

Celebrating the Rule of Law in New York and South Africa



CLE MATERIALS

October 21, 2025

In-Person at the New York Law School & Virtual Program



Celebrating the Rule of Law in New York and South Africa

October 21, 2025 | New York Law School

Program

5:30 – 6:30 PM

60 minutes, 1.0 CLE credits in Ethics & Professionalism

Welcome

Prof. Penelope Andrews

John Marshall Harlan II Professor of Law & Director, Racial Justice Project, New York Law School

Trustee Emeritus, Historical Society of the New York Courts

Introductions

Dean Anthony W. Crowell

Dean, President, and Professor of Law, New York Law School

Conversation

Hon. Jenny Rivera

Associate Judge of the New York Court of Appeals

Hon. Leona Theron

Justice of the Constitutional Court of South Africa

Dean Anthony W. Crowell

Moderator

Closing Remarks

Allison M. Morey

Executive Director, Historical Society of the New York Courts

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Biographies

Hon. Jenny Rivera, Associate Judge of the Court of Appeals, has spent her entire professional career in public service. She clerked for the Honorable Sonia Sotomayor, on the Southern District of New York, and also clerked in the Second Circuit Court of Appeals Pro Se Law Clerk's Office. She worked for the Legal Aid Society's Homeless Family Rights Project, the Puerto Rican Legal Defense and Education Fund (renamed Latino Justice PRLDEF), and was appointed by the New York State Attorney General as Special Deputy Attorney General for Civil Rights. Judge Rivera has been an Administrative Law Judge for the New York State Division for Human Rights, and served on the New York City Commission on Human Rights. Prior to her appointment, she was a tenured faculty member of the City University of New York School of Law, where she founded and served as Director of the Law School's Center on Latino and Latina Rights and Equality.

She is a renowned legal scholar and has published extensively on interpersonal violence, women's rights, and legal issues that impact the Latino community. She served on the American Bar Association (ABA) Commission on Hispanic Legal Rights and Responsibilities from 2010 to 2012 and, as the Rapporteur to the Commission, Judge Rivera authored the Report, *Latinos in the United States: Overcoming Legal Obstacles, Engaging in Civic Life*. She currently serves as Chair of the ABA's Board of Elections and is a member of the New York State Bar Association's (NYSBA) Task Force on the U.S. Territories, and she has previously served as Elections Chair for the Hispanic National Bar Association (HNBA), all by appointment of the respective Bar Association President. She is a former member of the HNBA Latina Commission and, in collaboration with the HNBA, Judge Rivera co-authored a report on Latina attorneys in the public interest sector, *La Voz de la Abogada Latina: Challenges and Rewards in Serving the Public Interest*. Judge Rivera has received several awards, including the ABA Spirit of Excellence Award and the NYSBA Diversity Trailblazer Lifetime Achievement Award, and the Puerto Rican Bar Association's Presidential Medal.

Judge Rivera is an elected member of the American Law Institute, the leading independent US organization that produces scholarly work to clarify, modernize and otherwise improve the law, including the Restatements of the Law, Model Codes, and Principles of Law. She is an appointed member of the HNBA Presidential National Task Force on Hispanic Law Faculty and Deans.

Judge Rivera graduated from Princeton University and received her J.D. from New York University School of Law, where she was a Root-Tilden Scholar. She received her LL.M. from Columbia University School of Law.

Hon. Leona Theron was born in Wentworth, South Africa, a working-class township under apartheid, and grew up in poverty. Despite these challenges, she excelled academically and earned Bachelor of Arts and Bachelor of Laws degrees from the University of KwaZulu-Natal. In 1989, she was awarded a Fulbright Scholarship and completed a Masters of Law degree at

Georgetown University, Washington, D.C. In the U.S., she also worked with the International Labour Organisation and a Los Angeles law firm.

After ten years of practice as an advocate, she was appointed in 1999 as the first Black woman judge of the KwaZulu-Natal High Court, and at 32, the youngest judge in South Africa. In 2010, Justice Theron was appointed as a Judge of the Supreme Court of Appeal as its youngest member, and in 2017, she joined the Constitutional Court, South Africa's highest court. Over her 26 years on the bench, she has been a leader in judicial education, served on multiple boards, presented widely at national and international conferences, and made history as the first woman President of the Administrative Tribunal of the African Development Bank.

Dean Anthony W. Crowell is New York Law School's 16th Dean and President, and a Professor of Law. He also serves as the Faculty Director of the NYLS Center for New York City and State Law. His teaching and other academic work centers on state and local government law, civics education and engagement, and leadership. He began teaching at NYLS in 2003.

As a first-generation college student and a longtime New York City public servant, Dean Crowell proudly reintroduced NYLS as *New York's law school*. His management philosophy is rooted in his experience as a senior executive in New York City government for more than a decade, where he served as Counselor to Mayor Michael R. Bloomberg. Under the Dean's leadership, NYLS has repositioned itself as a law school for the 21st century lawyer and a leader in New York City and State government. NYLS issued its first comprehensive Strategic Plan under the Dean's leadership, and adopted a dynamic and successful new curriculum—known as Think BIG. The School's current Strategic Plan reflects the new demands and opportunities confronting law schools and the profession.

Celebrating the Rule of Law in New York and South Africa

Materials

1. Vincent Martin Bonventre, *Toward The Wilson Court: The Court of Appeals' Tradition Calls on the New Chief Judge* 88 Albany Law Review 1 (2024).
2. Linnea E. Riegel, *Judge Jenny Rivera: The Lone Dissenter for the Accused* 81 Albany Law Review 1171 (2024).
3. *Cuomo v. New York State Commn. on Ethics & Lobbying in Govt.* 2025 NY Slip Op 00902.
4. *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13.
5. Constitutional Court of South Africa, *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma and Others*, Media Summary (2021).

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TOWARD THE WILSON COURT: THE COURT OF APPEALS' TRADITION CALLS ON THE NEW CHIEF JUDGE

*Vincent Martin Bonventre**

“[W]ith the elevation of Caitlin Halligan and this chief judge, we are elevating the stature of this court. In a very short time, we have put it back where it belongs.”

—Governor Kathy Hochul¹

“It is vital that we restore the court to its position of national pre-eminence”

—Chief Judge Rowan Wilson²

New York’s highest court has a tradition of being one of the nation’s most respected and influential judicial tribunals.³ Whether or not the

* Vincent M. Bonventre, J.D., Ph.D.; Justice Robert H. Jackson Distinguished Professor of Law, Albany Law School; Author, NEW YORK COURT WATCHER; Director, Center for Judicial Process. Special thanks to Michael Badalamenti, Sarah Midani, and the editorial staff of the *Albany Law Review*, Volume 88, for their work in preparing this Article for publication.

¹ *Video, Audio, Photos & Rush Transcript: Governor Hochul Delivers Remarks at Investiture of Court of Appeals Judge Caitlin Halligan*, GOVERNOR’S PRESS OFF. (June 7, 2023), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-delivers-remarks-investiture-court-appeals> [<https://perma.cc/UT4T-GXDY>].

² Luis Ferré-Sadurni & Grace Ashford, *Judge Who Could Shift N.Y.’s Highest Court Left Sails Through Hearing*, N.Y. TIMES (April 17, 2023), <https://www.nytimes.com/2023/04/17/nyregion/chief-judge-rowan-wilson.html> [<https://perma.cc/B8UY-YHZF>] (quoting Wilson’s opening statement at his senate confirmation hearing on April 15, 2023).

³ See William O. Douglas, *Chief Judge Stanley H. Fuld*, 71 COLUM. L. REV. 531, 531 (1971) (“The New York Court of Appeals has, throughout its history, enhanced the traditions of independence, fearlessness, and liberalism for which the American judiciary is proud.”); accord David Margolick, *New York’s Court of Appeals Faces Vast Changes as a New Era Begins*, N.Y. TIMES (Nov. 7, 1982), <https://www.nytimes.com/1982/11/07/nyregion/new-york-s-court-of-appeals-faces-vast-changes-as-a-new-era-begins.html> [<https://perma.cc/2EE5-A8K7>]; see also Stewart E. Sterk, *The New York Court of Appeals: 150 Years of Leading Decisions*, in THERE SHALL BE A COURT OF APPEALS 49, 50 (1997); Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. L. 31, 41–51 (1989) [hereinafter Bonventre, *State Constitutionalism*].

court has failed to live up to that legacy in recent years, Governor Kathy Hochul and Chief Judge Rowan Wilson have made clear their shared belief in the need to “restore” the court’s “national pre-eminence.”⁴ They believe that is “where [the court] belongs.”⁵ Indeed, the court’s historic stature to which they refer is unmistakable when one reviews the contributions to the development of the law, not just in New York, but across the nation, by Wilson’s predecessors and the courts they led.⁶

I. WILSON’S PREDECESSORS

It is certainly not possible here to provide a comprehensive examination of the court’s proud history. But even a very brief selection of landmark opinions authored by a few of Wilson’s predecessors will underscore the New York high court’s tradition of innovation, boldness, and influence.

A. *The Court’s Early Years*

It did not take long after the first judges took the bench, on September 7, 1847, for the Court of Appeals to begin making its mark on the law of this state and the nation.⁷ By 1870, when Robert Earl was first elected chief judge,⁸ the court was already issuing decisions that would become landmarks in many areas of the law.⁹ Earl would figure prominently in the court’s growing influence.

In *In re Jacobs*,¹⁰ speaking through Earl, the court invalidated a so-entitled health statute that had no real connection to health.¹¹ Articulating a principle that the U.S. Supreme Court would embrace many years later when it invalidated racial segregation in public schools,¹² Earl asserted that, “[O]ne may be deprived of his liberty

⁴ GOVERNOR’S PRESS OFF., *supra* note 1; see Ferré-Sadurní & Ashford, *supra* note 2.

⁵ Ferré-Sadurní & Ashford, *supra* note 2; see GOVERNOR’S PRESS OFF., *supra* note 1.

⁶ See generally Sterk, *supra* note 3; Bonventre, *State Constitutionalism*, *supra* note 3, at 41–51.

⁷ Judith S. Kaye, *Foreword* to THERE SHALL BE A COURT OF APPEALS 1, 1 (1997).

⁸ *Robert Earl*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/robert-earl/> [<https://perma.cc/5UYW-JWCG>]. Earl was chief judge twice. He was first elected to the court in that position in 1870 and, twenty-two years later, he received an interim appointment to fill a vacancy in that position. He retired in 1894, having reached the mandatory retirement age. *Id.*

⁹ Sterk, *supra* note 3, at 50–51.

¹⁰ *In re Jacobs*, 98 N.Y. 98 (1885).

¹¹ *Id.* at 98–99.

¹² See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (“[L]iberty’ . . . is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.”).

and his constitutional rights thereto violated without the actual imprisonment or restraint of his person.”¹³ In *Jacobs*, Earl’s court held that the law “arbitrarily interfere[d] with [the] personal liberty” to earn a living.¹⁴

Under Benjamin Cardozo,¹⁵ one of the greatest judges in American history, the court was likewise one of the greatest in American history.¹⁶ Cardozo and his court were immeasurably influential in developing so many areas of American law. As Chief Judge Judith Kaye wrote in her portrait of her renowned predecessor, “Surely, by now everything about Cardozo has been said.”¹⁷ So no need to add to it here.

Cardozo’s immediate successor, Cuthbert Pound,¹⁸ was instrumental in putting an end to the so-called *Lochner* era¹⁹—that period from the early 1900s to 1937, during which the Supreme Court repeatedly invalidated legal protections for workers as violating the *freedom of contract* between employee and employer.²⁰ In *People v. Nebbia*,²¹ writing for New York’s high court, Pound declared that enough is enough! In his majority opinion upholding minimum prices for milk to help struggling dairy farmers, Pound acknowledged that the state’s law would be invalidated under the Supreme Court’s current “[m]echanical concepts of [laissez-faire] jurisprudence.”²² But he added that “constitutional law is a progressive science[, and] statutes aiming to establish a standard of social justice . . . are to be

¹³ *Jacobs*, 98 N.Y. at 106. In *Riggs v. Palmer*, Earl’s opinion for the majority established the bedrock principle that, regardless of the literal words, legal instruments should not be construed to allow a person to reap the benefit of his wrongdoing—in that case, a murderer who would otherwise inherit from his victim. See *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889).

¹⁴ *Jacobs*, 98 N.Y. at 115.

¹⁵ Associate Judge of the New York State Court of Appeals, 1914–1926 / Chief Judge, 1927–1932. Judith S. Kaye, *Benjamin Nathan Cardozo: Biography*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/benjamin-nathan-cardozo/> [https://perma.cc/8HG2-PNLF].

¹⁶ See *id.*

¹⁷ *Id.* Among other works, she refers to ANDREW L. KAUFMAN, *CARDOZO* (1998); in Kaye’s words, a “731-page masterpiece, which took 41 years to complete.” Kaye, *supra* note 15.

¹⁸ Associate Judge of the New York State Court of Appeals, 1915–1931 / Chief Judge, 1932–1934. See Vincent M. Bonventre, *Pound, Cuthbert W.*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 433, 433–34 (Robert K. Newman ed., 2009).

¹⁹ Named after *Lochner v. New York*, 198 U.S. 45 (1905), for an era in which the Supreme Court elevated laissez-faire economics to a constitutional principle that permitted little interference with business and property rights. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 666–67 (6th ed. 2019).

²⁰ *Id.* at 666.

²¹ *People v. Nebbia*, 186 N.E. 694 (N.Y. 1933).

²² *Id.* at 699.

interpreted with that degree of liberality which is essential to the attainment of the end in view.”²³

Thereafter, Irving Lehman²⁴ led his court to be, among other things, a national champion for religious liberty and independent state court protection of civil liberties.²⁵ In *People v. Sandstrom*,²⁶ he penned a concurring opinion condemning the enforcement of a mandatory pledge of allegiance to the flag against a Jehovah’s Witness student who objected on religious grounds.²⁷ The Supreme Court followed his lead a few years later in *West Virginia v. Barnette*.²⁸ The Supreme Court again followed Lehman’s lead after he wrote for his court in *People v. Barber*,²⁹ which rejected the application of a local license requirement to the door-to-door religious proselytizing of Jehovah’s Witnesses.³⁰

Just as importantly, Lehman underscored the freedom and, indeed, the obligation of state courts to independently construe “the guarantees of fundamental rights” under their own constitutions.³¹ “[T]his court is bound to exercise its independent judgment,” he stressed, “and is not bound by a [Supreme Court] decision . . . limiting the scope of similar guarantees” in the federal Constitution.³²

The Court of Appeals that included Stanley Fuld³³ influenced the development of the law across the nation, much as the court did during the Cardozo era.³⁴ For that reason, Fuld has regularly been compared to Cardozo.³⁵ Indeed, his opinions were repeatedly

²³ *Id.* (citing *Austin v. City of New York*, 179 N.E. 313 (N.Y. 1932)). The Supreme Court actually affirmed, *Nebbia v. New York*, 291 U.S. 502 (1934), and shortly thereafter abandoned its laissez-faire jurisprudence in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937).

²⁴ Associate Judge of the New York State Court of Appeals, 1924–1939 / Chief Judge, 1940–1945. Henry M. Greenberg, *Irving Lehman*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/irving-lehman/> [https://perma.cc/N4CS-7PMF].

²⁵ *Id.*; see also Vincent M. Bonventre, *Lehman, Irving*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 327, 327–28 (Robert K. Newman ed., 2009).

²⁶ *People ex rel. Fish v. Sandstrom*, 18 N.E.2d 840 (N.Y. 1939).

²⁷ *Id.* at 844 (Lehman, J., concurring).

²⁸ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

²⁹ *People v. Barber*, 46 N.E.2d 329 (N.Y. 1943).

³⁰ See *id.* at 332; *Murdock v. Pennsylvania*, 319 U.S. 105, 106–07, 117 (1943). The Supreme Court, citing *Barber* in *Murdock*, actually overruled its previous decision in *Jones v. Opelika*, 316 U.S. 584 (1942), where it had upheld such a local law against religious objectors. See *Murdock*, 319 U.S. at 112, 117.

³¹ See *Barber*, 46 N.E.2d at 331.

³² *Id.*

³³ Associate Judge of the New York State Court of Appeals, 1946–1966 / Chief Judge, 1967–1973. Sidney H. Stein & Jonathan Goldin, *Stanley Howells Fuld*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/stanley-howells-fuld/> [https://perma.cc/W9NW-V2FJ].

³⁴ See Sidney H. Stein, *Stanley H. Fuld: A Life Lived in the Law*, 104 COLUM. L. REV. 258, 259 (2004); Douglas, *supra* note 3, at 531.

³⁵ See, e.g., Douglas, *supra* note 3, at 531.

recognized in the Supreme Court’s own landmark decisions expanding the rights of the accused during that Court’s era under Chief Justice Earl Warren.³⁶ For example, Fuld and his court led the nation in *People v. Waterman*,³⁷ outlawing—as a matter of independent New York law—“secret interrogations” without “first advis[ing the suspect] of his privilege [against self-incrimination] and his right to the assistance of counsel.”³⁸ Similarly, in *People v. Donovan*,³⁹ while finding it “unnecessary to consider” what the Supreme Court might decide, the Court of Appeals, speaking through Fuld, outlawed any custodial questioning where the suspect’s attorney was denied access to him.⁴⁰

Without more, these five chief judges and their courts would have assured the Court of Appeals its place among the nation’s most eminent judicial tribunals.

B. The Modern Era

Chief Judges Earl, Pound, Cardozo, Lehman, and Fuld are hardly the only predecessors providing Rowan Wilson with shining examples of what the Court of Appeals has been and can be. Nor would it be accurate to claim that the court’s pre-eminence is purely a matter of the past. In the modern era,⁴¹ New York has not lacked for chief judges who were true to the court’s proud tradition.⁴² Of course, like all human institutions and their leaders, the court and its chief judges have not always lived up to the best of their history. There have been times, no doubt, when the court veered—whether deliberately or not—from that heritage for which it has historically been eminent.

Among the chief judges who helped advance the law in New York and earn the court’s continued national pre-eminence was Lawrence

³⁶ *E.g.*, *Massiah v. United States*, 377 U.S. 201, 205 (1964) (quoting Fuld in *People v. Waterman*, 175 N.E.2d 445, 448 (N.Y. 1961)); *Massiah*, 377 U.S. at 205 n.5 (citing a long list of New York decisions); *Miranda v. Arizona*, 384 U.S. 436, 465 n.35 (1966) (citing Fuld’s opinion in *People v. Donovan*, 193 N.E.2d 628 (N.Y. 1963)).

³⁷ *People v. Waterman*, 175 N.E.2d 445 (N.Y. 1961).

³⁸ *Id.* at 448.

³⁹ *People v. Donovan*, 193 N.E.2d 628 (N.Y. 1963).

⁴⁰ *Id.* at 629.

⁴¹ For the purposes here, that period begins with the retirement of Fuld in 1973, Stein & Goldin, *supra* note 33, which happens, also, to be just a few years following the 1969 end of the Warren Era during which the Supreme Court vigorously expanded the protection of civil rights and liberties, *see generally* Nadra Kareem Nittle, *How the Warren Court Expanded Civil Rights in America*, HISTORY (Dec. 5, 2022), <https://www.history.com/news/earl-warren-supreme-court-civil-rights> [https://perma.cc/3YGM-GSC6].

⁴² *See infra* text accompanying notes 43–56.

Cooke⁴³—the first chief judge under the gubernatorial appointment system adopted in 1977.⁴⁴ Cooke was a prominent state and national voice for state courts to build upon their own precedents and values to protect both civil and criminal due process, despite the Supreme Court’s narrowing of such protections at the time under the federal Constitution.⁴⁵ Within the Court of Appeals, he authored several rights-protective landmarks doing exactly that.⁴⁶

Judith Kaye,⁴⁷ like Cooke, both natives of Monticello in Sullivan County,⁴⁸ was a strong voice for the independent state constitutional protection of rights and liberties.⁴⁹ Indeed, Kaye was not only the court’s strongest proponent of such protections throughout her tenure; she was also nationally recognized as one of the foremost scholars of judicial federalism, as well as one of the nation’s brightest state court judges.⁵⁰ Both as an associate judge and the court’s chief judge, Kaye made her mark on search and seizure, the right to counsel, free press, LGBTQ rights, and so many other areas of the law.⁵¹

⁴³ Associate Judge of the New York State Court of Appeals, 1975–1978 / Chief Judge, 1979–1984. See Joyce Adolfsen & Lou Adolfsen, *Lawrence Henry Cooke*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/lawrence-henry-cooke/> [<https://perma.cc/S6JZ-RLGP>].

⁴⁴ See *Amendment Victory Spurs Court Change*, N.Y. TIMES (Nov. 10, 1977), <https://www.nytimes.com/1977/11/10/archives/new-jersey-pages-amendment-victory-spurs-court-change-plans-to-make.html#> [<https://perma.cc/GP2P-HADS>].

⁴⁵ See Bonventre, *State Constitutionalism*, *supra* note 3, at 48; Adolfsen & Adolfsen, *supra* note 43.

⁴⁶ See *A Dedication to Chief Judge Lawrence H. Cooke*, 53 FORDHAM L. REV. 145 (1984) (especially tributes by Judith S. Kaye and Robert Abrams); Bonventre, *State Constitutionalism*, *supra* note 3, at 49–51; William H. Honan, *Lawrence H. Cooke, 85, New York Chief Judge, Dies*, N.Y. TIMES (Aug. 19, 2000), <https://www.nytimes.com/2000/08/19/nyregion/lawrence-h-cooke-85-new-york-chief-judge-dies.html> [<https://perma.cc/F9AP-NFHQ>]. See generally Jay C. Carlisle II & Anthony DiPietro, *The Life and Legacy of Chief Judge Lawrence H. Cooke: “Truly an Exemplary Life. A Life Well Lived”*, 80 ALB. L. REV. 1233, 1245–62 (2017).

⁴⁷ Associate Judge of the New York State Court of Appeals, 1983–1993 / Chief Judge, 1993–2008. Steven C. Krane, *Judith Smith Kaye*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/judith-smith-kaye/> [<https://perma.cc/4DN6-E5HZ>].

⁴⁸ Judith S. Kaye, *Chief Judge Lawrence Cooke*, 71 ALB. L. REV. 1055, 1056 (2008).

⁴⁹ See Ruth Bader Ginsburg, *In Praise of Judith S. Kaye*, N.Y.U. L. REV. 653, 653–54 (2009).

⁵⁰ See Henry M. Greenberg, *The Making of a Judge’s Judge: Judith S. Kaye’s 1987 Cardozo Lecture*, 81 BROOK. L. REV. 1363, 1367–73 (2016); Ginsburg, *supra* note 49, at 653–54; Kevin Sack, *Woman in the News; Cuomo’s Choice to Head the Court of Appeals: A Judge’s Judge*, N.Y. TIMES (Feb. 23, 1993), <https://www.nytimes.com/1993/02/23/nyregion/woman-in-the-news-cuomo-s-choice-to-head-the-court-of-appeals-a-judge-s-judge.html> [<https://perma.cc/9YMS-UGGN>]. See generally Vincent Martin Bonventre, *New York’s Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the New York Court of Appeals*, 67 TEMP. L. REV. 1163 (1994) [hereinafter Bonventre, *Kaye: Her Separate Opinions*].

⁵¹ See Krane, *supra* note 47; Ginsburg, *supra* note 49, at 654.

Jonathan Lippman,⁵² chief administrative judge for Kaye for twelve years,⁵³ was one of the court's most dynamic leaders. He was emphatic about being far less concerned with assembling unanimous agreements among the judges than with securing what he viewed to be the right results.⁵⁴ He did so, for example, in 4-3 opinions protecting privacy against warrantless government surveillance and mandating reforms to address the systemic inadequacy of legal representation for indigent criminal defendants.⁵⁵ As the *New York Times* reported, despite a "clear 4-to-3 conservative majority," the court under Lippman rendered significant decisions, not only protecting the rights of the accused, but also workers' rights, injured patients, and the environment.⁵⁶

But the modern era, like other eras in the court's history, was not always characterized by the level of leadership, influence, and national prominence represented by these chief judges.⁵⁷ One of the most glaring examples is the repeated reversals the court suffered at the hands of the Supreme Court in the mid-to-late 1980s.⁵⁸ It might

⁵² Chief Judge of the New York State Court of Appeals, 2009–2015. John W. McConnell, *Jonathan Lippman*, HIST. SOC'Y OF THE N.Y. CTS., <https://history.nycourts.gov/biography/jonathan-lippman/> [<https://perma.cc/R82Y-KCE9>]; see also Matthew J. Laroche, *Chief Judge Jonathan Lippman: A New Era*, 73 ALB. L. REV. 925, 927 (2010).

⁵³ McConnell, *supra* note 52.

⁵⁴ See William Glaberson, *Top Judge Sets Liberal Course for New York*, N.Y. TIMES (Feb. 17, 2010), <https://www.nytimes.com/2010/02/18/nyregion/18lippman.html> [<https://perma.cc/PY8L-5C4Q>] ("I am a result-oriented person," Judge Lippman said, "and the result I am looking for is not necessarily unanimity.").

⁵⁵ See *People v. Weaver*, 909 N.E.2d 1195, 1201 (N.Y. 2009) (holding that placement of a GPS tracking device constituted a search requiring a warrant under New York's state constitution); *Hurrell-Harring v. State*, 930 N.E.2d 217, 224–25 (N.Y. 2010) (holding that a group of indigent criminal defendants succeeded in stating a claim against the state for "constructive denial of the right to counsel" regarding "broad systemic deficiencies").

⁵⁶ Glaberson, *supra* note 54; see also Vincent Martin Bonventre, *Introduction to the Ninth Annual Chief Judge Lawrence H. Cooke Symposium, High Courts, Center Seat: Chief Justices at Albany Law School*; and "The Lippman Top Ten", 78 ALB. L. REV. 1347, 1350–52 (2015) [hereinafter Bonventre, *Symposium Introduction*]. Notably, in personal conversations at the time with chief justices from state courts around the country, they volunteered to me that, with Lippman at the helm, they were again paying close attention to the Court of Appeals.

⁵⁷ See Vincent Martin Bonventre, *The New York Court of Appeals: An Old Tradition Struggles with Current Issues*, 22 PERSPS. ON POL. SCI. 149, 149 (1993) [hereinafter Bonventre, *An Old Tradition*] (discussing cases where the court found greater protection for individual liberties under New York's state constitution than would be required federally, and the questions those decisions raised within the court about the "propriety" and "legitimacy" of setting state standards that way).

⁵⁸ See *People v. Class*, 472 N.E.2d 1009 (N.Y. 1984), *rev'd*, 475 U.S. 106 (1986); *People v. P.J. Video, Inc.*, 483 N.E.2d 1120 (N.Y. 1985), *rev'd*, 475 U.S. 868 (1986); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 479 N.E.2d 764 (N.Y. 1985), *rev'd*, 476 U.S. 573 (1986); *Arcara v. Cloud Books, Inc.*, 480 N.E.2d 1089 (N.Y. 1985), *rev'd*, 478 U.S. 697 (1986); *324 Liquor Corp. v. McLaughlin*, 479 N.E.2d 779 (N.Y. 1985), *rev'd*, 479 U.S. 335 (1987); *Immuno A.G. v. Moor-Jankowski*, 549 N.E.2d 129 (N.Y. 1989), *vacated and remanded*, 497 U.S. 1021 (1990); *People v. Harris*, 532 N.E.2d 1229 (N.Y. 1988), *rev'd*, 495 U.S. 14 (1990).

be argued that the Court of Appeals was trying to protect constitutional rights, while the increasingly *conservative*⁵⁹ Supreme Court would not allow it. But the only reason the Supreme Court had any say in most of those cases is that the Court of Appeals had relied on Supreme Court precedents instead of its own independent state constitutional law.⁶⁰ This reliance on federal precedents instead of its own independent law was exactly the opposite of that Court of Appeals tradition under Chief Judges Lehman, Fuld, Cooke, Kaye, and Lippman, among others.⁶¹

It is true that, when reversed by the Supreme Court, the Court of Appeals on remand would sometimes apply more protective state constitutional law.⁶² This was the high court of New York State, with a proud tradition of independent non-reactive decision-making, regularly resorting to the constitutional law of New York State only on the rebound.⁶³ Not surprisingly, this development was not lost on judicial scholars studying the court and, not surprisingly, the court's reputation took a hit.⁶⁴

Beyond that, the court retrenched on many areas of constitutional rights in which it had previously been vigorously protective. Among the areas were search and seizure, right to counsel, fair trial, right to

⁵⁹ For a discussion of the use of the terms *conservative* and *liberal* in judicial scholarship, see Vincent Martin Bonventre, *Supreme Shift: What the 6-3 Conservative Majority Means Going Forward*, 93 N.Y. STATE BAR. J. 8, 9 (Jan./Feb. 2021).

⁶⁰ See *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). It is rudimentary that the Supreme Court has no jurisdiction to review a state court decision protecting constitutional rights as a matter of its own law. See *id.* ("Although we [the Supreme Court] have announced a number of principles in order to help us determine whether various forms of references to state law constitute adequate and independent state grounds [such that the Supreme Court would not have jurisdiction], we openly admit that we have thus far not developed a satisfying and consistent approach for resolving this vexing issue.").

⁶¹ See *supra* text accompanying notes 7–56.

⁶² See e.g., *People v. P.J. Video, Inc.*, 501 N.E.2d 556, 558 (N.Y. 1986), *on remand from* 475 U.S. 868 (1986); *Arcara v. Cloud Books, Inc.*, 503 N.E.2d 492, 494–95 (N.Y. 1986), *on remand from* 478 U.S. 697 (1986).

⁶³ Compare *supra* text accompanying notes 7–56, with cases cited *supra* note 62.

⁶⁴ See, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 781–82, 785, 792 (1992) (variously characterizing the Court of Appeals' state constitutional decision-making at the time as "grudging," "ambigu[ous]," "obscur[e]," and "conclusory"); Peter J. Galie, *Modes of Constitutional Interpretation: The Court of Appeals' Search for a Role*, 4 EMERGING ISSUES IN STATE CONST. L. 225, 225 (1991) (reviewing the Court of Appeals' difficulties in deciding how to approach questions about constitutional rights); see also Luke Bierman, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at the New York Court of Appeals*, 12 Touro L. REV. 633 (1996) (examining the "discordancy" at the Court of Appeals in applying state constitutional law); Bonventre, *An Old Tradition*, *supra* note 57 (reviewing decisions in which the "propriety and even legitimacy" of state constitutional independence were being questioned); Gary Spencer, *'Judicial Federalism' Remains Viable: But Judges Are Deeply Divided Over How and When to Apply Doctrine*, N.Y.L.J., Oct. 15, 1991, at S2 (surveying remaining contemporary fractures in the court over "questions of how and when to" apply the judicial federalism doctrine to its decisions).

a jury, free expression, and LGBTQ rights.⁶⁵ And among those who prominently objected to this backpedaling—and who did so in dissenting and separate concurring opinions—was then-Associate Judge Kaye.⁶⁶ Her disagreement with the court’s retrenchment and her leadership in advocating for stronger protections under independent state constitutional law were among the very reasons her elevation to be chief judge was celebrated.⁶⁷

This period in the court’s history, shortly before the elevation of Kaye to be chief judge in 1993,⁶⁸ was not the only time in the modern era that the court faltered in its national leadership in advancing the protection of constitutional rights and liberties, especially in doing so as a matter of independent state-based decision-making.⁶⁹ By the end of that decade, it became clear that the court again had strayed far from that proud tradition. Perhaps the most glaring illustration was the court’s rejection of the right to marry for same-sex couples⁷⁰—*a fortiori* because it had already been recognized by other state courts as a matter of their state constitutional law.⁷¹ The court during the latter half of Kaye’s tenure as chief judge was hardly an eminent protector of civil or criminal rights.⁷²

Thereafter, for a brief period of nearly seven years with Kaye’s successor, Jonathan Lippman, at the helm, the court did return to its roots.⁷³ The political and ideological composition of the court was not much different than it had been in the immediately preceding

⁶⁵ See Bonventre, *Kaye: Her Separate Opinions*, *supra* note 50, at 1169–89 (discussing then-Associate Judge Kaye’s critical separate opinions in cases affecting civil liberties, equal and fair treatment, criminal justice, and state-based adjudication).

⁶⁶ See *id.*; see also *People v. Scott*, 593 N.E.2d 1328, 1346–48 (N.Y. 1992) (Kaye, J., concurring) (featuring Kaye instructing some of her colleagues about the legitimacy of independent state constitutional adjudication).

⁶⁷ See, e.g., Gary Spencer, *Kaye is Selected Chief Judge by Governor*, N.Y.L.J., Feb. 23, 1993, at 1, col. 6; Sarah Lyall, *Cuomo Nominates Judith Kaye for Top New York Judicial Post*, N.Y. TIMES (Feb. 23, 1993), <https://www.nytimes.com/1993/02/23/nyregion/cuomo-nominates-judith-kaye-for-top-new-york-judicial-post.html> [<https://perma.cc/PA3Z-NUF2>]; Sack, *supra* note 50.

⁶⁸ Krane, *supra* note 47.

⁶⁹ See, e.g., Gary Spencer, *High Court’s 1998-99 Rulings Indicate Shift in Direction*, N.Y.L.J., July 20, 1999, at 2, col. 3.

⁷⁰ See *Hernandez v. Robles*, 855 N.E.2d 1, 22 (N.Y. 2006) (Kaye, C.J., dissenting).

⁷¹ See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

⁷² See Vincent Martin Bonventre, *Toward the Lippman Court: Flux and Transition at New York’s Court of Appeals*, 73 ALB. L. REV. 889, 893–904 (2010); John Caher, *Court Seen as Slow in Expanding Tort Claims, Criminal Defendants’ Rights*, N.Y.L.J., July 24, 2001, at 1, col. 5; Spencer, *supra* note 69, at 1, col. 6.

