OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

JUDICIAL SERVICE COMMISSION (JSC)

MEETING OF THE SMALL JSC TO CONSIDER THE COMPLAINT BY ADVOCATE ANTHONY BRINK AGAINST JUSTICE PRESIDENT DUNSTAN MLAMBO HELD VIRTUALLY

HELD ON 02 MAY 2024

BEFORE CHIEF JUSTICE RAYMOND MNYAMEZELI MLUNGISI ZONDO

PANEL MEMBERS:

MINISTER RONALD OZZY LAMOLA
MADAM JUSTICE PRESIDENT MAHUBE BETTY MOLEMELA
DEPUTY JUSTICE PRESIDENT AUBREY PHAGO LEDWABA
PREMIER ANDREK PANYAZA LESUFI
ADVOCATE SESI BALOYI SC
ADVOCATE TEMBEKA NGCUKAITOBI SC
MS HLALELENI KATHLEEN MATOLO-DLEPU, LPC
ADVOCATE JENNIFER CANE SC
MR MVUZO NOTYESI
MR MABOKU MANGENA
PROFESSOR CLEMENT MARUMOAGAE

OTHER MEMBERS PRESENT:

MS MBALI MONDLANE (SECRETARIAT)

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MEETING HELD ON 02 MAY 2024

PREMIER LESUFI: I delegated MEC Mamabolo to join you, but I am briefed he is not available at short notice.

CHIEF JUSTICE ZONDO: Yes.

PREMIER LESUFI: But I have joined, so I will be part of the meeting. My sincerest apologies. Good evening.

CHIEF JUSTICE ZONDO: Okay. No. Thank you very much, Premier. Thank you. Are there; did you confirm that we do have the quorum?

MS MONDLANE: Yes, we do, Chief Justice.

CHIEF JUSTICE ZONDO: Okay. All right. Let us start the meeting officially. I requested this meeting so that the Small JSC could consider the recommendation made by the Judicial Conduct Committee, the Appeal Panel, that heard an appeal in the matter of a complaint by Advocate Brink against Judge President Mlambo.

That is the matter that we are going to deal with. So I welcome everyone to the meeting, and thank you for making time for us to deal with this matter. Mbali, do you want to tell us all the apologies that you have received?

MS MONDLANE: Chief Justice, I have received an apology from Commissioner Notyesi, earlier, I think it was before he spoke to Commissioner Ngcukaitobi.

CHIEF JUSTICE ZONDO: Yes.

MS MONDLANE: And I received an apology from

Commissioner Shabangu-Mndawe, she said she will join the meeting late, as well as Commissioner Pillay.

CHIEF JUSTICE ZONDO: Ja. Okay. No, thank you very much. Let us go straight to it. I think we will proceed on the basis that everybody has been able to read the judgment of the Appeal Panel of the Judicial Conduct Committee, as well as the written submissions from Judge President Mlambo, as well as from Advocate Brink.

As I understand the position, Advocate Brink is calling for a process which would lead to a settlement of the matter, of his complaint, without the matter having to go to a Tribunal, or any further formal process.

Judge President Mlambo has made his submissions, and he requests that we reject the recommendation of the majority of the Appeal Panel.

I think with the time that we have lost, that we should go straight to the discussions as to what we should do with the recommendation. So I put the floor to Commissioners who wish to express their views, they can raise their hands, and then I will identify them. I do not see any hands at this stage.

One option is ...[intervenes]

ADV NGCUKAITOBI SC: Commissioner Lamola's hand is up, Chief Justice. The Minister's hand is up.

CHIEF JUSTICE ZONDO: Oh, okay. No, I do not see here.

Minister, please go ahead? For some reason I do not see his hand being up here, but go ahead, Minister.

MINISTER LAMOLA: Ja, no, thank you very much, CJ.

CHIEF JUSTICE ZONDO: Oh, now it comes up. Yes?

MINISTER LAMOLA: Thank you very much, CJ, for the opportunity. Indeed, I have gone through the submissions, including the earlier finding by Justice Zondi.

CHIEF JUSTICE ZONDO: Yes.

MINISTER LAMOLA: And also of the Appeal Committee, which wants further investigation, though they are based on the fact that they could not do further scrutiny of the veracity of some of the issues that there were investigations.

This is despite the fact that Section 18(3)(d) of the JSC Act empowers them to look at further; any further written or oral argument on the matter.

CHIEF JUSTICE ZONDO: Yes.

MINISTER LAMOLA: [Indistinct] that could be requested, and also the submission of Mlambo that deals with some of the unanswered questions that the Appeal Committee posed, which they felt should be investigated by a Tribunal.

CHIEF JUSTICE ZONDO: Yes.

MINISTER LAMOLA: When we look at those submissions, they further disapprove some of the allegations that he suborned Mr Mhatiti to lie under oath, as he was under the

impression, even though it was not correct, that the complainant physically visited his chambers as told by the secretary.

He also proved through a copy of the documents that there was no indication that the said documents were sent via telefax. Additionally, his submissions also proved that the complainant made an incorrect allegation that Mlambo JP preferred the appointment to the position of senior litigator as he does not sit in those processes as a Chairperson of the board. This was the function of the executive management.

So I do think that Chief Justice, on this basis, I do not see us having any reasons to agree with the process to take it further for investigations by a [indistinct] process, because I do believe that when we do so, we should be having very good information and evidence backed up by thorough product of investigation.

CHIEF JUSTICE ZONDO: Yes.

MINISTER LAMOLA: And in this regard, it does not seem like we have such empower; we have been empowered to that level.

Lastly is that, even if it does, it does not take us to issues of gross misconduct and so forth. So I do not support that we should take this matter further, other than to reject the recommendations, CJ. Thank you.

CHIEF JUSTICE ZONDO: Thank you, Minister. The Minister's hand only came up later, so I do not know whether my laptop delays hands. So if somebody has got their hand, and I do not seem to recognise them, they must just announce their wish to say something.

ADV NGCUKAITOBI SC: Chief Justice ...[intervenes]

PREMIER LESUFI: [Indistinct].

CHIEF JUSTICE ZONDO: [Indistinct]. Oh, yes ...[intervenes]

ADV NGCUKAITOBI SC: It is Tembeka Ngcukaitobi.

CHIEF JUSTICE ZONDO: Commissioner Ngcukaitobi, yes?

ADV NGCUKAITOBI SC: I am happy to go after the Premier, I think he spoke before I did.

CHIEF JUSTICE ZONDO: Oh. Oh, Premier? Go ahead, Premier?

PREMIER LESUFI: I am also happy to go after Advocate Ngcukaitobi, Chief Justice.

CHIEF JUSTICE ZONDO: Oh, okay. All right. Well, we are back with you, Commissioner Ngcukaitobi?

ADV NGCUKAITOBI SC: Okay. No, that is fine. Thank you, Chief Justice. Now I also; I mean, I have been trying to read this.

My understanding is that what happened here which; the two complaints that remain from the Appeal Committee, that should be investigated by the Tribunal, is a

complaint that in an answering affidavit in the Labour Court, the statement was made, not by Judge Mlambo, but by someone who deposed to an affidavit on behalf of the board, that the complainant, that is Mr Brink, had reprehensibly left Kwa Zulu Natal and attended at the Office of the Judge President in Johannesburg, without announcement, and without appointment.

Mr Brink denies this. There is a concern that this is not properly investigated by the designated judge, and so there is no evidence positively to support the allegation that Mr Brink attended at the South Gauteng High Court without announcement.

Judge Mlambo himself did not sign the affidavit, but it is an employee at the Legal Aid Board, and the criticism of the Appeal Committee seems to be that there should have been a thorough investigation prior to the affidavit being signed, because the affidavit could potentially be perjurious.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: Then the minority says well, this specific thing, Judge Mlambo relied on information that he received for someone else inside the board, and he himself made that clear, that he did not have personal knowledge of this.

And so the allegation that he suborned somebody

to lie under oath is unfounded.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: So you then get two outcomes. One is the Appeal Committee says the matter has not been properly investigated. At the same time it says; it discloses a gross misconduct, but it is either it has not been properly investigated, in which event, it must be properly investigated.

And one, to refer it to the JCT, we must be satisfied that there is gross misconduct that is disclosed. But one cannot say because there has not been a proper investigation, therefore there is a possibility of gross misconduct.

We have to be satisfied that *prima facie* it discloses gross misconduct, which means we need some level of facts and conclusions that point to gross misconduct, not on the part of anyone at the Legal Aid Board, but on the part of Judge Mlambo.

