JUDICIAL CONDUCT COMMITTEE

Ref No: JSC/28/03/2024

In the matter between:

SOLIDARITY LEGAL NETWORK **COMPLAINANT**

and

JUDGE MANDLENKOSI PERCIVAL MOTHA **RESPONDENT**

Ref No: JSC/119/10/2025

In the matter between:

RETIRED JUDGE
HERMANUS C J FLEMMING **COMPLAINANT**

and

JUDGE MANDLENKOSI PERCIVAL MOTHA **RESPONDENT**

Date: 10 November 2026

Decision: 1. In terms of section 17(8)(*g*) of the Judicial Service Commission Act 9 of 1994 (the Act) Judge Motha is issued with a warning against repeating the conduct identified in this ruling.

2. In terms of section 17(8)(*b*) of the Act Judge President Ledwaba must reprimand Judge Motha for his conduct within 15 days of this ruling.

SECTION 17 RULING

JUDICIAL CONDUCT COMMITTEE (MABINDLA-BOQWANA JP)

Introduction

[1] Two complaints were lodged with the Chairperson of the Judicial Conduct Committee (the JCC/Committee) under section 14(1)[1] of the Judicial Service Commission Act 9 of 1994 (the Act) against the respondent, Judge Mandlenkosi Percival Motha. The complaints are considered together because they arise from the same facts. They stem from a matter that served before Judge Motha in the Gauteng Division of the High Court (High Court) on 23 January 2024, *Peri Formwork Scaffolding Engineering (Pty) Ltd v Broad-Based Black Economic Empowerment Commissioner and Others*[2] (*Peri Formwork*).

[2] Mr Émil Glas lodged the first complaint on behalf of Solidarity Legal Network (Solidarity). Retired Judge Hermanus CJ Flemming lodged the second complaint.

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[1] Section 14(1) of the Act provides:
"Any person may lodge a complaint about a judge with the Chairperson of the Committee: Provided that the Chairperson may refer the complaint to the Deputy Chief Justice to deal with in terms of the provisions of the Act, and the Deputy Chief Justice assumes the role of the Chairperson in respect of that complaint."

[2] *Peri Formwork Scaffolding Engineering (Pty) Ltd v Commissioner of Broad-Based Black Economic Empowerment & Others* [2024] ZAGPPHC 359 (*Peri Formwork*).

Judge Flemming served as a judge of the High Court in Johannesburg from 1977 and later as its Deputy Judge President until his retirement in 2002. He asserts his interest in the matter as a citizen of the Republic of South Africa and says he regards judges' conduct in court as important. Solidarity alleges that it represents over 1000 members of the legal profession.

[3] The complaint by Judge Flemming was considered[3] by the former Acting Chairperson of the Committee, then Acting Deputy Chief Justice Madlanga, who summarily dismissed it in terms of section 15(2)(*a*) of the Act, on the grounds that it did not fall within the parameters of any of the grounds set out in section 14(4)[4] of the Act. Judge Flemming's appeal against this decision was upheld by the Committee, which referred the matter to the Chairperson of the JCC for an inquiry in terms of section 17 of the Act.[5]

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[3] 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."

[4] Section 14(4) of the Act provides: "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;
(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] Sections 17(1) and (2) provide:
(1) 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."

[4] The Acting Chairperson of the JCC, Deputy Chief Justice Mlambo, decided that the Solidarity complaint should also be processed in terms of section 17 and designated me, as a member of the Committee, to deal with both matters in terms of section 17 of the Act. A complaint is processed in terms of this section if it is necessary to determine its merits and it is not based on any of the grounds in section 14(4)(*a*) of the Act. However, as can be seen under section 17(4)(*c*) quoted below, if, in the inquiry, grounds of incapacity, gross incompetence or gross misconduct are likely to be established, then the member must recommend that the Committee should recommend to the Commission that the complaint should be investigated by a Tribunal.

[5] Copies of the complaints were forwarded to Judge Motha, who furnished the Committee with his response to the allegations as envisaged in section 17(3) of the Act. Having received the response, and all documents filed on record, I decided that an oral hearing is not necessary at this stage.

