



JUDICIAL CONDUCT COMMITTEE

Ref No: JSC/119/01/2025

In the matter between:

RETIRED JUDGE HCJ FLEMMING

APPELLANT

and

JUDGE MP MOTHA

RESPONDENT

Date: 18 November 2025

Decision: 1. The appeal is upheld.

2. The matter is referred to the Chairperson of the Judicial Conduct Committee for an inquiry in terms of section 17 of the Judicial Services Commission Act.

RULING

THE JUDICIAL CONDUCT COMMITTEE (Jafta J, Majiedt J and Saldulker JA)

[1] This is an appeal lodged in terms of section 15(5) of the Judicial Service Commission Act¹ (the JSC Act) against a ruling of Madlanga ADCJ in terms of section 15(2)(a) of the JSC Act to dismiss the complaint lodged by retired Judge Hermanus Flemming, the former Deputy Judge President of the Gauteng Division of the High Court (Judge Flemming). The complaint was lodged against the respondent, Judge Mandlenkosi Percival Motha of the Gauteng Division of the High Court, Pretoria (Judge Motha).

[2] Judge Flemming's complaint emanates from a judgment delivered in the Pretoria High Court by Judge Motha on 19 April 2024 in *Peri Formwork Scaffolding Engineering (Pty) Ltd v Broad-Based Black Economic Empowerment Commissioner and Others*.² In his complaint Judge Flemming alleges that Judge Motha was grossly incompetent and guilty of conduct unbecoming of a judge, within the meaning of sections 14(4)(a) and (e) of the JSC Act.³ He contends that these shortcomings are apparent from the content and tone of the judgment itself.

[3] The case concerned a claim for redress under the Broad-Based Black Economic Empowerment Act⁴ (the BBBE Act) by nine persons who were previously employed by the applicant, Peri Formwork Scaffolding Engineering (Pty) Ltd (Peri). The business activities of Peri largely entail the selling and hiring

¹ 9 of 1994.

² [2024] ZAGPPHC 359.

³ These sections read:

“(4) The 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...

(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”.

⁴ 53 of 2003.

of formwork, formwork equipment solution, scaffolding systems, designing, consulting and construction supplies to the building, general construction and civil engineering industries. The employees were dismissed by Peri for alleged misconduct relating to a strike. Consequent to their dismissal, they lodged a complaint with the respondent, the Broad-Based Black Economic Empowerment Commissioner (the Commissioner). They sought redress by way of the distribution of shares of the employee trust (the FASCO Empowerment Trust) to them.

[4] In his ruling the Commissioner found that there had been no violation of the Act, but held as follows:

“... the analysis of the Fasco Empowerment Trust Deed appears to contain clauses which are contrary to the objectives of the B-BBEE Act, and may amount to fronting practice or misrepresentation of the B-BBEE status, and the B-BBEE Commission has concluded that there is merit to warrant an investigation in respect of this matter in terms of sections 13(F)(1)(d) and 13J(1) of the B-BBEE Act read with Regulation 15 of the B-BBEE Regulations.”

[5] The case ended up before Judge Motha in the High Court as a review brought by Peri against the findings of the Commissioner. In the course of his judgment, Judge Motha made the impugned remarks. In short, he bemoaned the fact that there was not a single “African counsel” on brief in a case concerning Black Economic Empowerment.⁵ Right at the outset of the judgment the Judge observed:

⁵ Perplexingly, in light of the case concerning the BBEE Act, the Judge enunciated his difficulty as follows in para 2 of the judgment:

“For fear of reprisal, most people prefer to call a spade a gardening tool. Hence, and sadly, thirty (30) years into democracy courts are still seized with matters of *Ubandlululo*, *kgethollo*, *diskriminasie* and fronting. The irony was not lost on this court when, in a matter dealing with the Broad-Based Black Economic Empowerment Act and fronting, seven litigants, the legal firm, Office of State Attorney and four counsel failed to perceive the importance of the presence of, at the very least, a single...African counsel, ...!⁶

[6] As will appear presently, this appeal turns on a narrow point of law and it is therefore not necessary to delve into the merits of the case. It will suffice for present purposes to state that Judge Motha ruled that the Commissioner’s decision was final in nature, upheld the review and set aside the Commissioner’s decision. Despite Peri’s substantial success in the matter, Judge Motha ordered each party to pay their own costs.