So I think there is an evidentiary gap in the approach taken by the majority, particularly the conclusion they reach that; the flaw in the approach of the designated judge was a failure to properly interrogate this.

Now the same thing seems to be the case with the second complaint. The complaint, as I understand it, is what was the reason why the appointment was not made,

was it because the positions had been frozen? This is the job now of the senior litigator in the office.

Was it because the positions were frozen, or was it because, as I think, it was another employee, Nair, submitted an affidavit in which he said it is not because the positions were frozen, but it was because we did not secure sufficient applicants.

The Appeal Committee says that reason cannot be true, that there were not sufficient applicants. But again, like the first, we do not really see Judge Mlambo getting involved in this, because all he does is to chair the board, and he is not the one responding to the prior requests, or signing these affidavits on behalf of the board.

And even on this one, they complain that there is a mistake in the reasoning of the designated judge, because he does not expressly engage, he makes a generic statement, and then does not expressly engage with this, and if this had been properly investigated, it would be sort of improper for the judge to give a false explanation.

But again, the problem is what is the false explanation? On what facts, and on what evidence can we conclude that there is a *prima facie* case of gross misconduct?

So what we ultimately are left with is one statement. It is true that if a judge lies under oath, that is

gross misconduct. It must therefore be investigated, but it begs the question, did he lie under oath? You know.

So I think that it is very difficult on an evidentiary basis to take this matter forward because of the very reasons given by the Appeal Committee, that this has not been properly investigated.

So that is why I would support the Minister. The Minister's view is that there is no case for gross misconduct, but I think my view is to support that, but for different reasons, to say actually the Appeal Committee itself says that the matter has not been properly investigated.

Now, we cannot say, because we do not have the jurisdiction to say it must go on to be investigated, it seems that our jurisdiction is to either agree that the matter goes to the JCT, or the matter is dismissed, and we do not have any authority to say it must go elsewhere, and particularly because that is the recommendation in front of us.

There is something; there are two factors here that are truly disturbing. The one is there is a response given by Advocate Brink, who says; given by Advocate Brink; a dismissal; so he litigated this thing until the hills, until the Labour Appeal Court.

In the Labour Appeal Court, his leave to appeal was dismissed by Judge Waglay, Judge Sutherland, and Judge

Davis. And it was a one-liner that says your application for leave to appeal has been dismissed.

He complains about that, and he says it is a fraudulent court order which was procured on the instruction of Judge Mlambo, and then he goes on, on quite frankly a racist rant, where he says the grammar that has been used is indicative of Judge Mlambo's second language, second speaker English skills, and the language that would have been used by Judge Waglay, Judge Davis and Judge Sutherland is usually unpretentious, clear, and accurate.

Now; so that is the one statement where it is plainly racist, as far as I read it. The second one is the threat to us. If you looks at his submission to us, he says well, I no longer want this to go to JCT as recommended by the JCC. What I want is reconciliation.

But then he says, if you do not agree to the reconciliation, I am giving you a month, I am going to publish my Appendix 1. When you look at this Appendix 1, it is a scurrilous document, so-called intelligence report, that makes thoroughly discreditable allegations against the entire Judiciary. Truly, truly [indistinct] style.

Towards the end it then talks about politicians, some of whom are members of the JSC, Commissioner Malema, etcetera, about another intelligence report that he had provided.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: Now, I do not know if those things are within scope, but they are fully disturbing, reflective of the character that we are dealing with.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: But on the merits of it, I think the matter must be dismissed, and if the JSC is to respond to the threats against it, that you either do what I want, failing which I am going public, I think that is thoroughly discreditable conduct that we should resist.

Thank you, Chief Justice. Those are my two small inputs.

CHIEF JUSTICE ZONDO: Thank you, thank you. Let me have more comments or views?

ADV BALOYI SC: CJ, this is Baloyi ...[intervenes]

MR NOTYESI: Can I ...[intervenes]

ADV BALOYI SC: You have Notyesi on the platform. I think he might want to say something about his presence here. He is getting; he has his hand up.

CHIEF JUSTICE ZONDO: Oh, oh. Commissioner Notyesi, are you there? Good afternoon.

MR NOTYESI: Good afternoon, Chief Justice, and good afternoon Commissioners. Commissioners, firstly, I am available to participate in these proceedings of the JSC, but I am Acting Judge, then I am not too sure whether my

participation would be acceptable, otherwise I just want guidance.

Otherwise, I want to participate is; I am not sitting there in court, I am at my roll, I am at home, so I have read the papers, I have read the complaint, I prepared for it, but that was just the only little thing that troubles me, which I seek guidance of this Committee before I participate any further.

CHIEF JUSTICE ZONDO: Yes.

MR NOTYESI: That is why initially I intended to tender an apology, if I should not participate, but from where I am sitting, I believe that I am entitled to participate to the extent that I am not doing this during the time of not being a judge, and I have been resigned as a Commissioner in that, so; but I am subject to your; that is what I want to place before the JSC, before I participate in the matter.

CHIEF JUSTICE ZONDO: I have previously had the discussions maybe last year, or even the year before with somebody, I do not know if it was Commissioner Notyesi, about this kind of situation.

I will be happy to hear what Commissioners think, but my *prima facie* view, which I think is the view that I would have expressed sometime back was that to the extent that you; that somebody in your position participates in the JSC in his or her capacity as an attorney representing the

attorneys profession, it seems to me that during the period that you are an Acting Judge, you taken for all intents and purposes, to be a judge, but of course, one knows that Acting Judges have got practises to run.

But we also know that there are certain things that they cannot do while they are Acting Judges. So my *prima facie* view was that a judge would not represent the interests of attorneys, just as an attorney would not present the interests of judges, and that I would be inclined to the view that during your acting stint, your alternate should attend.

But that is just my view, and it is not a view that I think, as far as I know, has been discussed here, and it would be good if one can hear more views. There is a hand up? Is; whose hand is up? Please go ahead and speak whoever it is.

ADV CANE SC: Chief Justice ...[intervenes]

CHIEF JUSTICE ZONDO: Or was it Notyesi ...[intervenes]

ADV CANE SC: Jennifer Cane, you are correct that a hand was up, but it was to give a contribution on the merits of the matter.

CHIEF JUSTICE ZONDO: Yes, please. Oh, oh ...[intervenes]

ADV CANE SC: So I took it down ...[intervenes]

CHIEF JUSTICE ZONDO: Oh ...[intervenes]

ADV CANE SC: Because you are busy dealing with Commissioner Notyesi.

CHIEF JUSTICE ZONDO: Oh, yes. Okay. All right.

ADV CANE SC: On that, I do recall there was a previous decision in line with what you are saying.

CHIEF JUSTICE ZONDO: Yes. Oh, okay. I forgot. I was not; I could not remember, or if I was there.

ADV CANE SC: I cannot remember whether you were there. I am trying to remember, there was somebody, one of the Commissioners acting there, and the exact sentiment was expressed that you have just expressed.

CHIEF JUSTICE ZONDO: Ja.

ADV CANE SC: And the person then could not participate.

CHIEF JUSTICE ZONDO: Ja.

MADAM JUSTICE PRESIDENT MOLEMELA: Chief Justice?

CHIEF JUSTICE ZONDO: Yes?

MADAM JUSTICE PRESIDENT MOLEMELA: It is ...[intervenes]

CHIEF JUSTICE ZONDO: Justice Molemela?

MADAM JUSTICE PRESIDENT MOLEMELA: Yes, thank you very much.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: I; yes, I echo the same sentiments that you have expressed, Chief Justice.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: I think if that were to be allowed, it would alter the composition as we know it, in the sense that there would now be an additional judge.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: So I agree with you that the correct course would be to get an alternate. Thanks, Chief Justice.

CHIEF JUSTICE ZONDO: Thank you. Any ...[intervenes]

MR NOTYESI: Ja ...[intervenes]

CHIEF JUSTICE ZONDO: Any other Commissioner who wishes to say something on this point?

MR NOTYESI: Chief Justice, sorry, with your leave ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

MR NOTYESI: Look, ja, if; as I am saying, I am subject to the guidance, so if there is a position that once we are acting we cannot perform the function of the JSC, I accept that, and like; and I believe that the Committee is; I mean, you are correct, and you can be ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

MR NOTYESI: I mean, my absence would not affect the quorum, you can proceed.

CHIEF JUSTICE ZONDO: Yes.