[6] Section 17(4) sets out what to do if a matter is determined without a formal hearing. It states:

'If, pursuant to the steps referred to in subsection (3), the Chairperson or a member concerned is satisfied that there is no reasonable likelihood that a formal hearing on the matter will contribute to determining the merits of the complaint, he or she must, on the strength of the information obtained by him or her in terms of subsection (3) –

(a) dismiss the complaint;

(b) find that the complaint has been established and that the respondent has behaved in a manner which is unbecoming of a judge, and impose any of the remedial steps referred to in subsection (8) on the respondent; or

(c) recommend to the Committee, to recommend to the Commission that the complaint should be investigated by a Tribunal.'

[7] The above provisions authorise the member designated on the strength of the information obtained to take one of three further steps stated in the section. First, the member may dismiss the complaint. Second, if the complaint is established and the member is satisfied that the respondent judge has behaved in a manner unbecoming of a judge, he or she may impose remedial steps listed in section 17(8).[6]

[8] Third, and as stated, if a member concludes that the complaint, if established, will likely indicate that the respondent judge suffers from incapacity, is grossly incompetent, or is guilty of gross misconduct, the member must request that the Committee recommend to the Commission that a Tribunal investigate the matter. This is because only a Tribunal may investigate complaints of incapacity, gross incompetence and gross misconduct. If the Commission is satisfied with the Committee's recommendation, or on reasonable grounds suspects that a judge is suffering from incapacity, is grossly incompetent, or is guilty of misconduct, it must request the Chief Justice to appoint a Tribunal.[7] Before I outline the complaints, it is useful to set out the *Peri Formwork* judgment and the facts on which the complaints are based.

Facts

[9] As appears in the *Peri Formwork* judgment, Peri Formwork Scaffolding Engineering (Pty) Ltd (Peri Formwork) brought a review application in the High

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[6] Section 17(8) provides: "Any one or a combination of the following remedial steps may be imposed in respect of a respondent:
(a) Apologising, to the complainant, in the manner specified.
(b) A reprimand.
(c) A written warning.
(d) Any form of compensation.
(e) Subject to subsection (9), appropriate counselling.
(f) Subject to subsection (9), attendance of a specific training course.
(g) Subject to subsection (9), any other appropriate corrective measure."

[7] Section 19(1) of the Act.

Court against the Commissioner for Broad-Based Black Economic Empowerment (Commissioner) and the Broad-Based Black Economic Empowerment Commission (Commission), among other respondents. The challenge concerned the Commission's findings made on 17 December 2020 alleging fronting practice and conduct that purportedly undermined the objectives of the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act). The Commission alleged that this led Peri Formwork to misrepresent its B-BBEE status. The matter was heard by Judge Motha.

[10] Peri Formwork had dismissed nine employees who were involved in a strike demanding R500 adjustments, a R5 increase, and a 20% B-BBEE shareholding in the employee trust, in which they were made beneficiaries. The employees then approached the B-BBEE Commission for redress "in a form of shares of the employee trust. . . to be distributed to the former employees". While the Commission found that the complaint did not disclose any violation of the B-BBEE Act, it also found that clauses in a Trust Deed may amount to fronting, a misrepresentation of B-BBEE status, and warranted an investigation.

[11] The preliminary question before the High Court was whether the Commission's findings were interim or final. The Commission and the Commissioner's counsel recorded at the outset that, if the Commission's decision was found to be final, they would offer no resistance to having it reviewed and set aside in terms of PAJA. Having found that the Commission's decision was final, the court acknowledged that there was no *lis* between the parties on the merits of the review application. For the reasons it gave, it found that the Commission's findings violated section 6(2) of PAJA in several respects. They were 'demonstrably flawed', and the court accordingly reviewed and set them aside. It found no case made out for a declaratory order, which was apparently also sought in the notice of motion.

[12] Despite its findings, the court decided that each party should pay its own costs, not based on the merits of the case but for reasons that follow. The court reasoned that it had asked counsel for short heads of argument but was treated with disdain and a 'cantankerous or boisterous display by counsel of all hues', which it said must be nipped in the bud before it takes root. This stemmed from a directive issued by the court on 16 February 2024, followed by another on 20 February 2024, requiring counsel to submit heads of argument on the conspicuous absence of African counsel in a B-BBEE matter and "the possible violation of section 9(2)[8] of the Constitution, due to failure to have African counsel on brief in this matter."