⁷³ See Laroche, *supra* note 52, at 950–51 (“His [Lippman’s] decisions have signaled the development of a more progressive Court compared to recent history.”); McConnell, *supra* note 52; see also Bonventre, *Symposium Introduction*, *supra* note 56, at 1350–51; Glaberson, *supra* note 54; Joel Stashenko, *Chief Judge to Review Why Court Accepts Few Criminal Appeals*, N.Y.L.J., Apr. 22, 2009, at 1, col. 3.

years.⁷⁴ Still, the court under Lippman rendered decisions, including landmarks in criminal law, that were reminiscent of an earlier era of national leadership.⁷⁵

The subsequent six-year period, however, resembled little of the Lippman era—or of the Fuld, Cooke, or early Kaye eras. That is why, following that period, the appointment of someone like Rowan Wilson to be chief judge was heralded by many as an important step toward restoring the court's stature and pre-eminence to what it had been.⁷⁶

II. TURNING TO WILSON

Perhaps the most curious and conspicuous feature of that recent six-year period—between 2016, when Janet DiFiore was appointed chief judge, to the summer of 2022, when she resigned from the court—was the reduced caseload.⁷⁷

As Thomas Newman, one of New York's most venerable appellate counsels, has noted, “[t]he picture changed dramatically” as “total annual dispositions dropped year after year.”⁷⁸ This drastic reduction in cases accepted for appeal began at the very outset of the DiFiore era,⁷⁹ and it continued throughout her tenure as chief judge.⁸⁰

⁷⁴ See Glaberson, *supra* note 54; Stashenko, *supra* note 73.

⁷⁵ See *supra* notes 54–56 and accompanying text.

⁷⁶ See, e.g., *supra* note 1 and accompanying text; Michael Gianaris, *Senate Deputy Leader Gianaris Attends Investiture of Court of Appeals Chief Judge Rowan Wilson*, N.Y. STATE SENATE (Sept. 12, 2023), <https://www.nysenate.gov/newsroom/press-releases/2023/michael-gianaris/senate-deputy-leader-gianaris-attends-investiture> [<https://perma.cc/95JH-4GXF>] (“He is a groundbreaking jurist who will elevate New York’s Court of Appeals to its rightful and historical place as a leader in American law.”).

⁷⁷ See Thomas R. Newman & James Edward Pelzer, *Declining Dispositions of the Court of Appeals*, 85 ALB. L. REV. 925, 935 (2022); Jesse McKinley & Benjamin Weiser, *Chief Judge Resigns at Crucial Time for New York’s Top Court*, N.Y. TIMES (July 11, 2022), <https://www.nytimes.com/2022/07/11/nyregion/janet-difiore-ny-judge.html> [<https://perma.cc/TVZ3-2TR8>].

⁷⁸ Newman & Pelzer, *supra* note 77, at 935; see also Vincent Martin Bonventre, *The Incredible Shrinking Docket: The Court of Appeals’ Reduced Caseload*, N.Y. CT. WATCHER (June 16, 2022), <http://www.newyorkcourtwatcher.com/2022/06/the-incredible-shrinking-docket-court.html> [<https://perma.cc/6LV2-7Q7F>] [hereinafter Bonventre, *Incredible Shrinking Docket*]; Vincent Martin Bonventre, *The Incredible Shrinking Docket: The Court of Appeals’ Reduced Caseload (The Graph)*, N.Y. CT. WATCHER (June 28, 2022), http://www.newyorkcourtwatcher.com/2022/06/the-incredible-shrinking-docket-court_28.html [<https://perma.cc/2X8H-VFVD>] [hereinafter Bonventre, *Shrinking Docket Graph*].

⁷⁹ See Vincent Martin Bonventre, *NY Court of Appeals: Steep Cut in Criminal Cases (Part 1)*, N.Y. CT. WATCHER (Feb. 26, 2018), <http://www.newyorkcourtwatcher.com/2018/02/ny-court-of-appeals-steep-cut-in.html> [<https://perma.cc/3BKB-R9ET>] [hereinafter Bonventre, *Steep Cut Pt. 1*]; Colby Hamilton, *Court of Appeals Hears Fewest Criminal Cases in 15 Years*, N.Y.L.J., Jan. 30, 2018, at 1, col 5.

⁸⁰ Bonventre, *Shrinking Docket Graph*, *supra* note 78.

During both the Kaye and Lippman eras, the average annual number of appeals decided exceeded 200.⁸¹ But by the end of the first full year into the tenure of Chief Judge DiFiore, 2017, the number had been cut to 142.⁸² By 2020, the number had fallen below 100, and by 2021—the last full year under DiFiore—it had fallen to 81.⁸³ These were the lowest numbers in Court of Appeals history.⁸⁴

If anything, the reduction in the criminal caseload was even more drastic. During the Lippman years, the court averaged over 100 decisions in criminal appeals annually.⁸⁵ That number dropped to 62 in DiFiore’s first full year, and by the last two years of her tenure, that number dipped to 42 and 44 respectively.⁸⁶

But just as quickly as the caseload dropped during the DiFiore era, it began to rise under Rowan Wilson.⁸⁷ The new chief judge⁸⁸ made clear his view that the court “must dramatically increase its caseload to regain its stature.”⁸⁹ In fact, an increase in the court’s caseload

⁸¹ Newman & Pelzer, *supra* note 77, at 935.

⁸² See JOHN P. ASIELLO, 2017 ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK app. 4 (2017).

⁸³ See JOHN P. ASIELLO, 2020 ANNUAL REPORT OF THE CLERK OF THE COURT OF APPEALS app. 4 (2020); JOHN P. ASIELLO, 2021 ANNUAL REPORT OF THE CLERK OF THE COURT OF APPEALS app. 4 (2021) [hereinafter ASIELLO, 2021 COURT CLERK REPORT].

⁸⁴ Newman & Pelzer, *supra* note 77, at 931. For a look at the figures in the annual reports from the Wachtler era through those of Kaye, Lippman, and DiFiore, as well as an illustrating graph, see Bonventre, *Incredible Shrinking Docket*, *supra* note 78; Bonventre, *Shrinking Docket Graph*, *supra* note 78.

⁸⁵ See Vincent Martin Bonventre, *The Incredible Shrinking Docket: Criminal Appeals (CLA’s) Granted by Court of Appeals Judges*, N.Y. CT. WATCHER (Aug. 2, 2022), <http://www.newyorkcourtwatcher.com/2022/08/the-incredible-shrinking-docket.html> [https://perma.cc/5PSX-PMUK].

⁸⁶ See Bonventre, *Incredible Shrinking Docket*, *supra* note 78; see also Bonventre, *Shrinking Docket Graph*, *supra* note 78. N.B., the figures reflected in both of these references are drawn from the Court’s own Annual Reports. See, e.g., ASIELLO, 2021 COURT CLERK REPORT, *supra* note 83, at app. 4; see also Vincent Martin Bonventre, *NY Court of Appeals: Steep Cut in Criminal Cases (Part 2)*, N.Y. CT. WATCHER (May 7, 2018), <http://www.newyorkcourtwatcher.com/2018/05/ny-court-of-appeals-steep-cut-in.html> [https://perma.cc/6A4C-UUCM]; Hamilton, *supra* note 79.

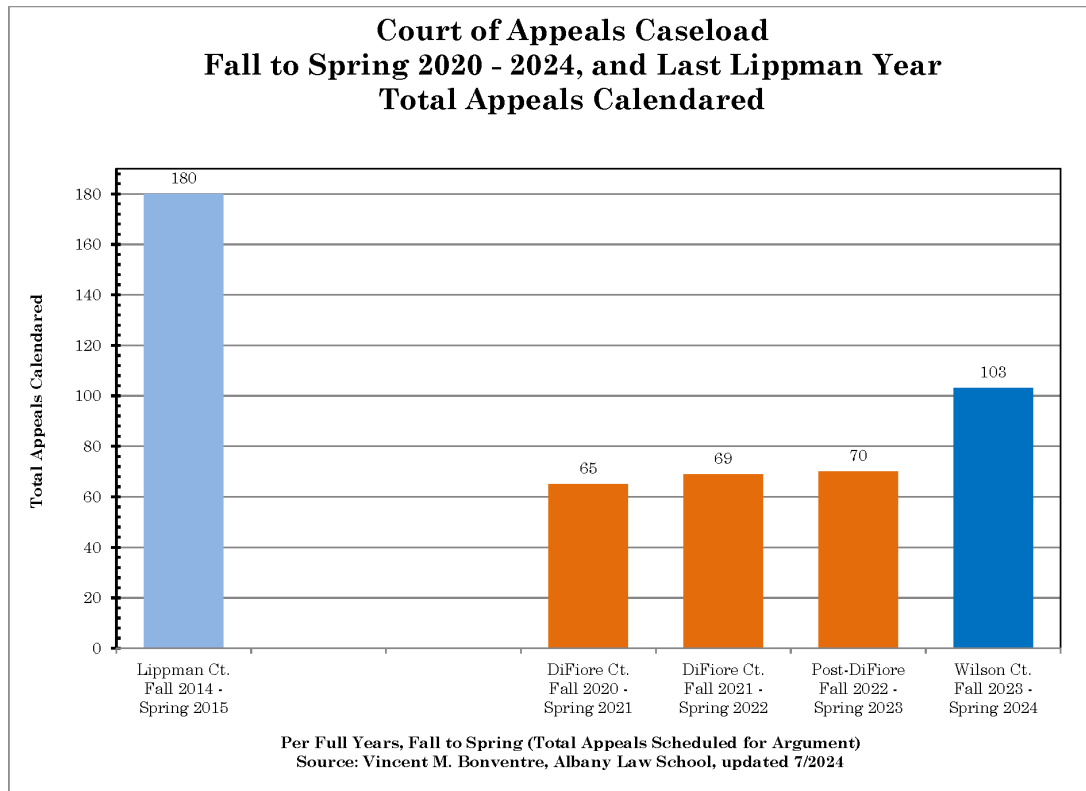
⁸⁷ See Vincent Martin Bonventre, *NYCOA: The Wilson Uptick*, N.Y. CT. WATCHER (Nov. 25, 2023), <http://www.newyorkcourtwatcher.com/2023/11/nycoa-wilson-uptick.html> [https://perma.cc/9UGK-JE4K] [hereinafter Bonventre, *Wilson Uptick*].

⁸⁸ Then-Associate Judge Wilson was nominated to be chief judge by Governor Hochul and confirmed by the senate in April 2023. *Honorable Rowan D. Wilson*, CT. OF APPEALS, <https://www.nycourts.gov/ctapps/jwilson.htm> [https://perma.cc/2XVH-PNNJ].

⁸⁹ Jennifer Andrus, *Chief Judge Rowan Wilson: By Taking on More Cases, New York’s Court of Appeals Will Regain Its Former Glory*, NYSBA (Jan. 17, 2024), <https://nysba.org/chief-judge-rowan-wilson-by-taking-on-more-cases-new-yorks-court-of-appeals-will-regain-its-former-glory/> [https://perma.cc/2ZQ8-FPLG]; Yancey Roy, *Drop In Criminal Caseload Puts Spotlight on How Top Court Chooses its Cases*, NEWSDAY (July 18, 2021), <https://www.newsday.com/news/region-state/court-of-appeals-criminal-cases-p76405> [https://perma.cc/S55X-B6J4].

already under Wilson would be apparent to anyone who recently visited the court during a session or followed the court's calendar.⁹⁰

Looking at the appeals calendared for argument during the first full year of Wilson's tenure—from fall 2023 through spring 2024—the number had already increased by almost 50%.⁹¹ During the last few years under DiFiore, as well as during the interim year before Wilson took center seat, the court scheduled no more than 70 cases.⁹² That number rose to over 100 in the first full year under Wilson.⁹³



For criminal appeals alone, the number increased from a high of 31 in the immediately preceding years to 51 in Wilson's first full year.⁹⁴

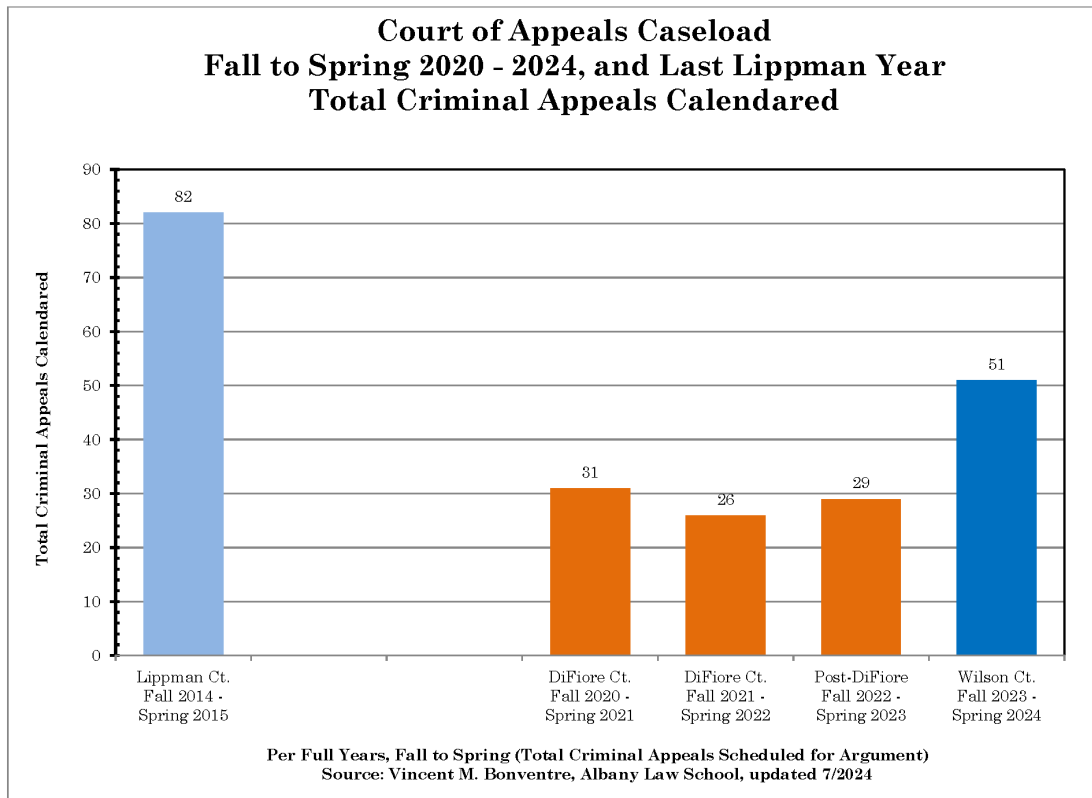
⁹⁰ See Andrus, *supra* note 89. The Court's calendar is publicly accessible and frequently updated. See *Court Case Summaries*, CT. OF APPEALS, <https://www.nycourts.gov/ctapps/summaries.htm> [https://perma.cc/RW84-3822].

⁹¹ Vincent Martin Bonventre, *Part 5, More on Caseload and on Criminal Appeals—NYCOA: The Wilson Uptick*, N.Y. CT. WATCHER (July 6, 2024), <http://www.newyorkcourtwatcher.com/2024/07/part-5-more-on-caseload-and-on-criminal.html> [perma.cc/AT83-TUJD].

⁹² See *id.*

⁹³ *Id.*

⁹⁴ *Id.*



To be sure, the Wilson uptick has not approached the numbers under Chief Judge Lippman.⁹⁵ But the increase has nevertheless been both quite significant and immediate. Overall, Wilson’s efforts resulted in a total of 112 appeals, civil and criminal, being decided in the twelve months between August 2023 and July 2024—as compared to the 81 decisions during the final calendar year under DiFiore.⁹⁶

But the change under Wilson is not confined to the increased number of cases heard and decisions issued. The decisions themselves have changed, as have the majorities and dissents.⁹⁷ That latter phenomenon is, perhaps, the most striking and revealing of all.

⁹⁵ See *id.*

⁹⁶ The figure for Wilson is not yet available through the Court’s Annual Reports, so it is calculated from the Court’s decisional lists for the relevant twelve months. See *Court Decisions*, CT. OF APPEALS, <https://www.nycourts.gov/ctapps/decisions.htm> [https://perma.cc/C3FX-5VEX]. The figure for DiFiore is from ASIELLO, 2021 COURT CLERK REPORT, *supra* note 83, at app. 4.

⁹⁷ See Vincent Martin Bonventre, *Part 6, Who’s Dissenting?—NYCOA: The Wilson Uptick*, N.Y. CT. WATCHER (July 10, 2024), <http://www.newyorkcourtwatcher.com/2024/07/part-6-whos->

While Janet DiFiore was chief judge, then-Associate Judge Wilson dissented regularly.⁹⁸ In the last full year of the DiFiore court—from fall 2021 through spring 2022—he wrote or joined a dissent in 35 of the decisions.⁹⁹ By sharp contrast, Judge Anthony Cannataro never did.¹⁰⁰ In fact, Cannataro neither wrote nor voted in dissent a single time while he was on the bench with DiFiore.¹⁰¹

Once DiFiore departed, however, and was replaced by Wilson, the dynamics at the court changed dramatically.¹⁰² During the first full year with Wilson as chief judge—from fall 2023 through spring 2024—Cannataro dissented 15 times.¹⁰³ In fact, he has now done so more than Wilson, whose dissents dropped from 35 to 13.¹⁰⁴

What about the substance of the decisions? Not surprisingly, the general direction of the decisions also changed from DiFiore to Wilson.¹⁰⁵ The patterns are unmistakable. Comparing even a few decisions under DiFiore, with Wilson in dissent, and a few under Wilson, with him in the majority, will make that clear.

dissenting-nycoa-wilson.html [perma.cc/2AHR-T9HN] [hereinafter Bonventre, *Who's Dissenting?*].

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* Cannataro joined the court in 2021 and served as acting chief judge after DiFiore's departure. See *New York's High Court Picks Cannataro as Acting Chief Judge*, AP NEWS (Aug. 24, 2022), <https://apnews.com/article/new-york-city-state-courts-kathy-hochul-a9234bb8ef8289c0a58ab39f4173cd11> [https://perma.cc/RR4D-QY3B].

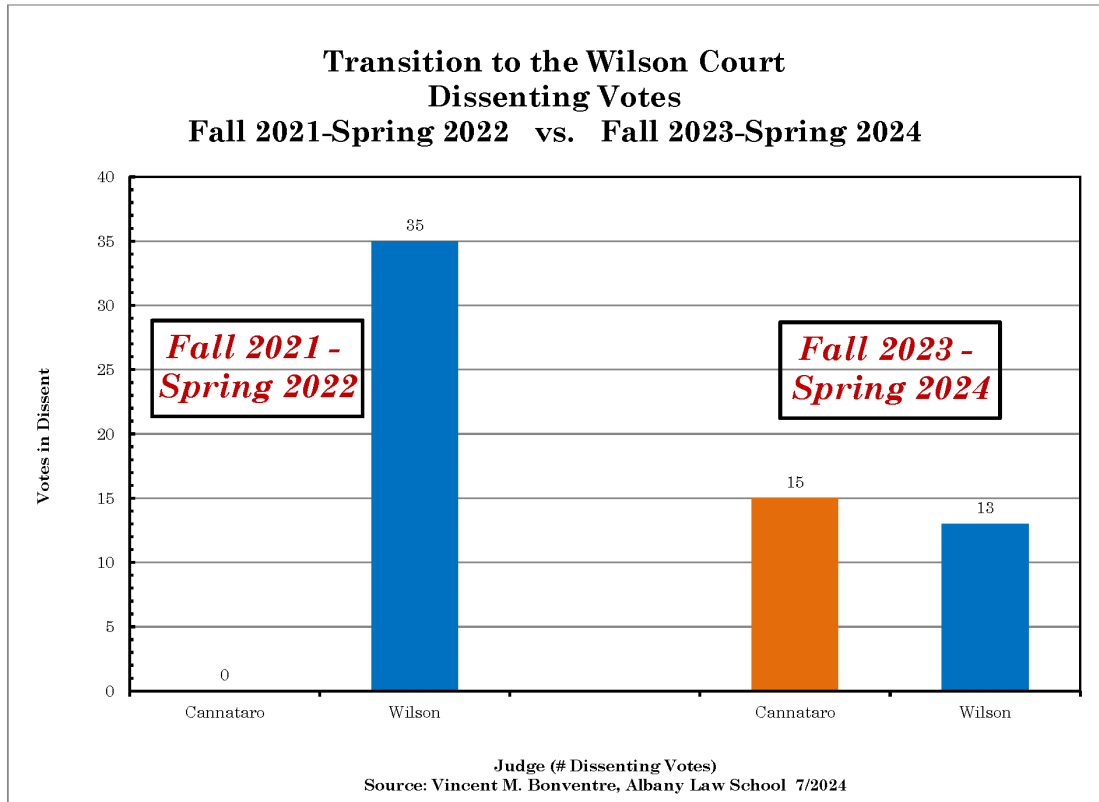
¹⁰¹ Bonventre, *Who's Dissenting?*, *supra* note 97. These figures are compiled from the court's website and from searches on Westlaw.

¹⁰² See *id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* To be clear—and emphatically so—this is not about who was right or wrong, or whose positions are wiser or less so. I, of course, have my own views and preferences, but this is just about the facts.

¹⁰⁵ See *infra* notes 106–140 and accompanying text.



A. *DiFiore Court*—*Wilson Dissenting*

In *People v. Tiger*,¹⁰⁶ a 5-2 majority held that a post-conviction claim of actual innocence was not available for a defendant who had pleaded guilty at trial.¹⁰⁷ In a passionate dissenting opinion, then-Associate Judge Wilson argued that the defendant's claim was supported by fundamental principles of criminal law, especially since an intervening civil trial had proven that she actually was innocent of any wrongdoing.¹⁰⁸ In another 5-2 decision, this time in an unsigned memorandum, the majority in *People v. Ibarguen*¹⁰⁹ held that the defendant could not challenge the warrantless entry and

¹⁰⁶ *People v. Tiger*, 110 N.E.3d 509 (N.Y. 2018).

¹⁰⁷ *Id.* at 517, 529.

¹⁰⁸ *Id.* at 524–25 (Wilson, J., dissenting) (quoting *United States v. Watson*, 792 F.3d 1174, 1183 (9th Cir. 2015); *In re Winship*, 397 U.S. 358, 372 (1970)).

¹⁰⁹ *People v. Ibarguen*, 178 N.E.3d 917 (N.Y. 2021).

search of a residence, even though he was an invited dinner guest.¹¹⁰ Wilson dissented, arguing that the defendant had a “legitimate privacy interest” that at least entitled him to a hearing under New York’s statutory and decisional law.¹¹¹ Finally, *People v. Dawson*¹¹² was one more case that underscored the unambiguously prosecution leaning of the DiFiore court in criminal law.¹¹³ There, another 5-2 majority, in yet another unsigned memorandum, ruled that the defendant had not unequivocally requested counsel during custodial interrogation.¹¹⁴ In dissent, Wilson included a transcription of the otherwise unavailable video from the sealed record which, as he argued, showed clearly that the defendant had wanted to contact his attorney.¹¹⁵

The decisional pattern in civil cases was just as clear. For example, in *Toussaint v. Port Authority*,¹¹⁶ a 4-3 majority rejected a seriously injured worker’s claim under the state Labor Law on the ground that, despite the requirement that all operators of a particular machine be trained, the Labor Law regulation was not sufficiently specific to trigger liability when it was violated.¹¹⁷ In dissent, Wilson argued that the very purpose of the Labor Law and its regulations is to prevent and redress workplace injuries.¹¹⁸ A few weeks later, in an unsigned memorandum in *Cutaia v. Board of Managers*,¹¹⁹ the same 4-3 majority again rejected liability for a serious workplace injury on the ground that the worker could not remember his fall from the purportedly inadequate ladder.¹²⁰ Wilson argued in dissent that fall-related injuries from an inadequate ladder were all the facts necessary for recovery under the Labor Law.¹²¹ Later that same year, in a continuation of the DiFiore court’s tendency to oppose liability (though now with Acting Chief Judge Cannataro presiding), the 4-2

¹¹⁰ See *id.* at 917–18, 932 (citing *People v. LaFontaine*, 705 N.E.2d 663 (N.Y. 1998); *People v. Nicholson*, 48 N.E.3d 944 (N.Y. 2016); *Dunaway v. New York*, 442 U.S. 200 (1979)).

¹¹¹ *Ibarguen*, 178 N.E.3d at 921, 931–32 (Wilson, J., dissenting) (citing *Rakas v. Illinois*, 439 U.S. 128, 148 (1978)).

¹¹² *People v. Dawson*, 190 N.E.3d 1151 (N.Y. 2022).

¹¹³ See *id.* at 1152 (citing *People v. Glover*, 661 N.E.2d 155, 156 (N.Y. 1995); *People v. Mitchell*, 810 N.E.2d 879, 882 (N.Y. 2004)).

¹¹⁴ *Dawson*, 190 N.E.3d at 1151–52, 1160 (citing *Glover*, 661 N.E.2d at 156; *Mitchell*, 810 N.E.2d at 882).

¹¹⁵ *Dawson*, 190 N.E.3d at 1152–53 (Wilson, J., dissenting) (citing *People v. Cunningham*, 400 N.E.2d 360, 362–63 (N.Y. 1980)).

¹¹⁶ *Toussaint v. Port Auth.*, 188 N.E.3d 571 (N.Y. 2022).

¹¹⁷ See *id.* at 574–75, 586 (citing *Misicki v. Caradonna*, 909 N.E.2d 1213, 1219–20 n.2 (N.Y. 2009)).

¹¹⁸ See *Toussaint*, 188 N.E.3d at 579.

¹¹⁹ *Cutaia v. Bd. of Managers of 160/170 Varick St. Condo.*, 190 N.E.3d 28 (N.Y. 2022).

¹²⁰ See *id.* at 29, 36.

¹²¹ See *id.* at 30 (Wilson, J., dissenting).

majority in *Howell v. City of New York*,¹²² in another unsigned memorandum opinion, held that the court’s “special duty rule” disallowed a victim’s claim based on police failure to protect.¹²³ In an especially impassioned dissent, Wilson argued that the police failure to enforce orders of protection against a known assailant, even after repeated communications with the victim, did create a special duty to her.¹²⁴

Those *conservative*¹²⁵ decisional patterns were not lost on court watchers.¹²⁶

B. Wilson Court—Wilson in the Majority

Change became evident within a few months of Wilson’s elevation to chief judge—which also saw Caitlin Halligan’s appointment to the court.¹²⁷ In *People v. Brown*,¹²⁸ with now-Chief Judge Wilson in the 4-3 majority—consisting of himself and Judges Jenny Rivera (who authored the opinion), Shirley Troutman, and Halligan—the court ruled that the robbery defendant’s conviction for unlawful imprisonment of a child could not be treated as a sex offense, because it was entirely devoid of any sexual conduct or motive.¹²⁹ The same day, the same 4-3 majority, this time in an opinion by Chief Judge Wilson in *People v. Cuencas*,¹³⁰ held that a warrantless entry and search of the defendant’s residence was not justified by the consent of another, who had no reasonably apparent authority to offer it.¹³¹ In one more decision that day, with the same 4-3 line-up in another opinion by Wilson, the court in *People v. DeBellis*¹³² held that the

¹²² *Howell v. City of New York*, 202 N.E.3d 569 (N.Y. 2022).

¹²³ *Id.* at 571 (citing *Ferreira v. City of Binghamton*, 194 N.E.3d 239, 252 (N.Y. 2022)).

¹²⁴ See *Howell*, 202 N.E.3d at 573–74.

¹²⁵ Regarding the terms *conservative* and *liberal*, see source cited *supra* note 59.

¹²⁶ See, e.g., Ross Barkan, *Liberals Have the Chance to Reshape a Conservative High Court (Not That One)*, N.Y. MAG., INTELLIGENCER (July 11, 2022), <https://nymag.com/intelligencer/2022/07/janet-difiores-resignation-gives-ny-dems-an-opening.html> [<https://perma.cc/G7WQ-DGW2>]; Sam Mellins, *A New Conservative Majority on New York’s Top Court is Upending State Law*, N.Y. FOCUS (July 7, 2022), <https://nysfocus.com/2022/07/07/court-of-appeals-conservative-bloc> [<https://perma.cc/843G-LPFL>]; Vincent Martin Bonventre, *NYCOA: Criminal Appeals (Part 3)—Voting & Decisional Patterns*, N.Y. CT. WATCHER (Mar. 13, 2019), <http://www.newyorkcourtwatcher.com/2019/03/nycoa-criminal-appeals-part-3-voting.html> [<https://perma.cc/4RUY-4XT2>].

¹²⁷ Caitlin Halligan was nominated by Governor Hochul and confirmed by the senate in April 2023. *Hon. Caitlin J. Halligan*, CT. OF APPEALS, <https://www.nycourts.gov/ctapps/jhalligan.htm> [<https://perma.cc/M6QV-NJVK>].

¹²⁸ *People v. Brown*, 232 N.E.3d 1223 (N.Y. 2023).

¹²⁹ *Id.* at 1224–25, 1244 (citing *People v. Knox*, 903 N.E.2d 1149 (N.Y. 2009)).

¹³⁰ *People v. Cuencas*, 227 N.E.3d 312 (N.Y. 2023).

¹³¹ *Id.* at 320, 323.

¹³² *People v. DeBellis*, 225 N.E.3d 859 (N.Y. 2023).

defendant's lawyer's failure to raise the defendant's only possible defense constituted ineffective counsel, whether or not the overall representation was deemed deficient.¹³³

A change in civil cases, although perhaps not as stark, has also been apparent. So, for example, in *Tax Equity Now N.Y. LLC v. City of New York*,¹³⁴ the same 4-3 majority that emerged in the criminal decisions—this time in an opinion by Judge Rivera—held that the complainants had sufficiently pleaded a cause of action against the city for unfair discrimination in property taxes favoring wealthy residents.¹³⁵ A couple of days later, in *Brookdale Physicians' Dialysis Associates, Inc. v. Department of Finance*,¹³⁶ the same 4-3 majority, in another Rivera opinion, upheld the revocation of a not-for-profit tax exemption where the property was leased to a for-profit corporation.¹³⁷ The next month, in *Alcantara v. Annucci*,¹³⁸ yet again the same 4-3 majority, this time in an opinion by Judge Troutman, held that the Department of Corrections and Community Supervision is obligated under the Corrections Law to make some attempt to secure "employment, educational, and training opportunities" for sex offenders confined on post-release supervision.¹³⁹

At the least, these decisions suggest some adjustment of the court's previously consistent *conservative* leanings in both its criminal and civil decisions.

III. CONCLUSION

It is too early to determine whether the caseload under Chief Judge Wilson will continue to increase and reach the pre-DiFiore levels. Similarly, it is too early to predict whether the Wilson court will be rendering the sort of landmark decisions that have stamped the tenures of the chief judges discussed earlier as milestones in the court's history.

Nor should it be inferred from the above contrast between the courts under DiFiore and Wilson that the decisions in this early-Wilson era have been uniformly "liberal," or that they will increasingly become so. This is but an early sketch.

¹³³ See *id.* at 864–65, 872.

¹³⁴ *Tax Equity Now N.Y. LLC v. City of New York*, 241 N.E.3d 103 (N.Y. 2024).

¹³⁵ *Id.* at 108–09, 113, 136.

¹³⁶ *Brookdale Physicians' Dialysis Assocs. v. Dep't of Fin.*, 239 N.E.3d 157 (N.Y. 2024).

¹³⁷ *Id.* at 159, 168, 172.

¹³⁸ *Alcantara v. Annucci*, 242 N.E.3d 642 (N.Y. 2024).

¹³⁹ See *id.* at 643, 648.

But this early sketch, especially together with a discussion of the court in the modern era under Chief Judges Cooke, Kaye, and Lippman, as well as a brief survey of the court’s historic place under earlier chief judges, hopefully helps to put the current court in perspective. That perspective is, perhaps, especially helpful as the court is shifting with a change in the center seat.

Upon his nomination to be chief judge, Wilson declared, “Protecting the rights of New Yorkers is my top priority.”¹⁴⁰ The evidence thus far suggests that he is beginning to turn the court in that traditional direction.

¹⁴⁰ *Governor Hochul Nominates Rowan Wilson to Be Chief Judge of the New York State Court of Appeals*, GOVERNOR’S PRESS OFF. (Apr. 10, 2023), <https://www.governor.ny.gov/news/governor-hochul-nominates-rowan-wilson-be-chief-judge-new-york-state-court-appeals> [<https://perma.cc/7G8W-G8GA>].

JUDGE JENNY RIVERA: THE LONE DISSENTER FOR THE ACCUSED

*Linnea E. Riegel**

We cannot simply hope or expect that . . . biases, prejudices, or deep-rooted stereotypes will disappear because of legislative fiat. Indeed, adverse and hostile responses are most common when individuals and institutions are pushed the hardest to relinquish power and to reject the most pernicious of traditions . . . judges, law enforcement personnel, and . . . lawyers, must be educated to recognize and work to eliminate the pervasive bias in our courts and criminal justice system.¹

I. BEFORE THE BENCH

Judge Jenny Rivera had an untraditional start to her career on the bench. She was not a judge first, she did not work in the judiciary, she was not a practicing attorney, she did not work in a law firm, she was not a government lawyer, she did not work in the district attorney's office, legislature, or executive branch, and she was not in any other line of work traditional for a New York Court of Appeals Judge.² After she graduated from New York University School of Law in 1985, Judge Rivera clerked for the Second Circuit Court of Appeals Pro Se Law Clerk's office, as well as for then Southern District of New York Court Judge Sonia Sotomayor.³ She was an attorney for the Legal Aid Society and an associate counsel for the Puerto Rican Legal Defense and Education Fund.⁴ She served as an

* Juris Doctor, Albany Law School, 2018; Master of Science, The College of St. Rose, 2012; Bachelor of Arts, Union College, 2008.

¹ Jenny Rivera, *The Politics of Invisibility*, 3 GEO. J. ON FIGHTING POVERTY 61, 63 (1995).

² Vincent Bonventre, *Jenny Rivera: Cuomo's High Court Pick*, N.Y. CT. WATCHER (Jan. 19, 2013), <http://newyorkcourts.org/watcher.com/2013/01/jenny-rivera-cuomos-high-court-pick.html>.