MR NOTYESI: You know, and ja ...[intervenes]

CHIEF JUSTICE ZONDO: Ja.

MR NOTYESI: I think that is that. It would make sense if I can just [indistinct] ...[intervenes]

CHIEF JUSTICE ZONDO: Ja.

MR NOTYESI: As I have initially; although I intended to participate, but I do understand there are valid reasons. I mean, I think Judge Molemela and you, Chief Justice, you articulate the point.

I mean technically, I am a Judge, although I am a half Judge. I am not too sure whether acting judges are half judges or what they are ...[intervenes]

CHIEF JUSTICE ZONDO: You are an *amper* Judge.

MR NOTYESI: Ja, because even there, you can see that we are *amper* judges, I mean. Okay, no, no, no. I am fine. I am fine, but ja.

CHIEF JUSTICE ZONDO: Okay.

MR NOTYESI: That is it. I will, I will ...[intervenes]

ADV NGCUKAITOBI SC: You can send ...[intervenes]

CHIEF JUSTICE ZONDO: Okay.

ADV NGCUKAITOBI SC: Send me your contribution on SMS.

MR NOTYESI: I will send it, but the contribution; my contribution was exactly what you have said in any way.

CHIEF JUSTICE ZONDO: Okay. No, thank you very much,

Commissioner Notyesi.

MR NOTYESI: Thank you so much. Thank you. Thank you.

CHIEF JUSTICE ZONDO: Yes.

MR NOTYESI: Thank you, Chief Justice. Thank you.

CHIEF JUSTICE ZONDO: Thank you. Commissioner Cane, you wanted to make a contribution on the merits?

ADV CANE SC: Thank you, Chief Justice. I agree with the Minister and Commissioner Ngcukaitobi. The first complaint, I could just add in addition to the reasons that they have given, what has now happened is that Judge Mlambo has put up a very detailed response in relation to what the majority of the Committee considered to be absent, and he does give documentary evidence, for example, that the posts were frozen and that the three posts, there were three, of them, nobody has been appointed in that position to date.

He gives some documentary evidence that it was due to financial constraints and explains why those financial constraints were not actually minuted at board level and were dealt with at a different level to that, but there is some documentary evidence that that is exactly the reason for it.

On the first complaint relating to his secretary, what he also puts up, if I could locate my note in that regard, is the fact that he very much stresses that this was an operational matter; oh, sorry, that is still relating to the

failure to appoint somebody, the stressing of the operational level with which that was dealt that.

I had something in addition to add on the first point. He obviously; he says he believed his secretary at the time, and he gives us the additional information that the Labour Court process [indistinct] did actually have to be delivered to the recipient by hand, and so he had believed his secretary that Mr Brink had actually personally attempted to deliver it at his chambers, and that does have an air of credibility about it.

The overriding impression, having read the very detailed report that Judge Mlambo has now submitted, is that he really has covered all the areas that the majority thought were left wanting, or required further investigation, and he has done so in a very detailed, comprehensive way, which would mean that the lacunas they identified, if they were such, have been fully covered.

I agree with Judge Mlambo that we should not allow a further platform for this to continue, since that has now been done. What Advocate Brink does in his response, as picked up by Commissioner Ngcukaitobi is he actually embarks on a course of extortion.

I think it is actually; I think what he does probably ticks all the requirements of the criminal offence of extortion, of actually directly threatening the Commission of

what consequences will follow unless we give in to what he is demanding and make it happen.

And it is very clear that; what he says is that it involves various State officials getting out their calculator; so it is quite clear that he wants to be paid, and that if he is not paid, then he is going to resort to an extortionary strategy.

What we know about that State Security Agency report as well, it appears at page 561 of the papers, that it was previously submitted, and that the State Security Agency has found it was [indistinct] and that in fact the author was Advocate Brink himself.

So we have that additional information before us. It seems to me, on the papers, to be highly undesirable to allow this to go for further investigation before a Tribunal, and that the correct course should be as both my previous Commissioners have also suggested, which is not to follow the majority's recommendation, on the basis that they issues they have raised have been now fully addressed to our satisfaction.

That would be my submission. Thank you.

CHIEF JUSTICE ZONDO: Yes. Let me hear more views. I just want to mention this, maybe as more Commissioners speak, maybe somebody will address this. I did not get a chance to check this thoroughly, but I got the impression

that some of the documents that Judge President Mlambo has furnished to us may not have been before the Appeal Committee, and the judge of first instance.

That may raise the question whether when we consider a recommendation from an Appeal Panel such as this, we are confined to what was before them, or we can look at what may be given to us after.

I am not sure about the answer, I am just raising it because I got that impression, but obviously if they were all before the previous; before the Committee, the Appeal Committee, and the judge of first instance, then the issue does not arise.

Of course, with regards to the issue of Mr Brink visiting the Judge President's chambers, it was a very awkward thing because when I looked at the affidavit of the Judge President's secretary, I may have misread it, it did not seem to confirm that she had told him that Mr Brink had visited the chambers in person, but at the same time, it is difficult to think why would the Judge President have thought that; why would the Judge President falsely say Brink had been to his chambers, if in fact he had not been there?

What would he be seeking to achieve? Even if the secretary had not said that Brink had been there in person. So which comes back to the point that the; I think the Judge

President makes the point that he *bona fide* believed that, at the time, that Brink had been there in person.

I just thought I might just mention that, but let me hear more views from Commissioners. Commissioners? Are the views that have been expressed reflective of your views?

FEMALE COMMISSIONER: Yes.

CHIEF JUSTICE ZONDO: Ja.

MADAM JUSTICE PRESIDENT MOLEMELA: CJ?

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: May I add something?

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: In agreeing with Commissioner Ngcukaitobi, I would also just want to mention that as you know Chief Justice, I once served in the Judicial Conduct Committee.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And I do recall that there was a matter that I handled, it was a complaint by Mr Maseko against Judge Steenkamp, who is now deceased.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And the complaint went on appeal, and on appeal it was yourself,

and Justice, now retired Justice Khampepe.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And the outcome that you gave in the matter; or maybe just, let me just pause to indicate that ...[intervenes]

CHIEF JUSTICE ZONDO: Ja?

MADAM JUSTICE PRESIDENT MOLEMELA: In that matter too, the complainant had alleged that the judge had lied, because the judge had mentioned in his judgment, it was a; it originated as a labour dispute, and so Judge Steenkamp, in his judgment ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: Said that he did not receive any representations on behalf of the complainant in the matter.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And so Mr Maseko took issue with that, and said that the judge had lied, because he had proof that his representation had in fact been sent through.

CHIEF JUSTICE ZONDO: Ja.

MADAM JUSTICE PRESIDENT MOLEMELA: To Judge Steenkamp, and he said that they had been sent through by the secretary.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And Judge Steenkamp denied it, and at first instance the complaint was dismissed, similar to this one.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And thereafter it went on appeal, and at the appeal level, it was handled by yourself and Justice Khampepe, and your conclusion in the matter was that there should be a hearing.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And I know this because I was the one who was tasked with conducting this kind of investigation.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And I think that it is an investigation that is contemplated in Section 17(5) and 18(2), Chief Justice.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: So what I am trying to say here is where the appeal body is of the view that there is certain information that needs to come to light, then it was open to them to actually refer the matter for a hearing of some sort.

CHIEF JUSTICE ZONDO: Ja. Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: In other words, their hands were not ...[intervenes]

CHIEF JUSTICE ZONDO: Tied.

MADAM JUSTICE PRESIDENT MOLEMELA: Yes, they were not tied. And on that basis, Chief Justice; and I do agree with you that, you know, one should be cautious of accepting *ex post facto* information that was before the appeal body, but my sense is that this matter would have had a different turn, had the procedure that you and Justice Khampepe; had this appeal body, in this matter, the majority, followed the same process that was followed by yourself and Justice Khampepe.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: And although I said, you know, one must not consider information that was not placed before the appeal body, now that we know what has been disclosed, even if it is on an *ex post facto* basis, it becomes really disconcerting, in my view, for us to just, you know, agree that the matter should be referred to a Tribunal, when we are aware of all these things.

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: So I agree with the submissions that were made by Commissioner Ngcukaitobi, and in addition thereto, I just wanted to also mention this information that from my point of view, there were other avenues that could have been followed to secure more information being shared with the appeal body.

Thanks, Chief Justice.

CHIEF JUSTICE ZONDO: Thank you. Thank you.

ADV BALOYI SC: Yes. Chief Justice, it is Baloyi.