[7] The complaint lodged by Judge Flemming does not concern the merits of the orders made by Judge Motha – they are accepted as correct. Instead, it relates to remarks made in the course of the underlying reasoning of the orders. According to the complaint, Judge Motha’s statements were “unsupported by either reason or evidence”, disclosed “lack of logic (including wrong handling of the law and the facts), overstatements and hypered criticism [and] inconsistency”. There was

“...it is disconcerting and inexcusable for organs of state, largely populated by black professionals who were empowered to occupy positions of power in the Office of State Attorney and Commission (as vanguards of black economic empowerment), to display such a staggering lack of appreciation of the imperative to have on brief African counsel, especially, in a matter involving the [Broad-Based Black Economic Empowerment Act 53 of 2003](#), as amended”.

The reference to “African counsel” is inexplicable since section 1 of the BBBE Act contains the following definition: “‘black people’ is a generic term which means Africans, Coloureds and Indians...”.

The same inexplicable reference also occurs in para 1 of the judgment. These references are inscrutable since the Judge himself in para 42 of the judgment sets out this definition in section 1 of the BBE in glowing terms: “Occupying the pride of place under this rubric are the definitions of black people and fronting practice in terms of section 1 of the Act, as amended...”

⁶ Para 1 of the judgment.

also mention made in the complaint of Judge Motha's severe criticism of the lack of "African counsel" and the costs order.

[8] The complaint was dismissed in terms of section 15(2)(a) by Madlanga DCJ on the grounds that it does not fall within the parameters of any of the grounds set out in section 14(4) of the JSC Act. Section 15(2)(a) must be read with section 15(1)(a). They read:

"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-

(a) does not fall within the parameters of any of the grounds set out in section 14(4)."

[16] The grounds relied on in the complaint are those enunciated in section 14(4)(a) and (e) of the JSC Act. They are listed in subsection (a) as 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. Those listed in subsection (e) are 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.

[17] In his submissions on appeal, Judge Flemming contends that his complaint was wrongly dismissed as it clearly raises matters falling within section 14(4)(a) and (e) of the Act, namely, gross incompetence and conduct unbecoming of a

judge. He asks that the dismissal decision be set aside and replaced with a direction under section 16 of the JSC Act for investigation of the complaint.⁷ Judge Flemming reiterates that his complaint concerns conduct prejudicial to the integrity of judicial office, rather than disagreement with the outcome on the merits.

[18] In his response to the appeal, Judge Motha regrettably fails to engage with its merits. Instead, after noting that the complaint does not concern the orders, except perhaps for some dissatisfaction with the costs order, he expresses his disappointment that the “balance of the complaint is replete with pejorative remarks, sometimes downright expletives”. What follows then is an unfortunate *ad hominem* (personal) attack on Judge Flemming. Reference is made to Judge Flemming having commenced practice as an advocate in 1959 and that is linked to the banning of many liberation movements in the following year, 1960. Then follows a reference to Judge Flemming having been appointed as a Judge in 1977 and it is noted that this was a year after the 1976 Soweto uprising.

[19] These remarks are not only regrettable, but they also lend no assistance at all in adjudicating this appeal. I say no more than this: while race remains a difficult issue which, given our lamentable history, must not be evaded or shied away from, it must not distract one’s focus on the task at hand as a judicial officer, namely to adjudicate the case before you without fear, favour or prejudice as the Constitution demands. And we must do so with an impartial mind, reaching a decision based on the correct application of the relevant law to the facts found to have been proved.

⁷ Section 16 refers to serious conduct which may result in the impeachment of a Judge in the most egregious cases.

[20] For the reasons that follow, the appeal must be upheld. The complaint pertinently raises issues that, on the most benevolent interpretation for the respondent, Judge Motha, may, if proved, constitute at least wilful or grossly negligent conduct, not listed under paragraph (a) to (d) of section 14(4), 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. This relates directly to the grounds in section 14(4)(e).

[21] The complaint also raises gross incompetence as a ground. However, on the evidential material before us, I am not persuaded that, if established, the complaint will *prima facie* prove that Judge Motha was grossly incompetent, so as to warrant a recommendation that a Tribunal be established for the purpose of investigating the complaint. But, if at a later inquiry facts emerge which support that conclusion, such recommendation may still be made.

[22] Therefore, contrary to what was decided in dismissing the complaint, it plainly, at a minimum, falls within the parameters of section 14(4)(a) and (e). The appeal must thus succeed and an inquiry must be conducted in terms of section 17 of the JSC Act.

[23] The following order is made:

(a) The appeal is upheld.

(b) The matter is referred to the Chairperson of the Judicial Conduct Committee for an inquiry in terms of section 17 of the Judicial Services Commission Act.

Rajesh

THE JUDICIAL CONDUCT COMMITTEE