³ John Caher, *Q&A: Judge Jenny Rivera*, N.Y. L.J. (Jan. 3, 2014), <https://www.law.com/newyorklawjournal/almID/12002635849546/QA-Judge-Jenny-Rivera/>; *Honorable Jenny Rivera*, N.Y. CT. OF APPEALS, <https://www.nycourts.gov/ctapps/jrivera.htm> (last visited May 12, 2018); *Judge Jenny Rivera '85 Discusses the Role of State Courts at LAA Luncheon*, N.Y.U. L. NEWS, <http://www.law.nyu.edu/news/2017-laa-luncheon-judge-jenny-rivera-new-york-court-of-appeals> (last visited May 12, 2018).

⁴ *Faculty Directory, Hon. Jenny Rivera*, CUNY SCH. LAW, <http://www.law.cuny.edu/>

administrative law judge for the New York State Division for Human Rights and was on the New York City Commission on Human Rights.⁵ In addition to her work in the outside legal field, she worked in legal academia as an Assistant Professor of Law at Suffolk University Law School and as a Professor at City University of New York Law School (CUNY Law).⁶ While at CUNY Law, Judge Rivera founded the CUNY School of Law's Center on Latino and Latina Rights and Equality (CLORE), and she taught classes on Latina/os and the Law and Paradigmatic Challenges to Race-Based Discrimination Theory and Practice.⁷ Rivera also published several legal articles including *Translating Equality: Language, Law and Poetry*; *An Equal Protection Standard for National Origin Subclassifications*; and *The Politics of Invisibility*, among many others.⁸ In short, prior to her confirmation as a judge on the Court of Appeals, Jenny Rivera dedicated her career to social justice, civil rights issues and equal protection for women and Latina/os.

As a lawyer and an academic, her fight for social equality and justice was lauded, but there was concern in the legal community that those qualities, and her lack of judicial experience, would interfere with her work as a judge.⁹ Those who opposed her nomination, namely the Judiciary Committee, feared that she would be a judicial activist, using her role as a judge to promote the social welfare of Latinos/as and women.¹⁰ Others who opposed her nomination thought Rivera's legal experience was too narrow, her writing confusing and unclear, and her lack of judicial experience impractical for the high court.¹¹ On the other hand, many applauded her nomination and felt that her work in public service and knowledge of the problems facing immigrants, working families, victims of discrimination, etc. would be a much needed addition to the court.¹² Despite the skepticism and lack of support from the Judiciary Committee, Jenny Rivera's nomination was confirmed by

faculty/directory/emeriti/rivera.html (last visited May 12, 2018).

⁵ See Caher, *supra* note 3.

⁶ See Rivera, *supra* note 1, at 61; Caher, *supra* note 3.

⁷ See Bonventre, *supra* note 2; *Celebrating Judge Jenny Rivera*, CUNY SCH. LAW PUB. SQUARE (Apr. 17, 2013), <http://www1.cuny.edu/mu/law/2013/04/17/celebrating-judge-jenny-rivera/>.

⁸ See *id.*

⁹ See John Caher, *Rivera Confirmed for Court of Appeals Seat*, N.Y. L.J. (Feb. 13, 2013), <https://www.law.com/newyorklawjournal/almID/1202587811231/>.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

an overwhelming voice vote on February 11, 2013.¹³

II. THE PRO-ACCUSED JUDGE

After her confirmation, the question still loomed – what type of judge would Jenny Rivera be? Would she be an “activist willing to bend the law to accomplish her goals, a restrained judge reluctant to meddle in the affairs of the other branches of government, a judge prone to dissents, or some combination of the various traits, habits and approaches that make up a judicial philosophy”?¹⁴ After five years on the bench, Judge Rivera is not known as a judicial activist, a judge for women, or the judge for Latina/os. She has become the judge for the accused. The record she has compiled is

[n]early 3 times as pro-accused as that of the Court as a whole. . . it might be argued that Judge Rivera’s record is extreme, that her tendencies lean so far in favor of the rights of the accused, that her votes skew the data. . . [h]owever, her pro-accused record is more than counterbalanced by that of two of her colleagues, Judge Michael Garcia and Eugene Pigott, at the other end of the court’s spectrum.¹⁵

In fact, her first written opinion with the Court of Appeals was a pro-accused majority in *People v. Griffin*.¹⁶

In *Griffin*, the Court of Appeals affirmed an order from the Appellate Division stating that the trial court improperly discharged the defendant’s counsel.¹⁷ The Defendant’s attorney requested a change in date for the trial so that Legal Aid’s new attorney had time to prepare for the trial.¹⁸ The trial court denied this request even though the court had given the People more time when requested.¹⁹ Legal Aid then requested for an adjournment, which was rejected, and the court relieved Legal Aid of representing the Defendant.²⁰ The court appointed an 18-B counsel for the Defendant, and the Defendant was eventually found guilty and sentenced to two

¹³ See *id.*

¹⁴ John Caher, *Rivera’s Record Runs Deep But Is Limited to Social Justice Issues*, N.Y. L.J. (Jan. 24, 2013), <https://www.law.com/newyorklawjournal/almID/1202585475344/>.

¹⁵ Vincent Bonventre, *Part 8 – Observations: Generally Conservative (Early DiFiore Court Patterns)*, N.Y. CT. WATCHER (Oct. 31, 2016), <http://www.newyorkcourtwatcher.com/2016/10/part-8-observations-generally.html>.

¹⁶ *People v. Griffin*, 987 N.E.2d 282 (N.Y. 2013).

¹⁷ See *id.* at 283.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.* at 283–84.

concurrent terms of twenty years to life.²¹ The Appellate Division reversed the Supreme Court's decision stating, "discharge of defendant's counsel without consulting defendant was an abuse of discretion and interfered with defendant's right to counsel."²² In her first written majority, Judge Rivera stated,

the right to counsel is so deeply intertwined with the integrity of the process in Supreme Court that defendant's guilty plea is no bar to appellate review. A claim that removal of counsel was part of the court's disparate, unjustifiable treatment of defense counsel goes to the fundamental fairness of our system of justice. While the right to counsel of choice is qualified, and may cede, under certain circumstances, to concerns of the efficient administration of the criminal justice system, we have made clear that courts cannot arbitrarily interfere with the attorney-client relationship, and interference with that relationship for purpose of case management is not without limits, and is subject to scrutiny.²³

Rivera's first swing on the court has become her favorite swing as a Judge. She continuously and tirelessly writes opinions, often dissents, to ensure that they accused have their day in court and the full weight of the criminal justice system.

III. THE LONE DISSENTER

While her first written majority opinion was pro-accused, Judge Rivera is often the lone dissenter in pro-accused cases.²⁴ As the voice of the pro-accused, her goal in each case is to ensure that the Court is treating the accused justly. She often finds that the actions of the lower court did not give the defendant a fair trial, such as the court not properly explaining procedures to the defendant,²⁵ violating the right to appeal,²⁶ and more often than not, violating the defendants' constitutional rights.²⁷ Judge Rivera has seemingly made it her goal to ensure that the accused are given the same rights in court as every

²¹ See *id.* at 284.

²² *Id.* (quoting *People v. Griffin*, 934 N.Y.S.2d 393, 395 (App. Div. 2011)).

²³ *Griffin*, 987 N.E.2d at 284.

²⁴ See *Bonventre*, *supra* note 15.

²⁵ See, e.g., *People v. Monk*, 989 N.E.2d 1, 5–6 (N.Y. 2013) (Rivera, J., dissenting).

²⁶ See, e.g., *People v. Perez*, 12 N.E.3d 416, 423 (2014) (Rivera, J., dissenting); *Griffin*, 987 N.E.2d at 284 (Rivera, J., dissenting).

²⁷ See *Monk*, 989 N.E.2d at 6 (Rivera, J., dissenting).

other person who enters the courtroom.²⁸

Her first written dissent on the court was as a lone dissenter in *People v. Monk*, where she determined that the accused had a constitutional right to understand his plea deal.²⁹ In *Monk*, the defendant agreed to a 10-year sentence with a mandatory five-year post release supervision (PRS) period.³⁰ When the Defendant agreed to this plea, he was not aware that the PRS could result in an additional five years of incarceration.³¹ The majority held that the trial court did not have the obligation to explain to the Defendant his plea acceptance, stating the court “has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions.”³² In her dissent, Judge Rivera explained that a trial court has the constitutional duty to ensure that a defendant understands his or her plea bargain and in “today’s criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”³³ A defendant’s need to understand what his or her plea means is crucial not only because it is a due process right, but because it is the crux of ensuring rights to the accused in the criminal justice system.³⁴

She was the lone dissenter for the pro-accused again in her first year with her dissent in *People v. Smith*.³⁵ Here, the majority determined that a police officer could give testimony in court to the description the victim gave out of court as long as it did not mislead the jury.³⁶ This was based on a decision in *People v. Huertas*,³⁷ where the Court held “that a crime victim could testify her own description of her attacker, given to the police shortly after the crime” during trial.³⁸ Judge Rivera, on the other hand, found “no basis upon which to conclude such evidence constitutes anything other than bolstering of the victim’s testimony.”³⁹ The Court allows prior consistent statements only for a purpose other than the truth of the matter, and

²⁸ See Bonventre, *supra* note 15.

²⁹ *Monk*, 989 N.E.2d at 5–6 (Rivera, J., dissenting).

³⁰ See *id.* at 2 (majority opinion).

³¹ See *id.*

³² *Id.* at 3 (quoting *People v. Catu*, 825 N.E.2d 1081, 1082 (N.Y. 2005)).

³³ *Monk*, 989 N.E.2d at 5 (quoting *Missouri v. Frye*, 566 U.S. 136, 144 (2012)).

³⁴ See *Monk*, 989 N.E.2d at 4 (citations omitted).

³⁵ *People v. Smith*, 5 N.E.3d 972, 975 (N.Y. 2013).

³⁶ See *id.* at 974.

³⁷ *People v. Huertas*, 553 N.E.2d 992 (N.Y. 1990).

³⁸ See *Smith*, 5 N.E.3d at 972 (citing *Huertas*, 553 N.E.2d 992).

³⁹ *Smith*, 5 N.E.3d at 975.

here, allowing the officer to testify to the victim's prior statement did nothing but give the jury more reason to believe the victim over the accused.⁴⁰

Judge Rivera continued her trend as the lone dissenter for the pro-accused in her next four years on the bench. In her second year, she wrote dissents in cases such as *People v. Flinn*⁴¹ and *People v. Perez*.⁴² In *Flinn*, Rivera disagreed with the majority when they determined that the defendant validly waived his right to be present during the bench conference when prospective jurors were being questioned during voir dire.⁴³ During trial, the judge told the defendant that he was "welcome to attend" any bench conferences, and when one occurred, he chose not to attend and told his attorney he waived that right.⁴⁴ The majority found that the defendant implicitly waived his right when he heard the judge say "welcome to attend," and he explicitly waived his right when his lawyer told the court that he had done so.⁴⁵ Conversely, Judge Rivera found that the trial court did not "properly inform the defendant of his fundamental right to attend certain conferences, and to confirm and make a public record of defendant's alleged waiver communicated to the court by counsel . . . [which] constitutes a violation of defendant's rights."⁴⁶

In *Perez*, there were four separate criminal cases at issue, all of which had not been pursued for more than a decade after a notice of appeal had been filed.⁴⁷ In each case, the defendants obtained new attorneys, got leave to appeal, and then each case was dismissed on the People's motion.⁴⁸ The questions in these cases were whether the defendants' constitutional rights were violated and whether the court used proper discretion when dismissing the cases.⁴⁹ The majority stated that the defendants have the right to a fair appellate proceeding "with the minimal safeguards necessary to make an adequate and effective appeal," and in three of the four cases they found that the defendants were given a fair proceeding and their rights were not violated.⁵⁰ Judge Rivera agreed with the majority on

⁴⁰ See *id.* 975, 976.

⁴¹ *People v. Flinn*, 7 N.E.3d 496 (N.Y. 2014).

⁴² *People v. Perez*, 12 N.E.3d 416 (N.Y. 2014).

⁴³ See *Flinn*, 7 N.E.3d at 496, 497.

⁴⁴ See *id.* at 496.

⁴⁵ See *id.* at 497.

⁴⁶ *Id.* at 497.

⁴⁷ See *Perez*, 12 N.E.3d at 417.

⁴⁸ See *id.*

⁴⁹ See *id.* at 417–18.

⁵⁰ See *id.* at 420.

only two of the cases.⁵¹ In the two where she disagreed, she asserted that because the defendant's counsel in one of the cases violated his professional duties and obligations owed to his client, and in the other case failed to take into consideration that he was a juvenile during his conviction, "violat[ed] the defendants' fundamental rights to appeal their appellate convictions and, as a consequence, the Court's decisions in these cases undermine public confidence in the legal profession and our system of justice."⁵² Her dissent in this case shows how strongly she feels that the goal of the justice system is for *both* the accused and the accuser, not *just* the accuser.

In her third year on the Court, she soloed in her dissents in cases such as *People v. Guthrie*⁵³ and *People v. Sanders*.⁵⁴ In *Guthrie*, the defendant was given a breathalyzer after a cop stopped her for running a stop sign and notice a strong smell of alcohol.⁵⁵ Her blood alcohol was over the legal limit and she failed the field sobriety tests.⁵⁶ The cop arrested her and charged her with a DWI in addition to a stop sign violation.⁵⁷ The defendant moved to suppress the evidence stating that there was a lack of probable cause for her initial stop.⁵⁸ The majority held that under the Fourth Amendment, a seizure is permissible by the police so long as it is reasonable and the officer has probable cause to believe that a violation was committed.⁵⁹ Here, although the stop sign was not a registered sign, because it conformed to sign regulations and it was placed in a position that conforms to traffic laws, it was a valid stop sign, and the officer had the right to pull the defendant over when she ran the stop sign.⁶⁰ Thus, the evidence to convict her of the DWI should not have been suppressed.⁶¹

Judge Rivera, however, stated that the Court has consistently held that an officer's mistake of law does not give him the prerequisite to search and seizure and any evidence contained in this manner must

⁵¹ See *id.* at 422 (first citing *People v. Lopez*, 60 N.Y.S.3d 808, 808 (App. Div. 2017); then citing *People v. Calaff*, 815 N.Y.S.2d 824, 825 (App. Div. 2006)).

⁵² See *Perez*, 12 N.E.3d at 423.

⁵³ *People v. Guthrie*, 30 N.E.3d 880 (N.Y. 2015).

⁵⁴ *People v. Sanders*, 34 N.E.3d 344 (N.Y. 2015).

⁵⁵ See *Guthrie*, 30 N.E.3d at 882.

⁵⁶ *Id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.* at 883 (first citing *People v. Robinson*, 767 N.E.2d 638, 641–42 (2001); then citing *Whren v. United States*, 517 U.S. 806, 809–10 (1996)).

⁶⁰ See *Guthrie*, 30 N.E.3d at 888.

⁶¹ See *id.*

be suppressed.⁶² Society, she averred

relies on police officers to enforce laws based on what the laws say, not on an officer's mistaken belief. Excusing an officer's mistake of law removes an incentive to learning the law. While the realities of police work rightly justify tolerance of an officer's mistake of fact, there is no similar basis to accept or excuse an officer's error regarding what the law permits and forbids.⁶³

Here, the officer did not have probable cause to stop her vehicle because his mistake of law, not knowing the stop sign was registered, is not justifiable, and therefore the evidence obtained after the stop should have been suppressed.⁶⁴

In *Sanders*, the issue was whether the defendant knowingly, voluntarily, and intelligently waived his right to appeal.⁶⁵ The defendant was arrested for assaulting and stabbing a sixteen year-old during a gang assault, and on the eve of his trial he pled guilty to the charges.⁶⁶ During the "plea colloquy" the defendant's plea and rights were discussed, he was asked if he understood, and said he did.⁶⁷ After he was convicted, he filed a notice of appeal pro se.⁶⁸ The majority determined that even though the defendant waived his right to appeal during the plea colloquy, because he did so knowingly and intelligently, his waiver of appeal is upheld.⁶⁹

In her dissent, Judge Rivera determined that the waiver was invalid because the nature of the appeal was not defined fully during the plea colloquy.⁷⁰ The majority used the defendant's prior background in court to determine that his knowledge was sufficient, but Judge Rivera, quoting the Second Department, concluded that "whatever information the defendant was, or was not, provided with regard to his right to appeal in those prior criminal proceedings is not in this record, [and] [a]s a result, this Court is forced to speculate that the defendant gained an understanding of the nature of his right to appeal from his prior contacts with the criminal justice system."⁷¹

⁶² See *id.* (Rivera, J., dissenting).

⁶³ See *id.* at 890.

⁶⁴ See *id.* at 882, 884–85, 894.

⁶⁵ See *People v. Sanders*, 34 N.E.3d 344, 345, 347 (2015).

⁶⁶ See *id.* at 345.

⁶⁷ See *id.* at 345–46.

⁶⁸ See *id.* at 346.

⁶⁹ See *id.* at 347.

⁷⁰ See *id.* at 348.

⁷¹ *Id.* at 349 (citing *People v. Sanders*, 976 N.Y.S.2d 205, 210 (2d Dep't 2013)).

The defendant was not intelligently and sufficiently informed of his waiver of appeal, and therefore his appeal on the merits of the suppression claim should have been heard.⁷²

Her fourth and fifth years on the bench had her as the lonely dissenter in cases including *People v. Harrison*,⁷³ *People v. Davis*,⁷⁴ *People v. Arjune*,⁷⁵ *People v. Ocasio*,⁷⁶ and *People v. Sivertson*.⁷⁷ As seen in many of her dissents, in *Davis*, Judge Rivera disagreed with the majority about whether there was legally sufficient evidence to show that the defendant's assault on a victim was an actual contributory cause of the victim's death and that the death was a foreseeable result of the defendant's conduct.⁷⁸ Here, the defendant entered the victim's house looking for drugs, and was seen exiting the house several minutes later with a white bag.⁷⁹ The victim was found dead two days later.⁸⁰ The victim's autopsy revealed that the cause of death was Hypertensive Cardiovascular Disease aggravated by obesity and the enlargement of the heart.⁸¹ The Medical Examiner testified that stress can accelerate a person's death by cardiovascular disease and although the victim's physical injuries did not cause the death, the stress the assault caused led to his death.⁸² The defendant was charged and convicted of second-degree murder.⁸³ The Appellate Division reversed the charges and the majority in this Court determined that both the crime scene evidence and the Medical Examiner's testimony established a sufficient connection between the defendant's actions, and the victim's death and the violent nature of the attack made the victim's death foreseeable.⁸⁴

Judge Rivera adamantly disagreed with the majority finding that the evidence did not show a sufficient connection or was reasonably foreseeable.⁸⁵ She concluded that between the defendant's obesity and Hypertensive Cardiovascular disease and the Medical

⁷² See *id.* at 348–49.

⁷³ *People v. Harrison*, 52 N.E.3d 223, 228 (N.Y. 2016) (Rivera, J., dissenting).

⁷⁴ *People v. Davis*, 66 N.E.3d 1076, 1083 (N.Y. 2016) (Rivera, J., dissenting).

⁷⁵ *People v. Arjune*, 89 N.E.3d 1207, 1217 (N.Y. 2017) (Rivera, J., dissenting).

⁷⁶ *People v. Ocasio*, 65 N.E.3d 1263, 1268 (N.Y. 2016) (Rivera, J., dissenting).

⁷⁷ *People v. Sivertson*, 77 N.E.3d 349, 350 (N.Y. 2017) (Rivera, J., dissenting).

⁷⁸ See *Davis*, 66 N.E.3d at 1078, 1083.

⁷⁹ *Id.* at 1079.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *id.* at 1081.

⁸⁵ See *id.* at 1083.

Examiner's Report stating the cause of death was not from the injuries, that the People did not "prove beyond a reasonable doubt that in the course of committing a robbery and burglary defendant caused the victim's death. Causation for criminal liability requires both that the 'culpable act [was] a "sufficiently direct cause" of the death' and that the 'fatal result was reasonably foreseeable.'"⁸⁶

In *Sivertson*, Rivera wrote a lengthy dissent to the Court's extremely short majority. The majority held that Appellate Division's decision was beyond the Court's further review because the record supported the Appellate Division's conclusion, which was that a warrantless entry into a defendant's home "was justified by exigent circumstances is a mixed question of law and fact."⁸⁷ Judge Rivera found that there was no evidence to support the ruling that exigent circumstances justified the warrantless entry.⁸⁸ Exigent circumstances are "those circumstances that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officer or other persons, the destruction of relevant evidence, the suspect's escape, or some other consequence improperly frustrating legitimate law enforcement efforts."⁸⁹ Here, the defendant was lying in bed watching television, completely unaware that the police were surrounding his home and banging on his doors and windows.⁹⁰ When he became aware of the cops appearance, he rolled over in bed and ignored them.⁹¹ These facts led the lower courts to determine exigent circumstances, but Judge Rivera stated that the facts do not support a finding that the defendant was dangerous or that the defendant would escape if the police did not quickly apprehend him, thus the warrantless entry was not justified.⁹²

IV. CASES AGAINST THE ACCUSED

Although Judge Rivera is known as the pro-accused judge and often makes that happen with her lone dissents, there have been cases throughout her career where she has written the majority for

⁸⁶ *Id.* (internal citations omitted).

⁸⁷ *People v. Sivertson*, 77 N.E.3d 349, 350 (N.Y. 2017).

⁸⁸ *Id.*

⁸⁹ *Id.* at 353 (citations omitted).

⁹⁰ *Id.* at 354–55.

⁹¹ *Id.*

⁹² *See id.* at 355.

cases against the accused.⁹³ During her second year on the court, she wrote the majority for *People v. Gordon*,⁹⁴ where the defendant was charged with robbery and assault after the jury saw a surveillance camera that showed defendant's suspicious activity in a department store and threatening a police officer.⁹⁵ At trial, the People submitted the video footage to corroborate the live testimony and the jury found the defendant guilty of robbery and assault.⁹⁶ The defendant appealed the convictions on a lack of legally sufficient evidence because the stolen items were not recovered.⁹⁷ A "verdict is legally sufficient if there is any valid line of reasoning and permissible inferences that could lead a rational person to conclude that every element of the charged crime has been proven beyond a reasonable doubt."⁹⁸ Judge Rivera, writing for the Court, determined that stolen items did not need to be recovered in order to establish sufficient evidence for the jury to find the defendant guilty because the rest of the evidence led a rational person to conclude that the crime had been committed.⁹⁹

Further, in *People v. Marshall*,¹⁰⁰ the issue was whether the trial court improperly denied the defendant's request for a *Wade* hearing.¹⁰¹ The defendant was arrested and charged with several offenses arising from an assault on a New York City bus.¹⁰² The day before her scheduled court appearance, the prosecutor met with the complainant to show her a picture of the defendant from the day of the arrest.¹⁰³ This meeting prompted the defendant to ask for a *Wade* hearing to determine whether the "display was unduly suggestive."¹⁰⁴ The Court granted the hearing but denied the request to call Counsel, who displayed the picture, as a witness.¹⁰⁵ After the hearing, the court, relying heavily on eyewitness testimony from the complainant and the bus driver, found the defendant guilty.¹⁰⁶ The defendant

⁹³ See *infra* notes 93, 99, 110.

⁹⁴ *People v. Gordon*, 16 N.E.3d 1178 (N.Y. 2014).

⁹⁵ *Id.* at 1180–81.

⁹⁶ *Id.* at 1182.

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting *People v. Delamota*, 960 N.E.2d 383, 387 (N.Y. 2011)).

⁹⁹ *Gordon*, 16 N.E.3d at 1185.

¹⁰⁰ *People v. Marshall*, 45 N.E.3d 954 (N.Y. 2015).

¹⁰¹ *Id.* at 956.

¹⁰² *Id.* at 957.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 958.

appealed stating that the ADA should have been called at the hearing.¹⁰⁷ Citing the Supreme Court, the majority stated “[a]part from the uncertainty of human memory, suggestive identification procedures ‘increase the dangers inhering in eyewitness identification,’” and pretrial identification procedures that unduly suggest a defendant’s guilt based on misidentification is improper.¹⁰⁸ Here, the majority, with Judge Rivera at the helm, determined that the showing a photograph of the defendant carries the risk of undue suggestiveness and the defendant was entitled to a proper *Wade* hearing, however, the error was harmless because the complainant found an independent source to corroborate the defendant to the crime.¹⁰⁹

Finally, in *People v. Hatton*,¹¹⁰ the defendant was accused of forcible touching, sexual abuse, and harassment.¹¹¹ In two of the complaints, the women accused the defendant of smacking them on the buttocks.¹¹² The defendant pled guilty to one count of forcible touching and was sentenced to one-year in jail.¹¹³ The defendant completed his year but appealed the conviction stating that the accusatory instruments were factually insufficient.¹¹⁴ The Court looked at whether the factual part of the instrument was able to establish a reasonable cause to believe that the defendant had committed the crimes he was accused of.¹¹⁵ The defendant attempted to argue that “a person may smack another on the buttocks for a legitimate purpose, such as in self-defense or in defense of another,” but the Court found that argument “jurisdictionally deficient.”¹¹⁶ Judge Rivera further explained that intent is difficult to discern, but the factual portions of the instruments provided a reasonable cause to infer that the defendant did commit the crime, and “those factual allegations are of the kind that ‘give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant

¹⁰⁷ See *id.* at 959 (citing *People v. Marshall*, 990 N.Y.S.2d 439, 439 (2d Dep’t 2014)).

¹⁰⁸ *Marshall*, 45 N.E.3d at 959 (quoting *Wade*, 388 U.S. at 229).

¹⁰⁹ See *Marshall*, 990 N.Y.S.2d at 963 (first citing *Wade*, 388 U.S. at 241; then citing *People v. Chipp*, 552 N.E.2d 608, 613 (N.Y. 1990); and then citing *People v. Adams*, 423 N.E.2d 379, 382 (N.Y. 1981)).

¹¹⁰ *People v. Hatton*, 44 N.E.3d 188 (N.Y. 2015).

¹¹¹ See *id.* at 190.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 191–92 (quoting *People v. Dumay*, 16 N.E.3d 1150, 1152 (N.Y. 2014)).

¹¹⁶ *Hatton*, 44 N.E.3d at 193.

from being tried twice for the same offense.”¹¹⁷

V. CONCLUSION

From nomination to confirmation, to the longest sitting judge on the Court of Appeals, Judge Jenny Rivera has proven herself a formidable jurist. Rivera overcame a rocky start, amid skepticism that her background as an academic would be unsuitable for a seat on the highest court in New York, she has proven herself time and time again that she will fight for the equal weight of the criminal justice system for both the accused and the accuser. Her pro-accused solo dissents substantiate her effort to guarantee that all people get their day in court, especially the accused. Rivera focuses on the nuances of rules of law and past decisions when she is deciding a case to give the accused every opportunity for equal justice. Whether it is an evidentiary issue, an issue of court explanation, or a due process issue, Judge Rivera will work until she is sure the accused has had their day in court. There are times when she has strayed from this path, but just as every great jurist has strayed before. By ensuring the pro-accused are heard, and “addressing the spectrum of oppression and, thus recognizing as visible who and what are otherwise treated as invisible,” will create the equal justice system that Judge Rivera has strived to create.¹¹⁸

¹¹⁷ *Id.* at 194 (quoting *People v. Casey*, 740 N.E.2d 233, 236 (N.Y. 2000)).

¹¹⁸ Rivera, *supra* note 1, at 63.

State of New York Court of Appeals

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

No. 1
Andrew M. Cuomo,
Respondent,
v.
New York State Commission on
Ethics and Lobbying in
Government,
Appellant.

Dustin J. Brockner, for appellant.
Gregory J. Dubinsky, for respondent.
New York City Bar Association et al., amici curiae.

RIVERA, J.:

The issue on this appeal is whether, on its face, the Ethics Commission Reform Act of 2022 unconstitutionally vests the State Commission on Ethics and Lobbying in Government with executive power. Plaintiff's principal argument is that because the

Commission exercises executive power, the Governor must have power to appoint and remove the Commissioners. In New York, however, the Legislature—not the Governor—may ordinarily define the terms on which non-constitutional state officers may be appointed and removed. Moreover, the Legislature structured the Commission to address a narrow but crucial gap arising from the inherent disincentive for the Executive Branch to investigate and discipline itself, which has serious consequences for public confidence in government. The Act does not displace the Executive Branch to accomplish that goal; instead, it confers upon an independent agency power to enforce a narrow set of laws, thus mitigating the unique danger of self-regulation. The Act addresses a threat to the legitimacy of government itself with an extraordinary response. While the Act extends very close to the boundary of permissible legislation, it is not “intrinsically a constitutional affront to the separation of powers doctrine” (*Cohen v State*, 94 NY2d 1, 15 [1999]). We therefore conclude that the Act is not unconstitutional in every conceivable application.

Plaintiff’s secondary arguments are likewise unavailing. The Commission’s placement within the Department of State does not violate Article V of the State Constitution. The Court has previously recognized the propriety of independence from the departmental head where necessary to achieve the purposes of a new entity and the Commission falls squarely within that precedent. And, despite what plaintiff contends, the Commission’s power to investigate the Governor and possibly impose a fine does not interfere with the Legislature’s impeachment power. Accordingly, we conclude that plaintiff has not carried his burden and reverse the order of the Appellate Division.

I.

A.

Joint Commission on Public Ethics

In 2011, in response to highly public cases of unchecked corruption and graft at the highest levels of New York State government, then-Governor, and plaintiff on this appeal, Andrew M. Cuomo and the Legislature agreed to create an agency responsible for enforcing the state's ethics and lobbying laws against legislative and executive officials, among others.¹ The Governor proposed and the Legislature enacted former Executive Law § 94, which established within the Department of State the Joint Commission on Public Ethics (JCOPE) (*see* former Executive Law § 94). Its fourteen members generally served five-year terms and were appointed as follows: six by the Governor and the Lieutenant Governor; and eight by the Legislature, with three each appointed by the Senate's Temporary President and the Assembly's Speaker and one each by the Senate's and the Assembly's Minority Leaders (*see id.* § 94 [2]). Of the six members appointed by the Executive Branch, at least three had to belong to a political party different from the Governor's (*see id.*). Members were removable by the appointing official if that official determined there was good cause (*see id.* § 94 [7]). The Governor was authorized to

¹ *See* Jacob Gershman, *At Deadline, Ethics Unit Is in Limbo*, Wall St J, Dec. 12, 2011, § A at 21 (“[The Governor] hailed the creation of the joint commission as a historic effort to end ‘the dysfunction and corruption that has plagued Albany’ ”); *see e.g.* Michael Cooper, *Hevesi Pleads Guilty to a Felony and Resigns*, NY Times, Dec. 23, 2006, § B at 1.

“designate the chair[person] of the commission,” who held that position at the Governor’s pleasure (*id.* § 94 [4]).

Early in its establishment and throughout its tenure, JCOPE was criticized for its lack of independence and ineffectiveness. Good-government advocates argued that JCOPE suffered fundamental structural deficiencies. They noted the deleterious effects of what was commonly called the “special vote” or “minority veto,” which limited JCOPE’s ability to investigate certain officials (*see e.g.* Danny Hakim & Thomas Kaplan, *Though Hailed, Albany Ethics Deal Is Seen as Having Weaknesses*, NY Times, June 6, 2011, § A at 24). For example, under one of the “special vote” provisions, when a JCOPE member sought to investigate a statewide elected official or a direct appointee of such an official, JCOPE’s members had to approve the action by a majority, including two of the Governor’s three appointees (*see* former Executive Law § 94 [13] [a]). This meant that two of the Governor’s politically aligned appointees could block an investigation of the Governor, even if the remaining 12 members voted to investigate. An analogous provision restricted investigations into legislative officials unless at least two members who voted to authorize the investigation were appointed by a legislative leader from the same party as the subject of the investigation (*see id.*). Observers also raised concerns about the appointments process and individual members’ independence, including the Governor’s authority to appoint the Chair, the appearance of appointments based on political relationships rather than experience and ability, and removal by the appointing official based on easily manipulated grounds (*see e.g.* Mike Vilensky & Josh Dawsey, *Ethics Panel under Fire*, Wall St J, Jan. 31, 2015, § A at 15). These criticisms gained purchase as cases of corruption

and misuse of power continued to surface, leading to resignations and criminal prosecutions while JCOPE remained on the sidelines.

B.

Commission on Ethics and Lobbying in Government

At the 2022 State of the State Address, a new Governor declared that “JCOPE is irreparably broken and has failed to earn the public’s trust.” The Governor specifically identified the “special vote” and the appointments process as requiring change and proposed a new ethics law as part of the 2022-2023 budget. The Legislature thereafter enacted and the Governor signed into law the Ethics Commission Reform Act of 2022 (the Act), which amended Executive Law § 94 and replaced JCOPE with the Commission on Ethics and Lobbying in Government. Like JCOPE, the Commission is established in the Department of State and charged with the investigation and enforcement of the ethics and lobbying laws (*see* Executive Law § 94 [1] [a]). Those under the Commission’s jurisdiction include statewide elected officials; members and employees of the Legislature; certain statutorily defined state officers and employees; current and former candidates for statewide office, Senate, and Assembly; the political party chair; and current and former lobbyists and their clients (*id.*). The Commission also enforces financial disclosure requirements and reviews disclosure forms of statewide elected officials, their officers and employees and other persons subject to disclosure under Public Officers Law 73-a (*see* Executive Law § 94 [9]). As part of its specific grant of authority under the Act, the Commission has rulemaking power to “adopt, amend and rescind any rules and regulations

pertaining to” Public Officers Law § 73 (concerning official ethics), Public Officers Law § 73-a (financial disclosure), Legislative Law Article 1-a (lobbying) and Civil Service Law § 107 (political activities and contributions) (Executive Law § 94 [5] [a]). With respect to members and employees of the Legislature, the Commission’s powers are limited: the Commission may investigate such persons but must refer any potential violations of the ethics laws to the legislative ethics commission (*see id.* § 94 [10] [p] [i]).