CHIEF JUSTICE ZONDO: Yes, Commissioner Baloyi?

ADV BALOYI SC: Yes. I think in short; I agree with the conclusion that is being proposed. Looking at Section 19, it requires that; in fact it says that;

> "[19] Whenever it appears to the Commission -
>
> (a) on account of a recommendation by the Committee in terms of Section 14(4)(b) or 18(4)(a)(iii), (b)(iii) or (c)(iii),"

Which is what is facing us now ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC:

> "(b) on any other grounds, that there are reasonable grounds to suspect that a judge:
>
> (i) is suffering from an incapacity;
>
> (ii) is grossly incompetent; or -
>
> (iii) is guilty of gross misconduct,
>
> as contemplated in Section 177(1)(a) of the Constitution, the Commission must request the Chief Justice to appoint a Tribunal in terms of Section 21."

Now as Commissioner Ngcukaitobi started, he said; he put it this way, he says well, there must be *prima facie* evidence before us that he may be guilty of gross misconduct before we refer it to ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: Now on the documents before us, take for example, the suborning, or insubordination of Mhatiti, that allegation, the Appeal Committee gets to the conclusion that that issue must go to the Tribunal, both on the basis that on the face of the documents it looks like it might have been faxed, and not delivered by hand, and so maybe there is something to Mr Brink saying that he actually faxed it.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: But we have to take into account, or at least I take into account what the rules of the Labour Court says. They say it must be delivered by sheriff. So there has to be physical delivery, whether by Brink or by the sheriff, the rules say the sheriff.

So that for me is a counter to a conclusion that says when you look at the date stamps, it suggests that he faxed. Well, that is not all that you have. You have in fact the requirement for delivery in person. It has to be delivered on the person.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: Which would mean under [indistinct].

CHIEF JUSTICE ZONDO: I do not know what is happening Commissioner Baloyi. You ...[intervenes]

ADV BALOYI SC: [Indistinct].

CHIEF JUSTICE ZONDO: You ...[intervenes]

ADV BALOYI SC: [Indistinct].

CHIEF JUSTICE ZONDO: Sorry, Commissioner Baloyi.

ADV BALOYI SC: [Indistinct].

CHIEF JUSTICE ZONDO: Sorry, Commissioner Baloyi.

ADV BALOYI SC: [Indistinct] the conclusion that brings that the JPD not give a full answer, or did not justify effectively [indistinct].

MADAM JUSTICE PRESIDENT MOLEMELA: Chief Justice, may I suggest that Mbali phone Commissioner Baloyi just to inform her that she is inaudible please, Chief Justice.

CHIEF JUSTICE ZONDO: Ja, Mbali can you do that please.

MS MONDLANE: Yes, I ...[intervenes]

CHIEF JUSTICE ZONDO: I think probably she cannot hear us, because I was calling her.

MS MONDLANE: Yes, I was also calling her. I have just texted her; I see she is responding to my text.

CHIEF JUSTICE ZONDO: Ja. Commissioner Baloyi, can you hear me now?

MS MONDLANE: She has logged off, Chief Justice. She just asked me to send it; to send the link on her phone, so I am doing that now.

CHIEF JUSTICE ZONDO: Oh. Maybe she will join us just now.

MS MONDLANE: Yes, I have just sent her the link. She will be joining shortly.

CHIEF JUSTICE ZONDO: Okay. Premier, did I come back to you after Commissioner Ngcukaitobi?

PREMIER LESUFI: No, you did not ...[intervenes]

CHIEF JUSTICE ZONDO: Oh ...[intervenes]

PREMIER LESUFI: But I understand, Chief Justice.

CHIEF JUSTICE ZONDO: I am sorry. I am terribly sorry.

PREMIER LESUFI: No, no, that is okay. It is okay, Chief Justice. All right.

CHIEF JUSTICE ZONDO: Okay. No. Maybe because we are going to; we will ask Commissioner Baloyi to basically go back and start afresh. I think when she finishes, I will give you a chance. I am so; I am terribly sorry. It is just that now we; I do not think we can discuss in her absence. Mbali, are you able to phone her and talk to her and hear what her plans are about the situation? Or what she is trying to do?

MS MONDLANE: Hi Commissioner?

ADV BALOYI SC: Yes, Mbali?

MS MONDLANE: Are you winning?

ADV BALOYI SC: I am trying. [Indistinct] I am trying. I am struggling. I think it is [indistinct].

MS MONDLANE: All right. Okay. Thank you.

ADV BALOYI SC: [Indistinct].

MS MONDLANE: No, no.

ADV BALOYI SC: [Indistinct].

MS MONDLANE: All right, thanks. Chief Justice, she will keep trying. She said we can go ahead.

CHIEF JUSTICE ZONDO: Okay. All right. Let me give the Premier the opportunity to express his views. Premier?

PREMIER LESUFI: Thank you so much, Chief Justice. Let me also greet fellow Commissioners, the Minister, and everyone that is on this call.

CHIEF JUSTICE ZONDO: Yes.

PREMIER LESUFI: You might be aware, Chief Justice, that I only familiarised myself with the documents just moments ago ...[intervenes]

CHIEF JUSTICE ZONDO: [Indistinct]. Yes.

PREMIER LESUFI: Yes, but I must say, I fully concur with what the Minister has tabled, together with Advocate Ngcukaitobi.

CHIEF JUSTICE ZONDO: Ja.

PREMIER LESUFI: This matter, it is quite clear that we cannot take it beyond here. It is noted, there are concerns raised ...[intervenes]

CHIEF JUSTICE ZONDO: Ja.

PREMIER LESUFI: But there is no gross misconduct, and it

will be extremely difficult for us to start establishing new facts on a matter that might not take us forward.

CHIEF JUSTICE ZONDO: Ja.

PREMIER LESUFI: So on that score, I fully concur with their views, and I support their recommendations.

CHIEF JUSTICE ZONDO: Ja.

PREMIER LESUFI: Thanks, Chief Justice.

CHIEF JUSTICE ZONDO: No, thank you, Premier. I just want to mention, for what it is worth, that we will just need to really apply our minds properly, because we have, as the JSC, in the past, we have made decisions and they are taken to court, and we are overturned.

That has happened many times since around 2010, I am sure. We do not have; I do not think we have a good record of making decisions that withstand scrutiny, and it is important that at a certain point, we just do our best that the decisions we make, are decisions that we can fight for, because we believe they are in accordance with the Constitution, and the law, and the evidence before us.

Even recently, the past few years, when we are challenged on decisions that we have made, we have tended to settle, and I do not think that when that happens as often as it seems to have happened, it gives confidence to the public that we apply our minds properly.

I am not saying that we; in this case that we are

not, I am just saying that if we want to change that scenario, we need to just make sure that we apply our minds properly. Thank you. Any other views?

Is Commissioner Baloyi back?

ADV BALOYI SC: Yes, I am back, CJ.

CHIEF JUSTICE ZONDO: Oh, yes.

ADV BALOYI SC: I think ...[intervenes]

CHIEF JUSTICE ZONDO: We did not hear most of what you were saying.

ADV BALOYI SC: Yes.

CHIEF JUSTICE ZONDO: I do not know what happened with technology, I think you would have to start afresh, I am sorry about that.

ADV BALOYI SC: No, that is fine, CJ. I think it is a problem on my side.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: But, okay, I think with that disruption, I can state my position much more simpler.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: And it is that we are required to be satisfied that there is a *prima facie* case that the Judge President is guilty of gross misconduct.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: And in doing so, we take into account the nature of the allegations that have been made. So it is not

sufficient to simply say well, that is what the appeal body recommends, that there should be a Tribunal and therefore we are going to constitute it ...[intervenes]

CHIEF JUSTICE ZONDO: Ja.

ADV BALOYI SC: [Indistinct] recommend.

CHIEF JUSTICE ZONDO: Ja, ja.

ADV BALOYI SC: We have to look at what is the evidence that is comprising the complaint, and the responses thereto.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: And unless we are satisfied that the; a combination of these result or produce a *prima facie* case that the Judge President is guilty of gross misconduct, then we; I think we would be shaking our responsibility if we refer it to a Tribunal because we want to satisfy ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: A potential criticism ...[intervenes]

CHIEF JUSTICE ZONDO: Ja.

ADV BALOYI SC: That no doubt Mr Brink is going to sponsor.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: He is not going to be happy with a decision that says that this matter is not going to a Tribunal, if we are not settling with him, you know ...[intervenes]

CHIEF JUSTICE ZONDO: Ja, ja.

