

## **JUDICIAL CONDUCT COMMITTEE**

Ref no: JSC/1028/2022

**In the matter between:**

**MR S MKHIZE**

**Complainant**

**and**

**JUDGE M NKOSI**

**Respondent**

**Date:** 26 July 2024

**Decision:** The Committee recommends that the matter be referred to the Acting Chairperson for a formal inquiry to be held in terms of section 17 of the JSC Act to determine the merits of the complaint.

---

### **RULING**

---

**THE JUDICIAL CONDUCT COMMITTEE (JAFTA J, SHONGWE JA,  
and MABINDLA-BOQWANA JA)**

[1] This appeal was lodged by Mr Siza Mkhize (complainant) against the decision of the Acting Chairperson in terms of which the complaint filed against

Judge Mfuniselwa Nkosi (respondent) was dismissed on the grounds that it lacked substance and did not fall within the ambit of the Judicial Service Commission Act (JSC Act)<sup>1</sup>. The appeal was filed in terms of section 15 of the JSC Act which vests every complainant with a right to appeal against a summary dismissal of a complaint<sup>2</sup>. An appeal under this provision lies against a summary dismissal of a complaint effected in terms of section 15(2). The latter section obliges the Acting Chairperson to summarily dismiss a complaint under certain defined bases.<sup>3</sup> One of those bases is that the complaint falls outside the parameters of grounds set out in section 14(4). This is an indication that under the JSC Act, complaints against Judges may be based on the grounds listed in section 14(4).

[2] In July 2022 the complainant lodged a complaint against the respondent with the Judicial Conduct Committee (Committee). The complaint was based on two distinct grounds. The first ground was that at the hearing of a case before the KwaZulu-Natal Division of the High Court (high court), the respondent exhibited conduct that led to a reasonable apprehension that the respondent was not impartial. The complainant alleges that he was acting in person at that hearing. He says the respondent denied him a fair chance to present his case and that the respondent excessively and continuously interjected while he presented his argument. Some of those interjections, he continues, were based on incorrect information. But when his opponent was presenting his side of the case ‘there were minor interjections’. He concludes that the manner in which the hearing was

---

<sup>1</sup> 9 of 1994 as amended

<sup>2</sup>Section 15(5) of the JSC Act provided. “The committee must inform the complainant, the respondent and the commission in writing of any decision envisaged in subsection (4) and the reasons therefore”.

<sup>3</sup> Section 15(2) of the JSC Act provided. “A complaint must be dismissed if it -

- (a) does not fall within the parameters of any grounds set out in section 14
- (b) does not comply substantially with the provisions of section 14(3)
- (c) is solely related to the merits of a judgement or order
- (d) is frivolous or lacking substance”

conducted reveals that the respondent was partially in favour of the opponent whose case was brought by the respondent's former law firm.

[3] To bolster further the contention of apprehension of bias, the complainant alleges that the respondent reached a conclusion in that matter which was at variance with admitted facts. He alleges that in the replying affidavit filed by his opponent it was admitted that the lateral support wall in issue was erected by the complainant's neighbour and not by the complainant. The complainant says facts which favoured him in that matter were ignored and findings were made against him without supporting facts.

[4] With regard to the second ground, the complainant alleges that at the time litigation was instituted against him in the high court, the respondent was still a partner in the law firm that represented the applicant. In other words, the applicant in that matter was a client of the respondent's firm. When the respondent presided over the matter, the case had been pending for a year in the high court and the respondent had not completed a year as a Judge.

[5] The complainant states that during the Judicial Service Commission's interviews of candidates for appointment as judges, in 2018, the respondent made an undertaking that he would recuse himself in all matters involving his former law firm. But the respondent was not appointed on that occasion. He was again interviewed in April 2021 and he was successful on that occasion. The relevant hearing before the respondent occurred in October 2021.

[6] Based on these facts, the complainant asserted that in presiding over the case, the respondent violated article 12(3) of the Code of Judicial Conduct (the

Code). Although he did not make a specific reference to another article of the Code, it appears, from the facts, that article 13 is implicated as well. The latter article obliges a Judge to recuse himself or herself if there is a reasonable suspicion of bias based on objective facts. It will be remembered that the complainant alleged that there was a reasonable apprehension of bias on the part of the respondent.

[7] This is the complaint that was dismissed summarily in accordance with the following decision:

‘The complaint is dismissed in terms of section 15(2)(c) and 15(2)(d) of the Judicial Service Commission Act, 1994 (JSC Act) on the grounds that it is solely related to the merits of a judgment and it is lacking in substance and does not fall within the parameters of any grounds set out in section 14(4).’

