



JUDICIAL CONDUCT COMMITTEE

Ref no: JSC/1157/23

In the matter between:

MR B L NCONGWANE

Complainant

and

JUDGE C VAN ZYL

Respondent

Date: 26 July 2024

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

RULING

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

Introduction

[1] This complaint was referred to the Judicial Conduct Committee (Committee) by the Deputy Chief Justice in her capacity as the Acting Chairperson of the Committee (Acting Chairperson). Section 16(1) of the Judicial Service Commission Act 9 of 1994 (the JSC Act) provides that: (1) If the Chairperson is satisfied that, in the event of a valid complaint being established, it is likely to lead to a finding by the Commission that the respondent suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, as envisaged in section 14(4)(a), the Chairperson must – (a) refer the complaint to the Committee in order to consider whether it should recommend to the Judicial Service Commission (Commission) that the complaint should be investigated and reported on by a Judicial Conduct Tribunal (Tribunal); and (b) in writing, inform the respondent of the complaint. The section requires the Chairperson to consider a complaint on the assumption that the allegations in the complaint are established, and that the Commission is likely to make a finding that the Judge against whom the complaint is brought suffers from incapacity, is grossly incompetent or is guilty of gross misconduct. If the Chairperson is satisfied, then the section mandates her to refer the complaint in question to the Committee. The allegations set out in the complaint must give rise to the likelihood that the Commission would find that one of the grounds for the removal from office as envisaged in section 177 of the Constitution has been established. Section 177 provides that a judge may be removed from office only if: (a) the Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

[2] In terms of section 16(4) of the JSC Act, the Committee must consider whether the complaint, if established, will *prima facie* indicate incapacity, gross incompetence or gross misconduct by the respondent, in which case, the Committee may (a) refer the complaint to the Chairperson for an inquiry referred to in section 17(2); or (b) recommend to the Commission that the complaint should be investigated by a Tribunal.

[3] If a *prima facie* case with regard to one of the listed grounds in section 177 of the Constitution is established, then the Committee may recommend to the Commission that a Tribunal be established for the purposes of investigating fully the complaint and reporting the outcome to the Commission. Contextually, the purpose of the referral to the Committee is for the Committee to consider whether a recommendation to the Commission should be made for a Tribunal to be established for purposes of investigating and reporting on the complaint. A complaint warrants the establishment of a Tribunal only if the allegations of the complaint give rise to one or more of the grounds of removal from office of a judge as set out in section 177(1) of the Constitution.

[4] Thus this Committee must evaluate the complaint raised by Mr Ncongwane carefully and the representations made by him, and that of the respondent Judge, to determine whether a *prima facie* case for incapacity, gross misconduct or gross incompetence as contemplated in section 177 of the Constitution has been established against Judge Van Zyl.

[5] We turn now to consider the present complaint with a view to evaluating the complaint as envisaged in section 16(4) of the JSC Act.

Factual Background

[6] Mr Ncongwane filed a complaint against Judge Van Zyl of the Free State Division of the High Court, Bloemfontein (Bloemfontein High Court). In his complaint Mr Ncongwane alleged that he was an applicant in a civil matter which he instituted against his wife for damages, when he discovered after their divorce, that he was not the biological father of the youngest of their three children, who was born during the subsistence of their marriage. The matter was heard by Judge Van Zyl during 2018 in the Bloemfontein High Court, and she reserved judgment on 14 June 2018. On 13 December 2018, Judge Van Zyl granted an order dismissing the case with costs, without giving written reasons. It appears from the complaint that this order did not come to the complainant's attention. In December 2019, Mr Ncongwane, was informed by his attorney that an order was granted on 13 December 2018 by Judge Van Zyl, where his case was dismissed with costs, and that a written judgment would follow. At the time of the filing of the complaint on 3 November 2022, he had not received the written judgment. Mr Ncongwane alleged that as a result of the delay by Judge Van Zyl, in providing a written judgment, he was unable to exercise his constitutional right to consider and weigh his options whether to appeal the judgment, and thus ask that the judgment be set aside.