ADV BALOYI SC: We are not talking to him about [indistinct].

CHIEF JUSTICE ZONDO: Ja.

ADV BALOYI SC: So I agree that on the information that is before us; and it may well be that it is a consequence of how the initial judge, Judge Zondi, conducted the investigation, it may well be, it is a product of that.

CHIEF JUSTICE ZONDO: JA.

ADV BALOYI SC: But the consequence of it is what we are sitting with, at least in my view, does not present us with a *prima facie* case of guilt of gross misconduct that would warrant the constitution of a Tribunal.

And unfortunately; the unfortunate consequence of that conclusion is that we are unable to go and do our own investigation before we make the final decision. We work with the evidence that is before us, and consider the recommendation against that evidence, and if we find that on the evidence that is before us that a case cannot be made, or he could not be found; a *prima facie* case could not be made, we have to refuse, to decline the recommendation to refer to a Tribunal.

CHIEF JUSTICE ZONDO: Yes. Thank you very much, Commissioner Baloyi. Of course, a preferable way, if the legislation permitted, would have been that if at this stage

of us considering the recommendation, we are furnished with evidence that was not before the Appeal Panel, if we were able to refer the new evidence to the Panel, and let them consider it, and see whether they come to the same conclusion.

ADV BALOYI SC: Yes.

CHIEF JUSTICE ZONDO: But it does not look like we have such power. I do not know if anybody is; has been able to pick it up, I have not picked it up.

ADV BALOYI SC: No.

CHIEF JUSTICE ZONDO: Because that would have been what would be best, to say well, on the evidence that was before the Panel, this is the recommendation that they came up with, but subsequently other evidence has been placed before us, which seems to suggest that had it been before the Panel, they might have reached a different conclusion.

ADV BALOYI SC: Yes.

CHIEF JUSTICE ZONDO: It looks like there are no further inputs. Let me, let me ...[intervenes]

ADV BALOYI SC: CJ, you have Mangena, Maboku, whose hand has been up for a while.

CHIEF JUSTICE ZONDO: Oh, is that so? No, I did not see it.

ADV BALOYI SC: Yes.

CHIEF JUSTICE ZONDO: Please, Commissioner, go ahead.

MR MANGENA: Thank you, Chief Justice, and good evening fellow Commissioners.

CHIEF JUSTICE ZONDO: Yes.

MR MANGENA: In summary, I agree with the submissions that have been made, that there is no merit in the complaint, but I also wanted to address myself to the Chief Justice's question, whether, as this body, we are well-placed to consider additional documents, or additional evidence that came straight to us, while it has not served before the Appeal Committee.

My view is this one, Advocate Brink has given us a settlement proposal, or a demand, depending on how one sees it, and surely he had envisaged that that proposal will need to be considered by this Body. It could not have been something that could have been resolved by any other Committee of the JSC, other than ourselves.

So; and by bringing in that settlement proposal, he had also opened himself up for invitation to submit additional documents by Judge President Mlambo, which he has done.

In consideration of his settlement proposal, and the documentation received by Judge President Mlambo, we are well-placed to take a decision; one, that we reject the settlement proposal, but also now having been placed with additional evidence, we are well-placed to say that by virtue

of the information at our disposal, we do not see a need to refer this matter for consideration by any other body.

In our wisdom, there is no merit in the complaint, and it should be the end of it. Thank you, Chief Justice.

CHIEF JUSTICE ZONDO: Thank you. There is a hand that is up, or was that Commissioner Mangena's one. Mbali ...[intervenes]

ADV CANE SC: Chief Justice, I did have my hand up, and it was just to answer a question you raised earlier, not to re-traverse the same ...[intervenes]

CHIEF JUSTICE ZONDO: Oh, yes, please.

ADV CANE SC: If I may draw the Commissioner's attention to Section 18(3)(d), it is perhaps what Justice Molemela was referring to.

It actually expressly authorises the Appeal Committee to call for further written or oral argument, and I think in calling for further material or argument, one could read in that, that the; if they had raised the questions that they do in their reasoning, that those matters could have been addressed by way of other documents as part of that argument.

Then you raised the question as to whether we could consider the additional written material before us, and there I would ask the Commissioners to consider Section 19(3) where we are duty-bound to request the parties, or

invite them, to comment in writing on our; on what we are intending to do.

And so we have received those comments in writing, I think we are entitled to then take into account what is submitted to us at this point. Thank you, Chief Justice.

CHIEF JUSTICE ZONDO: Thank you. Is there another hand?

ADV NGCUKAITOBI SC: No, Chief Justice ...[intervenes]

FEMALE COMMISSIONER: Ja ...[intervenes]

ADV NGCUKAITOBI SC: I just wanted to add that ...[intervenes]

CHIEF JUSTICE ZONDO: Ja?

ADV NGCUKAITOBI SC: [Indistinct] Commissioner Cane has in fact answered this, because the only point that I wanted to make is that if you look at the comment by Judge Mlambo at page 511, dated 12 April, it says at the beginning;

> "I extend my gratitude to the JSC for this opportunity to submit representations in the outcome of the judgment handed down by the JCC."

Now we invited him to make representations, so it would be odd to invite him to make representations, and for us to then turn around and say we have no power to consider

those representations.

CHIEF JUSTICE ZONDO: I hear what you say, Commissioner Baloyi. There are two possibilities, and maybe the question is the ambit of representations.

In a situation such as this, one scenario is that parties are being invited to make submissions, and I am deliberately not using the word representations, make submissions to us whether on the record before us, and assuming that that is the record that was before the Appeal Panel, whether or not the recommendation of the Panel; it would be justified to accept the recommendation of the Panel, or to reject it on that record.

Or whether, when the Act says representations, it does not confine that to submissions. It could be submissions; it could be other material that is; that the parties could place before us.

So there is that, but there is a more important point I want to raise, to check with Mbali. Mbali, this new evidence, do you know whether it was given to Mr Brink so that he had an opportunity to say something about it or not?

MS MONDLANE: No, it was not, Chief Justice.

CHIEF JUSTICE ZONDO: It was not given to him?

MS MONDLANE: No.

CHIEF JUSTICE ZONDO: And there is no indication that Mlambo Judge President sent a copy to him of what he sent

to us?

MS MONDLANE: So far there is none, but I can check with the Judge President.

CHIEF JUSTICE ZONDO: Ja, I am thinking that if we are entitled to take into account the new evidence, if we take it into account and arrive at a decision that is prejudicial to any party, and that party was not given a chance to deal with that evidence, there might be problems.

So I am thinking whether before; if the position is that Brink is unaware, or was not given these, I am thinking that we should consider giving; disclosing to him that there is this new material, and letting him comment or say whatever he wants to say about, before we make our final decisions.

That is what is in my mind. What do Commissioners think?

ADV BALOYI SC: CJ ...[intervenes]

DEPUTY JUSTICE PRESIDENT LEDWABA: [Indistinct].

ADV BALOYI SC: It is ...[intervenes]

DEPUTY JUSTICE PRESIDENT LEDWABA: [Indistinct].

ADV BALOYI SC: Oh, sorry.

CHIEF JUSTICE ZONDO: [Indistinct], Commissioner Baloyi?

DEPUTY JUSTICE PRESIDENT LEDWABA: Sorry [indistinct] my hand, I was asking that maybe after Advocate

Baloyi, if I could be given an opportunity [indistinct].

CHIEF JUSTICE ZONDO: Oh, okay. Thank you.

DEPUTY JUSTICE PRESIDENT LEDWABA: It is Ledwaba.

CHIEF JUSTICE ZONDO: Thank you, DJP.

DEPUTY JUSTICE PRESIDENT LEDWABA: Thank you.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: Yes.

CHIEF JUSTICE ZONDO: Commissioner Baloyi?

ADV BALOYI SC: Yes, CJ, it is about the reading of Section 19(3) and what in fact it permits us to do. It reads;

> "[19](3) The Commission must, unless it is acting on a recommendation referred to in section 16(4)(c) or 18(4)(a)(iii), (b)(iii),"

And we are in (b)(iii) as I understand it.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC:

> "...unless it is acting on a recommendation referred to in section 16(4)(c) or 18(4)(a)(iii), (b)(iii), or (c) (iii), before it requests the appointment of a Tribunal, inform the respondent, and, if applicable, the complainant, that it is considering to make that request and invite the respondent, and, if applicable, the complainant, to comment in writing on the fact that the Commission is considering to so request."

