



## **JUDICIAL CONDUCT COMMITTEE**

**Ref no: JSC/1166/23**

In the matter between:

**KENNETH SKHOSANA**

**COMPLAINANT**

and

**JUDGE ANDRE VAN NIEKERK**

**RESPONDENT**

**DATE:** 25 August 2026

**DECISION:** 1. The appeal is dismissed.

2. The dismissal of the complaint in terms of section 15(2)(c) of the Judicial Service Commission Act, 9 of 1994, as amended, is confirmed.

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### **RULING ON APPEAL**

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**JUDICIAL CONDUCT COMMITTEE (JAFTA J, MAJIEDT J AND SALDULKER JA)**

## Introduction

[1] This is an appeal in terms of section 15(5) of the Judicial Service Commission Act, 9 of 1994, as amended (the Act), against the dismissal of a complaint by Mr Kenneth Skhosana, the complainant. The Acting Chairperson of the Judicial Conduct Committee (the JCC) dismissed Mr Skhosana's complaint in terms of section 15(2)(c) of the Act<sup>1</sup> on the ground that it related solely to the merits of a judgment. Under the Act, complaints against Judges must be lodged with the JCC. The Chairperson of the JCC is required to determine, at the first stage, the provisions of the Act in terms of which each complaint may be processed.<sup>2</sup> Lesser complaints may be summarily dismissed under section 15, as has happened here.

## Background facts

[2] The complainant was a security guard at Eskom and was dismissed on 15 December 2014. On 22 April 2015, in proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA), the dismissal was found to be substantively unfair, and the complainant was awarded relief of reinstatement and retrospective compensation of R92 783. Eskom was ordered to reinstate Mr Skhosana on the same terms and conditions as before his dismissal of 15 December 2014. The amount in respect of retrospective compensation had to be

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<sup>1</sup> In relevant part, section 15 reads: "15(1)(a) If the Chairperson or 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—

....

(c) is solely related to the merits of a judgment or order;

...

(5) A complainant who is dissatisfied with a decision to dismiss a complaint in terms of subsection (1) may, within one month after receiving notice of that decision, appeal to the Committee in writing against that decision, specifying the grounds for the appeal."

<sup>2</sup> Section 14(2) of the Act provides: "when a complaint is lodged with the Chairperson in terms of subsection (1), the Chairperson must deal with the complaint in accordance with section 15, 16 or 17, but in the event of a complaint falling within the parameters of section 15, the Chairperson may designate a Head of Court to deal with the Complaint, unless the complaint is against the Head of Court."

paid by Eskom by 31 May 2015. The CCMA ordered Mr Skhosana, in turn, to render his services to Eskom from 4 May 2015. The award was certified in June 2017.

[3] According to Mr Skhosana, unbeknown to him, his trade union, the National Union of Mineworkers (NUM), signed an agreement with Eskom for his re-employment and the payment of compensation in the sum of R40 173. He says he only became aware of these facts when he inquired about the payment owed to him.

[4] According to Mr Skhosana, after several unsuccessful inquiries and attempts to obtain the compensation awarded by the CCMA, he approached the Labour Court. He first filed an application to have his back pay quantified and to have the CCMA award enforced. Eskom countered that they had entered into a settlement agreement with NUM, Mr Skhosana's trade union, to re-employ him. Eskom further claimed that the settlement agreement had superseded the CCMA award.

[5] The matter was heard by Manyage AJ, who held that the award issued by the CCMA was binding until reviewed or set aside. The Judge further held that the agreement between NUM (on behalf of Mr Skhosana) and Eskom did not supersede the duly certified CCMA award, as the award had the same effect as a judgment of the Labour Court. Consequently, Manyage AJ concluded that the Court had no jurisdiction to entertain Mr Skhosana's application.

[6] According to the complainant, pursuant to the proceedings before Manyage AJ in the Labour Court, he approached Eskom again to seek compliance with the award. In light of Eskom's continued refusal to comply, he then launched

contempt proceedings in the Labour Court, for an order *ad factum praestandum* (to comply with a specific obligation). The matter was heard by Van Niekerk J.

[7] The judgment by Van Niekerk J sketches the background narrative somewhat differently from Mr Skhosana's version. Eskom was cited as the first respondent and its Chief Executive Officer and Chairperson as the second and third respondents, respectively. For the sake of brevity, I will simply refer to all the respondents as "Eskom". Mr Skhosana was self-represented.

[8] The Labour Court judgment records that Mr Skhosana's case was that Eskom had complied with the award as far as his back pay was concerned, but not in respect of his reinstatement. In Eskom's answering affidavit, this was disputed. Eskom averred that it had fully complied with the CCMA award by reinstating Mr Skhosana in July 2017, and by paying him the full amount of the award, save for certain statutory deductions.

[9] According to the judgment, Eskom averred that, within a week of the award being issued, and as it was preparing to file an application to review and set aside the award, NUM approached Eskom on behalf of the complainant with a request to resolve the dispute. NUM and Eskom then entered into a settlement agreement on the basis that Eskom would not proceed with a review of the award, in return for which the complainant agreed to forgo his right to be reinstated. It was agreed that the complainant would, instead, accept an offer of re-employment with an additional equivalent of two months' salary.