[8] The decision was communicated to the complainant in writing on 13 December 2022. In that correspondence he was also informed that if he was dissatisfied, he was entitled to appeal against that decision within one month from the date he received the notification. He was also told that should he elect to appeal, he was required to specify the grounds of appeal.

[9] Having chosen to appeal, the complainant filed a document outlining the grounds of appeal he relied on. It is a long document which raises all sorts of issues, the majority of which relates purely to the merits of the judgment that was granted by the respondent. However, there are specific grounds dedicated to apprehension of bias and the violation of article 12(3) of the Code.

[10] The appeal documents were served on the respondent and he was requested to furnish a response. Indeed, on 7 March 2024 the respondent filed his response.

He confirmed that the case referred to by the complainant was placed before him for hearing and that at the commencement the respondent informed the parties that previously he was a partner at Shepstone and Wylie, one of the legal firms involved in the matter. He asked if there was an objection to him presiding in the matter. Both parties, including the complainant, said they had no objection.

[11] The respondent alleges that the hearing was properly conducted and that the complainant appeared in person. He admits that there were instances where he interjected during the complainant's presentation, to point out that some of the legal submissions were not relevant or supported by the facts. The respondent also outlined in summary the facts in the relevant matter and the conclusion he reached.

[12] This is the backdrop against which the appeal must be assessed. Needles to point out that when the matter came before the Acting Chairperson, only the complainant's statement was presented to her. She did not have the comprehensive documents filed on appeal. We now have complete papers on the matter. We will consider the grounds on which the complaint was dismissed.

### **Complaint is solely related to the merits of the judgment**

[13] The first ground on which the dismissal was based was that it related solely to the merits of the judgment. As stated the Chairperson is obliged to dismiss a complaint that is solely related to the merits of a judgment or order. The rationale is that errors in judgments are subject to correction by appeal courts and such matters fall outside the scope of the JSC Act in terms of which complaints against Judges are processed.

[14] The critical question here is whether on the present facts, the complaint is exclusively about the merits of the judgment. This is what the word ‘solely’ in section 15(2) connotes. It qualifies and limits the extent of complaints which may not be pursued against Judges. Drafters of the Code were alive to the fact that Judges may violate the Code in the process of performing judicial duties such as adjudicating cases and writing judgments.

[15] A perusal of both articles 12 and 13 of the Code underscores this point. For example, article 13 obliges a Judge to recuse himself or herself from hearing or deciding a case if there is a conflict of interest or a reasonable suspicion of bias. Such conflict or suspicion may emerge during the course of the hearing or even after the decision has been reached. In that event the Judge would be disqualified to adjudicate the case, and the complaint about the disqualification of the Judge concern would relate to the merits of the matter but not exclusively to those merits.

[16] While it is true that the major part of the complaint relates to the merits of the judgment rendered by the respondent and that the complainant seeks to overturn that judgment, the complaint does not relate solely to those merits. It includes allegations about the violation of the Code.

### **Complaint lacks substance**

[17] The complaint was also dismissed on the grounds that ‘it is lacking in substance’. This ground, like the one discussed above, is listed in section 15(2).<sup>4</sup>

---

<sup>4</sup> Section 15(2) of the JSC Act provides:

It authorises the Chairperson of this committee to dismiss a complaint forthwith if it 'is frivolous or lacking in substance'. Here the Acting Chairperson did not find that the complaint is frivolous. Instead, she held that it was lacking in substance. This requires us first to determine the meaning of the words 'lacking in substance' and proceed to measure the complaint against the standard so determined.

[18] With regards to substance, the provision does not require proof of the complaint at the stage of lodging. What the provision needs is that the allegations made must reasonably be capable of sustaining the complaint lodged, if they were later established. Allegations are without substance if they are incapable of supporting the complaint despite being established. Therefore, we must assume that the allegations made by the complainant are true for purposes of determining whether they lack substance.

[19] The relevant allegations are the following. Having confirmed that his former law firm was involved in the case, the respondent asked if the parties objected to him hearing the case and proceeded to hear it when no objection was raised. When the complainant presented his argument, the respondent interjected him excessively but did not do the same to his opponents. The respondent made factual findings which were not supported by the facts on record. He presided over a case that commenced whilst he was a partner at the relevant law firm and

---

A complaint must be dismissed if it –

- (a) does not fall within the parameters of any of the grounds set out in section 14 (4);
- (b) does not comply substantially with the provisions of section 14 (3);
- (c) is solely related to the merits of a judgment or order;
- (d) is frivolous or lacking in substance; or
- (e) is hypothetical.

was less than a year as a Judge when he entertained the matter. The outcome favoured the client of his former law firm.