So the submissions we would receive; we would ask for; we can ask for submissions, unless we are acting under; on a recommendation under 18(4)(b), and we are acting under a recommendation, and on my reading and understanding, we are not entitled to ask for those submissions. I know that is what we have been doing in practise ...[intervenes]

CHIEF JUSTICE ZONDO: Ja.

ADV BALOYI SC: But on my reading now, is we are actually not authorised to do that, certainly not by 18(4)(b)(iii).

CHIEF JUSTICE ZONDO: So;

> "[19](3) The Commission must, unless it is acting on a recommendation referred to in section 16(4)(c) or 18(4)(a)(iii), (b)(iii) or (c)(iii), before it requests the appointment of a Tribunal, inform the respondent, and, if applicable, the complainant, that it is considering to make that request and invite the respondent, and, if applicable, the complainant, to comment in writing on the fact that the Commission is considering to so request."

Well, I do not know if you have had a chance to apply your mind to 16(4)(c) and 18(4)(a)(iii), (b)(iii) or (c)(iii), because

I am not sure that this makes sense to me.

You have a recommendation, we have; what happens is that the Panel sends a recommendation to us, and what we have been doing all along is that before the Commission, Small Commission can have a meeting and deliberate, we ask the complainant and the respondent to give us their written submissions about whether or not we should accept or reject the recommendation.

Now that seems simple and straightforward. Now this subsection seems to tell us that there are certain situations where we need not ask for representations, and those situations are 16(4)(c) or 18(4)(a)(iii), (b)(iii), and so on, and Commissioner Baloyi, you are saying that we are acting in terms of; we are acting on a recommendation referred to in 18(4)?

ADV BALOYI SC: Yes. 18(4)(b)(iii).

CHIEF JUSTICE ZONDO: 18(4)(b)(iii)?

ADV BALOYI SC: (iii), (b)(iii).

CHIEF JUSTICE ZONDO: Ja, no. I think you are right that we are acting in terms of that Section. It is just that it does not; it does not seem to make sense to me why in that situation, the Act should contemplate that we should not make this request, because it makes sense for us to make the request to the parties, because you want to be persuaded in case you should not call for a Tribunal, but on

the face of it, it does look like, you know, the recommendation of the Panel comes from; is in terms of Section 18(4)(b)(iii) which is included in the exception in Section 19(3) ...[intervenes]

ADV BALOYI SC: Yes.

CHIEF JUSTICE ZONDO: Which is included in the exceptions where we do not have to approach the parties and ask them for submissions.

ADV BALOYI SC: Yes.

CHIEF JUSTICE ZONDO: Of course, there is the idea that we are relying on those to say; to justify our outcome.

MADAM JUSTICE PRESIDENT MOLEMELA: Chief Justice, [indistinct] ...[intervenes]

CHIEF JUSTICE ZONDO: Is everybody following the discussion?

MADAM JUSTICE PRESIDENT MOLEMELA: Yes, Chief Justice, I am following.

CHIEF JUSTICE ZONDO: In other words, if Commissioner Baloyi's interpretation is correct, we were not supposed to ask for representations from the parties.

MADAM JUSTICE PRESIDENT MOLEMELA: [Indistinct].

CHIEF JUSTICE ZONDO: We were supposed to; we were just; we were supposed to just consider the recommendation and make a decision. But we did ask for representations, and the parties did submit representations,

and including new evidence, which helps to draw light which we are relying on to say there is no basis to request the establishment of a Tribunal.

But I think Commissioner Molemela, you wanted to say something?

MADAM JUSTICE PRESIDENT MOLEMELA: I wonder whether I should say something, because I am not offering a solution. I am just making things worse actually, to say Chief Justice, if we follow; and I think Commissioner Baloyi, but if she is correct, then we must also have a look at 19(1), which is very worrisome.

> 19(1)(a), because then it seems to me that
> "[19](1) Whenever it appears to the Commission- (a) on account of a recommendation by the Committee in terms of Section 16(4)(b) or 18(4)(a)(iii), (b)(iii) or (c)(iii),"

And Commissioner Baloyi says we are (b)(iii), then thereafter we must go to that part that says;

> "as contemplated in Section 177(1)(a) of the Constitution, the Commission must request the Chief Justice to appoint a Tribunal in terms of Section 21."

That is why I was saying, I think I am just going to make matters even worse, because it seems to me that a

consideration of whether there are reasonable grounds to suspect that the judge is grossly incompetent and so forth, those are covered under (b) ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: So; and we are under (a). We are under 19(1)(a), because there is a recommendation by the Committee in terms of Section 18(4)(b).

CHIEF JUSTICE ZONDO: Yes.

MADAM JUSTICE PRESIDENT MOLEMELA: Which takes us straight to the Commission must request. So I am just making matters worse, Chief Justice, but I thought I should mention that so that we can maybe engage with that as well. Thank you.

CHIEF JUSTICE ZONDO: Yes. Thank you. Anyone else who wants to say something about these legal issues?

FEMALE COMMISSIONER: [Indistinct].

ADV NGCUKAITOBI SC: [Indistinct].

CHIEF JUSTICE ZONDO: Yes?

ADV NGCUKAITOBI SC: Look, I would like to propose that we move forward. I think that the; while you have no duty to ask for representations, but nevertheless you ask for representations, it seems difficult to fault the process for being unfair.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: So, because you have no duty, but then you do it, but it seems very difficult for an argument to arise that you have been unfair.

Then there is a second issue, which is precedence. We have done it this way, but obviously it does not mean this is the way. Then there is also the prejudice, in this case we have invited, so how do you invite, and then ignore.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: So I think we have entertained them. I do think; and you will remember Chief Justice, we had another conversation about a different matter, which is whether we have any power to suspend a judge pending [indistinct] ...[intervenes]

CHIEF JUSTICE ZONDO: Yes. Yes.

ADV NGCUKAITOBI SC: The outcome, and the resolution of the Small JSC was to ask for legal advice, which three months later is still outstanding. So I think just like that issue, this particular issue that Commissioner Baloyi is raising, also needs to go for senior counsel opinion before it comes back to us.

CHIEF JUSTICE ZONDO: Ja.

ADV NGCUKAITOBI SC: But we have an agenda item in front of us, which is whether or not to recommend the constitution of the JCT in line with what the JCC has

decided.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: Now, the; as I understand it, the view is still that on what we have in front of us, we have no basis *prima facie* to constitute a JCT, to advise the President, rather, to constitute a JCT. We have to tell him that there is no basis to constitute a JCT.

Now there is a question whether can we take into account the representations, we invited them. So in accommodating Mr Brink, we must also be careful not to create unfairness on the part of Judge Mlambo, because he too has rights that should be protected.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: And he has done what he was expected to do. He is entitled not to have the matter hanging over his head. He is expecting a decision. No doubt he knows that we are meeting, so he is also entitled to a decision.

I have got a fundamental problem, and this is the last thing that I am going to say, I have got fundamental problem with the approach taken by Mr Brink. Particularly, as far as we are concerned. I do not mind; well, I mean, I mind all of the racism in the previous communication, but what he has said to us is that we have two options.

The one option is that we must accede to what he

demands, failing which; and acceding to what he demands, the so-called reconciliatory; the actual words used, it is actually spine-chilling, because the actual words used is that we must out the calculator and work out what he is entitled to.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: And he will then settle the matter on that basis.

CHIEF JUSTICE ZONDO: Ja.

ADV NGCUKAITOBI SC: So it is extortion upon extortion.

CHIEF JUSTICE ZONDO: Ja.

ADV NGCUKAITOBI SC: Then the other alternative is that he would then explode this so-called intelligence report, when you read that it is fake upon fake.

CHIEF JUSTICE ZONDO: Ja.

ADV NGCUKAITOBI SC: So when you have a complainant with; who comes to this Body with such ill motives, like plainly ill motives, then you really start wondering like what am I actually dealing with? And are we not, wittingly or unwittingly, playing into the hands of something else that we do not fully understand?

And subjecting one of our Judge President's to plainly harassment, with no basis whatsoever, on the grounds of a person who clearly has another agenda, so I would really ask, unless people say look, there is a *prima*

facie case, it is a strong case, it is not fair to say to the Judge President; I mean for instance, here at the JSC we have had it now recently, somebody does not like our decision, they go to court.

