



JUDICIAL CONDUCT COMMITTEE

Ref No: JSC/696/21

In the matter between:

Moses Makatu

Complainant

and

Acting Judge Herman Niewoudt

Respondent

Ruling

Judicial Conduct Committee (Maya DCJ, Jafta J, Shongwe JA and Mabindla-Boqwana JA)

- [1] This is an appeal lodged in terms of section 15 of the Judicial Service Commission Amendment Act (Act).¹ The appeal is against the decision of Waglay JP who dismissed the complaint lodged by Mr Moses Makatu (complainant) against the former Acting Judge Herman Niewoudt (respondent).
- [2] The complainant had a claim that was prosecuted in the Labour Court and which was allocated to the respondent for consideration and decision as the presiding Judge. It is apparent from the papers that the complainant was acting in person.

¹ 20 of 2008.

- [3] In due course the respondent rendered judgment in the matter and requested a permanent Judge to sign and deliver the judgment on his behalf. It appears that at the time, the respondent's acting stint had come to an end.
- [4] The judgment was against the complainant and in favour of his opponent. Dissatisfied with this turn of events and acting in person, the respondent lodged a complaint with the Chairperson of the Committee. He alleged that there were certain events that occurred on the eve of the hearing of his matter in open court on 28 July 2021. He said there was an exchange of emails between his opponents and the presiding Judge. However, the complainant does not spell out what that exchange was about.
- [5] The complainant says that when the written judgment was delivered, he noticed that it was not signed by the author, the respondent, but by another Judge. Despite him having made a strong case, the outcome favoured his opponent. He found it suspicious that the judgement was not signed by the author. This, together with the exchange of emails, caused him to believe that his claim was not properly considered.
- [6] He then lodged a complaint against the respondent in August 2021, the receipt of which was acknowledged by this Committee. Having considered the complaint, the Chairperson of the Committee dealt with it in terms of section 15 of the Act.² This provision empowers the Chairperson to designate the Head of Court from which the complaint arose, to deal with the complaint. This occurs where the Chairperson is of the opinion that the complaint may be dismissed on the grounds listed in section 15(2) of the Act.
- [7] Acting in terms of section 15, the Chairperson designated Waglay JP to consider the complaint. Having perused it, Wagley JP concluded that there was no substance in the allegation of bias and that the complaint was effectively about the merits of a judgment.

² Section 15 of the Act provides: '(1) If a Chairperson of the Head of Court designated in terms of section 14(2) is of the view that the complaint falls within the parameters of the grounds set out in subsection (2), he or she must dismiss the complaint.

(2) A complaint must be dismissed if it –

(a) does not fall within the parameters of any 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; or
(d) is hypothetical.'

Consequently, it should be dismissed in terms of section 15 (2)(c) of the Act. Indeed, the Judge President dismissed that complaint.

- [8] Having been informed of the outcome, the complainant lodged an appeal to this Committee. He complained that Waglay JP just read and dismissed the complaint without considering all the facts. He bemoaned the fact that no investigation was undertaken. The notice of appeal does not address or challenge the reason furnished for dismissal, even though it does specify grounds of appeal on which the complainant rely.
- [9] A careful consideration of the record reveals that the allegation of bias on the part of the respondent is not sustained. It also shows that essentially the matter is about the complainant's dissatisfaction with the outcome. This fall outside the remit of this Committee.
- [10] But, there is a more serious obstacle that stands in the way of success of this appeal. This relates to this Committee's competence to entertain a complaint against a former acting Judge.
- [11] This Committee is established by section 8 of the Act.³The Committee is charged with responsibility to 'receive, consider and deal with complaints in terms of Part III' of the Act. Therefore, the Committee derives its mandate from the Act which specifies how and on whom such mandate may be exercised.
- [12] Part III of the Act consists of sections 14 – 18. Section 14 governs the lodging of complaints against Judges. Section 15 tells us how the complaints which suffer from certain defects could be disposed. Section 16 outlines a process to be followed in processing complaints which may lead to the removal of Judges from office. Section 17 is dedicated to complaints which do not lead to the removal from office whereas section 18 regulates appeals against decisions taken in disposing complaints.

³ Section 8 of the Act provides: '(1) The Commission has a Judicial Conduct Committee, comprising –
(a) The Chief Justice, who is the Chairperson of the Committee;
(b) The Deputy Chief Justice;
(c) Four Judges, at least two of whom must be women, designated by the Chief Justice in consultation with the Minister, for the period determined at the time of such designation, provided that such period may not exceed two years.'