[20] These, if established, are reasonably capable of supporting an apprehension that the respondent was not impartial. They may also show a plausible breach of article 12(3) of the Code. In these circumstances the complaint has substance.

### **Complaint not falling within the parameters of section 14(4)**

[21] The last ground on the basis of which the complaint was dismissed is that it was not based on any of the grounds listed in section 14(4) of the JSC Act<sup>5</sup>. This provision contains a list of grounds on which a complaint against a Judge may be based. These grounds include a wilful or grossly negligent breach of the Code. It cannot be disputed that if it is eventually found that the respondent should have recused himself from the relevant case, his failure to do so may have violated the Code. In mandatory terms article 13 of the Code directs Judges to recuse themselves where there is a reasonable suspicion of bias based on objective facts. Here such facts are alleged and the respondent himself must have had some doubt hence he asked if the parties objected to him hearing the matter.

---

<sup>5</sup> Section 14(4) of the JSC Act reads the grounds upon which any complain against a judge may be lodged, are any one or more of the following:

- (a) incapacity giving rise to a judge's inability to perform the functions of judicial office in accordance with prevailing standard, or gross incompetence, or gross misconduct, as envisaged in section 177(1)(a) of the constitution
- (b) Any willful or grossly negligent breach of the code of judicial conduct referred to in section 12, including any failures to comply with any regulation referred to in section 13(5)
- (c) Accepting, holding or performing any office of profit or receiving any fees, emoluments or remuneration or allowance in contravention of section 11
- (d) Any willful or grossly negligent failure to comply with any remedial step, contemplated in section 17(8), imposed in terms of this Act; and
- (e) Any other willful or grossly negligent conduct, other than conduct contemplated in paragraph (a) to (d), that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudice to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.



[22] In addition, if it is true that the relevant case was instituted before the respondent's appointment as a Judge and that the other party was represented by the law firm in which the respondent was a partner, it may well be that the respondent has breached article 12(3) of the Code. Under this article a Judge previously in private practice is precluded from sitting in any case in which his former law firm was involved before that Judge was appointed.

[23] Therefore the complaint was based on grounds listed in section 14(4). It falls under section 14(4)(b) of the JSC Act which refers to a breach of the Code. Since none of the grounds cited in support of the dismissal may be upheld, the appeal must succeed. However, we emphasise that the success is limited to the part of the complaint which relates to alleged breaches of the Code. It does not extend to the merits of the judgment issued by the respondent. That part of the matter falls outside the jurisdiction of this Committee. An appeal against the merits of a judgment lies in the competent appeal court and consequently the complainant may approach such court for appropriate relief.

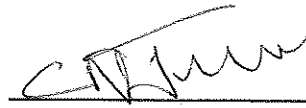
[24] The partial success of this appeal means that the complaint ought not to have been summarily dismissed. Instead there should have been an inquiry into its merits. Section 18(4) of the JSC Act mandates this Committee on appeal to set aside a dismissal made in terms of section 15 and refer the complaint to the Chairperson for an inquiry under section 17.<sup>6</sup>

---

<sup>6</sup> Section 18(4) of the JSC Act provides that after consideration of an appeal in terms of subsection 3, the committee must-

- (a) In the case of an appeal against a dismissal of a complaint as contemplated in section 15(4)(a)-
  - (i) Confirm the dismissal
  - (ii) Set aside the dismissal and refer the complaint to the Chairperson for an inquiry in terms of section 17; or

[25] Accordingly the complaint is referred to the Acting Chairperson for an inquiry in terms of section 17.



**THE JUDICIAL CONDUCT COMMITTEE**

- 
- (iii) Set aside the dismissal and recommend to the commission that the complaint should be investigated by a tribunal in terms of section 19;
  - (b) In the case of an appeal against a dismissal of a complaint as contemplated in section 17(7)(a)-
    - (i) Confirm the dismissal
    - (ii) Set aside the dismissal, and find that the complaint has been established and that the respondent has behaved in a manner which is unbecoming of a judge, and impose any of the remedial steps referred to in section 17(8) on the respondent; or
    - (iii) Set aside the dismissal and recommend to the commission that the complaint should be investigated by a tribunal in terms of section 19;
  - (c) In the case of an appeal against a finding or remedial steps, or a finding and remedial steps as contemplated in section 17(7)(b)-
    - (i) Set aside the decision concerned; or
    - (ii) Confirm the decision or set aside the decision concerned and substitute it with an appropriate decision, with or without any amendment of the remedial steps imposed, if applicable; or
    - (iii) Set aside the decision and recommend to the commission that the complaint should be investigated by a tribunal in terms of section 19.