The 11 members of the Commission are appointed to four-year terms as follows: three members are nominated by the Governor; two by the Temporary President of the Senate; one by the Minority Leader of the Senate; two by the Speaker of the Assembly; one by the Minority Leader of the Assembly; one by the Attorney General; and one by the Comptroller (*id.* § 94 [3] [a]).² Thus, five members are appointed by Executive officials and six by legislators.

The Act provides that each nominee must be approved by an Independent Review Committee (IRC), composed of the state’s accredited law schools’ deans or their designees (*see id.* § 94 [2] [c]).³ The IRC “review[s] the qualifications of the nominated candidate” and “[t]hose candidates that the [IRC] deems to meet the qualifications necessary for the services required based on their background and expertise . . . shall be appointed.” If the IRC does not approve a nominee, the appointing official nominates another person (*id.* § 94 [3] [d]). The Act expressly prohibits appointment of a person who is, or within the

² The original terms were staggered (*see* Executive Law § 94 [4] [a]).

³ There are currently fifteen such law schools in New York.

last two years was, a registered lobbyist, a legislative employee or member, a statewide elected official, or a qualifying State officer or employee (*see id.* § 94 [3] [e]).

Whereas JCOPE members could be removed by their appointing authority, Commission members may be removed under the Act only by a majority vote of the Commission (*see id.* § 94 [4] [c]). Removal is limited by statute to cases where there is good cause—substantial neglect of duty, misconduct in office, violation of confidentiality restrictions, inability to discharge the powers or duties of office or violation of the Act—and must follow written notice and opportunity for a reply (*id.*).

Another significant difference is the omission of the “special vote” provisions. Under the Act, the Commission may initiate an investigation of the ethics and lobbying laws by simple majority vote (*see id.* §§ 94 [4] [h], [10] [c], [d], [f]).

If the Commission concludes that there is credible evidence of a violation, it provides the subject of the investigation with the opportunity for a hearing before an independent arbitrator, who may hear sworn testimony and receive evidence (*see id.* §§ 94 [10] [h], [i]). After the hearing, the Commission decides whether there exists a substantial basis to find a violation (*see id.* § 94 [10] [p]). Upon such finding, the Commission may impose civil penalties, which are capped at either \$10,000 or \$40,000, depending upon the nature of the violation, plus the value of any gift, compensation, or benefit received as a result of the violation (*see id.* §§ 94 [10] [n] [i], [ii]). The Commission may also refer a matter for criminal investigation upon a finding of sufficient cause (*see id.* § 94 [10] [n] [iv]). If the Commission concludes that a person who is neither a member of the Legislature, a legislative employee, nor a candidate for the Legislature has violated the

ethics or lobbying laws, the Commission may, “in addition to or in lieu of any fine authorized by [the Act],” refer the matter “to their employer for discipline with a warning, admonition, censure, suspension or termination or other appropriate discipline” (*id.* § 94 [10] [p] [ii]).

II.

In 2020, during his tenure as Governor, plaintiff sought approval from JCOPE to publish a book, which JCOPE granted, and the book was published later that year. In 2021, JCOPE notified plaintiff that he may have violated Public Officers Law § 74 (3) (a), (b), (c), (d), and (h), by “abus[ing] [his] State position for personal benefit, including but not limited to utilizing State property, personnel or other resources of the State for activities associated with the book and promoting the book during State appearances” (*Cuomo v New York State Joint Commn. on Pub. Ethics*, 76 Misc 3d 1036, 1041 [Sup Ct, Albany County 2022]). Plaintiff denied any violation. After plaintiff’s resignation, JCOPE issued plaintiff a notice of investigation and hearing. When the Commission replaced JCOPE, it authorized continuation of the investigation into plaintiff and scheduled a hearing.

Plaintiff then filed this action against the Commission seeking a judgment declaring the Act facially unconstitutional and enjoining the investigation. Plaintiff asserted that the Act violates constitutional principles of separation of powers because the Commission exercises investigatory and enforcement powers constitutionally entrusted to the Executive, without sufficient oversight by the Governor. Plaintiff also asserted that the Act violates Article V of the State Constitution because, although the Commission is formally

within the Department of State, it functions as a separate department without a head appointed by the Governor with the advice and consent of the Senate. Finally, plaintiff claimed that the Act unconstitutionally displaces the constitutional impeachment process, by permitting the Commission to sanction the Governor for putative violations of the Public Officers Law.

Plaintiff moved for a preliminary injunction and the Commission cross-moved for summary judgment. Supreme Court declared unconstitutional the investigation and enforcement provisions of the Act (Executive Law §§ 94 [5] [a], [c]; [10]; [14]) and enjoined the proceedings against plaintiff (81 Misc 3d 246 [Sup Ct, Albany County 2023]). The Appellate Division stayed the order pending resolution of the Commission's appeal, except insofar as Supreme Court enjoined the hearing proceeding against plaintiff (2023 NY Slip Op 75090[U] [3d Dept 2023]). The Appellate Division thereafter affirmed, concluding that the Act violates the separation of powers by encroaching on the powers of the Executive Branch to expand those of the Legislature (228 AD3d 175 [3d Dept 2024]). The Appellate Division granted the Commission's motion for leave to appeal to this Court and certified the question whether it erred in affirming the order of Supreme Court.⁴

⁴ A severability issue has been briefed at Supreme Court, but judicial action is stayed pending resolution of this appeal.

III.

A.

Duly enacted legislation is entitled to a strong presumption of constitutionality (*see White v Cuomo*, 38 NY3d 209, 216 [2022], citing *Dalton v Pataki*, 5 NY3d 243, 255 [2005]; *Schulz v State*, 84 NY2d 231, 241 [1994]; *Van Berkel v Power*, 16 NY2d 37, 40 [1965]; *In re Fay*, 291 NY 198, 207 [1943]). Moreover, “all the legislators and the Legislature itself are entitled to the presumption that they act only in accordance with the fulfillment of their oaths of office” (*Cohen*, 94 NY2d at 13). Plaintiff, as the party challenging the constitutionality of the Act, has a heavy burden to establish its unconstitutionality (*see Stefanik v Hochul*, — NY3d —, —, 2024 NY Slip Op 04236, *3 [2024]; *People v Viviani*, 36 NY3d 564, 576 [2021]). On this facial challenge, plaintiff must establish “in any degree and in every conceivable application, the law suffers wholesale constitutional impairment” (*White*, 38 NY3d at 216 [internal quotation marks omitted]). There are no facts in dispute, and thus summary judgment in the Commission’s favor is warranted if plaintiff fails to establish that, in every possible case, the Act is unconstitutional.

Plaintiff argues that the Act is facially unconstitutional because it empowers the Commission to exercise quintessentially executive powers free from gubernatorial accountability. Plaintiff focuses on the absence of statutory authority for the Governor either to appoint a majority of the Commissioners or to remove any of them. The Commission, plaintiff claims, is controlled by “legislative agents.” The Commission principally responds that New York’s constitution permits the Legislature to vest some

executive power with politically independent bodies to meet practical demands and that enforcing ethics and lobbying laws against executive officials requires such autonomy.

We conclude that plaintiff has failed to establish the facial unconstitutionality of the Act. Three factors compel our decision. First, our separation of powers doctrine is flexible and based on a commonsense view of the workings of government, thus allowing for some overlap between the coordinate branches. Second, New York’s Governor does not have sole and unlimited powers to appoint or remove state officers because our State Constitution disperses those powers between the Legislature and the Governor. Third, the integrity of our constitutional design depends on the public’s trust in government, and the Act provides an additional ethics enforcement mechanism narrowly targeted to the problems inherent in the Executive Branch’s self-regulation.

B.

i.

Separation of Powers is a Flexible Doctrine

“Because any ‘assign[ment] by law [of] new powers and functions to . . . commissions’ is [s]ubject to the limitations contained in [the state] constitution,’ we must . . . consider whether the enabling act violates the separation of powers doctrine” (*Delgado v State*, 39 NY3d 242, 255 [2022 plurality], quoting NY Const art V, § 3 [citation omitted]). “The doctrine has deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government” (*Cohen*, 94 NY2d at 11, citing NY Const, art III, § 1; art IV, § 1; art VI, § 1; *Clark*, 66 NY2d at 189). “[O]ne of the plain

purposes of the separation of powers theory is to guard against one Branch seeking to maximize power” (*Cohen*, 94 NY2d at 13, citing Charles D. Breitler, *The Lawmakers*, in 2 Benjamin N. Cardozo Memorial Lectures, at 798; see *Delgado*, 39 NY3d at 271 [Wilson Ch. J., concurring]). “[I]t is the correlative oversight of each lawmaking Branch over one another—in essence a dependency, rather than a separation—that balances the overall power to protect the *public’s* interests, not those individuals who occupy the offices of those Branches at varying times” (*Cohen*, 94 NY2d at 13). “While the doctrine [] does not require the maintenance of three airtight departments of government, it does require that no one branch be allowed to arrogate unto itself powers residing entirely in another branch” (*Under 21 v City of New York*, 65 NY2d 344, 356 [1985] [internal quotation marks and citations omitted]).

Contrary to the dissent’s view, the maxim that the separation of powers “is necessary *for the preservation of liberty itself*” does not require the dissent’s rigid analytical framework (dissenting op at 7). As Justice Story explained, the separation of powers does not demand that the branches “must be kept wholly and entirely distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree” (see *Dreyer v Illinois*, 187 US 71, 84 [1902], quoting Joseph Story, Commentaries on the Constitution of the United States 393 [5th ed 1891]). Instead, as the Court has continually reaffirmed, “it is *institutional interdependence* rather than *functional independence* that best summarizes the American idea of protecting liberty by fragmenting power. The genius of the system is synergy and not ‘separation,’ in the common connotation of that latter

word” (*Cohen*, 94 NY2d at 13-14 [internal quotation marks and citations omitted]; *see also Dreyer*, 187 US at 84).

We are guided here by “this Court’s long-standing and steadfast refusal to construe the separation of powers doctrine in a vacuum” (*Bourquin v Cuomo*, 85 NY2d 781, 785 [1995]). Instead, we “view[] the doctrine from a commonsense perspective” (*id.*). Indeed, the “exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers” (*Matter of Richardson*, 247 NY 401, 410 [1928] [Cardozo, Ch. J.]). Thus, as our caselaw makes clear, the branches are not hermetically sealed and “ ‘some overlap’ ” (*Bourquin*, 85 NY2d at 785, quoting *Clark*, 66 NY2d at 189) is permissible so long as core duties and responsibilities are retained. Each of our cooperative branches has a particular role that serves our constitutional design, which strikes a carefully balanced relationship among the three that provides for a check on governmental overreach.⁵

⁵ The dissent relies pervasively upon scholarly publications concerning state constitutions (*see e.g.* dissenting op at 7, quoting Robert F. Williams & Lawrence Friedman, *The Law of American State Constitutions* 275 [2d ed 2023]; dissenting op at 9, quoting G. Alan Tarr, *Understanding State Constitutions* 16 [1998]; dissenting op at 22, quoting John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 *Temp L Rev* 1205, 1248 [1993]). Such publications, although helpful, cannot substitute as sources of law for the text of our Constitution or the holdings and analyses of this Court. Contrary to the dissent, our caselaw makes clear that in New York, the separation of powers is functional and flexible rather than formalistic and rigid.

ii.

Power of Appointment and Removal

Under our state’s constitutional scheme, the Governor does not have exclusive powers of appointment and removal. Quite the contrary, the constitutional text and history make clear that those powers generally are divided between the Legislature and the Governor. On that score, we reaffirm that the question before us is one of State law, and Federal precedent has limited significance (*see Prentis v Atlantic Coast Line Co.*, 211 US 210, 225 [1908] [“Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state”])).

In support of his expansive view of gubernatorial power, plaintiff relies on a misinterpretation of the Constitution’s Vesting and Take Care clauses. New York’s original Vesting Clause provided “[t]hat the supreme executive power and authority of this state shall be vested in a governor” (1777 NY Const, art XVII). It now provides that “[t]he executive power shall be vested in the governor” (NY Const, art IV, § 1). The original Take Care Clause stated “[t]hat it shall be the duty of the governor . . . to take care that the laws are faithfully executed, to the best of [the governor’s] ability” (1777 NY Const, art XIX). It currently states that “[t]he governor . . . shall take care that the laws are faithfully executed” (NY Const, art IV, § 3). That the Governor is now vested only with “[t]he executive power” rather than with “the supreme executive power and authority” belies

plaintiff's expansive theory of executive power. As the dissent notes, this change reflects the intended diffusion of the power within the Executive Branch. However, the change is also consistent with the diffusion of appointment and removal power between the Legislative and Executive branches (*see* 4 Lincoln, *The Constitutional History of New York* at 456).

Plaintiff ignores the import of this change and instead erroneously equates our State Vesting and Take Care clauses with those found in the Federal Constitution. Indeed, plaintiff's reliance on federal caselaw to argue for an expansive executive dominance in our constitutional design ignores that, unlike the federal government, New York does not have a unitary Executive. The powers of the President of the United States derive from the Federal Constitution, under which "the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" (*Seila Law LLC v Consumer Fin. Protection Bur.*, 591 US 197, 203 [2020], quoting US Const art II, § 1, cl 1; *id.* § 3).

Apart from the text, history further demonstrates that the appointment and removal powers are shared between the two branches. In fact, our State Constitution grants the Legislature extensive power over the appointment and removal of state officers.

As early as 1776, more than a decade before the federal framers met in Philadelphia, New York's First Constitutional Convention gathered in White Plains (1 Charles Z. Lincoln, *The Constitutional History of New York* at 484 [1906]). The next year, the Convention adopted a document that, although similar to its federal successor in some respects, created a distinct governmental structure (*see* Charles C. Thach, *The Creation of*

the Presidency 1775-1789: A Study in Constitutional History at 34-43, 52-54 [1969]; Wood, *The Creation of the American Republic, 1776-1787* at 463). New York's 1777 Constitution, like its later federal analog, contained a Vesting Clause and a Take Care Clause. However, the 1777 Constitution contained no precursor to the federal Appointments Clause. That provision requires that the President appoint "principal officers" (*Seila Law*, 591 US at 217 n 3), while reflecting "Congress's central role in structuring the Executive Branch" (*id.* at 266 [Kagan, J., dissenting in part]). New York's Constitution, by contrast, gave the Governor "very little voice in either appointments or removals" of state officers (Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum L Rev 353, 385 [1927]). Instead, those powers generally rested with a Council of Appointment, which comprised the Governor and four Senators (*see* 1777 NY Const, art XXIII; *Matter of Trustees of Vil. of Saratoga Springs v Saratoga Gas, Elec. Light & Power Co.*, 191 NY 123, 132 [1908]; *People v Foot*, 19 Johns 58, 59 [Sup Ct 1821]; 1 Lincoln, *The Constitutional History of New York* at 611).⁶ Thus, the executive power vested in the Governor included only limited control over appointments and removals.

⁶ Following some dispute, the Constitution, as adopted, clarified that the power to nominate prospective officers rested concurrently with each of the Council's members, including the Governor (*see* 1777 NY Const, art XXIII, as amended 1801; 1 Lincoln, *The Constitutional History of New York* at 596-612). In so doing, the State rejected a proposal to give the Governor the exclusive power of nomination (*see* 1 Lincoln, *The Constitutional History of New York* at 610).

In 1821, New York adopted its Second Constitution, which abolished the Council. However, the appointment and removal powers generally did not revert to the Governor. To the contrary, the 1821 Constitution created a default rule that the power to determine methods of appointing officers rested with the Legislature. Article IV, § 15 provided: “All officers heretofore elected by the people shall continue to be elected; and all other officers whose appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as may by law be directed” (1821 NY Const, art IV, § 15; *see also People ex rel. Whiting v Carrique*, 2 Hill 93, 104 [Sup Ct 1841] [per Bronson, J.]). Concomitantly, section 16 established a presumption that the appointing authority had power to remove, unless the Legislature said otherwise: “Where the duration of any office is not prescribed by this Constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment” (1821 NY Const, art IV, § 16). Elsewhere, the 1821 Constitution specified that certain officers would be appointed or removed by the Governor, the Legislature, or some combination of the two (*see e.g. id.* §§ 2, 4, 6). Together, these reforms largely transferred power from the Council of Appointment to the Senate—not to the Governor (*see* 1 Lincoln, *The Constitutional History of New York* at 750).

This balance of power between the Legislature and the Governor persisted even amid other constitutional changes. In 1846, a new Constitution made certain executive officers—including the Secretary of State, the Comptroller, the Treasurer, and the Attorney General—elective (*see* 1846 NY Const, art V, §§ 1, 2). These alterations diminished

legislative control without enhancing gubernatorial power. For one thing, they created a plural executive, with multiple officials accountable to a statewide public.⁷ Moreover, they did not change the general rule of legislative control over appointment to and removal from offices about which the Constitution was silent (*see* 1846 NY Const, art X, § 2 [appointment power]; *id.* § 3 [removal power]).⁸ Nor did that rule change in subsequent decades, much to some Governors’ disappointment (*see e.g. People ex rel. Gere v Whitlock*, 92 NY 191, 198 [1883]; *Sturgis v Spofford*, 45 NY 446, 449 [1871]; *People ex rel. Miller v Peck*, 73 AD 89, 93 [4th Dept 1902]; *People ex rel. Williams v Zucca*, 36 Misc 260, 261 [Sup Ct, New York County 1901]). In 1872, Governor John T. Hoffman proposed to amend the 1846 Constitution so that the Governor would appoint the Secretary of State, the Attorney General, and the State Engineer and Surveyor (2 Lincoln, *The Constitutional History of New York* at 520-521). This was a “radical change” (*id.* at 521), meant to remake New York’s Executive Branch in the model of its federal counterpart (*see id.* at 469). But Governor Hoffman’s proposal failed to become law (*see id.* at 523-524; 1846 NY Const, art V, §§ 1, 2, as amended to 1880; 1894 NY Const, art V, § 1).

⁷ The dissent argues that the creation of a plural executive is irrelevant to this appeal (*see* dissenting op at 15-16). But plaintiff argues that the Act unconstitutionally limits *the Governor’s* appointment and removal powers. It is to this point that the fracturing of power within the Executive Branch is pertinent. We elsewhere consider—and reject—plaintiff’s suggestion that the Act unconstitutionally encroaches upon the broader power of the Executive Branch.

⁸ At the same time, the 1846 Constitution omitted § 15 of the 1821 Constitution. Whatever effect that may have had on the Legislature’s power to appoint officers, there is no indication that the 1846 Constitution was understood to confer upon the Governor an exclusive power to appoint and remove officers.

Nor were the Governor’s powers of appointment and removal materially changed by adoption of the 1894 Constitution. Historian Charles Z. Lincoln—who had served as legal adviser to Governor Theodore Roosevelt (*see* 1 Lincoln, *The Constitutional History of New York* at iii)—explained in 1906 that “[m]any officers are beyond the governor’s immediate control, for, as to them, [the governor] has no power of removal” (4 Lincoln, *The Constitutional History of New York*, at 456; *see also id.* at 456-458). Three years later, Governor Charles Evans Hughes agreed: “the Legislature with few exceptions has reserved final administrative control in making the heads of departments, to whose appointment the Senate’s consent is necessary, removable only by it” (3 *Public Papers of Charles Evans Hughes* at 8-9 [1910]).⁹

Even sweeping reorganizations of the State Government preserved the Legislature’s presumptive control over the power to appoint and remove state officers. In 1925, the State amended the Constitution to create the two-tiered civil-department structure still in place

⁹ This Court’s language in *Matter of Guden*, upon which plaintiff and the dissent rely (*see* dissenting op at 22-23 & n 7), does not require a different reading of this history. There, the Court stated that “the power of removal is an executive power, and in this state it has been vested in the governor” (*Matter of Guden*, 171 NY 529, 531 [1902]). That statement, however, is narrower than plaintiff claims. *Guden* concerned only the power to remove a sheriff (*see id.*) Since 1821, the New York Constitution had vested that power explicitly with the Governor (*see id.*; 1894 NY Const, art X, § 1; Reports of the Proceedings and Debates of the Convention of 1821, at 389-391 [1821]). *Guden* thus addressed removal of an officer as to whom the Constitution was clear, not silent. Similar is this Court’s reference to “the removal of a public officer” as “an executive act” (*Richardson*, 247 NY at 410, citing *Guden*). In *Richardson*, the Court considered the conduct of a “justice of the Supreme Court” who had been “made the delegate of the Governor in aid of the removal of a public officer” by statute (*id.*). The dissent ignores this plain distinction that the Legislature—not the Constitution—made the removal at issue an executive act.

today. This structure consists of “subordinate . . . commission[s] within the departments,” which operate “under” “ ‘heads of Departments’ ” who form “the Governor’s ‘Cabinet’ ” and are appointed by the Governor with the approval of the Senate (*Matter of Cappelli v Sweeney*, 167 Misc 2d 220, 226, 229 [Sup Ct 1995], *affd on op below*, 230 AD2d 733 [2d Dept 1996]; *see generally* 1894 NY Const, art V, as amended 1925). These amendments “confer[red] greater power and, concomitantly, greater accountability upon the Governor” (*Cappelli*, 167 Misc 2d at 232). However, they did not alter the residual “executive power” vested in the Governor. Indeed, the amended Constitution, much like its predecessors since 1821, continued to provide that “[a]ll other officers, whose election or appointment is not provided for by this Constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed as the Legislature may direct” (1894 NY Const, art X, § 2; *see also* 1939 NY Const, art IX, § 8). This Court later explained that this language “mean[t] precisely what it says,” that “the Constitution itself grants to the Legislature the power to prescribe the method by which officers other than those provided for by the Constitution shall be selected or chosen (*Lanza v Wagner*, 11 NY2d 317, 329, 330 [1962]).

In 1963, New York amended Article IX to reform the State’s “home rule” scheme (*see* Richard Briffault, *Local Government and the New York State Constitution*, 1 Hofstra L & Pol’y Symp 79, 87-89 [1996]). Those amendments removed the language authorizing the Legislature to “direct” the appointment of offices “created by law.” However, the new Constitution still contained a catch-all: “Except as expressly provided, nothing in [Article IX] shall restrict or impair any power of the legislature in relation to,” among other things,

“[m]atters other than the property, affairs or government of a local government” (NY Const, art IX, § 3[a] [3]). And as this Court had previously explained, “[t]he reservation of this power is merely another way of saying that the Legislature is unfettered as to ‘matters of state concern’ ” (*Adler v Deegan*, 251 NY 467 [1929], *amended*, 252 NY 615 [1930], quoting City Home Rule Law, § 30). Consequently, nothing in the 1963 amendments suggested that the appointment and removal powers were suddenly and silently vested with the Governor after nearly two centuries of legislative preeminence.

We glean from this history that the executive power entrusted to the Governor through our Constitution’s Vesting and Take Care Clauses does not encompass exclusive, indefeasible powers to appoint or remove non-constitutional state officers. Those clauses were never understood to confer an exclusive power on the Governor to appoint and remove executive officers. Plaintiff’s contrary claim thus lacks textual and historical support.

iii.

The Act is Intended to Regain and Retain Public Confidence in Government, by Limiting
Executive Self-Regulation in Public Ethics

New York’s functional approach to the separation of powers requires that we consider the intent of the legislation and the realities of governing within a system of cooperative branches. These considerations establish that the Act furthers a singular purpose: regaining and retaining public confidence in government by creating an

independent mechanism for ensuring that executive officials comply with the ethics and lobbying laws.

Regulation by the Governor and senior executive officials of their own ethical obligations has distinct implications for the separation of powers. Our Constitution secures government for the people through government by the people, guaranteeing a broad franchise, robust participation rights, and public officials whose power depends upon electoral approval (*see e.g.* NY Const, art I, §§ 1, 8, 9, 11; art II, § 1; art III, § 1; art IV, § 1; art V, § 1). The separation of powers supports this strategy, by ensuring that the public knows who exercises what authority and can readily hold them to account (*cf.* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 Duke LJ 545, 628 [2023]). For that reason, in nearly every context, New York's separation-of-powers principles do not countenance laws that insulate appointees from supervision by officials directly accountable to the public to the extraordinary degree authorized by the Act.¹⁰ With respect to official ethics, however, matters are different. The ethics laws alone presume that public accountability is insufficient to ensure the government's integrity. Were it otherwise, those laws would be unnecessary. The same presumption suggests that self-regulation in public ethics is illusory—or, at least, so the Legislature might conclude. Put

¹⁰ Even though liberty is not the only purpose against which our application of the doctrine should be measured (*see supra* at 12-13, citing *Dreyer*, 187 US at 84), we disagree with the dissent's implication that flexibility in the separation of powers necessarily comes at liberty's expense. There is good reason to think—and the Legislature was entitled to conclude—that robust, independent enforcement of the ethics laws against public officials promotes individual liberty.

differently, it is only in matters of public ethics that executive officials risk truly serving as judges in their own cases, despite our law's condemnation of such a practice (*see Orange County v Storm King Stone Co.*, 229 NY 460, 463 [1920]). So far as we can discern, similar concerns arise in no other legislative domain.

These are not merely prudential concerns, but rather implicate fundamental constitutional values. Public corruption and the misuse of power leads to public distrust in government and its officials (*see* Jong-Sung You, *Trust and Corruption*, in *The Oxford Handbook of Social and Political Trust* at 486 [2018] [(T)here is very strong and robust empirical evidence of the causal effect of corruption and institutional fairness on social trust as well as institutional trust]). As public confidence in government erodes, disaffection leads to reduced political participation and distrust of civic institutions (*see* Eduardo Rivera, Enrique Seira & Saumitra Jha, *Democracy Corrupted: Apex Corruption and the Erosion of Democratic Values* at 42-43 [May 15, 2024], *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4828243). This loss of trust is increasing, along with its attendant negative impact on public engagement (*see* Pew Research Center, *Public Trust in Government: 1958-2024* [June 24, 2024], *available at* <https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/> [finding that public trust in the federal government is near historic lows]). Experience confirms that democracy cannot thrive and institutions cannot function where the public perceives that government actors use their power to serve their personal interests rather than those of their constituents (*see e.g.* Rivera, Seira & Jha, *Democracy Corrupted*; *see also* Olivier Bargain & Ulugbek Aminjonov, *Trust and Compliance to Public Health*

Policies in Times of COVID-19, 192 J Pub Econ 1, 13 [2020] [“Trust in governments is an important determinant of citizens’ compliance with public health policies, especially in times of crisis”]). More pointedly as to the matter before us, the foundation of our constitutional system and our republican form of government may be jeopardized when New Yorkers no longer believe in the integrity of their government. Retaining public trust is essential for our government to function effectively and secure the freedom of its citizens, and thus is a paramount State interest (see Philip Pettit, *Republican Theory and Political Trust*, in *Trust and Governance* 295, 304 [Valerie Braithwaite & Margaret Levi, eds., 2003]). Greater flexibility in applying separation-of-powers principles is wholly—and uniquely—appropriate when adjudicating an effort to promote public confidence by limiting self-regulation of ethics and lobbying laws by government officials.

It is undisputed that the Act and the Commission structure are designed to address a serious threat to public confidence in government identified by both branches and by advocates. As such, the Act furthers “a paramount State interest” (*Cohen*, 94 NY2d at 12), in ensuring that executive officials comply with the ethics laws, which is essential to regaining and retaining public trust in government. Given the significant challenges posed by executive officials’ self-regulation, including the risk that an individual might elevate their private interests over those of the communities they are charged to serve, the joint decision of the Governor and Legislature to create an ethics commission independent of direct political control is entitled to substantial consideration by this Court.

To be clear, the mere fact that the two branches seek to address a vital issue of public concern is insufficient basis for us to overcome the separation of powers doctrine;

otherwise, the doctrine would be rendered nugatory by the simple expedient of identifying a problem and designing some governmental “fix.” Here, however, the branches are not dealing with the common problems of governing by which elected officials regularly pass and enforce laws to improve New Yorkers’ lives—such as, for example, the health code or sanitation rules—but rather with a means to ensure the foundational precept of a government for the people. The Act seeks to achieve that singular and paramount goal.¹¹

C.

Applying these constitutional standards here, we conclude that the Act neither unconstitutionally encroaches upon the Executive nor otherwise deviates from constitutional requirements.

First, the Act violates no constitutional command concerning appointments. Of the Commission’s eleven members, the Governor appoints three and the Executive Branch cumulatively appoints five. The six members appointed by the Legislature are spread between the controlling parties: two by the Temporary President of the Senate; one by the Minority Leader of the Senate; two by the Speaker of the Assembly; and one by the Minority Leader of the Assembly (Executive Law § 94 [3] [a]).¹² This structure is wholly

¹¹ The dissent misunderstands our discussion of the statutory purpose (*see* dissenting op at 16-17). Our point is not that the Act is good policy; on that, we express no view. Rather, our point is that the precise requirements of the separation of powers vary with the constitutional ends at stake, even as the doctrine’s basic contours remain fixed (*see Bourquin*, 85 NY2d at 785; *Matter of Richardson*, 247 NY at 410) To conclude otherwise would be to impose the very rigidity that our precedent has consistently rejected.

¹² The dissent ignores that this arrangement minimizes the risk of unified legislative control of the Commission.

consistent with New York’s constitutional tradition that generally allows the Legislature to direct the appointment of non-constitutional officers. Moreover, plaintiff’s own reasoning makes plain that not all appointees are agents of those who appointed them. Were it otherwise, further accountability mechanisms—including the removal power—might well be unnecessary to ensure that appointees carry out the commands of their “principals.” Thus, plaintiff’s contention that the Commission is controlled by “legislative agents” is without merit.

The same is true of his subsidiary claim that the Commission is appointed by a non-constitutional body, the IRC. The IRC does not appoint any member; it merely vets each nominee and ensures their qualifications to serve on the Commission. While the IRC may approve or deny a nominee, only a “selection member”—by law, a legislator or executive official—may appoint a member to the Commission (*see* Executive Law §§ 94 [2] [b]; [3] [d]). Indeed, the IRC has no power to consider, let alone appoint, someone who has not been nominated by a selection member or a person statutorily ineligible to serve on the Commission (*see id.* §§ 94 [3] [d], [e]). The Court has previously upheld as constitutional an arrangement where the Legislature created a “selection board” composed of eleven representatives of private universities and civic organizations to prepare a list of nominees for appointment to the New York City Board of Education, from which the City Mayor was required to choose (*see Lanza*, 11 NY2d at 322-323). The Court concluded that the board ensured the appointment of qualified individuals based on an “objective and nonpartisan basis” (*id.* at 333). Although *Lanza* involved a claim based upon the alleged delegation of legislative power, the animating principle applies with equal force to

plaintiff's separation of powers argument against the IRC: the Constitution does not bar the Legislature from relying on experts to assist with appointments that the Legislature is free to make on its own.¹³

The Board of Commissioners of Pilots also offers some precedent for the Commission's structure. That entity may make, promulgate, and enforce regulations, including by seeking penalties (*see* Navigation L §§ 95 [1]; 97 [1]). Currently, the Governor may appoint one of its six members (*see id.* § 87). But for over a century until 1999, the Commissioners of Pilots were chosen exclusively by private parties (*see Sturgis*, 45 NY at 449; Senate Introducer's Mem, Bill Jacket L 1999, ch 258). Contrary to plaintiff's suggestion, we cannot dismiss that longstanding body as an unconstitutional anomaly (*cf. Seila Law*, 591 US at 220, citing *Myers v United States*, 272 US 52, 220 [1926]).

Second, the Act remains within constitutional bounds respecting the removal power. The Supreme Court has observed that “it is ‘only the authority that can remove’ [executive] officials that they ‘must fear and, in the performance of [their] functions, obey’ ” (*Seila Law*, 591 US at 213-214, quoting *Bowsher v Synar*, 478 US 714, 726 [1986]). It is precisely because removal so forcefully commands obedience that the Legislature had sound reason to shield the Commission from it. To permit the Governor—or any other executive official—to remove Commissioners might well have been tantamount to permitting those

¹³ The dissent's analysis of this issue contradicts itself. Either the IRC has “the ultimate appointment power” and private citizens dominate the process (dissenting op at 25) or “the legislature appoints members to executive boards” and thereby encroaches upon the Executive Branch (dissenting op at 10). It cannot be both; indeed, it is neither.

officials to dominate the Commission and thereby to control the enforcement of the ethics laws against themselves and their political allies. This, in turn, might have engendered the very public distrust the Legislature sought to avoid. Considering the Legislature's long-held constitutional power to set the terms on which non-constitutional officials may be removed from office, we cannot conclude that it acted unlawfully in declining to grant the Governor the power to remove Commissioners.¹⁴

Third, and finally, the Legislature has not upset the careful balance among the coordinate branches (*see Delgado*, 39 NY3d at 264 [Wilson Ch. J., concurring]). In addition to the appointment powers discussed above, the Executive Branch has certain supervisory powers over the Commission. Primary among these is the Moreland Act, which empowers the Governor to investigate the Commission. Executive Law § 6 provides in relevant part:

“The governor is authorized at any time, either in person or by one or more persons appointed by [the governor] for the purpose, to examine and investigate the management and affairs of any department, board, bureau or commission of the state. The governor and the persons so appointed . . . are empowered to subpoena and enforce the attendance of witnesses, to administer oaths and examine witnesses under oath and to require the production of any books or papers deemed relevant or material.”

¹⁴ Nor is the Act's insulation of the Commission's members from removal by the Legislature fatal. Allowing the Legislature to wield removal power might have allowed it to assert undue influence on the Commission, which might itself have raised separation of powers concerns.