- [13] All these provisions refer to Judges as persons against whom complaints may be lodged and decided. The word ‘Judge’ appears in each provision and under the Act that word carries a specially defined meaning. Section 7(1)(g) of the Act informs us that Judge means –

“any Constitutional Court Judge or judge referred to in section 1 of the Judges Remuneration and Conditions of Employment Act, 2000 (Act 47 of 2001), which includes a judge who has been discharged from active service in terms of that Act, as well as any person holding the office of judge in a court of similar status to a High Court, as contemplated in section 166 of the Constitution, and, except for the purposes of section 11, includes any Constitutional Court judge or judge performing judicial duties in an acting capacity.”

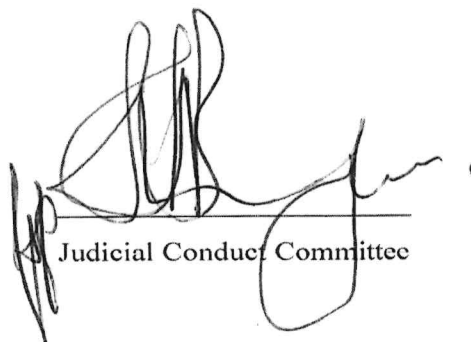
- [14] A close and careful reading of this definition reveals categories of Judges on whom the disciplinary processes contained in the Act apply. The first category is that of Constitutional Court Judges. This is followed by the class as defined in the Judges Remuneration and Conditions of Employment Act. The latter Act refers to permanent Judges of the Supreme Court of Appeal and the High Court. The third group consists of Judges discharged from active service under the 2001 Act on Judges remuneration. The fourth group comprises Judges of specialist courts of a status similar to the High Court, for example, Judges of the Labour Court and the Land Claims Court. The last category is made up of Constitutional Court Judges and other Judges who are appointed to perform judicial duties in courts other than those to which they were appointed. For example, a High Court Judge who is appointed to act in the Supreme Court of Appeal or a retired Judge who is called upon to perform judicial functions in an acting capacity.
- [15] Therefore, the definition of a Judge in section 7 of the Act does not include persons who are appointed to act in the High Court for a fixed period of time and who were not Judges already at the time of the appointment. Since the meaning of ‘Judge’ as defined in the enabling Act does not cover persons who were not Judges at the time of appointment to act, it appears that such persons do not fall within the competence of the Judicial Conduct Committee.
- [16] It is a settled principle of our law that where a word is defined in a statute, it must be accorded the defined meaning wherever it appears in that statute. However, this

principle may not be followed only where the context in which the word is used indicates clearly that the defined meaning should not apply.⁴

- [17] Accordingly, we hold that the Committee's authority to consider and deal with complaints in terms of Part III of the Act does not extend to former acting Judges. In coming to this conclusion, we have not lost sight of Article 2 of the Code of Judicial Conduct to the extent that it says the Code applies to acting Judges unless the context indicates otherwise.
- [18] In overview the Code, which is not a statute but subordinate legislation, cannot contradict and override the scope of the definition of 'Judge' in the Act. Nor can a wider meaning of judge in the Code justify the departure from the defined meaning in the Act. The opening words of section 7 of the Act tell us that the word 'judge' carries the defined meaning unless the context in which it is used in the Act itself indicates otherwise. This is not to say if the same word is used in a different sense in another legislation, the interpreter would be entitled to depart from the defined meaning and employ the meaning used in the other legislation.
- [19] This interpretative approach is also fortified by the language of Article 3 of the Code which states unequivocally that the Code 'must be applied consistently with the Constitution and the law as embodied in the common law, statutes and precedent, having due regard to the relevant circumstances.' This simply means in present circumstances that 'judge' in the Code must be construed consistently with its meaning in the Act. This is because this Committee can only deal with and consider complaints in terms of Part III of the Act. The Code does not empower it to follow a different procedure.
- [20] In these circumstances, we come to the conclusion that the complaint ought not to have been entertained because its object is not a Judge as defined in the Act. In general, complaints against practitioners who return to their profession at the end of their acting stint, may be referred to the relevant profession.

⁴ *Liesching v The State* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) at para 33.

[21] Accordingly, the appeal is dismissed.



Judicial Conduct Committee