[7] The Acting Chairperson directed Mr Ncongwane's complaint to the Committee in terms of section 16(1)(a) of the JSC Act.

[8] In response to the complaint, Judge Van Zyl made oral and written submissions and appeared before the Committee. Judge Van Zyl explained that Mr Ncongwane's matter was heard over several days, namely, 12 and 13 September 2017, 12 December 2017, 6 and 7 March 2018, 19 April 2018 and 14 June 2018. On 13 December 2018, she made an order where she dismissed the complainant's action with costs. She did not have an independent recollection of whether legal representatives were present in court and did not know why the complainant would have only been informed about the outcome of his matter in December 2019.

[9] Judge Van Zyl explained that the complainant's matter dealt with 'misattributed paternity', the nature and the basis of the cause of action she considered to be novel. She did extensive research on the issue, including research on international cases and the legal principles applicable for the adjudication of the matter. The research was very time-consuming, and she realised that it would go beyond the time period applicable for delivering judgments. However, she was able to reach a conclusion as a result of the research, but, as she did not have the time to write the full judgment, she only handed down an order dismissing Mr Ncongwane's claim. Judge Van Zyl explained that it was her *'definite and bona fide intention to provide the parties with a full judgment soon thereafter. In [her] mind [she] thought an order would be better for the parties at that stage than not knowing at all what the outcome was going to be'*.

[10] During November 2022, Judge President Musi of the Bloemfontein High Court enquired about the outstanding judgment, and she undertook to finalise the written judgment within a few days. However, even though she made

undertakings to make the full judgment available, she was unable to comply. She tried her best during November and December 2022 to finalise it but was unable to do so. Judge Van Zyl conceded that a number of enquiries were made by Mr Ncongwane about the outstanding judgment. Finally, on 13 June 2023, she made the written judgment available to the parties.

[11] Before this Committee, Judge Van Zyl justified her conduct by contending that her physical and mental health were relevant to the present complaint. She set out the medical facts over the period between July 2019 and March 2023. She informed the Committee that she was also on chronic medication for an autoimmune disease and ulcerative colitis. She was suffering from certain mental health issues and had since March 2019, consulted with psychiatrists, placed on sick leave and hospitalised.

[12] In August 2022, she wrote a letter to Deputy Judge President Mbhele of the Bloemfontein High Court, setting out the facts and circumstances and health issues, which over the relevant period had impacted upon her ability to properly comply with her judicial obligations. During the September 2022 recess, she attempted to finalise the editing of the written judgment, to no avail. In November 2022, JP Musi informed her that he was going to lodge a formal complaint against her. From then onwards her mental health deteriorated and she sought urgent medical assistance from both a psychologist and psychiatrist.

[13] Presently, both her physical and mental health had improved. Judge Van Zyl profusely apologised to Mr Ncongwane and the defendant for the ‘unacceptable delay in finalizing the full judgment’.

[14] In both her written and oral submissions, Judge van Zyl contended that the delay in not delivering her written judgment was because of her mental and health issues, which had impaired her ability to carry out her judicial functions. This related to one judgment which was reserved in June 2018, and the order delivered in December 2018.

[15] The question before this Committee is whether the complaint of the one long outstanding judgment would support *prima facie* proof of incapacity, gross incompetence or gross misconduct on the part of Judge Van Zyl as envisaged in section 177 of the Constitution, as a result that the establishment of a Tribunal should be recommended. This question can properly be answered only if we know what each of those terms mean in the context of the Constitution. Therefore, we proceed to interpret the relevant provision.

[16] What must be considered is whether the conduct of the judge in delaying the written reasons in respect of the one judgment where she had given the order without written reasons, must be measured against each of the listed grounds as contemplated in section 177 of the Constitution. Vexed questions relating to Judge Van Zyl's conduct arise. Is her conduct so serious that it brings the impartiality, integrity and the independence of the judiciary into disrepute? Is the misconduct of the judge inimical to the administration of justice and so serious so as to reduce public confidence in the administration of justice if the judge continues to perform judicial functions in the office that she was appointed to? Is her conduct of such a nature that it destroys public confidence in her ability to perform the judicial function of writing and delivering judgments?