We then put together an answering affidavit, maybe the Chief Justice instructs one of us to do a confirmatory affidavit. Maybe one statement is wrong. The next thing the Chief Justice is now going through a disciplinary hearing.

You see, once we open that, you just do not know where it is going to end.

CHIEF JUSTICE ZONDO: Yes. Yes. No, thank you, Commissioner Ngcukaitobi. Well, there is no doubt we have got to perform our duties in accordance with the law. Full stop. And the fact that we might be criticised, or not, if we are satisfied that what we are doing is the right thing, that is what we do.

So there is nothing we are going to do that we should not do, just because we do not want Brink to do whatever he is threatening to do, and there is nothing we will do which we are not supposed to do because we are protecting the Judge President.

We will apply our minds properly, and do the right thing. I think that what Commissioner Baloyi raised, she raised it in response to my question, to my concern that to

the extent that we are taking into account new evidence, if Brink has not been informed of that new evidence, to give him a chance to comment on it, we may be creating a problem.

So what Commissioner Baloyi was saying is that actually, we did not have to call for these submissions in terms of the Act, and of course what Commissioner Ngcukaitobi says well since we already called them, and you know, it would be strange if we do not take them into account, we must take them into account.

So I feel that fairness does suggest that we should not take into account that one of the parties does not even know about, not to speak about having been given a chance to comment.

So if the position is that there is no indication that he is aware of it, he was given it, my inclination would be that we; maybe we adjourn to finalise at a date to be fixed and get the Secretariat to let them have that, and then he must let us have his comments by a certain time, and then we meet him and deal with it.

That would be my inclination, because I am not sure what my answer would be if it is said but you were being unfair by taking into account new evidence, without hearing what ...[intervenes]

DEPUTY CHIEF JUSTICE LEDWABA: Sorry, Chief Justice.

ADV BALOYI SC: CJ?

CHIEF JUSTICE ZONDO: Yes.

DEPUTY CHIEF JUSTICE LEDWABA: Chief Justice [indistinct] I cannot raise my hand ...[intervenes]

CHIEF JUSTICE ZONDO: Yes. DJP, I am sorry. Ja. Go ahead.

DEPUTY CHIEF JUSTICE LEDWABA: Thank you, Chief Justice. Chief Justice, I think what you raised on whether should the response of Judge Mlambo be taken to Mr Brink or not ...[intervenes]

ADV BALOYI SC: No.

CHIEF JUSTICE ZONDO: Yes?

DEPUTY CHIEF JUSTICE LEDWABA: This may prolong the matter unnecessarily, and in my view, and you know I have read these documents thoroughly ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

DEPUTY CHIEF JUSTICE LEDWABA: I do not think there is any new evidence that Judge Mlambo has raised, but if some of the Commissioners think that there is new evidence, I think the papers, as they are, we are in a position to can take a decision.

Because there may be a situation where Mr Brink may come with something else, it means we must give Judge President Mlambo another opportunity to deal with that.

What I see here is that there is a dispute of fact, and which I think can be resolved on the documents before us, but if this matter is going to drag again and again, if the only way to resolve as to which version maybe should be accepted, is that there should be oral evidence, and we do not have; I mean if this matter goes back to the Committee, the Appeal Committee, and they call for new evidence, my simple view is that it is going another five years.

But it something that depends on whether can we, on what is before us, decide, and I think we can decide, and personally I agree with the views raised by the Minister, Ngcukaitobi and other members, other Commissioners. Thank you.

ADV BALOYI SC: CJ, if I may just add a follow up on that.

CHIEF JUSTICE ZONDO: Yes?

ADV BALOYI SC: That Brink has made submissions on our invitation, and in the past when we have invited people to make submissions at this point of the proceedings, we do not share the counterparties submissions that they made. We invite the complainant and we invite the accused, in quotes, to make submissions, and then we work on the basis of the two submissions that they have made.

And so if we were now to; so we have a situation now where Judge President Mlambo has made his submissions in the way that he has made them, Brink has

made his submissions, and this is where he tells us that we must take out our calculators and see what we give him, he has no interest in litigating this matter any further before the Tribunal.

And if we were to share with him the Judge President's submission, it seems it follows necessarily that the JP must also get his submissions, but this would be the first time that we do that, at least since I joined the JSC, because even with the very last one, the Mbenenge one, we, controversial as it was, we did not share between the parties what the other has said.

We simply received their submissions, and made our decisions on the basis of their respective submissions. So this would be something that we are doing for the first time if we do, and I do not; my view is that there is no compelling reason to do that.

Brink had the opportunity to put whatever facts he wanted to put before us with his submissions, he chose to deal with it in the way that he has done, and there is no unfairness to him if we decide this matter on the basis of their respective submissions that they have made to us.

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: Thank you, CJ.

CHIEF JUSTICE ZONDO: Ja, thank you, Commissioner Baloyi. Are there other views? I must say I think when you

...[intervenes]

MINISTER LAMOLA: CJ, Lamola.

CHIEF JUSTICE ZONDO: Yes, Minister? Minister?

MINISTER LAMOLA: Yes, I just wanted to say that I concur with the views expressed by Commissioner Ngcukaitobi.

CHIEF JUSTICE ZONDO: Ja.

MINISTER LAMOLA: And the Deputy Judge President, and the Commissioner Baloyi on this matter. I think we do have enough information on the basis that both parties have made their submissions, and the recommendations of the Appeal Tribunal, which also state that they do not have enough information or evidence.

So on that basis, I do think that we should proceed to make the decision, that indeed we do not accept these recommendations. There is no *prima facie* case for us to take forward. Thank you, CJ.

CHIEF JUSTICE ZONDO: Thank you. Is there another hand?

MS MATOLO-DLEPU: So, CJ, I have been raising my hand.

CHIEF JUSTICE ZONDO: Okay. Go ahead.

MS MATOLO-DLEPU: Okay. The Minister has just actually stated what I wanted to say, because I think we concentrated too much on the additional submissions, but in my view, what is before; what was before the Committee, there is no *prima facie* case against Judge Mlambo.

Not considering the additional submissions that came before us, I do not see any gross misconduct. So whether we take it back, but for me, what was presented to us, there is nothing that we can; that justifies us to take this matter forward. Thank you.

CHIEF JUSTICE ZONDO: Thank you. Any other views? Did Commissioner Pillay ultimately join?

MS MONDLANE: No, she did not, Chief Justice.

CHIEF JUSTICE ZONDO: Oh, she did not? Okay. I just wanted to say this in regard to my concern, if the parties are asked to submit written representations or written submissions on the same record, and they make submissions, for me it is one thing.

In other words, they look at the record, and say to us this is what you should make of this evidence. They both have the same evidence that they are talking about. It is one thing.

But if parties; one party has placed before us some material that the other party does not know about, and maybe does not even expect to be there, and we make a decision without the other party being made aware of this other material, and this is material going to evidence, it is not about legal submissions, you have a situation where one of the parties and the JSC have the same information before them, but another party does not have the same

information.

And the JSC makes a decision. I think that is unfair, and I think that the parties, before the JSC makes a decision, the parties should all be on the same page in terms of the evidence that the JSC may take into account.

So my view remains that before we make a final decision, if we are going to take into account the additional material, we should afford Brink the opportunity to comment, and then we make a decision.

And I would say to those Commissioners who say let us try and finalise this matter, because it should not drag for too long, I would say to them sometimes by just being patient a little bit, and take that one or two further steps, you might actually avoid a situation where there might be litigation that takes years.

And all you might have; we might have done is just wait maybe another two weeks, but by making sure that we have covered everything, we avoid maybe litigation that may take years.

I make an example, a lot of people with regards to the Commission that I chaired, thought that there would be lots of review applications, but I took trouble to cover a lot of things, and the result is that there are very review applications that came.

Many of the big fish who were implicated, and

against whom I made serious findings, did not take; did not launch any review applications. So that is my position, but obviously, of course, we will decide according to the majority.

Should we ask Mbali to give us the ballot and we go for the vote?

ADV NGCUKAITOBI SC: Chief Justice, could you just set out for us the question we are voting for or against?

CHIEF JUSTICE ZONDO: Oh, okay.

ADV NGCUKAITOBI SC: Yes.

CHIEF JUSTICE ZONDO: The; well, the question, I guess has to be whether we accept or reject the recommendation of the Appeal Panel. Now, I am not sure that what I do with my situation, or ...[intervenes]

ADV CANE SC: Chief Justice ...[intervenes]

CHIEF JUSTICE ZONDO: Or whether I should include anything that says whether we must defer our decision and afford Brink the opportunity, whether that should be another question. I am not sure. Commissioner Cane?

