



JUDICIAL CONDUCT COMMITTEE

Ref: JSC/1081/23

In the matter between:

Mr E Achuko

Complainant

and

Judge D Unterhalter

Respondent

RULING

THE JUDICIAL CONDUCT COMMITTEE (Maya DCJ, Shongwe JA, Saldulker JA and Mabindla-Boqwana JA)

[1] This complaint has its genesis from an email allegedly received by Mr E Achuko, (the complainant), on 16 February 2023. The email purports to be generated by Judge David Unterhalter, (the respondent). The complainant lodged a complaint in terms of section 14 (4) (c) read together with section 11 of the Judicial Services Act 9 of 1994 (the Act), allegedly on the basis of this email.

[2] In terms of section 16 (1) of the Act, the Acting Chairperson decided to refer the complaint to the Judicial Conduct Committee (the JCC), and advised the complainant and the respondent accordingly of her decision. The respondent filed his response to the complaint and also attached annexures in support of his denial of the allegations against him.

[3] On 24 October 2023, the JCC conducted a virtual hearing of the complaint. Both parties had submitted their written representations and had also been asked to attend the hearing, which they both did. The complainant appeared personally, unrepresented, and the respondent also attended accompanied by his legal representative, Mr A Moosajee. Mr Achuko relayed his complaint orally and questions were asked by the JCC panel members. Thereafter, Adv Moosajee made his submissions and the complainant was given an opportunity to reply. The decision of the JCC was reserved. What follows are the reasons for the decision of the JCC.

[4] On the subject of the email are the words 'Payment Advise'. The email contains an attachment that reads 'Achuko Payment Schedule'. According to the complainant, he could not open the attached file. Upon investigation, he established that the email message was blocked and needed a password he did not have to be opened. Upon further investigation, he established that the sender of this email was the respondent, who in 2019 presided in a matter between himself, ABSA Bank and Others, which he lost. This gave him reason to believe that the respondent was receiving a bribe from ABSA Bank and other opponents involved in the litigation. In light of this suspicion, he concluded that the conduct of the respondent was unlawful and in breach of his constitutional obligations and statutory duties.

[5] The respondent denied having composed the email or sending it. He stated that it came to his attention that an identical email had apparently been sent to many other people from his email address. He was alerted of the receipt and content of this email by the secretary of a former Constitutional Court Judge. When he investigated further, it became clear that his email had been hacked. Some of the people who received the email were known to him and were on his mailing address list. The complainant was, however, not on this list.

[6] He went further and requested assistance from the IT personnel at the Supreme Court of Appeal, where he was an Acting Judge, to unravel the origin of this mysterious email. They were unable to ascertain how the hacking happened but were in no doubt that his computer was hacked.

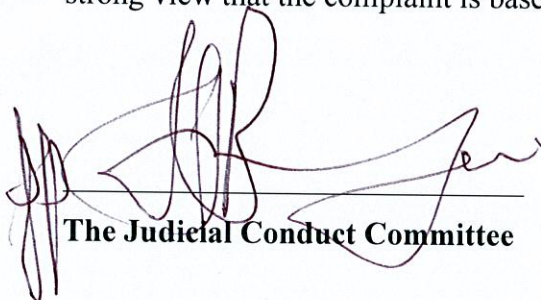
[7] The respondent pointed to certain features in the email which he contended were further indicators that he was not the author of the email. He submitted that he would not spell 'Advice' as 'Advise'. He further stated that the complaint is also not supported by what is contained in the email. The complainant's interpretation of the email is speculative. Nowhere, does it say in the email that he was being paid money by anyone, let alone a bribe and ABSA's name does not appear in the email. At best, on its reading, it is the sender who purportedly sent 'Payment Advise' to these various people. The respondent denied ever soliciting or being paid any bribes. He confirmed having presided in an application brought by the complainant against ABSA and FNB banks which he dismissed on merits. He also dismissed the application for leave to appeal.

[8] Having considered all the submissions, we find no merit in the complaint for the following reasons. On his own version, the complainant was unable to open the attachment of the email he received as it required a password which he did not have. He could, therefore, not say what was contained in the attachment. Accordingly, he had no basis to state that it contained details about a bribe. His is a speculation with no foundation. Assuming that the email was legitimately received, the complainant could have solicited help from those with IT knowledge to assist him to open the attachment. But he did not. On the other hand, the respondent went out of his way to seek assistance from IT experts. He could have simply denied sending the email and left the matter there, but thought it fit to go deeper into the matter as his integrity and the integrity of the judiciary was at stake.

[9] To make this kind of accusation against the respondent with absolutely no basis is seriously harmful both to him and the judiciary. It must be deprecated strongly. Of course, complaints should be lodged to the JCC for judges' breach of the Judicial Code of Conduct. It is, however, not acceptable to lay unfounded claims against judges.

[10] If the respondent was indeed receiving bribes it is unthinkable that he would send such an email to some of his colleagues and to people he did not even know. The complainant seeks to get around this by alleging that the respondent must have fabricated the dissemination of the email to various people. It is a trite principle of law that any complaint must be supported by evidence. In this case, the complainant, based on pure speculation, accused the respondent of

receiving bribes without verifying why he received the email in the first place. We are of the strong view that the complaint is baseless. It is accordingly dismissed.



The Judicial Conduct Committee