This law “recognize[s] explicitly the need for and the power in the Governor to oversee, but . . . not necessarily to direct, the administration of the various entities in the executive branch” (*Rapp v Carey*, 44 NY2d 157, 162 [1978]). Nothing in the Ethics Commission Reform Act diminishes this power, which “has been employed by virtually every governor to investigate problems of waste, mismanagement, and corruption at all levels of state government and recommend reforms” (Bennett Gershman, *Constitutionalizing Ethics*, 38 Pace L Rev 40, 43-44 [2017]).¹⁵

The Governor also exerts influence through budgeting. In brief, the Governor submits a budget, exercising “certain legislative powers” vested by Article VII, §§ 1-7 of the Constitution (*Pataki v New York State Assembly*, 4 NY3d 75, 83 [2004]). The Legislature then reviews it, wielding only “a limited grant of authority from the People to the Legislature to alter the budget proposed by the Governor,” and even then, “only in specific instances” (*id.* at 84 [internal quotation marks omitted]). The Act does not purport to alter this arrangement, but rather recognizes that “[t]he annual budget submitted by the governor shall . . . state the recommended appropriations” for the Commission” (Executive

¹⁵ The dissent observes that “[e]xecutive authority under the Moreland Act to investigate within the legislative sphere” is disputed (dissenting op at 20). Unlike the dissent, however, we do not view the Commission as an extension of the Legislature (*see supra* at 25-26). Thus, we view that dispute as immaterial. In any event, what the dissent characterizes as an “advisory opinion” (dissenting op at 20) in fact reflects only our Court’s “principle of party presentation” (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 82 [2018] [Rivera, J., concurring]). Defendant represented that the Governor retained the authority under the Moreland Act to investigate the Commission; plaintiff did not dispute that representation. Aside from rejecting the dissent’s characterization of the Commission, we express no view as to any potential future investigation.

Law § 94 [1] [f]). The budget process is not, as the dissent colorfully describes it, a shaming exercise (*see* dissenting op at 19). Instead, New York’s executive budgeting procedure, much like the federal congressional appropriations power, provides a “most complete and effectual weapon” against Commission overreach (Madison, Federalist No. 58).

In addition to supervising the Commission, the Executive Branch also retains concurrent enforcement authority. The Governor retains the power to discipline Executive staff (or not) even if the Commission chooses to impose fines (or not). Moreover, while responsibility for civil enforcement of the Act and the ethics and lobbying laws rests with the Commission (*see* Executive Law §§ 94 [10] [n] [i], [ii]; Public Officers Law §§ 73 [18]; 73-a [4]; 74 [4]), criminal enforcement remains with appropriate executive authorities (*see* Executive Law § 94 [10] [n] [iv]). These include the Attorney General who, upon request from the Governor, the Comptroller, or any State department head, may investigate and prosecute any alleged criminal offense (*see* Executive Law § 63 [3]). Even absent such request, the Attorney General may “commence civil investigations in the public interest” and may “prosecute ‘all persons indicted for corrupting or attempting to corrupt any member or member-elect of the legislature, or the commissioner of general services’ ” (*People v Gilmour*, 98 NY2d 126, 131 [2002], first citing Executive Law § 63 [8] and then quoting Executive Law § 63 [4]). District Attorneys, for their part, “have plenary prosecutorial power in the counties where they are elected” (*People v Romero*, 91 NY2d 750, 754 [1998]; *see* County Law § 700 [1]). Thus, the Act grants the Commission enforcement power without wholly displacing that of the Executive Branch. This

arrangement reflects the Act’s intended purpose: where an Executive official or their supervisor would have a conflict in investigating or disciplining themselves, the Commission has authority to do so.

Conversely, the Commission’s executive powers are limited. Although the Commission possesses the power to “implement” through monetary penalties the Legislature’s “critical policy decisions” (*Matter of LeadingAge N.Y., Inc. v Shah*, 32 NY3d 249, 259 [2018]), that power is subject to important constraints.¹⁶ First, the penalties are statutorily capped, providing a limitation on the Commission’s enforcement discretion (Executive Law §§ 94 [10] [n] [i], [ii]). And second, the Act provides for judicial review in an Article 78 proceeding, which is another control on potential Commission abuse or overreach (*see id.* § 94 [10] [o]; CPLR 7803). Thus, we cannot agree with plaintiff either that the Commission operates without executive oversight or that the Legislature has taken the “*whole power*” of the Executive to expand its own (*Cohen*, 94 NY2d at 13). A facial

¹⁶ The dissent contends that the limitations placed on the Commission’s ability to impose fines or discipline people within the Legislative Branch is part of the reason that the Act constitutes “a blatant encroachment on the power of another branch” (dissenting op at 4). The Legislature is indeed generally entitled to “discipline its own work and power” as it sees fit (*Cohen*, 94 NY2d at 14). However, its determination not to extend the full force of the Act’s supplemental enforcement authority to legislative members, candidates, and employees creates no facial constitutional defect. By prohibiting the Commission from “impos[ing] penalties or discipline upon” such persons (Executive Law at § 94 [10] [p]), the Act neither enlarges the power of the Legislative Branch nor diminishes that of the Executive Branch. Moreover, members of the Legislative Branch remain subject to enforcement actions by the Attorney General or the District Attorneys. Thus, the Executive Branch retains ample authority to secure the Legislative Branch’s rigorous adherence to the ethics and lobbying laws.

separation-of-powers challenge cannot stand on the Commission's civil penalty powers alone when the Commission's structure is otherwise constitutional.

We emphasize that the Act goes very near the line of what is constitutionally permissible without crossing it. As discussed, the State has a paramount interest in promoting public trust in government by ensuring impartial enforcement of the ethics and lobbying laws and the Act furthers that goal. Critically, the substantial limitations built into the Act ensure that the Commission remains within the constitutional guardrails we herein recognize. Our decision is thus narrow and limited to the unique problem of self-regulation and enforcement of the ethics and lobbying laws.

Plaintiff has brought a facial challenge, and he has not carried the heavy burden that lies with that choice. We hold only that the Act does not, in every possible application, unconstitutionally encroach upon the powers of the Governor or the Executive Branch. We express no view as to any issues plaintiff does not raise, including the constitutionality of the Act as applied to any other person subject to the Commission's authority.

V.

Plaintiff's remaining challenges to the Act are also without merit. Under Article V, except as otherwise provided, "the heads of all . . . departments and the members of all boards and commissions . . . shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law" (NY Const art V, § 4). Plaintiff contends that the Commission unconstitutionally operates as a department without a "head" removable by the Governor. This argument is

unpersuasive because the Commission is not a “department” in the constitutional sense. The Act expressly establishes the Commission “within the department of state” (Executive Law § 94 [1] [a]). This Court has explained—and the constitutional structure effectively requires—that an entity “within an existing government department” is not a “department” for purposes of Article V, § 4 (*Matter of Metropolitan Life Ins. Co. v New York State Labor Relations Bd.*, 280 NY 194, 208 [1939]). This rule reflects that the 1925 constitutional amendments that produced Article V “left the question of supervision and control by the Governor an open one to a large extent, and passed that problem along to the Legislature” (8 NY Constitutional Convention Comm., *Problems Relating to Executive Administration and Powers* at 268 [1938]). Thus, Article V enshrines a formal principle of governmental organization, not a substantive requirement of direct gubernatorial control of every state entity.

Plaintiff’s additional claim that impeachment is the only remedy for any alleged ethics violation by a Governor requires little comment. Plaintiff’s argument, although somewhat undeveloped, appears to be that the Legislature may discipline a Governor only by exercising the power of impeachment vested by Article VI, section 24 of the Constitution and that the Commission’s disciplinary authority permits an unconstitutional end run around this limitation.¹⁷ But the Commission’s power to impose a fine on the

¹⁷ We understand plaintiff to argue that only the Legislature may punish the Governor and only by impeachment, and that because the Legislature did not exercise that power during plaintiff’s gubernatorial tenure, the Commission cannot lawfully investigate and discipline him now without encroaching upon the Legislature’s exclusive authority. That claim is

Governor does not encroach on the Legislature's exclusive impeachment power. It only constitutes an additional means of exposing and punishing corruption, which is not inherently unconstitutional. Indeed, the Attorney General can criminally or civilly prosecute a Governor without disrupting the Legislature's impeachment authority and District Attorneys can prosecute Governors for violations of ethics laws. By any measure, the power given to the Commission is far more limited than either the Attorney General's or District Attorneys' power to prosecute the Governor criminally. Thus, the mere power of the Commission to investigate and fine is permissible. Further, insofar as plaintiff takes issue with the Commission's power to recommend impeachment, that power does not encroach on the Legislature because the Legislature can always ignore the Commission's recommendation.

VI.

In conclusion, we emphasize the unique constellation of factors that lead to our holding. Under our Constitution, the Governor does not have unfettered powers of appointment and removal. Trust in government is essential to democracy because its erosion leads to apathy, disaffection, and the breakdown of civic institutions. Indeed, government cannot function if the public perceives that those entrusted with public power are unaccountable when they misuse their authority for private gain. Maintaining public confidence is thus a foundational State interest and a core governmental responsibility.

meritless for the reasons we discuss. Plaintiff does not raise, and we do not consider, whether the impeachment power may be exercised against a former Governor.

Given the danger of self-regulation, the Legislature and the Governor have determined that there is an urgent need for the robust, impartial enforcement of the State's ethics and lobbying laws. That task is assigned to the Commission. Neither the Legislature nor the Executive Branch has undue influence over the Commission, a structural characteristic lawfully chosen to ensure the integrity of the Commissioners and to instill public faith in government. Finally, the Legislature has not otherwise encroached upon the exclusive constitutional purview of the Executive Branch. Plaintiff has thus failed to establish that the Act is unconstitutional on its face.

Accordingly, the order of the Appellate Division should be reversed, with costs, judgment declared in accordance with this opinion, and the certified question answered in the affirmative.

GARCIA, J. (dissenting):

The two courts below concluded that the Ethics Commission Reform Act of 2022 (the Act), which grants to the New York State Commission on Ethics and Lobbying in Government (the Commission) unprecedented responsibility for “administering, enforcing,

and interpreting New York state’s ethics and lobbying laws” (Executive Law § 94 [1] [a]), violates the State Constitution. The majority reaches a different conclusion, finding no separation of powers violation by relying on approbation of the Act’s goals, a “flexible” application of that doctrine that effectively eliminates a structural constitutional safeguard, and a focus on isolated provisions of the legislation. This novel approach, lauding the purported good government goals of the legislation at the expense of constitutional guardrails on interbranch encroachment, finds no support in this Court’s precedent. I agree with the courts below that the Act violates bedrock principles of separation of powers enshrined in our State Constitution and therefore I dissent.

I.

To describe the way in which the Commission is appointed, how it operates, who is—and who is not—subject to its enforcement power, and how its members may be removed is to fairly answer the constitutional question. By legislative design, the Commission is comprised of eleven members, a majority of whom (six) are nominated by the legislative branch and a minority (five) by the executive branch (Executive Law § 94 [3] [a]). But those “nominations” do not technically mean appointment. For that to happen, an Independent Review Committee (IRC) made up of “the American Bar Association accredited New York state law school deans or interim deans” must approve those nominations pursuant to self-devised criteria (*id.* § 94 [2] [c])—including apparently whether a nominee’s “lived experience allows them to understand the range of perspectives needed to effectively serve as a member of an ethics commission that has broad oversight of a large and diverse public workforce” (*see* State of New York Independent Review

Committee, *Committee Procedures Updated August 2024*). Once vetted for life experience and other attributes by the law school deans and installed, members are removable only by “a majority vote of the commission” (Executive Law § 94 [4] [c]). Of course, the legislature’s nominees constitute a majority of members, and a simple majority of Commission members constitutes a quorum (*id.* § 94 [4] [h]).

The majority, in its celebration of the good government aims of the legislation, neglects to detail the range—and limits—of these powers. The Commission’s executive authority is sweeping, both to investigate violations of sections of the Public Officers Law, the Lobbying Act, and the Civil Service Law, and to impose penalties (*id.* § 94 [10] [a], [n]), yet at the same time restricted in scope. The Commission has the authority to investigate both public officials—statewide elected officials, executive branch employees, legislative branch members and employees, candidates for elected office, and political party chairs—and private citizens, in the form of current or former “lobbyists and clients of lobbyists”—potentially thousands of individuals (*id.* § 94 [1] [a]). Upon determining that a violation of the law has occurred, the Commission may impose financial penalties of up to \$40,000, seek to recover the value of any benefit received from the alleged violation, and refer the matter to a respondent’s employer for discipline or to law enforcement for potential criminal violations (*id.* §§ 94 [10] [n], [p]).¹

¹ On this point, the Attorney General conceded at oral argument that the statute is ambiguous as to the effect of such a disciplinary “referral.” The Act provides that, for statewide elected officials the Commission may recommend only impeachment and “may not *order*” suspension or termination (Executive Law § 94 [10] [p] [ii] [emphasis added]), implying that for all other respondents, the Commission’s recommendation as to discipline must be followed.

There is one catch, one limit to that authority that goes unexamined by the majority in championing the statute's aim of addressing "the inherent disincentive" for one branch "to investigate and discipline itself" (majority op at 2). The statute prohibits the Commission from "impos[ing] penalties or discipline upon members of or candidates for member of the legislature or legislative employees" (*id.* § 94 [10] [p]). Investigations of these individuals are permitted, but upon finding a violation the Commission, although composed of a majority of appointments made by representatives of the legislature, may only "prepare a written report of its findings and provide a copy of that report to the legislative ethics commission" (*id.* § 94 [10] [p] [i]). And while reports of investigations into executive branch members and private citizens must be published on its website within twenty days of delivery to the parties (*id.* § 94 [10] [p] [ii]), there is no such mandate for reports of violations by legislative members or staff.

There was a time when this Court would not have hesitated to hold such a blatant encroachment on the power of another branch unconstitutional (*see e.g. Rapp v Carey*, 44 NY2d 157 [1978]; *People v Tremaine*, 252 NY 27 [1929]). Not today. Vigilance in enforcing the separation of powers doctrine is relaxed in deference to a law that, according to the majority, will increase "public confidence in government," reduce "apathy [and] disaffection," and prevent "the breakdown of civic institutions" (majority op at 2, 21-24, 34). These blessings seem unlikely to flow from today's decision.

II.

As an initial matter, I agree with the majority that in applying our separation of powers doctrine we must look to the New York State Constitution, its history, and to this

Court’s interpretation of both (*see* Robert F. Williams & Lawrence Friedman, *The Law of American State Constitutions* 270 [2d ed 2023] [“State constitutional separation of powers questions . . . call for a state-specific form of analysis rather than one applying a more generalized, or universalist, American-constitutional separation of powers doctrine”] (emphasis omitted))). I do, however, reject the suggestion (majority op at 11-13) that our State’s constitutional separation of powers doctrine is somehow less vital than its federal counterpart or that this Court is permitted to be less vigilant in enforcing that doctrine depending on our assessment of the merits of the alleged encroachment (*see* majority op at 21 [“New York’s functional approach to separation of powers requires that we consider the *intent of the legislation* and the realities of governing within a system of cooperative branches” (emphasis added)]). The majority understandably neglects to provide any authority for such a means-ends balancing test; it has no place in this Court’s separation of powers jurisprudence.

To understand the contours of a state constitution’s separation of powers doctrine, we must “account for historical development and synthesize the distinct constitutional visions of several generations of constitution-makers” (G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 NYU Ann Surv Am L 329, 332-333 [2003]).² In New York, those generations span more than 200 years, providing a rich and

² The majority complains that this dissent relies “pervasively” on “scholarly publications” related to issues of state constitutional interpretation and separation of powers doctrine in a case involving state constitutional interpretation and a separation of powers challenge (*see* majority op at 13 n 5; *see e.g.* Robert F. Williams & Lawrence Friedman, *The Law of American State Constitutions* 270 [2d ed 2023]; G. Alan Tarr, *Understanding State*

layered account of the development and strengthening of the doctrine, from our first state charter through the creation of the modern executive in the twentieth century. New York courts, like the Appellate Division and the Supreme Court in this case, have enforced separation of powers safeguards to protect that constitutional legacy.

There can be no dispute that the concept of separation of powers is deeply rooted in our State Constitution. While the doctrine finds no standalone expression in that document, it is, as we have “consistently recognized,” a principle nevertheless enshrined in the structure of the Constitution and “included by implication in the pattern of government adopted by the State of New York” in every Constitution from 1777 to the present iteration (*Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 355-356 [1985]; *see also Clark v Cuomo*, 66 NY2d 185, 189 [1985] [separation of powers is “implied by the separate grants of power to each of the coordinate branches of government”]; Madison, Federalist No. 47 [“The (1777) constitution of New York contains no declaration on this subject (of separation of powers); but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments”])). This Court has explained that “[t]he concept of the separation of powers is the bedrock of

Constitutions; John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp L Rev 1205, 1248 [1993]; *but see* majority op at 15, 16, 22-24 [citing, for example, *Democracy Corrupted: Apex Corruption and the Erosion of Democratic Values*, Stanford University Graduate School of Business Research Paper No. 4166 and *Trust and Compliance to Public Health Policies in Times of COVID-19* from the Journal of Public Economics]).

the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions” (*Matter of Maron v Silver*, 14 NY3d 230, 258 [2010]; *see also Matter of County of Oneida v Berle*, 49 NY2d 515, 522 [1980]). While “some overlap between the three separate branches does not violate the constitutional principle of separation of powers” (*Clark*, 66 NY2d at 189), the doctrine is a “*structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified” (*Matter of Maron*, 14 NY3d at 260-261 [internal quotation marks omitted]).

In the most basic terms, the aim of the doctrine is not merely the mechanical separation of the functions of government but the preservation of liberty. In rebuffing past attempts to erode that doctrine by casting it as an outdated “relic” that impedes, rather than protects, democracy, this Court has warned that “[t]he separation of the three branches is necessary *for the preservation of liberty itself* and it is fundamental of the organic law that each department should be free from interference, in the discharge of its peculiar duties, by either of the others” (*Matter of Maron*, 14 NY3d at 258 [emphasis added and internal citations and quotation marks omitted]; *see also Under 21*, 65 NY2d at 356 [“contrary to the Appellate Division’s characterization of the doctrine as a ‘vestigial relic,’ we have recently unanimously reaffirmed its continuing vitality”]). Or, as one leading state constitutional scholar has explained, “[a]s important as the ‘protection’ of one branch from another is, such as the executive from the legislature, *the underlying goal of the judicial enforcement of separation of powers principles is the liberty of the citizens*” (Williams & Friedman at 275 [emphasis added]; *see also* Ellen A. Peters, Getting Away from the

Federal Paradigm: Separation of Powers in State Courts, 81 Minn. L. Rev. 1543, 1564 [1997] [“It is appropriate to wonder whether unchecked governmental power anywhere, no matter how well intentioned and how expedient, can provide enduring assurance of the full protection of individual and civil rights that is basic to a democracy”]).

It is that overarching goal, the preservation of liberty, which has guided this Court in its application of our separation of powers restraints (*County of Oneida*, 49 NY2d at 522 [“Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of free government is imperiled when any one of the coordinate branches absorbs or interferes with another”])). We lose sight of that goal today by employing a “balancing test” that weighs this Court’s assessment of the benefits of the alleged encroachment against a bedrock principle of constitutional law.

The repercussions of the majority’s approach are all the more alarming given that this Court’s role in enforcing the balance of power among the branches of State government is vital—and unique. “[T]he federal separation of powers doctrine, unlike the federal analysis of individual rights incorporated through the Fourteenth Amendment, provides no binding ‘floor’ to the distribution of powers under the state constitution” (James A. Gardner, *The Positivist Revolution that Wasn’t: Constitutional Universalism in the States*, 4 Roger Williams U L Rev 109, 116 [1998]; see *Prentis v. Atlantic Coast Line Co.*, 211 US 210, 225 [1908] [“We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned”])). Accordingly, our role “in separation

of powers cases, particularly those involving encroachment, ‘ought to be as vigilant arbiter of process for the purpose of protecting individuals from the dangers of arbitrary government’ ” (Williams & Friedman at 275, quoting Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 249 U Pa L Rev 1513, 1565 [1991]). New York courts alone have this responsibility to the People of the State.

In addition to the lack of a federal backstop, the retention of plenary power by the legislature also counsels in favor of vigilance by this Court in enforcing the separation of powers doctrine when that branch is charged with encroaching on the authority of another. “The legislature has all the power . . . there is, except as limited by the Constitution” (*People ex rel. Cent. Trust Co. v Prendergast*, 202 NY 188, 197 [1911]; *see also People ex rel. Wood v Draper*, 15 NY 532, 543 [1857] [“(T)he people, in framing the constitution, committed to the legislature the whole law making power of the state”]). As a result, restraints on this power are found only “expressly or by necessary implication” in the language of the constitution (*Silver v Pataki*, 96 NY2d 532, 537 [2001]). In other words, “a state constitution serves as a charter of law and government for the state . . . provid[ing] *limitations* on the otherwise plenary, residual, sovereign power of states to make laws and govern themselves” (Williams & Friedman at 4). The effect of this residual plenary power of the legislature is that “[i]n determining the distribution of powers among the branches of state government, the underlying premise must be that the powers of the executive and the judicial branches are defined by the constitution, where the legislature’s are not” (G. Alan Tarr, *Understanding State Constitutions* 16 [1998]). Defined executive power

represents one of the few limits on legislative authority, an implied structural constraint the enforcement of which is a vital check on that plenary power.

Finally, the nature of the encroachment here, far from providing a reason for reduced vigilance, increases the threat and itself requires rigorous scrutiny. The legislature passed a law creating a “commission” with a majority of its own appointees, to exercise a quintessentially executive function—to enforce the law—without executive oversight, in effect a forced delegation of executive power. This form of encroachment, by which the legislature appoints members to executive boards, “constitutes a sort of ‘reverse delegation’—an encroachment that should be subjected to rigorous judicial scrutiny” (Williams & Friedman at 275). Because delegation “constitutes . . . a ceding of authority” while “reverse delegation is a form of legislative encroachment on the executive,” “[i]t can be argued persuasively that reverse delegation, therefore, should receive more rigorous judicial scrutiny than delegation” (*id.* at 276). Certainly, it should not be given less.

III.

In addition to these structural safeguards protecting the power of each branch, our constitutional history reflects the intention of the People to equip the executive with the power necessary to govern a modern state. At the same time, this enhanced power was balanced by intra-branch checks on the executive achieved by distributing certain powers to other executive officers. The majority both fails to acknowledge the development of robust executive power in New York and misunderstands the separation of powers implications of a non-unitary executive.

From the first Constitution in 1777, New York chose to “provide[] for a stronger executive than all the other states” to “keep the weaker branches (executive and judiciary) separate and independent” (Peter J. Galie, *Ordered Liberty* 4 [1996]; *see also* Tarr, *Understanding State Constitutions* at 87 [“The New York Constitution . . . provid(ed) a model for republican government with a substantially enhanced executive”]). At this point, however, the separation between the branches was very much a work in progress—for example, the Constitution “blend[ed] the executive and judiciary departments” by establishing a Council of Appointment (Madison, *Federalist* No. 47 [describing instances of state constitutions that “violated the (separation of powers) rule established by themselves” because “the appointment to offices, particularly executive offices, is in its nature an executive function,” and using as an example New York, where “members of the legislative are associated with the executive authority, in the appointment of officers”]; *see* 1777 NY Const art XXIII).

Those defects were addressed in the 1821 Constitution, which eliminated the Council of Appointment as well as the Council of Revision, a committee made up of the governor, state chancellor, and members of the judiciary empowered to revise and veto all proposed legislation (*see* 1 Charles Z. Lincoln, *The Constitutional History of New York* 611 [1906]; James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U Chi L Rev 235, 245[1989]). Described as “flagrant violations of the strict doctrine of separation of powers,” these entities were removed as part of an attempt to “realign[] the constitutional structure with notions of separation of powers and checks and balances” (*Ordered Liberty* at 89). In place of the Council of Revision, the governor was given veto

power (*id.* at 81; *see* 1821 NY Const, art I, § 12). Debate about “substitute plans” for appointment power occupied the convention, and “[t]he practical result of the change was the enlargement of the council from four to thirty-two members, and vesting in the governor the exclusive right of nomination” (1 Lincoln at 750 [the “thirty-two members” represented the size of the State Senate, the body charged with confirming the Governor’s nominations]; *see also* Jabez D. Hammond, *The History of Political Parties in the State of New York* 69-71 [1842] [The delegates were unanimous in the decision to “vest() (appointment power) in the governor and the senate” and came “to the determination to place the general appointing power in the governor, by and with the advice and consent of the senate”]). The 1821 Constitution thus “firmly fixed in the Constitution” “the nominating power of the governor” (1 Lincoln at 750). The majority’s statement that the abolition of the Council “transferred power from the Council of Appointment to the Senate—not to the Governor” is incorrect (majority op at 17).

Also added in 1821 was a “Take Care” clause, identical to the federal counterpart (*id.*), which “provide[s] the governor with the power to supervise and control the executive branch” (Peter J. Galie & Christopher Bopst, *The New York State Constitution* 142 [2d ed 2012]; *see* 1821 NY Const, art III, § 4).³ Building on the work done in 1821, constitutional amendments passed in 1846 placed “many restrictions on legislative power” and ceased to

³ The majority implies the existence of a meaningful difference between the State and Federal Take Care clauses, without articulating any basis for that conclusion (*see* majority op at 15). As discussed further below, the important distinction between the Federal and State Constitutions relevant to this clause—that is, the state’s fractured executive power—does not bear on the inter-branch encroachment of executive power but instead concerns the apportionment of the exercise of power within that branch.

identify “the legislative will . . . with the people’s will” (Ordered Liberty at 105 [“Taken as a whole, the reduction of legislative power was a most striking aspect of the work of the 1846 convention”]). This power, removed from the legislature, was transferred “from the government directly to the people, diminishing the power of all three branches” (*id.* at 111).

The increasing power of the executive is most strikingly evidenced by the proposals made at the 1915 convention, which included an attempt at placing “centralized authority in the hands of a single executive” (Ordered Liberty at 200). While the proposed constitution was rejected by voters, a majority of the changes recommended in 1915 ultimately passed through the amendment process (*see id.* at 201). As described in a leading treatise of New York State Constitutional history, “[t]he major developments in the constitutional powers of the [executive] office took place during the first half of the twentieth century and include a four-year term (1937), the executive budget (1927) and the executive reorganization and greater appointment powers (1925)” (Galie & Bopst at 137; *see also Tremaine*, 252 NY at 45 [in considering an allegation of legislative overreach in the budget process, the Court concluded that “(t)he provision for the budget system is a new and complete article of the Constitution,” and in light of the executive branch’s budgetary authority, the conferral of “powers on the legislative chairmen . . . is unconstitutional and void”]). With these revisions, the power of the executive was made commensurate with the evolving challenges of governing a modern state:

“The focus inevitably shifted to the executive branch. An effective executive, one in control of his [or her] own . . . budget, was identified with a responsible executive able to make government work to meet the needs of the people. It was an easy step to the conclusion that a more effective and responsible executive meant a more democratic government. One hundred

and fifty years after the adoption of the first constitution, the branch of government most identified at the founding with tyranny came to be seen as the branch most likely to provide democratic responsiveness” (Galie & Bopst at 31).

By the mid-1920s, changes to article V reinforced the effectiveness of the executive.

These amendments “complete[d] the [executive] branch by providing the ground rules for the organization of the civil departments” (Galie & Bopst at 151). Section 4, which provides for the only two department heads not appointed by the Governor because of a decision to ensure the independence of those departments, “confirms the governor’s power to appoint and remove heads of civil departments, which along with the executive budget, constitutes the basis of the governor’s power to supervise and control the executive branch” (Galie & Bopst at 156). As one historian summed up, after the passage of these amendments, “[t]he Governor of the State of New York possessed at last the power the Governor had always been intended to possess” (Robert A. Caro, *The Power Broker* 260 [1975]).

Ignoring this record of increasing executive power, done in careful increments over the course of 250 years, the majority instead selects somewhat puzzling features for its own analysis. For example, the majority places great weight on the change in phrasing from the 1777 Vesting Clause’s reference to “the supreme executive power and authority” to the current description of “executive power” (majority op at 14-15 [this change in language “belies plaintiff’s expansive theory of executive power”]). This reliance on a title change that took place in 1821 when the substantive powers of the executive were being enhanced and protected from encroachment is misplaced, as is the majority’s unsupported conclusion that this “change is also consistent with the diffusion of appointment and removal power

between the Legislative and Executive branches” (majority op at 15), a conclusion firmly rebutted by the history of executive power in New York.⁴

Reliance on this title change reflects a more fundamental flaw in the majority’s analysis. In fact, the change in phrasing has been explained not as a reduction in executive power in favor of the legislative branch, but as “leaving room for the application of other elements of executive authority by means of other officers who were . . . vested with large executive powers” (4 Lincoln at 456 [1906]). That is, contrary to the majority’s assessment (majority op at 14-15), a fractured executive does not result in more power given to the legislature or otherwise diminish the executive branch’s power as a whole. Instead, the dispersal of gubernatorial power was instituted as executive branch power increased; with that enhanced role came concern that a too powerful individual executive may pose a threat to liberty. Accordingly, the answer was the imposition of “intra-branch” separation of powers (*see e.g.* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 Roger Williams Univ L Rev 79, 102 [1998] [compared with the federal government and its unitary executive, “(e)xecutive branches of state governments often have a more diffused assignment of authority . . . , affording independence to other executive officers in addition to the governor . . . (to) act as an internal check on the state executive power”]; *see also* 81 Misc 3d at 251 [“rival executive officers() scrapping over their domains has nothing to do with this case”])). The majority’s focus on the creation of

⁴ It is unclear how the 1821 change in title could reflect the “diffusion of appointment and removal power” when, as even the majority recounts, the executive possessed “only limited control over appointments and removals” prior to that time (majority op at 16) and the 1821 constitution enhanced that executive authority.

“a plural executive, with multiple officials accountable to a statewide public” (majority op at 18), speaks not to a diminishment of executive power but to an intra-branch dispersal of power.

IV.

The majority ignores, or in the case of the non-unitary executive misinterprets, the relevant history representing distinct lines of power drawn by the People of this State, and in doing so diminishes this Court’s important role in preserving that separation. Instead, the majority relies on three factors that “compel” the conclusion that the law is constitutional: (1) a general “flexible” or “commonsense” approach to the separation of powers doctrine; (2) the fractured nature of executive power in New York and the fact that the Governor does not have the sole and unlimited powers of appointment and removal; and (3) a sense that “the integrity of our constitutional design depends on the public’s trust in government” and its view that the act accomplishes this goal (majority op at 11). This novel approach finds no support in our caselaw and sets a new, and dangerous, precedent for evasion of separation of powers constraints.

To take the last factor first, this Court has never recognized an exception to the separation of powers restraints based on legislative intent. To the contrary, we have explained that, when considering the constitutionality of a statute, “[w]e are not concerned with the policy or expediency of the legislation,” and “statutes which are beyond the power of the Legislature are invalid, though they may be politically wise” (*Village of Kenmore v Erie County*, 252 NY 437, 441 [1930]); *see also Rapp*, 44 NY2d at 160 [in analyzing whether a separation of powers violation has occurred, noting that “(n)ot at issue is the

wisdom of” the challenged executive action]; *People ex rel. Wood*, 15 NY at 546 [(“T)he business of the courts is with the text of the fundamental law as they find it. They have no political maxims and no line of policy to further or to advance”)]. The majority substitutes an “ends justifies the encroachment” approach for that policy-neutral analysis (*see* majority op at 25 n 11 [“[O]ur point is that the precise requirements of the separation of powers vary with the constitutional ends at stake”])).

This is perhaps the deepest flaw in the majority’s reasoning: heavy reliance on the purpose of the statute, which it promotes as “intended to regain . . . public confidence in government” as a remedy for a prior statute which the majority concludes was ineffective (majority op at 3-5, 21-25). In other words, we accept encroachment because it is the only way to accomplish the goal of “regaining and retaining public trust as a means to ensure the legitimacy of government” (majority op at 21-25). This is simply wrong as a matter of constitutional process. Moreover, the “last best hope” rhetoric is based on a false premise, namely that the only way to achieve this goal is an unconstitutional arrogation of executive power. Instead of a choice between allowing the threat to democracy that self-policing of the apparently rampant corruption in the executive branch poses (majority op at 21-25) or adherence to constitutional separation of powers constraints, the legislature could have opted to put to the People for a vote a constitutional amendment enacting the Commission. Indeed, this was the path taken to create the commission that imposes discipline on the judicial branch (NY Const, art VI, § 22), and members of the legislature attempted to begin the process of passing a constitutional amendment to enact an ethics agency to enforce ethics and lobbying laws in 2021 (2019 NY Senate Bill S855 [concurrent resolution

proposing “that the constitution be amended by adding a new article V-A; in relation to state government integrity”]). Such an approach would have given voters the opportunity to approve—or disapprove—of a Commission that removes such substantial power from the executive. And, if the legislature chose to, it could have put to the People the question of placing itself beyond the reach of that Commission. But the legislature, as the sole gatekeeper of the amendment process (*see* NY Const, art XIX; Jerald A. Sharum, Note, *A Brief History of the Mechanisms of Constitutional Change in New York and the Future Prospects for the Adoption of the Initiative Power*, 70 Albany L Rev 1055, 1080 [2007]), chose not to do so. And this choice, in the majority’s view, instills confidence in our democracy.

The majority also errs by focusing solely on the appointment and removal process without accounting for the full range of powers bestowed on the Commission. While perhaps the executive appointment or removal power may individually and in certain circumstances be constrained, removing both with respect to a Commission that also has the power to enforce the law has never been condoned by this Court. We have cautioned that each of these features is vital in its way to the exercise of executive power; more so in combination.

The majority assures us that in any event, the statute permits the Governor to maintain meaningful control over the Commission. First, the majority posits that statutory caps on the financial penalties the Commission may impose “provid[e] a limitation on the Commission’s enforcement discretion” (majority op at 31). To an individual penalized with a \$40,000 fine, a significant amount of money to most, this is cold comfort.

