JUDICIAL CONDUCT COMMITTEE

Ref No: JSC/283/12/2025

In the matter between:

MS S E ZWANE **COMPLAINANT**

and

JUDGE M T M PHEHANE **RESPONDENT**

Date: 02 November 2026

Decision: The complaint against Judge Phehane is dismissed in terms of section 17(4)(*a*) of the Judicial Service Commission Act 9 of 1994.

RULING

THE JUDICIAL CONDUCT COMMITTEE (MLAMBO DCJ)

Introduction

[1] Ms Zwane lodged a complaint, dated 29 November 2025, against Judge Phehane of the Labour Court. The complaint concerns the respondent's conduct when she presided over the review application in *Alternative Field*

Personnel (Pty) Ltd v Elizabeth Zwane and Others, Labour Court case number JR804/18, on 16 November 2023.

[2] On 28 July 2026, the respondent was invited to answer the complaint and delivered written representations on 13 August 2026. On 19 August 2026, the complainant was invited to comment and subsequently delivered an undated reply. I have considered those submissions together with the material documents in the file.

[3] Section 17 of the Judicial Service Commission Act 9 of 1994 (the Act) requires an inquisitorial inquiry into the merits of the complaint. No person bears an onus to prove or disprove a fact,[1] and the determination must be made on the information obtained under section 17(3).[2]

The Complaint

[4] The complainant was dismissed by Alternative Field Personnel (Pty) Ltd. A commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) subsequently found the dismissal substantively unfair, ordered her

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[1] Sections 17(1) and (2) of the Act provide, "If—

(a) the Chairperson is satisfied that, in the event of a valid complaint being established, the appropriate remedial action will be limited to one or more of the steps envisaged in subsection (8); or

(b) a complaint is referred to the Chairperson in terms of section 15 (1) (b) or section 16 (4) (a), or section 18 (4) (a) (ii), the Chairperson or a member of the Committee designated by the Chairperson must inquire into the complaint in order to determine the merits of the complaint.

(2) 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."

[2] Section 17(3) of the Act provides, "[f]or the purpose of an inquiry referred to in subsection (2), the Chairperson or member concerned—

(a) must invite the respondent to respond in writing or in any other manner specified, and within a specified period, to the allegations;

(b) may obtain, in the manner that he or she deems appropriate, any other information which may be relevant to the complaint; and

(c) must invite the complainant to comment on any information so obtained, and on the response of the respondent, within a specified period."

reinstatement and awarded her two months' compensation. The employer then applied to the Labour Court to review and set aside the arbitration award.

[5] On 16 November 2023, the respondent heard the employer's application for condonation and its review application. The resulting order granted condonation, reviewed and set aside the arbitration award, substituted a finding that the complainant's dismissal was substantively fair, and directed the complainant to pay the costs.

[6] The complainant alleges that the matter was heard and determined in her absence. She says that she did not know of the hearing and discovered only in June 2025 that the review had been finalised. She contends that this denied her a fair hearing.

The Response and Reply

[7] The respondent denies misconduct. She states that the condonation application was opposed, but the review application was not opposed. She says that the Court file reflected service on the email address used by the complainant's trade union and contained an affidavit of service recording that the applicant's indexes were emailed to that address and that receipt was acknowledged by a person named Zandile.

[8] The respondent states that Mr Moyo appeared at the hearing as an official of Inqubelaphambili Trade Union. According to her, he made submissions and informed the Court that the complainant would abide by its decision. The attendance

slip for 16 November 2023 records Mr Moyo as the union official appearing for the complainant and identifies Inqubelaphambili Trade Union.

[9] The applicant's practice note recorded that the matter was enrolled for hearing at the Labour Court on 16 November 2023 at 10h00. It identified the complainant as the first respondent and gave the union's email address as her contact address. The correspondence in the file shows that the practice note was sent to that address and that receipt was acknowledged.

[10] In her reply, the complainant focuses on the representation attributed to her at the hearing. She does not dispute that Mr Moyo appeared, but says that he had no valid mandate from her. She states that Inqubelaphambili Trade Union had ceased representing her, that she had later appointed attorneys, and that she did not instruct or authorise Mr Moyo to represent her on 16 November 2023 or to tell the Court that she would abide by its decision. She maintains that the history of her representation should have caused the Court to establish whether she had been personally notified and whether the union remained authorised to act for her. She asks that the circumstances be examined and that she be afforded an opportunity to have the matter heard again, preferably before a different Judge.