[10] This agreement between NUM (acting on behalf of Mr Skhosana) and Eskom was reduced to writing and signed on 11 May 2015. On that date, Mr Skhosana was offered re-employment, which he accepted on 18 May 2015. Mr Skhosana then commenced employment with Eskom. According to Eskom,

between July 2015 and May 2017, Mr Skhosana initiated grievances relating to what was termed Eskom's failure to comply with the arbitration award, as well as his performance bonuses. Eskom says it was taken aback by this turn of events, as, contrary to the terms of the settlement agreement of 11 May 2015, Mr Skhosana had referred a dispute to the CCMA seeking enforcement of its 22 April 2015 award.

[11] On 22 June 2017, Eskom advised the CCMA that it had decided to comply with the terms of the award. It calculated the amount due to Mr Skhosana as R128 479,54, being salary not received by him between January and May 2015. From that amount, Eskom applied a set-off in the sum of R40 175, in relation to the payment made to Mr Skhosana during June 2015 in fulfilment of the settlement agreement, on which, according to Eskom, Mr Skhosana had reneged. After tax and related deductions, a total of R73 578, 71 was paid to Mr Skhosana during July 2017.

[12] In light of the averments in Eskom's answering affidavit, and absent a replying affidavit, the Labour Court held that Eskom had fully complied with the CCMA's arbitration award and that it was not in contempt. The Labour Court consequently dismissed Mr Skhosana's contempt of court application.

[13] On 18 September 2023, the Constitutional Court dismissed Mr Skhosana's application for leave to appeal on the basis that it had no reasonable prospects of success.<sup>3</sup> Then followed the complaint to the JCC.

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<sup>3</sup> Although it does not appear from the papers, it is assumed that leave to appeal applications to the Labour Court and Labour Appeal Court suffered a similar fate.

## **The complaint**

[14] The complaint concerns the alleged misconduct by Judge Van Niekerk, who is alleged to have misrepresented, ignored and neglected the complainant's notice of motion and founding affidavit in the contempt of court application filed on 4 February 2022. In doing so, the Judge is alleged to have acted in bad faith in the performance of his duties in the case.

## **Judge Van Niekerk's response to the complaint**

[15] Judge Van Niekerk notes that the complaint appears to concern an alleged misstatement or misrepresentation concerning the nature of Mr Skhosana's claim in the judgment delivered on 31 October 2022. According to Judge Van Niekerk, that is manifestly a matter that does not concern any breach of the Judicial Code of Conduct. Instead, the complaint relates solely to the merits of the judgment and order. The Judge further notes that Mr Skhosana had sought leave to appeal against his judgment, ultimately to the Constitutional Court, which unanimously dismissed the application for lack of reasonable prospects of success. It is no coincidence, says Judge Van Niekerk, that the affidavit in support of the present complaint is dated 20 October 2023, suggesting that the complaint was no more than a response to the Constitutional Court's ruling.

## **The complainant's further submissions relating to the appeal**

[16] Mr Skhosana contends in his further submissions that "the JCC continued the trend of...Judge Van Niekerk by misstating the relief sought". He submits that in dismissing his complaint as relating solely to the merits of the judgment and order, the JCC had ignored "binding constitutional precedent". According to

him, the decision is also against the provisions of sections 34<sup>4</sup> and 165(2)<sup>5</sup> of the Constitution. Mr Skhosana further submits that the JCC ought to have found that Judge Van Niekerk's conduct was so egregious that it warranted a finding of a breach of Section 14(4)(b) of the JSC Act.<sup>6</sup>

## **Evaluation**

[17] As is plain from the narration, this appeal relates solely to the merits of the judgment and order of Judge Van Niekerk. The Acting Chairperson was correct to dismiss the complaint on that basis. There was no misstatement of the relief sought by Judge Van Niekerk in the Labour Court, nor by the Acting Chairperson in the JCC proceedings, as contended by Mr Skhosana.

[18] It is not clear what “binding constitutional precedent” had been ignored, nor am I aware of any such relevant precedent. Lastly, Mr Skhosana’s reference to sections 34 and 165 (2) of the Constitution is utterly misconceived. The two sections have no bearing whatsoever on this appeal or the earlier complaint. Mr Skhosana has had a full hearing in the CCMA and twice in the Labour Court, before Manyage AJ and Van Niekerk J respectively. Leave to appeal applications to the Labour Court, the Labour Appeal Court and the Constitutional Court were all refused. There is no indication whatsoever on the papers that those presiding in all those proceedings had acted otherwise than with the independence required of them by the Constitution.

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<sup>4</sup> Section 34 reads: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

<sup>5</sup> Section 165 (2) provides: “The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.”

<sup>6</sup> Section 14(4)(b) reads: “(4) The grounds upon which any complaint against a judge may be lodged, are any one or more of the following:

(a)...

(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).” ...

[19] There are no merits in this appeal. It must consequently be dismissed.

[20] The following order is made:

1. The appeal is dismissed.
2. The dismissal of the complaint in terms of section 15(2)(c) of the Judicial Service Commission Act, 9 of 1994, as amended, is confirmed.

A handwritten signature in black ink, appearing to read 'Rajesh', is written above a horizontal line.

**JUDICIAL CONDUCT COMMITTEE**