ADV CANE SC: Perhaps, the way you were phrasing it is correct, or perfectly in order, whether we accept or reject, now or after ...[intervenes]

CHIEF JUSTICE ZONDO: Affording ...[intervenes]

ADV CANE SC: To reconvene after affording the parties the opportunities to consider and comment on each other's

input.

CHIEF JUSTICE ZONDO: Oh, so maybe it should be questions that cover my concern as well.

ADV CANE SC: Yes, it could be [indistinct] ...[intervenes]

CHIEF JUSTICE ZONDO: So in other words, in other words, I think what you are saying might be correct. You are saying that maybe there should be the question of whether you accept or reject the recommendation of the Panel.

Well, whether you accept the recommendation, maybe there would be a box there. Whether you reject the recommendation of the Panel or Committee, that is another box. And then whether you ...[intervenes]

ADV CANE SC: Defer ...[intervenes]

CHIEF JUSTICE ZONDO: Whether you agree that the decision we deferred pending affording Mr Brink the opportunity to comment on new evidence. I think it looks like it would need to be those three.

ADV CANE SC: Yes.

CHIEF JUSTICE ZONDO: Is that fine?

ADV CANE SC: Yes.

CHIEF JUSTICE ZONDO: I take it that means that it is fine. Before we go to; we ask Mbali to get us the ballot, can I raise this question, it is the first time that I am in a Small Committee meeting where we reject a recommendation. All

the other ones I think we have accepted.

To the extent that that has been done before, does anybody know whether the Small JSC is then supposed to prepare a document that gives its reasons for its decision? Yes?

ADV BALOYI SC: Yes, CJ. We have made a point to record the decision.

CHIEF JUSTICE ZONDO: Ja.

ADV BALOYI SC: And the reasons for it.

CHIEF JUSTICE ZONDO: Yes. So what I am asking is whether, apart from what was articulated here, there would be some kind of memo or something that; because I do not want to call it a judgment, that might look at issues more in detail or not.

ADV BALOYI SC: I have not seen the outcome of it, the final document that comes out. The most recent would be with Judge President Mbenenge, and perhaps Mbali can tell us what record ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

ADV BALOYI SC: What form of record she got from Commissioner Pillay, but there was quite a concerted exercise to make sure that there is a proper recordal.

CHIEF JUSTICE ZONDO: Ja, because it seems to me that it would be a good thing for the Small JSC to have a document which examines issues properly, and gives

reasons, because you have a situation where here the judge of first instance gave judgment in a certain way, and gave his reason, and then on appeal you have two Judges, all senior judges, two judges going this way. One senior judge going that way.

So that if we make whatever decision, it might be important that whatever document is there, it is a strong document. So maybe the Legal Committee can work on that. I do not know. What do Commissioners think?

ADV NGCUKAITOBI SC: We support that, Chief Justice. The head of the Litigation Committee is unfortunately not here.

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: But I think; Commissioner Baloyi and I are members ...[intervenes]

CHIEF JUSTICE ZONDO: Yes.

ADV NGCUKAITOBI SC: That we support it.

CHIEF JUSTICE ZONDO: You will work on that, ja.

ADV NGCUKAITOBI SC: Yes.

CHIEF JUSTICE ZONDO: Okay. No. That is all right.

ADV BALOYI SC: [Indistinct].

CHIEF JUSTICE ZONDO: Okay. All right. Then Mbali, please get us the ballots.

MS MONDLANE: Chief Justice, can I just get clarity. When it is a meeting like this, we usually get; I usually get an

SMS from the members stating which way they are voting.

CHIEF JUSTICE ZONDO: Oh, by the way, because it is virtual.

MS MONDLANE: Yes.

CHIEF JUSTICE ZONDO: Oh. Okay. Maybe it will be; will it not be better for members, Commissioners to just give you a sentence of what they are supporting, so that there can be no confusion about saying yes, or no.

MS MONDLANE: Yes, please. I have sent my number on the chat.

CHIEF JUSTICE ZONDO: Ja.

MS MONDLANE: My number is 0728204837.

CHIEF JUSTICE ZONDO: Ja. Okay. All right. So Commissioners, you can send to Mbali your position, what you support.

MADAM JUSTICE PRESIDENT MOLEMELA: CJ, can you please just repeat the options?

CHIEF JUSTICE ZONDO: Repeat?

MADAM JUSTICE PRESIDENT MOLEMELA: Yes.

CHIEF JUSTICE ZONDO: The one option is I accept the recommendation of the panel, of the Appeal Panel. The next one is I reject the recommendation of the Appeal Panel. The third one is I; the third one is let us defer the decision until we have; until Mr Brink has commented on the new evidence.

MALE COMMISSIONER: Chief Justice, [indistinct]. Okay.

CHIEF JUSTICE ZONDO: Yes?

MALE COMMISSIONER: Maybe let me accept your [indistinct] ...[intervenes]

CHIEF JUSTICE ZONDO: Sorry?

MALE COMMISSIONER: Because you are the Chair. Maybe let me accept what you are saying, Chief Justice. Maybe let us [indistinct] ...[intervenes]

CHIEF JUSTICE ZONDO: Oh, okay.

MALE COMMISSIONER: I am trying to [indistinct].

CHIEF JUSTICE ZONDO: Okay.

MALE COMMISSIONER: [Indistinct] to my phone or something, because I am using my phone for this.

CHIEF JUSTICE ZONDO: Okay. Thank you. I have sent the SMS to you, Mbali.

MS MONDLANE: I have received it, Chief Justice.

CHIEF JUSTICE ZONDO: Thank you.

MS MONDLANE: I am waiting for two Commissioners.

CHIEF JUSTICE ZONDO: Okay.

MS MATOLO-DLEPU: Sorry, Mbali, I think; did you get mine?

MS MONDLANE: Yes, I did, Commissioner.

MS MATOLO-DLEPU: All right.

ADV CANE SC: Mbali, I have sent you; it seems you got mine. It was sent on the WhatsApp.

MS MONDLANE: Yes, I have received it, Commissioner Cane.

ADV CANE SC: Oh, thank you.

MS MONDLANE: I am just waiting for Commissioner Marumoagae.

CHIEF JUSTICE ZONDO: Okay.

MS MATOLO-DLEPU: Mbali, we seem to have lost him. I do not see him.

CHIEF JUSTICE ZONDO: I did not realise he was attending. He ...[intervenes]

MS MONDLANE: Yes, he had joined in with another number. I am just trying to call him.

CHIEF JUSTICE ZONDO: Okay.

MS MONDLANE: Chief Justice, the results are in.

CHIEF JUSTICE ZONDO: Okay.

MS MONDLANE: We have nine Commissioners we are rejecting the recommendation of the Appeal Committee.

CHIEF JUSTICE ZONDO: Yes.

MS MONDLANE: We have three Commissioners who would like to defer, and there are no Commissioners who are accepting the recommendation of the Committee, of the Appeal Committee.

CHIEF JUSTICE ZONDO: Ja, do send the results to me, you remember you have sent them to me.

MS MONDLANE: Yes, I will send them to you right away,

Chief Justice.

CHIEF JUSTICE ZONDO: So it is nine rejecting, three preferring a deferring. So it is those two categories?

MS MONDLANE: Yes, Chief Justice.

CHIEF JUSTICE ZONDO: Okay. That is the result then, Commissioners. It seems that then the decision is to reject the recommendation. That is the decision of the Commission.

Thank you very much everybody, we have taken longer than I thought we would, but these are important matters, and they need to be considered properly and discussed properly, but we are done.

Thank you very much. The; unless there is something that somebody wants to say, I am ready to say that the meeting is officially closed.

ADV BALOYI SC: Thank you, Chief Justice.

ADV NGCUKAITOBI SC: Thank you, Chief Justice.

MADAM JUSTICE PRESIDENT MOLEMELA: Thank you, Chief Justice.

CHIEF JUSTICE ZONDO: Thank you.

MADAM JUSTICE PRESIDENT MOLEMELA: Bye everybody.

CHIEF JUSTICE ZONDO: Thank you very much.

COMMISSIONERS (JOINTLY): Thank you. Bye.

CHIEF JUSTICE ZONDO: The meeting is officially closed. Thank you. Bye bye.

FEMALE COMMISSIONER: Bye.

CHIEF JUSTICE ZONDO: Bye.

MEETING ADJOURNS

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