Exemption from rigorous scrutiny, or indeed any level of scrutiny, based on our own assessment of the severity of the penalties a commission may impose is unprecedented.⁵ Of course, once this Court determines that the statute is constitutional, the financial cap could always be increased—perhaps prompting a subsequent “how much is too much” constitutional challenge.⁶

Next, the majority notes that the governor’s budgeting powers remain, and thus serve as a limit on the Commission’s power. The statute of course does not “alter [the] arrangement” pursuant to which the Governor submits a budget that the legislature has limited power to change (majority op at 29)—what it does instead is arguably more troubling. It requires the Governor to specifically and separately “state the recommended appropriations” for the Commission, requiring separate and public disclosure of any attempt to reduce the Commission’s budget (*see* Executive Law § 94 [1] [f]). What is the purpose of this specific provision in the Act if the general executive control over budgeting were enough to constitute “control” over the Commission? This provision is aimed at shaming, not empowering, the Governor. That the only way the Governor can exercise

⁵ The Kansas Supreme Court, in upholding that state’s Governmental Ethics Commission against a challenge that the legislature had improperly usurped executive power, considered as the first of four relevant factors in assessing whether the separation of powers doctrine had been violated that “[n]otably absent is any means for the Commission to enforce compliance with the act or penalize violators thereof,” and instead the Commission “only investigates and reports to those who have authority to penalize or enforce” (*Parcell v State*, 228 Kan 794, 797, 620 P2d 834, 836 [1980]).

⁶ In addition, the majority fails to consider the statute’s clawback provision, which may represent a much larger dollar amount—as it does here (*see* Executive Law § 94 [10] [n]).

power over the Commission is to openly starve it of its funding demonstrates how far beyond her control the Commission operates.

The majority also takes comfort in the fact that the “Governor retains the power to discipline Executive staff (or not) even if the Commission chooses to impose fines (or not)” (majority op at 30). It is unclear how the retention of any such power mitigates the grant of that same power to a body outside the executive branch. Granting this Commission “parallel power” does not cure the unlawful delegation of executive authority.

In its effort to save the statute, the majority goes so far as to pre-approve an investigation under the Moreland Act of the workings of the Commission (*see* majority op at 28-29). Executive authority under the Moreland Act to investigate within the legislative sphere has been subject to dispute since its enactment in 1907 (*see* Ernst Henry Breuer, *Moreland Act Investigations in New York: 1907-65* at 2-7 [1965]; *see also* Richard J. Meislin, *Cuomo Pledges \$5 Million Budget in Announcing Corruption Panel*, NY Times, Jan 16, 1987, available at <https://www.nytimes.com/1987/01/16/nyregion/cuomo-pledges-5-million-budget-in-announcing-corruption-panel.html>) [last accessed Feb 7, 2025] [Governor Mario Cuomo acknowledging that the Feerick Commission’s “powers to investigate practices in the Legislature would be limited by legal separations between the branches of government”]). Certainly, the issue might arise again should a future governor decide to investigate the “independent” committee stocked with legislative nominees empowered (to some extent) to investigate the legislature. Perhaps the majority’s advisory opinion on the scope of executive power under the Moreland Act is an admission that today’s decision indeed ushers in a post-separation of powers inter-branch free-for-all.

As a third pillar of support, the majority leans heavily on the elasticity and “flexibility” of the separation of powers doctrine, selectively citing to Chief Judge Cardozo’s statement that “[t]he exigencies of government have made it necessary to relax a mere doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers” (*see Matter of Richardson*, 247 NY 401, 410 [1928]; majority op at 13). As the very next sentence of *Richardson* makes clear, however, for that Court, if not for the majority here, flexibility had its breaking point: “Elasticity has not meant that what is of the essence of the judicial function may be destroyed by turning the power to decide into a pallid opportunity to consult and recommend” (*id.*). *Richardson* is but one example of this Court rejecting attempts to substitute “academic debate” over “flexibility” in favor of vigilance in striking down blatant separation of powers violations (*see County of Oneida*, 49 NY2d at 523 [“A failure (by the executive) to fulfill th(e) obligation (to carry out the laws of the State) violates the unequivocal command of the Constitution—it is not subject to academic debate concerning the proper division of governmental powers”])). As in *Richardson*, the statute here passes the breaking point.

V.

Instead of the majority’s piecemeal approach, we must consider the overall effect of the statute, that is, whether the power granted to the Commission and the way that power is exercised results in an unconstitutional encroachment on executive authority (*see e.g. Matter of NYC C.L.A.S.H. Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 180 [2016] [all factors of the challenged action should be “taken

together” in assessing whether agency rulemaking violated separation of powers by encroaching on the province of the legislature (internal quotation marks omitted)]; *see* John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 Temp L Rev 1205, 1248 [1993] [recommending an analytical approach to the question of whether legislative appointment power over administrative agencies violates separation of powers principles by focusing “instead on the particular circumstances of each case and the real possibility of interference with the goals served by separation of powers if legislative appointees were permitted to exercise those particular functions, regardless of how those functions might be conceptually classified”]; Charles Herman Winfree, *State ex rel Martin v Melott: The Separation of Powers and the Power to Appoint*, 66 N C L Rev 1109, 1118-1119 [1988] [criticizing focus on “the appointments provision, divorced from the separation of powers provision,” in reviewing separation of powers challenges]). The Act fails this test.

The Act gives the legislature the majority of appointments and a majority is a quorum, meaning that the Commission can act by vote of only legislative appointees. But retention of some degree of appointment power in the executive is an obvious and necessary check on the balance of powers (*see e.g.* Devlin, 66 Temp L Rev at 1245-1246 [separation of powers concerns arise “if the legislature purports to reserve . . . appointment authority for itself or its leadership,” because “(e)ven if such an exercise of appointment authority by the legislative branch survives scrutiny under the appointments or vesting clauses of a state constitution, it may still fall afoul of more general distribution of powers concerns”]). Once appointed, members are only removable by a majority—which, again,

may occur by vote of only legislative appointees. But we long ago explained that “[i]n this country the power of removal is an executive power and in this state it has been vested in the governor by the people” (*Matter of Guden*, 171 NY 529, 532 [1902];⁷ *but see* majority op at 14, 27 [despite acknowledging the “limited significance” of federal precedent, relying on one federal case to support its statement that “the Act remains within constitutional bounds respecting the removal power”])). Both the appointment and removal power are placed beyond executive control (*see e.g. Devlin*, 66 Temp L Rev at 1210 n 16 [“(A)ny attempt to exercise indirect control over the administration of laws through appointment of administrators may violate basic allocation of powers principles by impermissibly joining lawmaking and law-applying power or by infringing on the ability of the executive branch to carry out its constitutionally assigned duties”])).

The Commission, composed in this way, is empowered to enforce the law. But our constitutional structure provides that “the Legislature makes laws and the Executive enforces them when made and each is, in the main, supreme within its own field of action” (*Tremaine*, 252 NY at 39; *see also Rapp*, 44 NY2d at 163 [“(I)n this State the executive has the power to enforce legislation and is accorded great flexibility in determining the methods of enforcement”])). Instead the Act permits the Commission to undertake

⁷ The majority rejects this language because the holding in *Guden* concerned removal power expressly vested in the Governor (majority op at 19 n 9). But the Court’s statement with respect to removal power appears in a discussion of the State’s separation of powers principles and well before the specific language of the provision was analyzed (171 NY2d at 531). That the holding was “narrower” than the statement does not call into question the legitimacy of the principle, namely a settled understanding of the removal power as executive (majority op at 19 n 9).

investigations, issue subpoenas, hold hearings, impose penalties, and demand forfeiture—all the ways in which a member of the executive branch would typically go about enforcing the laws (*see County of Oneida*, 49 NY2d at 523 [(“It cannot be denied that a principal function of the executive is to carry out the laws of the State”); 4 Lincoln at 471 [The Take Care clause “gives the governor general supervision of all officers, state or local, who may have any part in the administration of the law”]]).⁸ Particularly troubling is that the enforcement power delegated to the Commission is the power to enforce the State’s ethics and lobbying laws. The power of an outside body to discipline the executive branch is potentially the power to influence the actions of that branch—which may be why the legislature placed itself beyond the Commission’s reach. On the other hand, the Commission’s enforcement mandate reaches lobbyists and their clients, giving it unprecedented authority to penalize private citizens.

At this point, given the combination of constitutional infirmities already identified, the requirement of IRC approval of nominees is mere piling on. But discount this oddity the majority must, relying on *Lanza v Wagner* and *Sturgis v Spofford* (majority op at 26-27). Of course, the nature of the executive action in *Sturgis*—the licensing of New York harbor pilots—makes it a poor comparator (45 NY 446 [1871]). And the selection board in *Lanza* operated in reverse—the selection board provided names to the mayor, who then made the ultimate appointments from that list (11 NY2d 317, 332 [1962]). Indeed, in

⁸ From this same material, the majority quotes that “[m]any officers are beyond the governor’s immediate control, for, as to them, [the governor] has no power of removal” (majority op at 19). Yet again, the majority mistakes power dispersed within the executive branch for power removed from that branch.

Lanza this Court explained that its “decision in the present case does not require us to decide whether the Legislature could have validly conferred on the selection panel the power of ultimate appointment,” as the selection board “merely serves the purpose of providing by statutory sanction expert advice of unusual quality for the aid of the appointing power” (*id.* at 332 [internal quotation marks omitted]). Today, the majority decides that the reverse—diminishing the executive authority with a selection board of private citizens and giving to that board the ultimate appointment power⁹—passes constitutional muster (*see* majority op at 26-27).

This case is not *Bourquin v Cuomo* (85 NY2d 781 [1995] [creation of a Citizens Utility Board by Executive Order]) or *Cohen v State of New York* (94 NY2d 1 [1999] [applying presumption that legislators “act only in accordance with the fulfillment of their oaths of office” in challenge by certain legislators to law that restricted their own pay if appropriations submitted by the Governor were not acted upon in a timely manner]) (*see* majority op at 2, 10-13, 24, 31) but *Richardson*: the Act takes from the Governor what is “of the essence” of the executive function—the power to enforce the law—and “turn[s it] . . . into a pallid opportunity” for doing so through minority representation on a Commission controlled by legislative appointees (*Richardson*, 247 NY at 410). This encroachment demands the same response given in *Richardson*, but the unwavering

⁹ The dissent highlights two independent problems with the Commission—that the legislature has a greater number of nominees and that unelected individuals from non-profit organizations possess approval power over those nominees (majority op at 27 n 13).

commitment to separation of powers protections expressed by Chief Judge Cardozo is absent from today's decision.

VI.

After delineating all of the reasons that the Act is comfortably within constitutional limits, the majority “emphasize[s]”—suddenly—that “the Act goes very near the line of what is constitutionally permissible without crossing it” (majority op at 32). This inkling that something is terribly wrong is fleeting. What we come away with instead is the conviction that the majority is taken in by the form assumed by this legislation. It may have some rough features, the majority concedes, yet it means well. But a separation of powers issue will often come before a court as a wolf “clad, so to speak, in sheep’s clothing” (*Morrison v Olson*, 487 US 654, 699 [1988, Scalia, J., dissenting]). Wide-eyed, the majority closely examines individual parts of the statute before us—the appointment power, the removal power, the IRC—and pronounces each, in turn, not wolf. But step back—it’s not grandma; it’s a wolf.

Order reversed, with costs, judgment declared in accordance with the opinion herein and certified question answered in the affirmative. Opinion by Judge Rivera. Chief Judge Wilson and Judges Troutman and Halligan concur. Judge Garcia dissents and votes to affirm in an opinion, in which Judges Singas and Scarpulla concur. Judge Cannataro took no part.

Decided February 18, 2025



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 127/17

In the matter between:

RUSTENBURG PLATINUM MINE

Applicant

and

SAEWA obo MEYER BESTER

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

KOBUS ERASMUS N.O.

Third Respondent

Neutral citation: *Rustenburg Platinum Mine v SAEWA obo Bester and Others*
[2018] ZACC 13

Coram: Zondo ACJ, Cameron J, Froneman J, Jafta J, Kollapen AJ,
Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgment: Theron J (unanimous)

Heard on: 9 November 2017

Decided on: 17 May 2018

Summary: Referring to a fellow employee as a “swart man” — test for whether words are derogatory and racist is objective — starting point must take into account the history of apartheid

Lack of remorse and no acknowledgment of wrongdoing — no possibility of rehabilitation — dismissal is an appropriate sanction

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court, Johannesburg):

1. Rustenburg Platinum Mine is substituted by Sibanye Rustenburg Platinum Mines (Pty) Ltd as the applicant.
2. The appeal is upheld.
3. The order made by the Labour Appeal Court is set aside and replaced with:

“The appeal is dismissed with costs.”
4. There is no order as to costs.

JUDGMENT

THERON J (Zondo ACJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ concurring):

Introduction

[1] This Court must determine whether referring to a fellow employee as a “swart man” (black man), within the context of this case, was racist and derogatory and whether it was unreasonable for a commissioner, appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA), to conduct arbitration proceedings and find that the use of the term was racially innocuous. If it is found to be racist and derogatory the further enquiry is whether the sanction imposed by the employer, namely dismissal, was appropriate.

Parties

[2] The applicant is Rustenburg Platinum Mine, which conducts mining operations at Thembelani Mine, Rustenburg. The first respondent is the South African Equity Workers Association (SAEWA or respondent), a registered trade union, which is acting on behalf of Mr Meyer Bester who had previously been employed by the applicant at the Mine as a senior training officer. The second respondent is the CCMA, a statutory body established in terms of section 112 of the Labour Relations Act.¹ The third respondent is Mr Kobus Erasmus N.O. (the commissioner), a commissioner who had conducted the arbitration proceedings relating to an alleged unfair dismissal dispute between the applicant and Mr Bester. No relief was sought against the second and third respondents and they have not participated in these and the previous proceedings.

Background

[3] On 28 May 2013, the applicant dismissed Mr Bester on grounds of insubordination and the making of racial remarks. The essence of the complaint was that Mr Bester had referred to a co-worker as a “swart man” and in so doing breached a workplace rule that prohibits abusive and derogatory language. Mr Bester had been employed by the applicant since 1 March 2008.

[4] The facts giving rise to Mr Bester’s dismissal are detailed below. The applicant provided specified parking bays to certain employees. The applicant’s chief safety officer, Mr Ben Sedumedi, allocated a parking bay to Mr Bester. At some stage, Mr Sedumedi allocated the adjacent parking bay to Mr Solly Tlhomelang, an employee of a sub-contractor at the Mine. During the beginning of April 2013, Mr Bester found a large 4x4 vehicle similar in size to his own vehicle, parked in the adjacent parking bay. Though parking in a limited space was possible, it was difficult to reverse and he was concerned that the vehicles may be damaged in the process. Mr Bester decided to take the matter up with Mr Sedumedi in an effort to arrange for

¹ 66 of 1995.

the other vehicle to be parked elsewhere. Mr Bester made repeated efforts to raise the issue with Mr Sedumedi, which included phoning and emailing him, but without success.

[5] On 24 April 2013, an incident occurred, the details of which are not common cause. According to the version presented by the applicant, Mr Sedumedi held a safety meeting at which Mr Pieter Van der Westhuizen, Ms Salome Moeng, Mr Tshepo Segona, Mr Phumzile Gobinamba and Mr Tlhomelang, were present. The applicant's version is that Mr Bester stormed into the meeting while it was in progress, pointed his finger at Mr Sedumedi and said, in a loud and aggressive manner, that Mr Sedumedi must "verwyder daardie swart man se voertuig",² otherwise he, Mr Bester, would take the matter up with management.

[6] According to Mr Bester there was no meeting in progress, rather Mr Sedumedi and Mr Van der Westhuizen were casually discussing jogging routes. When they had finished chatting, Mr Bester raised his parking difficulty with Mr Sedumedi but he responded by saying that he would not speak to a C5 grade employee. According to Mr Bester, Mr Sedumedi said "jy wil nie langs 'n swart man stop nie . . . dit is jou probleem".³ Mr Bester said he told Mr Sedumedi not to turn the matter into a racial issue and that he intended taking the matter up with senior management.

[7] In a statement dated 2 May 2013, Mr Bester set out his version of what had transpired:

"Mr Sedumedi then started going on and on about me who does not want to park next to a 'swart man'. I then said to Mr Sedumedi he must not try and make this issue of the parking area a racial issue.

When I realised what Mr Sedumedi was trying to achieve and in which direction he wanted to force this issue I just turned around and left.

² Translated to English as "remove that black man's vehicle."

³ Translated to English as "you do not want to park next to a black man . . . this is your problem".

The next thing I have heard is that I have been charged and that I will be suspended.

I have not shouted at anybody in Mr Ben Sedumedi office neither had I pointed fingers at anyone or in any direction. I did not make any comments using the words ‘swart man’.”

[8] On 25 April 2013, the applicant suspended Mr Bester pending the outcome of a formal disciplinary enquiry. The applicant subsequently charged Mr Bester with two acts of misconduct. The first charge was for insubordination for disrupting a safety meeting. The second charge was for making racial remarks by referring to a fellow employee as a “swart man”.

[9] On 21 May 2013, Mr De Jager, the chairperson of the disciplinary enquiry, found Mr Bester guilty on both charges. Mr De Jager recommended the sanction of dismissal and, on 28 May 2013, the applicant dismissed Mr Bester.

Litigation history

CCMA

[10] On 3 June 2013, Mr Bester referred an alleged unfair dismissal dispute to the CCMA. The dispute was not resolved through conciliation and was referred to arbitration. The commissioner handed down his award on 19 December 2013. The commissioner held that the dismissal of Mr Bester was both substantively and procedurally unfair.⁴

[11] The commissioner’s reasoning on the substantive unfairness of the dismissal was:

“Both the applicant as well as the person referred to (Mr Solly Tlhomelang) further indicated that they did not know one another prior to the incident on the 24th of April 2013. It would therefore in my opinion have been highly probable that the

⁴ SAEWA *obo* Bester v Rustenburg Platinum Mine, unreported arbitration award of the CCMA, Case No NWRB1692-13 (19 December 2013) (Arbitration Award) at para 32.

applicant might have used the term ‘swart man’ to identify the person who parked next to him as he by that time did not know his name. I find it less probable that Mr Sedumedi (who was in my opinion an extremely poor and very evasive witness) would without being triggered by something that was said to him, accuse the applicant of not wanting to stop next to a ‘swart man’. No other derogatory words or phrases were used by the applicant (according to the witnesses). I really do not see how such a phrase (referring to a physical attribute in order to identify a certain person) could be classified as a racial remark. It would be similar to the situation where someone comes into the CCMA offices not knowing my name and then asking for me by stating the ‘wit man’ who for instance parked next to the entrance gate. I will not take any offence to this even if the person who utters these words is talking in a loud voice in front of all CCMA users.

The chairperson’s reasoning for finding the applicant guilty of both insubordination and racial remarks is with respect farfetched and nonsensical. It was clear that he was under immense pressure when dealing with the allegations of racial remarks and in the circumstances failed to keep a cool head and properly dissect what exactly was done and said.”⁵

[12] The commissioner ordered that the applicant reinstate Mr Bester with retrospective effect to his position as a senior training officer and awarded him back pay in the amount of R191 834.21.⁶

Labour Court

[13] Aggrieved by the arbitration award, the applicant launched an application in the Labour Court to review and set aside the award. The Labour Court held that the evidence of Mr Van der Westhuizen and Mr Sedumedi, with regards to the meeting that was underway when Mr Bester stormed through the door, was consistent with the evidence of the other employees present at the meeting and there was no cogent reason for the commissioner to have rejected this evidence.⁷ The Labour Court further found that the commissioner’s finding that Mr Bester uttered the words “swart man”

⁵ Id at paras 26.6-7.

⁶ Id at paras 33-4.

⁷ *Rustenburg Platinum Mine v SAEWA obo Bester* [2016] ZALCJHB 75 (Labour Court judgment) at para 19.

was supported by the evidence and, despite Mr Bester's denial, clearly correct.⁸ The Labour Court was of the view that "the commissioner's failure properly to resolve the material dispute of fact before him resulted in factual findings that are entirely arbitrary".⁹

[14] The Labour Court found that there was no conceivable reason why race might justifiably have served as an identifier:

"To the extent that context is relevant, it should be recalled that Mr Bester stormed into a meeting that was in progress, that he was aggressive and belligerent, that he pointed his finger at Mr Sedumedi and in a loud voice demanded that Mr Sedumedi remove the 'swart man's' car from next to his. Those present in the meeting were offended by Mr Bester's conduct. Mr Bester was not, as the commissioner suggested, benignly 'referring to a physical attribute in order to identify a certain person'. Mr Bester's reference to Mr Tlhomelang, as a 'swart man' was derogatory and racist."¹⁰

[15] In considering whether dismissal was an appropriate sanction, the Labour Court had regard to a memorandum circulated by the applicant to all employees on 16 April 2013, which reads:

"It has come to the management's attention that some employees use abusive language with fellow employees. It was also raised with management that some senior management are swearing and shouting at their subordinates.

This practice is not in accordance with our values and does not demonstrate care and respect towards each other and will therefore not be tolerated at Thembelani Mine.

Disciplinary action will be taken against anyone who uses abusive language towards another person on Thembelani Mine. Let us refrain from using derogatory language against each other and strive to work together harmoniously."¹¹

⁸ Id.

⁹ Id at para 20.

¹⁰ Id at para 23.

¹¹ Id at para 24.

[16] The terms of the memorandum made it clear that abusive and derogatory language would not be tolerated at the workplace. The Labour Court also noted that the undisputed evidence before the commissioner was that the applicant adopted a zero tolerance approach to the use of derogatory and abusive language.

[17] The Labour Court held that Mr Bester had committed an act of serious misconduct that warranted his dismissal and concluded that, on that ground alone, the award stood to be reviewed and set aside:

“In my view, on a proper assessment of the evidence that served before the commissioner, he reached a decision that a reasonable decision-maker would not have reached. Even if the commissioner’s flawed reasoning were to be disregarded, the result cannot be sustained on the basis that it nonetheless represents a reasonable result.”¹²

Labour Appeal Court

[18] The Labour Appeal Court stated that the test to determine whether the use of the words “swart man” by Mr Bester was derogatory or abusive, and in contravention of the applicant’s disciplinary code, was an objective one.¹³ It reasoned that, in order to determine whether the words “swart man” are derogatory, the use of the words must be looked at in the context in which they were uttered.¹⁴

¹² Id at para 26. The test for review was stated in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 110:

“To summarise, *Carephone* held that section 145 of the Labour Relations Act was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: [i]s the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

It is noted that the test the Labour Court applied was whether the decision reached was one which a reasonable decision-maker *would not*, as opposed to *could not*, have reached.

¹³ *SA Equity Workers Association o.b.o Bester v Rustenburg Platinum Mine* [2017] ZALAC 23; (2017) 38 ILJ 1779 (LAC) (Labour Appeal Court judgment) at para 16.

¹⁴ Id at para 19.

[19] The Labour Appeal Court was of the view that the real issue was whether Mr Bester's use of the descriptor "swart man" to identify the owner of the vehicle parked in the parking bay next to him was derogatory:

"The objective facts are that Mr Bester was angry with Mr Sedumedi for refusing to assist him to resolve his parking problem. This caused him to act precipitously by storming into Mr Sedumedi's office and demanding in an 'aggressive and belligerent' manner that Mr Sedumedi must instruct the 'swart man' to remove his car from next to his. Mr Bester did not know Mr Tlhomelang, the owner of the 4x4 vehicle which parked in the bay next to him, and neither did Mr Tlhomelang know him. An important contextual fact is that Mr Bester is white and to his knowledge the person parked next to him was black. Whilst Mr Bester's status as a white person would bring him within the scope of potential condemnation, that alone is insufficient for such a finding."¹⁵

[20] The Labour Appeal Court held that the Labour Court erroneously adopted a subjective test in determining the effect of the words "swart man" on the persons present at the meeting. The Labour Appeal Court further held that "the question that the Labour Court ought to have asked was whether, in the opinion of a reasonable person possessed of all facts, Mr Bester's use of the word[s] 'swart man' in this context was derogatory and racist".¹⁶ It found that "[h]ad Mr Sedumedi and Ms Moeng known the true state of Mr Bester's knowledge . . . they would not have viewed the expression 'swart man' in context as offensive".¹⁷

[21] The Labour Appeal Court held that Mr Bester did not know Mr Tlhomelang and therefore had no reason to denigrate him:

"While it is clear on the evidence that Mr Bester had no reason to denigrate either Mr Sedumedi or Mr Tlhomelang, he did have a need to identify Mr Tlhomelang – a

¹⁵ Id at para 21.

¹⁶ Id at para 25.

¹⁷ Id.

person whose name, rank and division were unknown to him – and he used race as a descriptor in doing so. He may have been unwise to opt for this descriptor but his lack of wisdom is not the point in issue”.¹⁸

[22] The Labour Appeal Court concluded that even though Mr Bester was charged with making racial remarks by referring to a fellow employee as a “swart man” the context disclosed that the perception that the words were derogatory and racist was certainly not the only plausible inference that could be drawn from the proven facts and the probabilities.¹⁹ The inference that Mr Bester used the words “swart man” in the context, to describe Mr Tlhomelang, whose name he did not know, was equally plausible.²⁰

[23] The Labour Appeal Court held that the Labour Court had erred in reviewing and setting aside the award of the commissioner. It confirmed the conclusion of the commissioner that the dismissal of Mr Bester was both substantively and procedurally unfair.²¹ In addition, the Labour Appeal Court held that a racist remark made in the workplace is a serious offence which warrants dismissal.²²

In this Court

Condonation

[24] The applicant filed three applications for condonation: for the late filing of its application for leave to appeal, the late filing of the record and the late filing of its written submissions.

[25] The application for leave to appeal was filed three days late. The reason for the delay was that on 1 November 2016 the applicant was sold as a going concern by

¹⁸ Id at para 27.

¹⁹ Id.

²⁰ Id.

²¹ Id at para 32.

²² Id at para 18.

Anglo American Platinum Limited (Anglo) to Sibanye Rustenburg Platinum Mines Proprietary Limited (Sibanye). This sale created confusion as to who the correct litigant was as Mr Bester was not identified as a transferring employee nor was he working in the operations that were transferred. The record was filed three days late. The reason provided for the delay was an “unfortunate and regrettable diary error” on the part of the applicant’s attorney. No prejudice was caused by the delay and a reasonable explanation was offered for it. The written submissions were filed two days late and no prejudice was caused by the delay. Condonation is granted for the late filing of the application for leave to appeal, the record and the written submissions.

Substitution application

[26] Sibanye has applied to substitute itself as applicant. The applicant supports the substitution application. According to the applicant, the substitution application is necessitated by virtue of the operation of section 197 of the Labour Relations Act in that:

- (a) Anglo has become incompetent to continue as the applicant in the main application;
- (b) By operation of law Sibanye, which is a competent juristic person, is the applicant in the main application;
- (c) Sibanye has effectively been substituted as the employer by the operation of section 197 of the Labour Relations Act; and
- (d) Sibanye has a direct and substantial interest in the outcome of the main application.

[27] Section 197(2) of the Labour Relations Act states:

“If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) —

- (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
- (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- (d) the transfer does not interrupt an employee's continuity of employment, and an *employee's contract of employment continues with the new employer as if with the old employer*". (Emphasis added.)

[28] The automatic consequences which flow from section 197 were lucidly explained in this Court's judgment in *NEHAWU*:

"Subsection (2) tells us the consequences that flow from a transfer of a business as a going concern as contemplated in subsection (1). It refers back to subsection (1) which envisages two categories of transfer: one from a solvent employer and the other, broadly speaking, from an insolvent employer. In both instances, the transfer of the business as a going concern results in the transfer of the workers to the new business. . . . The section is premised on the continuity of employment of the workers which is not interrupted by the transfer contemplated in subsection (1). 'That employment', subsection 9(4) says, 'continues with the new employer as if with the old employer'.

Reading the section as a whole and, in particular, having regard to the fact that all the rights and obligations flowing from employment with the transferring employer are transferred to the new employer in the case of a solvent business; that in the case of an insolvent business the contracts of employment are transferred; that the transfer of business does not interrupt the workers' continuity of employment; the inference that

the transferee employer takes over the workers and that the transferee employer is, by operation of law, substituted in the place of the transferor employer is irresistible. It follows by necessary implication.

If there is any doubt on this score, the recent amendment to section 197 puts matters beyond doubt by providing that ‘the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment’. Indeed its declared purpose is ‘. . . the clarification of the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern’.²³

[29] In *Success Panel Beaters & Service Centre CC* the Labour Appeal Court held that the enforcement of an Industrial Court order against the new employer was permissible, as the order was made and transfer of business affected after the commencement of the Act.²⁴ The granting or dismissal of the main application would therefore be enforceable against Anglo and Sibanye.

[30] In the circumstances, Sibanye has made out a case for substitution and this relief should be granted.

Jurisdiction

[31] The applicant relies on section 167(3)(b)(i)²⁵ to argue that this Court has jurisdiction to hear this matter as it directly involves and implicates a number of constitutional rights, namely, the right to fair labour practices,²⁶ dignity²⁷ and equality.²⁸

²³ *National Education & Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEWAHU*) at paras 63-5.

²⁴ *Success Panel Beaters & Services Centre CC v National Union of Metal Workers of South Africa* [2000] ZALAC 2; [2000] 6 BLLR 635 (LAC) at 638.

²⁵ Section 167(3)(b)(i) of the Constitution provides that: “The Constitutional Court may decide constitutional matters.”

²⁶ Section 23(1) of the Constitution provides that: “Everyone has the right to fair labour practices.”

²⁷ Section 10 of the Constitution provides that: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

²⁸ Section 9(1) of the Constitution provides that: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

[32] To determine whether a matter is a “constitutional matter” requires a broad interpretation.²⁹ This matter relates to the assessment of evidence in labour disputes and the test to determine whether, in a given context, a statement is racist. This case – and the issues it raises – clearly implicates the rights to dignity and equality, and how racism in the workplace might affect the right to fair labour practices. Given our country’s history and the remaining legacy of apartheid that our Constitution attempts to redress, a question involving racism and, more pointedly, what constitutes racism, is undoubtedly a constitutional issue and one that goes to the heart of our democracy.³⁰

Leave to Appeal

[33] The applicant argues that it is in the interests of justice to grant leave to appeal on the grounds that the Labour Appeal Court incorrectly applied the law and set a standard of proof that was unfair as it was higher than the standard at common law. A mere misapplication of the law would not ordinarily entitle this Court to interfere with a decision of the Labour Appeal Court. The Labour Appeal Court is a specialist court which functions in a specialised area of law.³¹ In *NEHAWU*, this Court recognised that judges of the Labour Court and Labour Appeal Court have the skill and experience to resolve labour disputes speedily and that this Court will only hear appeals from the Labour Appeal Court if the appeal raises “important issues of principle”.³²

²⁹ *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14. See also Du Plessis et al “Jurisdiction” in *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 19.

³⁰ See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (*SARS*) where this Court held, with reference to racism in the workplace, at para 29 that:

“The central feature of this case is the mother of all historical and stubbornly persistent problems in our country: undisguised racism. This, coupled with this Court’s constitutional duty to help entrench the values of equality, non-racialism and human dignity, demands that this application be appealable in the interests of justice. And the issue central to this dispute requires the attention of the highest court in the land, at such a time as this.”

³¹ *NEHAWU* above n 23 at para 30.

³² *Id* at para 31.

[34] The Labour Appeal Court stressed that the words must be looked at in the context in which they were uttered. In the Labour Appeal Court's view, "swart man" is *prima facie* a neutral phrase that requires context in order to acquire a pejorative – or laudatory – meaning.³³ As a consequence, the matter turned on whether the context in this instance transformed a neutral term into a pejorative one.

[35] The Labour Appeal Court recognised the potential impact of using racial descriptors as identifiers, particularly given the lingering legacy of apartheid but held that the "othering" implicit in the use of racial descriptors did not elevate them to pejorative expressions, stating:

"It is a valid concern that the use of race descriptors without more to describe people of different races provides no information beyond permitting the audience to lump people into social groupings akin to racial stereotyping, the perpetuation of which must be discouraged. However, in view of South Africa's legacy of racial segregation, it would be remiss to overlook the tendency to identify people of different race groups by using race descriptors, whether inadvertently or not. By the same token, it must be recognised that racial descriptors can have the effect of perpetuating rather than healing divisions; 'othering' in the parlance. But this in itself cannot be regarded as racist. If it were considered to be so, then organisations seeking to perpetuate black consciousness and identity would be subject to outright condemnation – and our society has yet to adopt so absolute a stance."³⁴

[36] The issue of when an apparently neutral race descriptor may be regarded as racially abusive or insulting is an important one that has not yet been considered by this Court. This issue is one which encompasses interests beyond those of the parties

³³ The Labour Appeal Court judgment above n 13 noted the impact of a loss of neutrality as leading to either a pejorative or laudatory meaning at para 19—

"the term 'black man', if used by a black person to refer to another black person, would not lose its neutrality: for example, 'the unidentified person who called yesterday was a black man'. However, when the word loses the neutrality, it can be pejorative. But it can equally be laudatory: for example, a bumper sticker of the by no means distant past proclaimed: 'I thank God I am a black man, Amen'. Context is, therefore, decisive to the neutrality or otherwise of the term 'black man'."

³⁴ *Id* at para 29.

involved and the approach of the courts in such matters is of general public importance.³⁵

[37] In addition, this Court is obliged, as a custodian of the Constitution, to ensure that the values of non-racialism, human dignity and equality are upheld and in doing so it has a responsibility to deliberately work towards the eradication of racism.³⁶ Our Constitution is the embodiment of the values, both moral and ethical, which bind us as a nation and which as a nation we strive to achieve.³⁷ As this Court aptly held “[t]he Constitution is the conscience of the nation”.³⁸ Having regard to the values of non-racialism, human dignity and equality and that there are reasonable prospects of success, it is in the interests of justice for this Court to grant leave to appeal.³⁹ In the circumstances, leave to appeal is granted.

Merits

The context in which the words were uttered

[38] It was accepted by both parties (the applicant and first respondent) that the use of the words “swart man”, per se, is not racist and that the context within which the words were used would dictate whether they were used in a racist or derogatory manner. It was also accepted that the test to determine whether the use of the words is racist is objective – whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory. This is in accordance with the test for whether a statement is defamatory, as enunciated in *Sindani*:

“The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the

³⁵ SARS above n 30 at paras 31-2.

³⁶ Id at paras 12, 14 and 29. See also *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* [2002] 6 BLLR 493 (LAC) at para 35.

³⁷ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 262.

³⁸ SARS above n 30 at para 12.