Applicable Legal Framework

[11] The complaint must be assessed against the statutory threshold of wilfulness or gross negligence. Article 2(3) of the Code,[3] read with section 14(4)(b) of the Act, applies that threshold to an alleged breach of the Code. Section 14(4)(e) similarly

[3] Article 2(3) of the Code provides, "Any wilful or grossly negligent breach of this Code is a ground upon which a complaint against a judge may be lodged in terms of section 14 (4) (b) of the Act."

requires any other conduct alleged to be incompatible with or unbecoming the holding of judicial office to have been wilful or grossly negligent.[4]

[12] Article 9(a) of the Code requires a Judge to resolve disputes in a fair hearing, including by observing the letter and spirit of the *audi alteram partem rule*.[5] Note 9(v) recognises that Judges may err in fact or law and that such errors are dealt with through the ordinary appeal and review procedures. It also states that complaints relating to the merits of a decision or procedural ruling must be dismissed at the outset.[6]

[13] *Fischer v De Broglio Attorneys Incorporated* clarifies the degree of culpability required.[7] The Judicial Conduct Committee held that wilfulness entails intentional or deliberate conduct, while gross negligence involves severe negligence marked by reckless disregard or blatant indifference. The standard imposed by section 14(4) is therefore a very high one.

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[4] Section 14(4) of the Act provides, "[t]he grounds upon which any complaint 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 standards, or gross incompetence, or gross misconduct, as envisaged in section 177 (1) (a) of the Constitution;

(b) Any wilful or grossly negligent breach of the Code of Judicial Conduct referred to in section 12, including any failure 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 allowances in contravention of section 11;

(d) Any wilful 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 wilful 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 prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts."

[5] Article 9(a)(i) of the Code provides, "[a] judge must—

(a) resolve disputes by making findings of fact and applying the appropriate law in a fair hearing which includes the duty to—

(i) observe the letter and spirit of the *audi alteram partem* rule; …".

[6] Note 9(v) of the Code provides, "[s]ince judges are fallible and can err in relation to fact or law, such errors are to be dealt with through the normal appeal and review procedures. Such errors, even if made by courts of final instance, cannot give rise to valid complaints. Complaints against judges that are related to the merits of a decision or procedural ruling are to be dismissed at the outset".

[7] [2025] ZAJSC 22 at paragraphs 22-24.

[14] Section 161(1)(*c*) of the Labour Relations Act 66 of 1995 permits a party in Labour Court proceedings to be represented by an office-bearer or official of that party's registered trade union. It therefore permits such representation where the statutory requirements are met. Whether Mr Moyo had authority to represent the complainant in this particular matter remains a separate factual question.

Evaluation

[15] The complainant's concern is understandable. She was not personally present when an order with serious consequences for her was made, and she says that the person who appeared did not have her authority. The disciplinary question is narrower: whether the information establishes that the respondent deliberately or with gross negligence denied the complainant a fair opportunity to be heard.

[16] The file does not establish that the respondent knew, or had been told, that the complainant had terminated the union's mandate. The material before me contains no notice informing the Court or the employer before the hearing that the union's mandate had terminated. Nor does it show that Mr Moyo's authority was challenged when he placed himself on record.

[17] The information available to the respondent instead presented an apparently regular union appearance. The practice note used the union's email address for the complainant; receipt of the practice note was acknowledged; and the attendance slip recorded Mr Moyo as the union official for the complainant. The file contains no transcript of the hearing. Nothing in the other documents before me contradicts the

respondent's account that Mr Moyo made submissions and stated that the complainant would abide by the Court's decision.

[18] The complainant's denial of a mandate raises a question about the authority under which Mr Moyo acted. The papers do not enable me to determine that question conclusively. Even if her account is accepted, however, it does not establish that the respondent knew that Mr Moyo lacked authority or that there was information before her requiring further inquiry into his mandate.

[19] In those circumstances, the respondent's acceptance of Mr Moyo's apparently regular appearance does not establish deliberate exclusion of the complainant or reckless indifference to her right to be heard.

[20] If the complainant establishes in appropriate proceedings that her representative lacked authority, or that the order was granted after defective notice, those matters concern the validity of the proceedings and the judicial remedies that may be available. The JCC cannot set aside the order, rehear the review application or direct that it be heard by another Judge.

[21] An error in accepting a representative's authority, if properly established, may constitute a procedural or adjudicative error. It does not automatically establish a wilful or grossly negligent breach of the Code. The available information does not show intentional conduct, reckless disregard or blatant indifference by the respondent.

[22] The material facts relevant to the respondent's conduct are contained in the written record. Even accepting the complainant's assertion that she did not authorise

Mr Moyo, there is no reasonable likelihood that a formal hearing will contribute to determining whether the respondent acted wilfully or with gross negligence.

Conclusion

[23] The record shows that a union official appeared for the complainant and that the documents available to the respondent were consistent with her understanding that the appearance was regular. It does not establish that the respondent knew that the official lacked authority, deliberately proceeded in the complainant's absence, or was grossly negligent in accepting the appearance.

[24] The information therefore does not establish a wilful or grossly negligent breach of the Code or other wilful or grossly negligent conduct contemplated in section 14(4)(*e*) of the Act. The complaint must be dismissed in terms of section 17(4)(*a*).

Ruling

[25] The complaint against Judge Phehane is dismissed in terms of section 17(4)(*a*) of the Judicial Service Commission Act 9 of 1994.

THE JUDICIAL CONDUCT COMMITTEE