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal against a decision of the Gauteng Division of the High Court, Johannesburg (the high court).

The issue before the SCA was whether the conduct of Judge Nkola John Motata (Judge Motata) is of such a kind as to render him incapable of performing the duties of his office.

In the early hours of 6 January 2007, Judge Motata, attempted to execute a U-turn whilst driving his vehicle along Glen Eagles Road in Hurlingham, Johannesburg, when he reversed into the boundary wall of a residential property owned by Mr Richard Baird. Having been informed telephonically of the incident by Mr Lucky Melk, the tenant of the property, Mr Baird arrived at the scene, whereafter he contacted the police. In the course of those events, Judge Motata became involved in a verbal altercation with Mr Baird. Mr Baird, who recorded some of the events as they unfolded, formed the view that Judge Motata was inebriated. In due course Judge Motata was charged – and despite his plea of not guilty – convicted of drunken driving before the Regional Court (the trial court).

Following upon the events of 6 January 2007, three complaints came to be lodged against Judge Motata with the first respondent, the Judicial Service Commission (the JSC). Two of the complaints – one lodged by a senior advocate at the Pretoria Bar (the Pretorius SC complaint) and the other by AfriForum (the AfriForum complaint) were referred to the Judicial Conduct Tribunal of the JSC (the Tribunal). The Tribunal found that Judge Motata was intoxicated at the time of the incident, by the time he went to trial (and subsequently appeared before the Tribunal), he would have considered the evidence, including the visual and audio recordings made at the time of the incident, and realised that ‘a denial of intoxication was against all [the] prevailing evidence [and] could not be true’.

AfriForum, with reference to Judge Motata’s conduct and utterances on the night of the incident, had complained that any judge who makes himself guilty of racist conduct has no place on the Bench. The Tribunal took the view that racist conduct on the part of a judge constitutes gross misconduct. It concluded that Judge Motata’s conduct constituted gross misconduct and recommended to the JSC that the provisions of s 177(1)(a) of the Constitution be invoked.

However, when the recommendation of the Tribunal served before the JSC, the majority of the JSC (the majority decision) rejected the Tribunal's recommendation. It found Judge Motata guilty of misconduct *simpliciter* and imposed a fine of R1 152 650.40 to be paid to the South African Judicial Education Institute.

On 21 July 2020, the appellant, Freedom Under Law (FUL), issued an application out of the Gauteng Division of the High Court, Johannesburg (the high court) to review and set aside the JSC's decision of 10 October 2019, and to substitute that decision with a finding that Judge Motata is guilty of gross misconduct as contemplated in s 177(1)(a) of the Constitution, alternatively, for the matter to be remitted to the JSC to be decided afresh taking into account the findings of the court. FUL contended that Judge Motata's conduct constituted gross misconduct, which warranted his removal from office in terms of s 177 of the Constitution. The high court rejected all of FUL's grounds of review.

On appeal, the SCA held that the approach followed by the majority decision was untenable for a number of reasons. To name a few, the SCA found that the majority decision of the JSC did not engage with Judge Motata's dishonesty regarding his intoxication at all. It merely regards his 'proven intoxication' as a mitigating factor. It held that the JSC did not pause to consider why the intoxication was a relevant consideration or seek to demonstrate how Judge Motata's breach of the standards of judicial conduct was rendered any less egregious by his intoxication. The JSC disregarded the factual findings of the Tribunal, without explaining why it did so. It ignored that the Tribunal was the body that had the advantage of hearing the evidence and assessing the credibility of the witnesses. The SCA held further that the majority decision ought to have enquired into whether or not the Tribunal had addressed the issues fully and fairly and directed its mind to the right questions in reaching the conclusion that Judge Motata should be removed from office. The SCA found no evidence of it having done so. The SCA emphasised that the majority of the JSC did not start with a clean slate, but was bound, not just by the findings of the Tribunal, but also the trial court in Judge Motata's criminal trial. The SCA added that had the JSC approached the evidence holistically instead of in a compartmentalised fashion, as it did, then it would not have been as receptive as it was to Judge Motata's assertions, including the assertion that he had been provoked by the use of the 'k-word', which he ultimately conceded before the Tribunal had not been employed by Mr Baird.

The SCA held that the high court, like the JSC, had also failed to consider the impact of Judge Motata's conduct on the public confidence in the independence, impartiality and integrity of the judiciary and that on all of the evidence, there was no alternative to removal. In conclusion, the SCA held that the recommendation by the Tribunal that the 'provisions of section 177(1)(a) of the Constitution be invoked', must stand. The majority of the SCA (Ponnan JA (Schippers JA and Kathree-Setiloane AJA concurring) remitted the matter to the JSC to be dealt with in terms of s 20(4) of the Judicial Service Commission Act 9 of 1994, namely that the JSC must submit the finding that Judge Motata is guilty of gross misconduct to the Speaker of the National Assembly.

The dissenting judgment, penned by Mocumie JA and Masipa AJA (the minority), agree with the reasoning and findings of the majority of the SCA. The minority proposes, however, that the matter be remitted to the JSC for reconsideration.

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