³⁹ Id at para 33.

article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply.”⁴⁰

[39] It is thus necessary to have regard to the evidence in this matter. In his evidence in chief, Mr Bester testified:

“I also know that in this era that we are working now and at this time, it would be devastating for your career to go into an office, start shouting and pointing fingers and shouting the word swart man in front of a hundred people. Even in front of one person. You just do not do it and therefore I say Mr Sedumedi is sucking this out of his thumb . . . that this incident has ever [taken] place.”

[40] Relevant portions of Mr Bester’s evidence under cross-examination read:

“Mr Yeates: You said to him jy moet daardie swart man se kar langs my wegvat.

Mr Bester: No I did not.

. . .

Mr Yeates: Using derogatory language like that would be detrimental to a person in your position.

Mr Bester: Absolutely.

Mr Yeates: And a person that would utter things like that should be dismissed.

Mr Bester: Yes.”

It is clear from this extract that it was Mr Bester’s evidence that he did not use the term “swart man”. He went on to acknowledge that using such language could be “detrimental to a person in his position” and could result in his dismissal.

[41] Four main witnesses, namely, Mr Van der Westhuizen, Mr Sedumedi, Ms Moeng and Mr Tlhomelang, testified on behalf of the applicant at the arbitration

⁴⁰ *Sindani v Van der Merwe* [2001] ZASCA 130; [2002] 1 All SA 311 (A) at para 11.

hearing. They said they were present at the meeting when Mr Bester made the statement attributed to him. Mr Tlhomelang, while not strictly part of the meeting because he had arrived late, was standing just outside the doorway. Mr Sedumedi, Mr Van der Westhuizen and Ms Moeng further testified that they had considered the remarks to be inappropriate.

[42] The commissioner found that Mr Bester did utter the words “swart man” and that he had pointed his finger at Mr Sedumedi whilst discussing the parking issue.⁴¹ He went on to hold that the dismissal was unfair on the basis that Mr Bester did not use the term in a derogative or racist manner but did so to identify the person who had parked next to him as he did not, at that time, know the person’s name.⁴²

[43] The defence, that the term “swart man” was not used in a derogatory or racist manner, was not raised or relied upon by Mr Bester. Mr Bester denied having used the term “swart man”. This defence, on which the commissioner hinged his entire ratio for his finding, was not based on any evidence before him.

[44] The evidence before the commissioner, on which both the applicant and respondent were agreed, was that the use of such terminology within Anglo’s workplace constituted derogatory language deserving of dismissal. It is against this evidentiary background that the commissioner was required to make his ruling.

[45] The Labour Appeal Court correctly stated the test to be applied:

“The test that applies to the determination of whether the use of the words ‘swart man’ by Mr Bester was derogatory or abusive, and in contravention of Rustenburg Platinum Mine’s disciplinary code, is an objective one. The employer, in this case, Rustenburg Platinum Mine, bore the evidentiary burden in the arbitration proceedings to prove that the language used by Mr Bester was objectively derogatory. The test is not based on how the employer understood the words nor on the subjective

⁴¹ Arbitration Award above n 4 at paras 26.5-6.

⁴² Id at paras 26.6 and 28.

feelings of the person/s to whom the remark was made, but rather whether a reasonable, objective and informed person would on the *correct facts* perceive it to be so. Once that is established on the evidence, the burden of proof shifts to the employee to prove the existence of a ground of justification and that the derogatory or racist remark was not made with the intent to demean.”⁴³ (Emphasis added.)

[46] The Labour Appeal Court unfortunately misdirected itself by finding in favour of Mr Bester, on the basis of an unarticulated defence not supported by the evidence. It was never Mr Bester’s defence that he used the words “swart man” as a descriptor or that he did not mean to “demean” any person. He denied using the words and conceded that if he had done so, it could be a dismissible offence. There was no evidence in the record justifying a finding for Mr Bester on the basis that the Labour Appeal Court did.

[47] In applying the test, namely, whether a reasonable, objective and informed person would, on the *correct facts* perceive it to be racist or derogatory, the Labour Appeal Court made a fundamental error, like the commissioner, as it failed to identify the correct facts and relied on evidence that had not been placed before it. The Labour Appeal Court erred by relying on a defence which was not raised by Mr Bester.

[48] The Labour Appeal Court’s starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary. In this sense, the

⁴³ Labour Appeal Court judgment above n 13 at para 16.

Labour Appeal Court's decision sanitised the context in which the phrase "swart man" was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in a post-apartheid South Africa.

[49] The Labour Appeal Court, by sanitising the context in which the words were used, incorrectly applied the test to determine whether the words used are derogatory, in the context of this matter, to the facts in this matter. The Labour Appeal Court, as well as the commissioner, failed to approach the dispute in an impartial manner taking into account the "totality of circumstances".⁴⁴ Not only was "swart man" as used here racially loaded, and hence derogatorily subordinating, but it was unreasonable to conclude otherwise. It was unreasonable for the commissioner, within this context, to find that using "swart man" was racially innocuous.

[50] Furthermore, in scrutinising the version of the witnesses as to whether they viewed the statement made by Mr Bester as being racist, the Labour Appeal Court applied a test that was too strict. The test was not whether they were correct in the context of the statement to have understood it as being racist; the test was whether, objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning.⁴⁵ Only Mr Bester could have given evidence that he uttered the words with no racist intent. He failed to do so. The commissioner made a similar error in coming to the conclusion that Mr Bester used the words "swart man" to identify and not to denigrate a person whose vehicle was parked next to his. The commissioner failed to have regard to the evidence before him and failed in particular to appreciate the context in which the words concerned were uttered. During the arbitration proceedings both parties were *ad idem* (of one mind) in this respect. They agreed that using such language at the applicant's workplace would be detrimental and could warrant dismissal.

⁴⁴ *Sidumo* above n 12 at para 78.

⁴⁵ *Mohammed v Jassiem* [1995] ZASCA 115; 1996 (1) SA 673 (SCA) at 711.

[51] The commissioner's award fell to be reviewed and set aside as he reached a conclusion that a reasonable decision-maker could not have reached. This is the test for review that this Court has established in *Sidumo*.⁴⁶ The Labour Court was therefore correct in reviewing and setting it aside.

[52] The past may have institutionalised and legitimised racism⁴⁷ but our Constitution constitutes a "radical and decisive break from that part of the past which is unacceptable".⁴⁸ Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by "strife, conflict, untold suffering and injustice".⁴⁹ Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others.⁵⁰ These prejudices do not only manifest themselves with regards to race but it can also be seen with reference to gender discrimination.⁵¹ In both instances, such prejudices are evident in the workplace where power relations have the ability "to create a work environment where the right to dignity of employees is impaired".⁵²

[53] Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society. The late former President of the Republic of South Africa, Mr Nelson Mandela, said that "de-racialising South African society is the new moral and

⁴⁶ *Sidumo* above n 12.

⁴⁷ *Makwanyane* above n 37 at para 262.

⁴⁸ *Shabalala v Attorney-General, Transvaal* [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26. See also Labour Court judgment above n 7 at para 21.

⁴⁹ *Makwanyane* above n 37 at para 262.

⁵⁰ *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 116.

⁵¹ *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 44.

⁵² Labour Court judgment above n 7 at para 22. See also *Campbell Scientific Africa (Pty) Ltd v Simmers* [2015] ZALAC 51; (2016) 37 ILJ 116 (LAC) at para 20.

political challenge that our young democracy should grapple with decisively”.⁵³ He went on to say that “we need to marshal our resources in a visible campaign to combat racism – in the workplace, in our schools, in residential areas and in all aspects of our public life”.⁵⁴ This Court has echoed such sentiments when it recognised that “South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations”.⁵⁵

Sanction

[54] Subsequent to the hearing of this matter, this Court invited the parties to file written submissions on whether, should it conclude that the finding of the internal disciplinary committee should be reinstated, the sanction imposed was too harsh and what alternative sanction could be considered. Both the applicant and the respondent filed additional submissions in this regard.

[55] In *Sidumo*, this Court listed a number of factors that a commissioner must consider when deciding on the fairness of a dismissal. The Court emphasised that the factors do not represent a closed list and that the weight to be attached to each factor would differ from case to case. The factors are: (i) the importance of the rule that was breached; (ii) the reason the employer imposed the sanction of dismissal; (iii) the basis of the employee’s challenge to the dismissal; (iv) the harm caused by the employee’s conduct; (v) whether additional training and instruction may result in the employee not repeating the misconduct; (vi) the effect of dismissal on the employee; and (vii) the long-service record of the employee.⁵⁶

⁵³ Address by President Nelson Mandela to National Conference of the Institute for a Democratic South Africa (Idasa) Cape Town (18 August 1995), available at http://www.mandela.gov.za/mandela_speeches/1995/950818_idasa.htm.

⁵⁴ *Id.*

⁵⁵ *SARS* above n 30 at para 8.

⁵⁶ *Sidumo* above n 12 at para 78.

[56] We are dealing here with racism in the workplace. Our courts have made it clear, and rightly so, that racism in the workplace cannot be tolerated.⁵⁷ Employees may not act in a manner designed to destroy harmonious working relations with their employer or colleagues.⁵⁸ They owe a duty of good faith to their employers which duty includes the obligation to further their employer's business interests.⁵⁹ In making racist comments in the public domain, the actions of the employee may foreseeably negatively affect the business of his employer or the working relationship between him and his employer or colleagues. The chairperson of the disciplinary hearing was alive to this. This is evident from his statement that "[d]ismissal will be imposed for a first offence if the circumstances so warrant it and the employee's behaviour destroy[s] the employment relationship".

[57] As a country in transition, South Africa faces the on-going challenge of how to generate and maintain processes that restore dignity, create political and economic equality, and promote a culture of human rights. The mining industry is a racially charged environment. The applicant, as a responsible employer, is tasked with creating an organisation that advocates and practices social justice. To this end, a memorandum warning against abusive and derogatory language was circulated to all employees at the applicant's mine a few days prior to the incident. It was this memorandum which gave rise to the charges levelled against Mr Bester. The applicant had introduced a behavioural policy in terms of which the offence of racial abuse could attract a sanction of dismissal, even for a first offence.

[58] In contending that dismissal was too severe a sanction in the circumstances of this matter, the respondent, in its additional submissions, argued that Mr Bester had

⁵⁷ In *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 1112 (LAC); [1998] 7 BLLR 666 (LAC) at para 12, Kroon JA stated that the use of racist remarks or conduct in the workplace should be considered in light of the highly charged racial or political atmosphere inherent in certain workplaces. Within such workplaces, the use of racist remarks can have the effect of destroying working relationships and being disruptive of the employer's business.

⁵⁸ *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 (IC) at 544B-C.

⁵⁹ *Council for Scientific and Industrial Research v Fijen* [1995] ZASCA 143; 1996 (2) SA 1 (SCA) at 9H-10D. See also *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C).

given the applicant five years of loyal service and during that time he had trained numerous miners on how to keep themselves and their colleagues safe and accident-free while working underground. It was also contended that Mr Bester was capable of being rehabilitated and that the incident sparking his dismissal was an extraordinary occurrence unlikely to occur again.

[59] Mr Bester has demonstrated an absolute lack of remorse for his actions and persisted with a defence of a complete denial. He did not acknowledge that his conduct was racist and inappropriate. He made no attempt to apologise. This Court has previously stated that the fact that an employee who is guilty of racist conduct apologised, admitted wrongdoing and demonstrated a willingness “to take part in whatever programme could be designed to help him embrace the values of our Constitution, especially equality, non-racialism and human dignity” may be a relevant factor in determining whether dismissal was an appropriate sanction.⁶⁰ As mentioned, Mr Bester failed to demonstrate a willingness to change. Instead, he resorted to a vicious attack on the witnesses who testified on behalf of the applicant during the disciplinary hearing. The chairperson of the hearing criticised Mr Bester’s conduct in the strongest terms:

“As chairperson I was astounded by the viciousness of the attacks by Mr Bester during the hearing. The behaviour carried out with intense violence and an apparent desire to inflict aggressive language, cruel and malicious act against a fellow employee and employees in a threatening manner during the hearing was irresponsible.”

The chairperson further noted that Mr Bester had, during the hearing, used foul language and behaved in an insolent, disrespectful, rude, offensive and disruptive manner. He explained:

⁶⁰ SARS above n 30 at para 45.

“Mr Bester challenged the authority of the hearing, being verbally rude and insulting and disrupting the ER Officer Mr Bogatsu Ramoenyane by verbally swearing (inappropriately) at him to keep quiet.”

[60] At the disciplinary hearing, and after having been found guilty, Mr Bester was invited to make submissions in mitigation. He used this opportunity to justify his misbehaviour during the hearing:

“It is human to react in the same manner as what I have done during the hearing as I have realised it is futile to argue whatever is being said as I am being framed. Seven witnesses against me with no witnesses? What was/is my chances? Therefore I have had all the same emotions as the normal man in the same circumstances would have had. Devastation, flabbergasted, revolt, being cross.”

Even at this late stage, there was no recognition that he had behaved badly during the hearing and more so, that he had once again insulted his colleagues. An acknowledgement of wrongdoing by Mr Bester would have gone a long way in evidencing the possibility of rehabilitation including an assurance to the applicant that similar misconduct would not be repeated in the future.⁶¹

[61] The fact that Mr Bester was dishonest in denying making the statement weighs heavily against him when considering sanction. In *Sidumo*, this Court stated that “[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal”.⁶² These sentiments were endorsed in *Timothy*, where the Court said:

“[G]iven the fact that the appellant had an unblemished record and that, until this point, there was no indication in his conduct of any dishonesty or any impropriety prior to the events that gave rise to this dispute, a form of progressive sanction would have been more appropriate. I have no doubt that these arguments would have carried far greater weight had there been a scintilla of recognition by the appellant of

⁶¹ *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* (2008) 29 ILJ 1180 (LC) at para 45.

⁶² *Sidumo* above n 12 at para 117.

his wrongdoing. . . . Throughout the disciplinary hearing . . . [the] appellant continued to take the view that the allegations brought against him were no more than lies. [The] [a]ppellant showed no remorse, no recognition of misconduct, save for a blatant and clearly dishonest denial.”⁶³

[62] Mr Bester has not learnt to conduct himself in a manner that respects the dignity of his black co-workers. By his actions he has shown that he has not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme.

[63] This Court is satisfied that dismissal was an appropriate sanction under the circumstances.

Costs

[64] The labour courts have established a principle in terms of which the general rule that costs follow the event does not apply in situations where “there is a long-standing and continuing labour and employment relationship [between the parties as] such orders might not be in the best interests of that relationship”.⁶⁴ In a similar vein, this Court will not readily make a costs order where there was a bona fide (good faith) dispute between parties who have a continuing bargaining relationship.⁶⁵ In this case, the dispute raises important issues not yet pronounced on by this Court and the impact of this decision will be felt beyond the parties to this litigation. In the circumstances, I make no order as to costs.

⁶³ *Timothy v Nampark Corrugated Containers (Pty) Ltd* [2010] ZALAC 29; (2010) 31 ILJ 1844 (LAC) at 1849E-H.

⁶⁴ *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 51.

⁶⁵ *National Union of Metalworkers of SA v Intervolve (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) (*Intervolve*) at para 73. Bona fide means “in good faith” and what constitutes a dispute was thoroughly canvassed in *Intervolve* at paras 86-8, but, as provided for in *Durban City Council v Minister of Labour* 1953 (3) SA 708 (N) at 712A-B, essentially a dispute—

“must, as a minimum so to speak, postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions.”

Order

[65] The following order is made:

1. Rustenburg Platinum Mine is substituted by Sibanye Rustenburg Platinum Mines (Pty) Ltd as the applicant.
2. The appeal is upheld.
3. The order made by the Labour Appeal Court is set aside and replaced with:
“The appeal is dismissed with costs.”
4. There is no order as to costs.

For the Applicant:

F Boda SC and Z Ngwenya instructed
by Cliffe Dekker Hofmeyr Inc.

For the First Respondent:

A P Landman instructed by Ronelda
Van Staden Attorneys.



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 127/17

In the matter between:

RUSTENBURG PLATINUM MINE

Applicant

and

SAEWA obo MEYER BESTER

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

KOBUS ERASMUS N.O.

Third Respondent

Neutral citation: *Rustenburg Platinum Mine v SAEWA obo Bester and Others*
[2018] ZACC 13

Coram: Zondo ACJ, Cameron J, Froneman J, Jafta J, Kollapen AJ,
Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgment: Theron J (unanimous)

Heard on: 9 November 2017

Decided on: 17 May 2018

Summary: Referring to a fellow employee as a “swart man” — test for whether words are derogatory and racist is objective — starting point must take into account the history of apartheid

Lack of remorse and no acknowledgment of wrongdoing — no possibility of rehabilitation — dismissal is an appropriate sanction

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court, Johannesburg):

1. Rustenburg Platinum Mine is substituted by Sibanye Rustenburg Platinum Mines (Pty) Ltd as the applicant.
2. The appeal is upheld.
3. The order made by the Labour Appeal Court is set aside and replaced with:

“The appeal is dismissed with costs.”
4. There is no order as to costs.

JUDGMENT

THERON J (Zondo ACJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ concurring):

Introduction

[1] This Court must determine whether referring to a fellow employee as a “swart man” (black man), within the context of this case, was racist and derogatory and whether it was unreasonable for a commissioner, appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA), to conduct arbitration proceedings and find that the use of the term was racially innocuous. If it is found to be racist and derogatory the further enquiry is whether the sanction imposed by the employer, namely dismissal, was appropriate.

Parties

[2] The applicant is Rustenburg Platinum Mine, which conducts mining operations at Thembelani Mine, Rustenburg. The first respondent is the South African Equity Workers Association (SAEWA or respondent), a registered trade union, which is acting on behalf of Mr Meyer Bester who had previously been employed by the applicant at the Mine as a senior training officer. The second respondent is the CCMA, a statutory body established in terms of section 112 of the Labour Relations Act.¹ The third respondent is Mr Kobus Erasmus N.O. (the commissioner), a commissioner who had conducted the arbitration proceedings relating to an alleged unfair dismissal dispute between the applicant and Mr Bester. No relief was sought against the second and third respondents and they have not participated in these and the previous proceedings.

Background

[3] On 28 May 2013, the applicant dismissed Mr Bester on grounds of insubordination and the making of racial remarks. The essence of the complaint was that Mr Bester had referred to a co-worker as a “swart man” and in so doing breached a workplace rule that prohibits abusive and derogatory language. Mr Bester had been employed by the applicant since 1 March 2008.

[4] The facts giving rise to Mr Bester’s dismissal are detailed below. The applicant provided specified parking bays to certain employees. The applicant’s chief safety officer, Mr Ben Sedumedi, allocated a parking bay to Mr Bester. At some stage, Mr Sedumedi allocated the adjacent parking bay to Mr Solly Tlhomelang, an employee of a sub-contractor at the Mine. During the beginning of April 2013, Mr Bester found a large 4x4 vehicle similar in size to his own vehicle, parked in the adjacent parking bay. Though parking in a limited space was possible, it was difficult to reverse and he was concerned that the vehicles may be damaged in the process. Mr Bester decided to take the matter up with Mr Sedumedi in an effort to arrange for

¹ 66 of 1995.

the other vehicle to be parked elsewhere. Mr Bester made repeated efforts to raise the issue with Mr Sedumedi, which included phoning and emailing him, but without success.

[5] On 24 April 2013, an incident occurred, the details of which are not common cause. According to the version presented by the applicant, Mr Sedumedi held a safety meeting at which Mr Pieter Van der Westhuizen, Ms Salome Moeng, Mr Tshepo Segona, Mr Phumzile Gobinamba and Mr Tlhomelang, were present. The applicant's version is that Mr Bester stormed into the meeting while it was in progress, pointed his finger at Mr Sedumedi and said, in a loud and aggressive manner, that Mr Sedumedi must "verwyder daardie swart man se voertuig",² otherwise he, Mr Bester, would take the matter up with management.

[6] According to Mr Bester there was no meeting in progress, rather Mr Sedumedi and Mr Van der Westhuizen were casually discussing jogging routes. When they had finished chatting, Mr Bester raised his parking difficulty with Mr Sedumedi but he responded by saying that he would not speak to a C5 grade employee. According to Mr Bester, Mr Sedumedi said "jy wil nie langs 'n swart man stop nie . . . dit is jou probleem".³ Mr Bester said he told Mr Sedumedi not to turn the matter into a racial issue and that he intended taking the matter up with senior management.

[7] In a statement dated 2 May 2013, Mr Bester set out his version of what had transpired:

"Mr Sedumedi then started going on and on about me who does not want to park next to a 'swart man'. I then said to Mr Sedumedi he must not try and make this issue of the parking area a racial issue.

When I realised what Mr Sedumedi was trying to achieve and in which direction he wanted to force this issue I just turned around and left.

² Translated to English as "remove that black man's vehicle."

³ Translated to English as "you do not want to park next to a black man . . . this is your problem".

The next thing I have heard is that I have been charged and that I will be suspended.

I have not shouted at anybody in Mr Ben Sedumedi office neither had I pointed fingers at anyone or in any direction. I did not make any comments using the words ‘swart man’.”

[8] On 25 April 2013, the applicant suspended Mr Bester pending the outcome of a formal disciplinary enquiry. The applicant subsequently charged Mr Bester with two acts of misconduct. The first charge was for insubordination for disrupting a safety meeting. The second charge was for making racial remarks by referring to a fellow employee as a “swart man”.

[9] On 21 May 2013, Mr De Jager, the chairperson of the disciplinary enquiry, found Mr Bester guilty on both charges. Mr De Jager recommended the sanction of dismissal and, on 28 May 2013, the applicant dismissed Mr Bester.

Litigation history

CCMA

[10] On 3 June 2013, Mr Bester referred an alleged unfair dismissal dispute to the CCMA. The dispute was not resolved through conciliation and was referred to arbitration. The commissioner handed down his award on 19 December 2013. The commissioner held that the dismissal of Mr Bester was both substantively and procedurally unfair.⁴

[11] The commissioner’s reasoning on the substantive unfairness of the dismissal was:

“Both the applicant as well as the person referred to (Mr Solly Tlhomelang) further indicated that they did not know one another prior to the incident on the 24th of April 2013. It would therefore in my opinion have been highly probable that the

⁴ SAEWA *obo* Bester v Rustenburg Platinum Mine, unreported arbitration award of the CCMA, Case No NWRB1692-13 (19 December 2013) (Arbitration Award) at para 32.

applicant might have used the term ‘swart man’ to identify the person who parked next to him as he by that time did not know his name. I find it less probable that Mr Sedumedi (who was in my opinion an extremely poor and very evasive witness) would without being triggered by something that was said to him, accuse the applicant of not wanting to stop next to a ‘swart man’. No other derogatory words or phrases were used by the applicant (according to the witnesses). I really do not see how such a phrase (referring to a physical attribute in order to identify a certain person) could be classified as a racial remark. It would be similar to the situation where someone comes into the CCMA offices not knowing my name and then asking for me by stating the ‘wit man’ who for instance parked next to the entrance gate. I will not take any offence to this even if the person who utters these words is talking in a loud voice in front of all CCMA users.

The chairperson’s reasoning for finding the applicant guilty of both insubordination and racial remarks is with respect farfetched and nonsensical. It was clear that he was under immense pressure when dealing with the allegations of racial remarks and in the circumstances failed to keep a cool head and properly dissect what exactly was done and said.”⁵

[12] The commissioner ordered that the applicant reinstate Mr Bester with retrospective effect to his position as a senior training officer and awarded him back pay in the amount of R191 834.21.⁶

Labour Court

[13] Aggrieved by the arbitration award, the applicant launched an application in the Labour Court to review and set aside the award. The Labour Court held that the evidence of Mr Van der Westhuizen and Mr Sedumedi, with regards to the meeting that was underway when Mr Bester stormed through the door, was consistent with the evidence of the other employees present at the meeting and there was no cogent reason for the commissioner to have rejected this evidence.⁷ The Labour Court further found that the commissioner’s finding that Mr Bester uttered the words “swart man”

⁵ Id at paras 26.6-7.

⁶ Id at paras 33-4.

⁷ *Rustenburg Platinum Mine v SAEWA obo Bester* [2016] ZALCJHB 75 (Labour Court judgment) at para 19.

was supported by the evidence and, despite Mr Bester's denial, clearly correct.⁸ The Labour Court was of the view that "the commissioner's failure properly to resolve the material dispute of fact before him resulted in factual findings that are entirely arbitrary".⁹

[14] The Labour Court found that there was no conceivable reason why race might justifiably have served as an identifier:

"To the extent that context is relevant, it should be recalled that Mr Bester stormed into a meeting that was in progress, that he was aggressive and belligerent, that he pointed his finger at Mr Sedumedi and in a loud voice demanded that Mr Sedumedi remove the 'swart man's' car from next to his. Those present in the meeting were offended by Mr Bester's conduct. Mr Bester was not, as the commissioner suggested, benignly 'referring to a physical attribute in order to identify a certain person'. Mr Bester's reference to Mr Tlhomelang, as a 'swart man' was derogatory and racist."¹⁰

[15] In considering whether dismissal was an appropriate sanction, the Labour Court had regard to a memorandum circulated by the applicant to all employees on 16 April 2013, which reads:

"It has come to the management's attention that some employees use abusive language with fellow employees. It was also raised with management that some senior management are swearing and shouting at their subordinates.

This practice is not in accordance with our values and does not demonstrate care and respect towards each other and will therefore not be tolerated at Thembelani Mine.

Disciplinary action will be taken against anyone who uses abusive language towards another person on Thembelani Mine. Let us refrain from using derogatory language against each other and strive to work together harmoniously."¹¹

⁸ Id.

⁹ Id at para 20.

¹⁰ Id at para 23.

¹¹ Id at para 24.

[16] The terms of the memorandum made it clear that abusive and derogatory language would not be tolerated at the workplace. The Labour Court also noted that the undisputed evidence before the commissioner was that the applicant adopted a zero tolerance approach to the use of derogatory and abusive language.

[17] The Labour Court held that Mr Bester had committed an act of serious misconduct that warranted his dismissal and concluded that, on that ground alone, the award stood to be reviewed and set aside:

“In my view, on a proper assessment of the evidence that served before the commissioner, he reached a decision that a reasonable decision-maker would not have reached. Even if the commissioner’s flawed reasoning were to be disregarded, the result cannot be sustained on the basis that it nonetheless represents a reasonable result.”¹²

Labour Appeal Court

[18] The Labour Appeal Court stated that the test to determine whether the use of the words “swart man” by Mr Bester was derogatory or abusive, and in contravention of the applicant’s disciplinary code, was an objective one.¹³ It reasoned that, in order to determine whether the words “swart man” are derogatory, the use of the words must be looked at in the context in which they were uttered.¹⁴

¹² Id at para 26. The test for review was stated in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 110:

“To summarise, *Carephone* held that section 145 of the Labour Relations Act was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: [i]s the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

It is noted that the test the Labour Court applied was whether the decision reached was one which a reasonable decision-maker *would not*, as opposed to *could not*, have reached.

¹³ *SA Equity Workers Association o.b.o Bester v Rustenburg Platinum Mine* [2017] ZALAC 23; (2017) 38 ILJ 1779 (LAC) (Labour Appeal Court judgment) at para 16.

¹⁴ Id at para 19.

[19] The Labour Appeal Court was of the view that the real issue was whether Mr Bester's use of the descriptor "swart man" to identify the owner of the vehicle parked in the parking bay next to him was derogatory:

"The objective facts are that Mr Bester was angry with Mr Sedumedi for refusing to assist him to resolve his parking problem. This caused him to act precipitously by storming into Mr Sedumedi's office and demanding in an 'aggressive and belligerent' manner that Mr Sedumedi must instruct the 'swart man' to remove his car from next to his. Mr Bester did not know Mr Tlhomelang, the owner of the 4x4 vehicle which parked in the bay next to him, and neither did Mr Tlhomelang know him. An important contextual fact is that Mr Bester is white and to his knowledge the person parked next to him was black. Whilst Mr Bester's status as a white person would bring him within the scope of potential condemnation, that alone is insufficient for such a finding."¹⁵

[20] The Labour Appeal Court held that the Labour Court erroneously adopted a subjective test in determining the effect of the words "swart man" on the persons present at the meeting. The Labour Appeal Court further held that "the question that the Labour Court ought to have asked was whether, in the opinion of a reasonable person possessed of all facts, Mr Bester's use of the word[s] 'swart man' in this context was derogatory and racist".¹⁶ It found that "[h]ad Mr Sedumedi and Ms Moeng known the true state of Mr Bester's knowledge . . . they would not have viewed the expression 'swart man' in context as offensive".¹⁷

[21] The Labour Appeal Court held that Mr Bester did not know Mr Tlhomelang and therefore had no reason to denigrate him:

"While it is clear on the evidence that Mr Bester had no reason to denigrate either Mr Sedumedi or Mr Tlhomelang, he did have a need to identify Mr Tlhomelang – a

¹⁵ Id at para 21.

¹⁶ Id at para 25.

¹⁷ Id.

person whose name, rank and division were unknown to him – and he used race as a descriptor in doing so. He may have been unwise to opt for this descriptor but his lack of wisdom is not the point in issue”.¹⁸

[22] The Labour Appeal Court concluded that even though Mr Bester was charged with making racial remarks by referring to a fellow employee as a “swart man” the context disclosed that the perception that the words were derogatory and racist was certainly not the only plausible inference that could be drawn from the proven facts and the probabilities.¹⁹ The inference that Mr Bester used the words “swart man” in the context, to describe Mr Tlhomelang, whose name he did not know, was equally plausible.²⁰

[23] The Labour Appeal Court held that the Labour Court had erred in reviewing and setting aside the award of the commissioner. It confirmed the conclusion of the commissioner that the dismissal of Mr Bester was both substantively and procedurally unfair.²¹ In addition, the Labour Appeal Court held that a racist remark made in the workplace is a serious offence which warrants dismissal.²²

In this Court

Condonation

[24] The applicant filed three applications for condonation: for the late filing of its application for leave to appeal, the late filing of the record and the late filing of its written submissions.

[25] The application for leave to appeal was filed three days late. The reason for the delay was that on 1 November 2016 the applicant was sold as a going concern by

¹⁸ Id at para 27.

¹⁹ Id.

²⁰ Id.

²¹ Id at para 32.

²² Id at para 18.

Anglo American Platinum Limited (Anglo) to Sibanye Rustenburg Platinum Mines Proprietary Limited (Sibanye). This sale created confusion as to who the correct litigant was as Mr Bester was not identified as a transferring employee nor was he working in the operations that were transferred. The record was filed three days late. The reason provided for the delay was an “unfortunate and regrettable diary error” on the part of the applicant’s attorney. No prejudice was caused by the delay and a reasonable explanation was offered for it. The written submissions were filed two days late and no prejudice was caused by the delay. Condonation is granted for the late filing of the application for leave to appeal, the record and the written submissions.

Substitution application

[26] Sibanye has applied to substitute itself as applicant. The applicant supports the substitution application. According to the applicant, the substitution application is necessitated by virtue of the operation of section 197 of the Labour Relations Act in that:

- (a) Anglo has become incompetent to continue as the applicant in the main application;
- (b) By operation of law Sibanye, which is a competent juristic person, is the applicant in the main application;
- (c) Sibanye has effectively been substituted as the employer by the operation of section 197 of the Labour Relations Act; and
- (d) Sibanye has a direct and substantial interest in the outcome of the main application.

[27] Section 197(2) of the Labour Relations Act states:

“If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) —

- (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
- (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- (d) the transfer does not interrupt an employee's continuity of employment, and an *employee's contract of employment continues with the new employer as if with the old employer*". (Emphasis added.)

[28] The automatic consequences which flow from section 197 were lucidly explained in this Court's judgment in *NEHAWU*:

"Subsection (2) tells us the consequences that flow from a transfer of a business as a going concern as contemplated in subsection (1). It refers back to subsection (1) which envisages two categories of transfer: one from a solvent employer and the other, broadly speaking, from an insolvent employer. In both instances, the transfer of the business as a going concern results in the transfer of the workers to the new business. . . . The section is premised on the continuity of employment of the workers which is not interrupted by the transfer contemplated in subsection (1). 'That employment', subsection 9(4) says, 'continues with the new employer as if with the old employer'.

Reading the section as a whole and, in particular, having regard to the fact that all the rights and obligations flowing from employment with the transferring employer are transferred to the new employer in the case of a solvent business; that in the case of an insolvent business the contracts of employment are transferred; that the transfer of business does not interrupt the workers' continuity of employment; the inference that

the transferee employer takes over the workers and that the transferee employer is, by operation of law, substituted in the place of the transferor employer is irresistible. It follows by necessary implication.

If there is any doubt on this score, the recent amendment to section 197 puts matters beyond doubt by providing that ‘the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment’. Indeed its declared purpose is ‘. . . the clarification of the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern’.²³

[29] In *Success Panel Beaters & Service Centre CC* the Labour Appeal Court held that the enforcement of an Industrial Court order against the new employer was permissible, as the order was made and transfer of business affected after the commencement of the Act.²⁴ The granting or dismissal of the main application would therefore be enforceable against Anglo and Sibanye.

[30] In the circumstances, Sibanye has made out a case for substitution and this relief should be granted.

Jurisdiction

[31] The applicant relies on section 167(3)(b)(i)²⁵ to argue that this Court has jurisdiction to hear this matter as it directly involves and implicates a number of constitutional rights, namely, the right to fair labour practices,²⁶ dignity²⁷ and equality.²⁸

²³ *National Education & Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEWAHU*) at paras 63-5.

²⁴ *Success Panel Beaters & Services Centre CC v National Union of Metal Workers of South Africa* [2000] ZALAC 2; [2000] 6 BLLR 635 (LAC) at 638.

²⁵ Section 167(3)(b)(i) of the Constitution provides that: “The Constitutional Court may decide constitutional matters.”

²⁶ Section 23(1) of the Constitution provides that: “Everyone has the right to fair labour practices.”