[17] Contextually, the conduct complained of must be measured against each of the grounds as envisaged in section 177 of the Constitution.

Incapacity and Gross Incompetence

[18] Under section 177 'incapacity' envisaged is of a permanent nature. It is a permanent inability that prevents a judge from performing judicial functions. This normally occurs where a judge is afflicted by a permanent infirmity of mind or body which renders the judge in question incapable of doing judicial duties. Here, although Judge Van Zyl suffered from bouts illnesses, they do not seem to have been of a permanent nature. Most importantly her ill-health commenced long after the period within which she was supposed to have delivered the relevant judgment.

[19] In the context of section 177, 'gross incompetence' means a serious inability to properly perform judicial functions, including writing and delivering judgments within the prescribed periods. The inability must be so serious as to severely break public confidence in the judge's ability to do judicial duties. In this case, there are no facts to indicate that if the complaint is established, it will *prima facie* show 'gross incompetence' or 'incapacity'. The complaint is limited to a failure to deliver one judgment. If there were other shortcomings on the part of Judge Van Zyl, the Judge President would have included them in the complaint. The probabilities are that the complaint is about an isolated failure to deliver a judgment.

[20] Barring this singular failure, it appears that Judge Van Zyl was able to perform her judicial functions diligently. Therefore, if the complaint is

established, it does not appear to us that in relation to these grounds, the test for establishing a Tribunal will be met.

Gross Misconduct

[21] For misconduct to rise to the level of 'gross misconduct' contemplated in section 177 of the Constitution, it must be so bad as to cause a serious loss of public confidence in the judges' ability to perform judicial duties. It is misconduct that warrants an immediate removal of a judge from judicial office on the basis that the public has lost confidence in his or her ability to discharge judicial functions properly.

[22] Although a single incident may constitute gross misconduct, in the present context it is difficult to imagine the failure to deliver one judgment as rising to the rank of gross misconduct. If the judge in question performs other judicial functions diligently and continues to deliver judgments in other matters within the prescribed periods, the public may not lose confidence in his or her ability to perform duties. This appears to have been the position in the present matter. If the complaint is eventually established, it will indicate no more than that Judge Van Zyl has failed to deliver a single judgment over a period of approximately five years. On the face of it, this does not rise to the level of gross misconduct.

[23] In the current matter the standard set in section 16(4) of the JSC Act, for recommending that a Tribunal be established to investigate the complaint, is not satisfied. Consequently, there is no legal basis for making such a recommendation.

[24] However, section 16(4) also obliges this Committee to refer the complaint to the Chairperson for an inquiry referred to in Section 17(2)¹, if there are reasonable grounds to suspect that a non-impeachable misconduct has been committed. The latter section permits the Chairperson or a member of the Committee designated by her to inquire into and determine the merits of the complaint.

[25] As mentioned earlier, Judge Van Zyl delivered her judgment in this matter almost five years from the date of hearing. This suggests that the Code of Judicial Conduct (the Code) was breached. It will be recalled that the Code prescribes that a judgment must be delivered within the term during which the hearing was concluded or during the course of the following term. Obviously, this was not done in the present case.

[26] The section 17 inquiry will determine the merits of the complaint, a matter which falls outside the remit of this Committee, hence it is necessary to make the referral.

[27] In the result, this Committee recommends that this matter be referred to the Chairperson for an inquiry to be held in terms of section 17(2) of the JSC Act.

¹ Section 17(2) provides that: 'Any inquiry contemplated in this section must be conducted in an inquisitorial manner and there is no onus on any person to prove or to disprove any fact during such investigation.'

J. Saldeiro

THE JUDICIAL CONDUCT COMMITTEE