[13] The judgment indicates that counsel (although it does not state for which party) wrote a memorandum stating that he would not file heads of argument but instead a memorandum, which he would also send to the Chairpersons of the Pretoria Bar and the GCB and to the media. As a mark of its displeasure, the court held that awarding costs to such a party amount to an endorsement and encouragement. The court said costs on an attorney-and-client scale would not dissuade recalcitrant practitioners, nor would a *de bonis propriis* order. It decided that each party should pay its own costs.

[14] The court remarked that the heads of argument it subsequently received did not, in its view, provide the assistance it had sought. In the heads, counsel referred to the cab-rank rule and section 34(2)(*a*)(i) of the Legal Practice Act 28 of 2014. They also referred to *Fischer and Another v Ramahlele and Others*,[9] which, in a nutshell, cautions against a court raising new issues not traversed in the pleadings or

[8] Section 9(2) of the Constitution provides: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."
[9] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) paras 13-15.

affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them.

[15] From the judgment it can be discerned that Peri Formwork's counsel submitted that section 9(2) placed a duty on the State to take measures to promote equality but argued that it found no application in this matter. They also referred to a possible infringement of separation of powers. The court found this to Peri Formwork's credit.

[16] For the State Attorney, it appears that African counsel who had not previously been involved in the matter prepared the heads of argument and the court was disappointed, as, according to the court, "it amounted to saying they don't see race. They only look at experience to procure counsel". The heads tabulated that the State Attorney's senior counsel had 33 years' experience at the Bar and his junior counsel 15 years' experience, vis-à-vis the opponents' senior and junior counsel, who had 25 and 18 years of experience at the Bar, respectively. Counsel for the State Attorney wrote: "In conclusion, we submit with respect that the two counsel were appointed mainly because of the experience at the [B]ar irrespective of their colour of skin." The court found this submission to be most 'ahistorical, antithetical to the B-BBEE Act, they were supposed to enforce, and utopian'. It mentioned that both parties missed the point as the court was "hobbled by the absence of the view from an African counsel."

[17] It bears mentioning that the court devoted the first part of its judgment to addressing the issue of a lack of African counsel on brief. It remarked as follows: "For fear of reprisal, most people prefer to call a spade a garden 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 (one) African counsel, okay as a junior!"[10]

[18] It further expressed how disconcerting and inexcusable it was that organs of state, largely populated by black professionals who were empowered to occupy positions of power in the Office of the State Attorney and Commission (as vanguards of black economic empowerment), display such a staggering lack of appreciation of the imperative to have, on brief, African counsel, involving the B-BBEE Act.

[19] The court further said this failure not only betrays the aspirations stated in the preamble of the B-BBEE Act but also conflicts with the dictates of section 9(2) of the Constitution, such that it would not close its eyes to this patent and palpable iniquity. It further stated that, in B-BBEE matters involving the State or Organs of State, and especially when senior counsel is on brief, it is in the interests of justice for presiding officers to insist on the involvement of at least one African counsel before the matter is heard. Accentuating the point, the court remarked:

"To this court, it is axiomatic that, in such matters, the inputs, insight and perspective of African counsel are indispensable to arrive at a just decision; otherwise, the court's judgment would be impoverished and monochromatic. In these matters, the presence of an African counsel is not a favour, but an imperative for justice must not only be done but must also be seen to be done. Furthermore, the adage nihil de nobis, sine nobis[11] immediately springs to mind."[12]

[20] The judge then referred to case law stating that superior courts can regulate their own process, as well as section 173 of the Constitution. To this end, he found that an inquiry into the absence of an African counsel in B-BBEE matters, 'fits

[10] *Peri Formwork* above n 2 at para 1.
[11] A Latin term translated to mean: 'Nothing about us without us'.
[12] *Peri Formwork* above n 2 at para 5.

snugly under the rubric of the capacious remit of procedure.' And that it is not unusual for the facts of a particular case to call for a procedure different from the usual one. According to the judge:

". . .an all-white team making submissions on fronting by a white owned company is not in the interest of justice because it is bound to miss nuances involved in cases of black people's struggle for empowerment and against racism; *a fortiori*, result in the miscarriage of justice. By parity of reasoning, the same is true of an all-male team making submissions on gender equity matters in the absence of a female counsel's submissions, where the State or an organ of State is involved. Lest I be misunderstood, I must hasten to add that I'm not advocating for an all-black team, but to achieve justice in B-BBEE matters, courts need to be true to the motto: ! ke e:/xarra//ke."[13]

[21] The judge equated this to instances where the courts have insisted on the presence of specific legal representatives, where litigants do not have access to lawyers who have the capacity to run the litigation properly, and the court would demand of a litigant who is eager to exercise his or her rights in terms of section 34 of the Constitution to be properly represented, in the interests of justice or for justice to be done. The court viewed proceeding to hear B-BBEE matters in the absence of African counsel as 'inimical to the spirit, purport and objects of the Bill of Rights, and makes a mockery of the Preamble and Founding Provisions of the Constitution.'