²⁷ Section 10 of the Constitution provides that: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

²⁸ Section 9(1) of the Constitution provides that: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

[32] To determine whether a matter is a “constitutional matter” requires a broad interpretation.²⁹ This matter relates to the assessment of evidence in labour disputes and the test to determine whether, in a given context, a statement is racist. This case – and the issues it raises – clearly implicates the rights to dignity and equality, and how racism in the workplace might affect the right to fair labour practices. Given our country’s history and the remaining legacy of apartheid that our Constitution attempts to redress, a question involving racism and, more pointedly, what constitutes racism, is undoubtedly a constitutional issue and one that goes to the heart of our democracy.³⁰

Leave to Appeal

[33] The applicant argues that it is in the interests of justice to grant leave to appeal on the grounds that the Labour Appeal Court incorrectly applied the law and set a standard of proof that was unfair as it was higher than the standard at common law. A mere misapplication of the law would not ordinarily entitle this Court to interfere with a decision of the Labour Appeal Court. The Labour Appeal Court is a specialist court which functions in a specialised area of law.³¹ In *NEHAWU*, this Court recognised that judges of the Labour Court and Labour Appeal Court have the skill and experience to resolve labour disputes speedily and that this Court will only hear appeals from the Labour Appeal Court if the appeal raises “important issues of principle”.³²

²⁹ *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14. See also Du Plessis et al “Jurisdiction” in *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 19.

³⁰ See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (*SARS*) where this Court held, with reference to racism in the workplace, at para 29 that:

“The central feature of this case is the mother of all historical and stubbornly persistent problems in our country: undisguised racism. This, coupled with this Court’s constitutional duty to help entrench the values of equality, non-racialism and human dignity, demands that this application be appealable in the interests of justice. And the issue central to this dispute requires the attention of the highest court in the land, at such a time as this.”

³¹ *NEHAWU* above n 23 at para 30.

³² *Id* at para 31.

[34] The Labour Appeal Court stressed that the words must be looked at in the context in which they were uttered. In the Labour Appeal Court's view, "swart man" is *prima facie* a neutral phrase that requires context in order to acquire a pejorative – or laudatory – meaning.³³ As a consequence, the matter turned on whether the context in this instance transformed a neutral term into a pejorative one.

[35] The Labour Appeal Court recognised the potential impact of using racial descriptors as identifiers, particularly given the lingering legacy of apartheid but held that the "othering" implicit in the use of racial descriptors did not elevate them to pejorative expressions, stating:

"It is a valid concern that the use of race descriptors without more to describe people of different races provides no information beyond permitting the audience to lump people into social groupings akin to racial stereotyping, the perpetuation of which must be discouraged. However, in view of South Africa's legacy of racial segregation, it would be remiss to overlook the tendency to identify people of different race groups by using race descriptors, whether inadvertently or not. By the same token, it must be recognised that racial descriptors can have the effect of perpetuating rather than healing divisions; 'othering' in the parlance. But this in itself cannot be regarded as racist. If it were considered to be so, then organisations seeking to perpetuate black consciousness and identity would be subject to outright condemnation – and our society has yet to adopt so absolute a stance."³⁴

[36] The issue of when an apparently neutral race descriptor may be regarded as racially abusive or insulting is an important one that has not yet been considered by this Court. This issue is one which encompasses interests beyond those of the parties

³³ The Labour Appeal Court judgment above n 13 noted the impact of a loss of neutrality as leading to either a pejorative or laudatory meaning at para 19—

"the term 'black man', if used by a black person to refer to another black person, would not lose its neutrality: for example, 'the unidentified person who called yesterday was a black man'. However, when the word loses the neutrality, it can be pejorative. But it can equally be laudatory: for example, a bumper sticker of the by no means distant past proclaimed: 'I thank God I am a black man, Amen'. Context is, therefore, decisive to the neutrality or otherwise of the term 'black man'."

³⁴ *Id* at para 29.

involved and the approach of the courts in such matters is of general public importance.³⁵

[37] In addition, this Court is obliged, as a custodian of the Constitution, to ensure that the values of non-racialism, human dignity and equality are upheld and in doing so it has a responsibility to deliberately work towards the eradication of racism.³⁶ Our Constitution is the embodiment of the values, both moral and ethical, which bind us as a nation and which as a nation we strive to achieve.³⁷ As this Court aptly held “[t]he Constitution is the conscience of the nation”.³⁸ Having regard to the values of non-racialism, human dignity and equality and that there are reasonable prospects of success, it is in the interests of justice for this Court to grant leave to appeal.³⁹ In the circumstances, leave to appeal is granted.

Merits

The context in which the words were uttered

[38] It was accepted by both parties (the applicant and first respondent) that the use of the words “swart man”, per se, is not racist and that the context within which the words were used would dictate whether they were used in a racist or derogatory manner. It was also accepted that the test to determine whether the use of the words is racist is objective – whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory. This is in accordance with the test for whether a statement is defamatory, as enunciated in *Sindani*:

“The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the

³⁵ SARS above n 30 at paras 31-2.

³⁶ Id at paras 12, 14 and 29. See also *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* [2002] 6 BLLR 493 (LAC) at para 35.

³⁷ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 262.

³⁸ SARS above n 30 at para 12.

³⁹ Id at para 33.

article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply.”⁴⁰

[39] It is thus necessary to have regard to the evidence in this matter. In his evidence in chief, Mr Bester testified:

“I also know that in this era that we are working now and at this time, it would be devastating for your career to go into an office, start shouting and pointing fingers and shouting the word swart man in front of a hundred people. Even in front of one person. You just do not do it and therefore I say Mr Sedumedi is sucking this out of his thumb . . . that this incident has ever [taken] place.”

[40] Relevant portions of Mr Bester’s evidence under cross-examination read:

“Mr Yeates: You said to him jy moet daardie swart man se kar langs my wegvat.

Mr Bester: No I did not.

. . .

Mr Yeates: Using derogatory language like that would be detrimental to a person in your position.

Mr Bester: Absolutely.

Mr Yeates: And a person that would utter things like that should be dismissed.

Mr Bester: Yes.”

It is clear from this extract that it was Mr Bester’s evidence that he did not use the term “swart man”. He went on to acknowledge that using such language could be “detrimental to a person in his position” and could result in his dismissal.

[41] Four main witnesses, namely, Mr Van der Westhuizen, Mr Sedumedi, Ms Moeng and Mr Tlhomelang, testified on behalf of the applicant at the arbitration

⁴⁰ *Sindani v Van der Merwe* [2001] ZASCA 130; [2002] 1 All SA 311 (A) at para 11.

hearing. They said they were present at the meeting when Mr Bester made the statement attributed to him. Mr Tlhomelang, while not strictly part of the meeting because he had arrived late, was standing just outside the doorway. Mr Sedumedi, Mr Van der Westhuizen and Ms Moeng further testified that they had considered the remarks to be inappropriate.

[42] The commissioner found that Mr Bester did utter the words “swart man” and that he had pointed his finger at Mr Sedumedi whilst discussing the parking issue.⁴¹ He went on to hold that the dismissal was unfair on the basis that Mr Bester did not use the term in a derogative or racist manner but did so to identify the person who had parked next to him as he did not, at that time, know the person’s name.⁴²

[43] The defence, that the term “swart man” was not used in a derogatory or racist manner, was not raised or relied upon by Mr Bester. Mr Bester denied having used the term “swart man”. This defence, on which the commissioner hinged his entire ratio for his finding, was not based on any evidence before him.

[44] The evidence before the commissioner, on which both the applicant and respondent were agreed, was that the use of such terminology within Anglo’s workplace constituted derogatory language deserving of dismissal. It is against this evidentiary background that the commissioner was required to make his ruling.

[45] The Labour Appeal Court correctly stated the test to be applied:

“The test that applies to the determination of whether the use of the words ‘swart man’ by Mr Bester was derogatory or abusive, and in contravention of Rustenburg Platinum Mine’s disciplinary code, is an objective one. The employer, in this case, Rustenburg Platinum Mine, bore the evidentiary burden in the arbitration proceedings to prove that the language used by Mr Bester was objectively derogatory. The test is not based on how the employer understood the words nor on the subjective

⁴¹ Arbitration Award above n 4 at paras 26.5-6.

⁴² Id at paras 26.6 and 28.

feelings of the person/s to whom the remark was made, but rather whether a reasonable, objective and informed person would on the *correct facts* perceive it to be so. Once that is established on the evidence, the burden of proof shifts to the employee to prove the existence of a ground of justification and that the derogatory or racist remark was not made with the intent to demean.”⁴³ (Emphasis added.)

[46] The Labour Appeal Court unfortunately misdirected itself by finding in favour of Mr Bester, on the basis of an unarticulated defence not supported by the evidence. It was never Mr Bester’s defence that he used the words “swart man” as a descriptor or that he did not mean to “demean” any person. He denied using the words and conceded that if he had done so, it could be a dismissible offence. There was no evidence in the record justifying a finding for Mr Bester on the basis that the Labour Appeal Court did.

[47] In applying the test, namely, whether a reasonable, objective and informed person would, on the *correct facts* perceive it to be racist or derogatory, the Labour Appeal Court made a fundamental error, like the commissioner, as it failed to identify the correct facts and relied on evidence that had not been placed before it. The Labour Appeal Court erred by relying on a defence which was not raised by Mr Bester.

[48] The Labour Appeal Court’s starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary. In this sense, the

⁴³ Labour Appeal Court judgment above n 13 at para 16.

Labour Appeal Court's decision sanitised the context in which the phrase "swart man" was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in a post-apartheid South Africa.

[49] The Labour Appeal Court, by sanitising the context in which the words were used, incorrectly applied the test to determine whether the words used are derogatory, in the context of this matter, to the facts in this matter. The Labour Appeal Court, as well as the commissioner, failed to approach the dispute in an impartial manner taking into account the "totality of circumstances".⁴⁴ Not only was "swart man" as used here racially loaded, and hence derogatorily subordinating, but it was unreasonable to conclude otherwise. It was unreasonable for the commissioner, within this context, to find that using "swart man" was racially innocuous.

[50] Furthermore, in scrutinising the version of the witnesses as to whether they viewed the statement made by Mr Bester as being racist, the Labour Appeal Court applied a test that was too strict. The test was not whether they were correct in the context of the statement to have understood it as being racist; the test was whether, objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning.⁴⁵ Only Mr Bester could have given evidence that he uttered the words with no racist intent. He failed to do so. The commissioner made a similar error in coming to the conclusion that Mr Bester used the words "swart man" to identify and not to denigrate a person whose vehicle was parked next to his. The commissioner failed to have regard to the evidence before him and failed in particular to appreciate the context in which the words concerned were uttered. During the arbitration proceedings both parties were *ad idem* (of one mind) in this respect. They agreed that using such language at the applicant's workplace would be detrimental and could warrant dismissal.

⁴⁴ *Sidumo* above n 12 at para 78.

⁴⁵ *Mohammed v Jassiem* [1995] ZASCA 115; 1996 (1) SA 673 (SCA) at 711.

[51] The commissioner's award fell to be reviewed and set aside as he reached a conclusion that a reasonable decision-maker could not have reached. This is the test for review that this Court has established in *Sidumo*.⁴⁶ The Labour Court was therefore correct in reviewing and setting it aside.

[52] The past may have institutionalised and legitimised racism⁴⁷ but our Constitution constitutes a "radical and decisive break from that part of the past which is unacceptable".⁴⁸ Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by "strife, conflict, untold suffering and injustice".⁴⁹ Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others.⁵⁰ These prejudices do not only manifest themselves with regards to race but it can also be seen with reference to gender discrimination.⁵¹ In both instances, such prejudices are evident in the workplace where power relations have the ability "to create a work environment where the right to dignity of employees is impaired".⁵²

[53] Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society. The late former President of the Republic of South Africa, Mr Nelson Mandela, said that "de-racialising South African society is the new moral and

⁴⁶ *Sidumo* above n 12.

⁴⁷ *Makwanyane* above n 37 at para 262.

⁴⁸ *Shabalala v Attorney-General, Transvaal* [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26. See also Labour Court judgment above n 7 at para 21.

⁴⁹ *Makwanyane* above n 37 at para 262.

⁵⁰ *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 116.

⁵¹ *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 44.

⁵² Labour Court judgment above n 7 at para 22. See also *Campbell Scientific Africa (Pty) Ltd v Simmers* [2015] ZALAC 51; (2016) 37 ILJ 116 (LAC) at para 20.

political challenge that our young democracy should grapple with decisively”.⁵³ He went on to say that “we need to marshal our resources in a visible campaign to combat racism – in the workplace, in our schools, in residential areas and in all aspects of our public life”.⁵⁴ This Court has echoed such sentiments when it recognised that “South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations”.⁵⁵

Sanction

[54] Subsequent to the hearing of this matter, this Court invited the parties to file written submissions on whether, should it conclude that the finding of the internal disciplinary committee should be reinstated, the sanction imposed was too harsh and what alternative sanction could be considered. Both the applicant and the respondent filed additional submissions in this regard.

[55] In *Sidumo*, this Court listed a number of factors that a commissioner must consider when deciding on the fairness of a dismissal. The Court emphasised that the factors do not represent a closed list and that the weight to be attached to each factor would differ from case to case. The factors are: (i) the importance of the rule that was breached; (ii) the reason the employer imposed the sanction of dismissal; (iii) the basis of the employee’s challenge to the dismissal; (iv) the harm caused by the employee’s conduct; (v) whether additional training and instruction may result in the employee not repeating the misconduct; (vi) the effect of dismissal on the employee; and (vii) the long-service record of the employee.⁵⁶

⁵³ Address by President Nelson Mandela to National Conference of the Institute for a Democratic South Africa (Idasa) Cape Town (18 August 1995), available at http://www.mandela.gov.za/mandela_speeches/1995/950818_idasa.htm.

⁵⁴ *Id.*

⁵⁵ *SARS* above n 30 at para 8.

⁵⁶ *Sidumo* above n 12 at para 78.

[56] We are dealing here with racism in the workplace. Our courts have made it clear, and rightly so, that racism in the workplace cannot be tolerated.⁵⁷ Employees may not act in a manner designed to destroy harmonious working relations with their employer or colleagues.⁵⁸ They owe a duty of good faith to their employers which duty includes the obligation to further their employer's business interests.⁵⁹ In making racist comments in the public domain, the actions of the employee may foreseeably negatively affect the business of his employer or the working relationship between him and his employer or colleagues. The chairperson of the disciplinary hearing was alive to this. This is evident from his statement that "[d]ismissal will be imposed for a first offence if the circumstances so warrant it and the employee's behaviour destroy[s] the employment relationship".

[57] As a country in transition, South Africa faces the on-going challenge of how to generate and maintain processes that restore dignity, create political and economic equality, and promote a culture of human rights. The mining industry is a racially charged environment. The applicant, as a responsible employer, is tasked with creating an organisation that advocates and practices social justice. To this end, a memorandum warning against abusive and derogatory language was circulated to all employees at the applicant's mine a few days prior to the incident. It was this memorandum which gave rise to the charges levelled against Mr Bester. The applicant had introduced a behavioural policy in terms of which the offence of racial abuse could attract a sanction of dismissal, even for a first offence.

[58] In contending that dismissal was too severe a sanction in the circumstances of this matter, the respondent, in its additional submissions, argued that Mr Bester had

⁵⁷ In *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 1112 (LAC); [1998] 7 BLLR 666 (LAC) at para 12, Kroon JA stated that the use of racist remarks or conduct in the workplace should be considered in light of the highly charged racial or political atmosphere inherent in certain workplaces. Within such workplaces, the use of racist remarks can have the effect of destroying working relationships and being disruptive of the employer's business.

⁵⁸ *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 (IC) at 544B-C.

⁵⁹ *Council for Scientific and Industrial Research v Fijen* [1995] ZASCA 143; 1996 (2) SA 1 (SCA) at 9H-10D. See also *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C).

given the applicant five years of loyal service and during that time he had trained numerous miners on how to keep themselves and their colleagues safe and accident-free while working underground. It was also contended that Mr Bester was capable of being rehabilitated and that the incident sparking his dismissal was an extraordinary occurrence unlikely to occur again.

[59] Mr Bester has demonstrated an absolute lack of remorse for his actions and persisted with a defence of a complete denial. He did not acknowledge that his conduct was racist and inappropriate. He made no attempt to apologise. This Court has previously stated that the fact that an employee who is guilty of racist conduct apologised, admitted wrongdoing and demonstrated a willingness “to take part in whatever programme could be designed to help him embrace the values of our Constitution, especially equality, non-racialism and human dignity” may be a relevant factor in determining whether dismissal was an appropriate sanction.⁶⁰ As mentioned, Mr Bester failed to demonstrate a willingness to change. Instead, he resorted to a vicious attack on the witnesses who testified on behalf of the applicant during the disciplinary hearing. The chairperson of the hearing criticised Mr Bester’s conduct in the strongest terms:

“As chairperson I was astounded by the viciousness of the attacks by Mr Bester during the hearing. The behaviour carried out with intense violence and an apparent desire to inflict aggressive language, cruel and malicious act against a fellow employee and employees in a threatening manner during the hearing was irresponsible.”

The chairperson further noted that Mr Bester had, during the hearing, used foul language and behaved in an insolent, disrespectful, rude, offensive and disruptive manner. He explained:

⁶⁰ SARS above n 30 at para 45.

“Mr Bester challenged the authority of the hearing, being verbally rude and insulting and disrupting the ER Officer Mr Bogatsu Ramoenyane by verbally swearing (inappropriately) at him to keep quiet.”

[60] At the disciplinary hearing, and after having been found guilty, Mr Bester was invited to make submissions in mitigation. He used this opportunity to justify his misbehaviour during the hearing:

“It is human to react in the same manner as what I have done during the hearing as I have realised it is futile to argue whatever is being said as I am being framed. Seven witnesses against me with no witnesses? What was/is my chances? Therefore I have had all the same emotions as the normal man in the same circumstances would have had. Devastation, flabbergasted, revolt, being cross.”

Even at this late stage, there was no recognition that he had behaved badly during the hearing and more so, that he had once again insulted his colleagues. An acknowledgement of wrongdoing by Mr Bester would have gone a long way in evidencing the possibility of rehabilitation including an assurance to the applicant that similar misconduct would not be repeated in the future.⁶¹

[61] The fact that Mr Bester was dishonest in denying making the statement weighs heavily against him when considering sanction. In *Sidumo*, this Court stated that “[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal”.⁶² These sentiments were endorsed in *Timothy*, where the Court said:

“[G]iven the fact that the appellant had an unblemished record and that, until this point, there was no indication in his conduct of any dishonesty or any impropriety prior to the events that gave rise to this dispute, a form of progressive sanction would have been more appropriate. I have no doubt that these arguments would have carried far greater weight had there been a scintilla of recognition by the appellant of

⁶¹ *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* (2008) 29 ILJ 1180 (LC) at para 45.

⁶² *Sidumo* above n 12 at para 117.

his wrongdoing. . . . Throughout the disciplinary hearing . . . [the] appellant continued to take the view that the allegations brought against him were no more than lies. [The] [a]ppellant showed no remorse, no recognition of misconduct, save for a blatant and clearly dishonest denial.”⁶³

[62] Mr Bester has not learnt to conduct himself in a manner that respects the dignity of his black co-workers. By his actions he has shown that he has not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme.

[63] This Court is satisfied that dismissal was an appropriate sanction under the circumstances.

Costs

[64] The labour courts have established a principle in terms of which the general rule that costs follow the event does not apply in situations where “there is a long-standing and continuing labour and employment relationship [between the parties as] such orders might not be in the best interests of that relationship”.⁶⁴ In a similar vein, this Court will not readily make a costs order where there was a bona fide (good faith) dispute between parties who have a continuing bargaining relationship.⁶⁵ In this case, the dispute raises important issues not yet pronounced on by this Court and the impact of this decision will be felt beyond the parties to this litigation. In the circumstances, I make no order as to costs.

⁶³ *Timothy v Nampark Corrugated Containers (Pty) Ltd* [2010] ZALAC 29; (2010) 31 ILJ 1844 (LAC) at 1849E-H.

⁶⁴ *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 51.

⁶⁵ *National Union of Metalworkers of SA v Intervolve (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) (*Intervolve*) at para 73. Bona fide means “in good faith” and what constitutes a dispute was thoroughly canvassed in *Intervolve* at paras 86-8, but, as provided for in *Durban City Council v Minister of Labour* 1953 (3) SA 708 (N) at 712A-B, essentially a dispute—

“must, as a minimum so to speak, postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions.”

Order

[65] The following order is made:

1. Rustenburg Platinum Mine is substituted by Sibanye Rustenburg Platinum Mines (Pty) Ltd as the applicant.
2. The appeal is upheld.
3. The order made by the Labour Appeal Court is set aside and replaced with:
“The appeal is dismissed with costs.”
4. There is no order as to costs.

For the Applicant:

F Boda SC and Z Ngwenya instructed
by Cliffe Dekker Hofmeyr Inc.

For the First Respondent:

A P Landman instructed by Ronelda
Van Staden Attorneys.



CONSTITUTIONAL COURT OF SOUTH AFRICA

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma and Others

CCT 52/21

Date of judgment: 29 June 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 29 June 2021 at 10h00, the Constitutional Court handed down judgment in an urgent application for direct access seeking an order declaring former President Jacob Gedleyihlekisa Zuma to be in contempt of court, and sentencing him to a period of two years' direct imprisonment.

In December 2020, in the matter of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2 (CCT 295/20), the applicant, being the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, approached the Constitutional Court on an urgent basis for an order that would compel Mr Zuma's co-operation with the Commission's investigations and objectives. On 28 January 2021, the Constitutional Court handed down judgment in that matter, ordering Mr Zuma to file affidavits and attend the Commission to give evidence before it. Mr Zuma responded by releasing a public statement in which he alleged that the Commission and the Constitutional Court were victimising him. From 15 to 19 February 2021, Mr Zuma did not attend the Commission as ordered. Accordingly, the Chairperson of the Commission announced that it would launch contempt of court proceedings. On the same day, Mr Zuma published another statement in which he levelled serious criticisms against the Judiciary and confirmed that he would neither obey the Constitutional Court's order nor co-operate with the Commission.

The applicant proceeded to approach the Constitutional Court for direct access on an urgent basis, submitting that a court that grants an order retains jurisdiction to ensure its compliance. The applicant submitted that, considering Mr Zuma's former and current political position, his conduct constituted a particularly reprehensible attack on the rule of law and posed a serious risk that it would inspire others to similarly undermine the administration of justice. It was the applicant's case that Mr Zuma was guilty of the crime of contempt of court as he had failed to comply with the order made in CCT 295/20. Furthermore, that in ostensibly defending his

contempt, Mr Zuma conducted a politically-motivated smear campaign against the Constitutional Court, the Commission and the Judiciary, which constituted an aggravating factor relevant to the determination of an appropriate sanction. The applicant submitted that, in such unprecedented circumstances, it was apposite for the Constitutional Court to respond on an urgent basis and that only a punitive sanction, in the form of an unsuspended order of imprisonment for a period of two years, would be appropriate.

Mr Zuma did not oppose this application, nor did he file any submissions.

The Helen Suzman Foundation applied to be admitted as *amicus curiae*. Its main submission was that an appropriate sanction in contempt proceedings must play the dual role of vindicating the dignity of the court as well as compelling compliance with the impugned order. And, to this end, it proposed several sanctions which contained both punitive and coercive elements. Its submissions were relevant to the question of sanction and were of assistance to the Court. Since it met the requirements to be admitted as *amicus curiae* in terms of the Rules of the Constitutional Court, the Helen Suzman Foundation was admitted.

The main judgment was penned by Khampepe ADCJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring). The second judgment was penned by Theron J (Jafta J concurring).

Both judgments agreed that this matter engaged the Constitutional Court's jurisdiction and that the circumstances warranted granting direct access on an urgent basis. Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary, and any disregard of an order of the Constitutional Court requires its intervention. It was held that neither the public's vested interests, nor the ends of justice, would be served if the matter had been required to traverse the ordinary, and lengthy, appeals process. It was accordingly held to be in the interests of justice to grant direct access, and to do so on an urgent basis.

The main judgment held that there could be no doubt that Mr Zuma was in contempt of court. The Constitutional Court had handed down an order in *CCT 295/20*. This had been served on Mr Zuma, who had subsequently failed to depose to affidavits or appear and give evidence before the Commission, as he had been ordered to do. And, he had failed to present evidence to establish a reasonable doubt as to whether his non-compliance was wilful and *mala fide*.

In determining the appropriate sanction, the main judgment considered the differences between coercive orders, which use suspended imprisonment as a threat to compel compliance, and punitive orders of direct committal. The main judgment held that a coercive order would be both futile and inappropriate as Mr Zuma was resolute in his refusal to comply. The main judgment held that affording Mr Zuma another opportunity to attend the Commission would have no effect other than to prolong his defiance and to signal that impunity is to be enjoyed by those who defy court orders. It was held that, notwithstanding the importance of the work of the Commission, neither the Court's honour, nor the public's interest in Mr Zuma's testifying before the Commission, would be vindicated by a coercive order. In any event, the main judgment noted that the public has an equally important, if not more acute, interest in a functioning Judiciary than in Mr Zuma's testifying before the Commission. An additional deficiency with a coercive order, so the main judgment found, was that the punitive effect of it would only operate upon future non-compliance. In other words, it would wield no punitive power in respect of Mr Zuma's contemptuous conduct, already so worthy of rebuke.

Finding that the appropriate sanction was likely to be a punitive order of unsuspended committal, the Court was alive to the need to safeguard Mr Zuma's right not to be arbitrarily deprived of physical freedom, as enshrined in section 12 of the Constitution. The main judgment acknowledged that after conviction in a conventional criminal trial, it is a violation of an accused person's right to a fair trial under section 35 of the Constitution to proceed to impose a sentence without affording her or him an opportunity to say something in mitigation of sentence. Whereas the second judgment concluded that Mr Zuma ought to have been afforded an accused person's rights given that what the applicant sought was a punitive order, the main judgment found that this was not a conventional criminal trial and a contemnor in civil proceedings is not an accused person for the purposes of section 35. Notwithstanding this, the main judgment was acutely aware that contempt proceedings, although brought by civil process, have a criminal component. It found that section 12 imports the right to be afforded a fair procedure akin to that afforded by section 35. Thus, affording a contemnor an opportunity to say something in mitigation of sentence is important given that removing a person's freedom is a drastic step. Accordingly, directions were issued on 9 April 2021, in which Mr Zuma was invited to file an affidavit on an appropriate sanction and sentence in the event that he be found guilty of contempt. The main difference between the procedure followed in this matter and that which is ordinarily followed in a criminal trial was that, since contempt proceedings deal with guilt and sentence in one process, the invitation was sent before the Court reached a decision on guilt.

In response to the directions, Mr Zuma did not file an affidavit but addressed a 21-page letter to the Chief Justice, in which he made further inflammatory statements intended to undermine the Court, portray himself as a victim of the law and evoke public sympathy. He also attempted to justify his contempt by stating that, by hearing this application while the outcome of his application for the review of the decision by the Chairperson of the Commission not to recuse himself was outstanding, the Constitutional Court had acted unconstitutionally. The main judgment held that this defence was unfounded since, had Mr Zuma not wanted to participate in the Commission hearings whilst his review application was pending, he should have sought an interim stay of proceedings, which he did not do. The main judgment emphasised that the Constitutional Court went to great lengths to safeguard Mr Zuma's rights. Consequently, there was no sound basis on which he could claim to have been treated unfairly or victimised.

Having found that Mr Zuma could not be described as an accused person as envisaged in section 35 and that a fair procedure had been followed to safeguard his right to freedom, the main judgment held that no section 36 limitations analysis arose in the circumstances.

The main judgment held that an unsuspended order of committal was further justified by certain exceptional features of this matter. First, Mr Zuma's scurrilous and unfounded attacks on the Judiciary and its members were intolerable and could not be met with impunity. Protecting courts from slanderous public statements, it was emphasised, has little to do with protecting the feelings and reputations of Judges, and everything to do with preserving their ability and power to perform their constitutional duties. Furthermore, the main judgment found that contempt is not the act of non-compliance with a court order alone, but encompasses the nature of the contempt, its extent and the surrounding circumstances. Thus, the Court was enjoined to take cognisance of the unique and scandalous features of the matter. It held that if these aspects were to be ignored, the Court would be adjudicating the matter with one eye closed, and declining to decide it without fear, as it is constitutionally mandated to do.

The main judgment further emphasised that Mr Zuma was no ordinary litigant, but was the former President of the Republic of South Africa, who continued to wield significant political influence and in whom lies a great deal of power to incite others to similarly defy court orders. Thus, if his conduct were to be met with impunity, he could do significant damage to the rule of law. The main judgment held that no person enjoys exclusion or exemption from the sovereignty of the laws of the Republic. And it would be antithetical to the value of accountability if those who once held high office were not bound by the law. The main judgment emphasised the existence of a heightened obligation on the President to conduct her or himself in a manner that accords with the Constitution. Although Mr Zuma was not President at the time of his contempt, his contumacy was all the more outrageous in light of the position he once occupied. The main judgment further noted that it was not insignificant that Mr Zuma's contemptuous conduct related to his duty to account for his time in Office. Accordingly, it was disturbing that he who twice swore allegiance to the Republic, its laws and the Constitution, sought to ignore and undermine the rule of law altogether.

The main judgment concluded that the cumulative effect of these factors was that the only appropriate sanction was a direct, unsuspended order of imprisonment.

In determining the length of sentence, the main judgment held that the Court was enjoined to consider the circumstances; the nature of the breach; and the extent to which the breach was ongoing. In doing so, it held that quantifying the egregiousness of Mr Zuma's conduct was an impossible task, but that the focus had to be on what kind of sentence would demonstrate, generally, that orders made by a court must be obeyed, and, to Mr Zuma specifically, that his contumacy stood to be rebuked in the strongest of terms. The main judgment concluded that if, with impunity, litigants, especially those in positions like that of Mr Zuma, are allowed to decide which orders they wish to obey and those they wish to ignore, a constitutional crisis will be precipitated. The main judgment ordered an unsuspended sentence of imprisonment for a period of 15 months.

The applicant sought costs on a punitive scale. The Constitutional Court affirmed the principle that punitive costs are exceptional and are reserved for instances where a litigant has conducted themselves in an indubitably vexatious and reprehensible manner, deserving of extreme opprobrium. The Court held that it was without question that the extraordinary award of punitive costs was warranted. Costs were awarded on an attorney and client scale.

The second judgment, penned by Theron J (Jafta J concurring), agreed that Mr Zuma was in contempt of the order in *CCT 295/20* but concluded that it would be unconstitutional to grant an order of unsuspended committal in the context of motion proceedings if the committal is not aimed at coercing compliance with a court order.

After surveying our jurisprudence on civil contempt, the second judgment concluded the following. First, that civil contempt has dual remedial and punitive purposes, with the main purpose of civil contempt proceedings being the enforcement of a court order, and that it had found no case in which a punitive committal order (unconnected to coercing compliance) had been ordered. Secondly, that the Constitutional Court had yet to consider the constitutionality of punitive committal orders in the context of civil contempt proceedings but had concluded, in respect of criminal contempt of scandalising the court, that a summary contempt procedure intended purely for penal purposes is inconsistent with the fundamental rights protected by sections 12 and 35(3) of the Constitution because there was no interference in the judicial process or the administration of justice, which called for swift remedial action.

The second judgment considered whether a common law rule allowing a civil court to order a punitive sanction of committal with no paired remedial purpose constituted a justifiable limitation of the right to freedom and security of the person (section 12) and an accused's right to a fair trial (section 35(3)). The second judgment emphasised, at the outset, that because constitutionality is determined objectively, it would be a mistake to fixate on Mr Zuma's conduct in these proceedings and that regard should instead be had to the position of contemnors in Mr Zuma's position.

The second judgment concluded that depriving a contemnor of liberty without a criminal trial limits section 12 of the Constitution and that there are a host of respects in which the civil contempt procedure falls short of the protections enshrined in section 35(3). First, although civil contempt proceedings are a hybrid of civil and criminal elements, and therefore must be conducted in a manner that is grounded in sections 12 and 35(3) of the Constitution, the adaptation of motion proceedings to reflect their hybrid status depends on a judicial officer's assessment of what seems fair in the circumstances. By contrast, the procedural rights in section 35(3) are peremptory. Secondly, civil contempt proceedings, especially when brought on an urgent basis (as they were in this case), limit the right to have adequate time to prepare a defence as enshrined in section 35(3)(b). Thirdly, the consequence of granting direct access in this matter was that the main judgment's committal order would be unappealable, which limits section 35(3)(o). Fourthly, the motion procedure limits the alleged contemnor's fundamental right to remain silent and to be presumed innocent to the extent that it requires the alleged contemnor to present her or his defence before the initiating party has made out a prima facie case against her. The second judgment concluded that these deficiencies amounted to a serious violation of constitutional rights when one has regard to the fact that sections 12 and 35(3) protect a profound and essential right to freedom, which is the bedrock of our constitutional order.

The second judgment concluded that in an open and democratic society based on human dignity, equality and freedom, litigants are not prosecuted criminally in civil court by their adversaries in circumstances where they are not afforded an opportunity to cure their contempt in order to avoid being deprived of their liberty. Although a contemnor faces a deprivation of liberty without a criminal trial when the committal order sought is coercive as well as when it is punitive and unsuspended, the second judgment explained that the limitation of rights inherent in the civil contempt procedure becomes unreasonable and unjustifiable when punitive committal is ordered, for two reasons. The first is that while civil contempt proceedings serve the legitimate purpose of providing successful litigants with a speedy and effective means of enforcing court orders, when the relief sought is singularly punitive and not linked to enforcement, this justification for limiting rights falls away. The second is that the limitation of rights is substantially tempered when the contemnor can avoid imprisonment by complying with the court order.

The second judgment agreed that the Constitutional Court must defend its orders and authority, but stressed that it can only do so within the bounds of the Constitution. It agreed that Mr Zuma's contempt exposed him to an order of committal, but concluded that the constitutionally compliant approach would have been either to make an order of coercive committal aimed at inducing Mr Zuma to comply with the Court's order (if the Commission's term has not come to an end by the time judgment is handed down) or an order referring the matter to the Director of Public Prosecutions for a decision on whether to prosecute Mr Zuma for contempt of court.