[22] Finally, the court observed that it formed the distinct impression that, had African counsel been part of either legal team, it would have received different inputs and submissions and, possibly, the matter would have proceeded differently. It further stated that, from the engagements, it soon became clear that, through no fault of counsel, it was exposed to a monochromatic perspective. An input from an African counsel would have helped answer questions that still lingered in its mind.

[13] Ibid para 9.

Nevertheless, it said, the horse had bolted since it continued with the matter and proceeded to give judgment.

Judge Flemming's complaint

[23] Judge Flemming alleges that Judge Motha exhibited gross incompetence in his judgment in the sense mentioned in section 14(4)(*a*) of the Act. He was also guilty of wilful or grossly negligent conduct incompatible with, or unbecoming of, the holding of judicial office, including prejudicial conduct to every aspect mentioned in section 14(4)(*e*) of the Act.

[24] Judge Flemming states that he does not claim Judge Motha's orders were wrong, but that he wrote more than was related to the order, exceeding proper limits for a judge. He did so in a manner that disclosed a lack of insight into the position of a judge, including statements unsupported by evidence; a lack of logic (including incorrect handling of the law and facts); overstatements; and hypercriticality and inconsistency.

[25] As regards the briefing of an 'African' or 'Black' (as defined) counsel, Judge Motha wrote no definitive conclusion and made no order. Judge Flemming also states that, in civil matters, the court decides only matters the parties wish it to decide. Apart from the non-argued award of costs, the factual issue requiring judgment was simple: it was whether the letter of the Commission conveyed a final or binding decision. The interpretation issue was simple, and the court agreed.

[26] Also, the relevant law was 'simply' that, if the said decision was flawed by taking the wrong view of the facts, it must be set aside. According to Judge Flemming, a 'sufficiently competent judge would in those circumstances not have written so many unnecessary words. It unnecessarily took Judge Motha 3 months.'

[27] Judge Flemming states that the parties had informed the court that they had agreed that the relief sought by Peri Formwork was justified, and that the Commission would pay Peri Formwork's costs if the Commission's decision in December 2020 was final. The court was called upon only to interpret that as an issue, based on two documents quoted in the judgment. A competent judge, after being informed that the respondent abandoned all other arguments, would have made a court order immediately after hearing arguments in favour of non-finality. This is in circumstances where the Supreme Court of Appeal (SCA) has made it clear that it is improper to decide a dispute that no longer exists.[14] However, for unexplained reasons, a few weeks later, Judge Motha required the parties to file heads of argument explaining why no African counsel was briefed and whether this did not amount to a violation of section 9(2) of the Constitution.

[28] According to Judge Flemming, Judge Motha wrote as if the review application concerned the decision of the office of the State Attorney, who should have briefed an African counsel to argue the *Peri Formwork* matter, a matter previous courts had closed their eyes to. The accusation against the State Attorney persisted even after counsel's memorandum revealed that since January 2024, the State Attorneys had issued almost 50 briefs, of which, according to Judge Flemming, only one had been issued to a white man: the Commission's senior counsel.

[29] Regarding Judge Motha's assertion that he would have benefited from having an African counsel in the matter, Judge Flemming stated that Judge Motha did not suggest he had any problems with the law, particularly the law on reviewing factual misdirections. Everything was clear. Judge Flemming submits that the claim by

[14] Presumably referring to *Road Accident Fund v Taylor* [2023] ZASCA 64; 2023(5) SA 147 (SCA) at paras 36, 39 and 51.

Judge Motha that he felt he could benefit from any further advocate cannot be accepted as true, and the cogency/truthfulness should be investigated. Judge Motha required the advocates to collect facts from the attorneys, not by way of 'evidence', but heads of argument; this, according to him, a judge cannot do.

[30] Judge Flemming further notes that section 9(2) of the Constitution authorises legislation; it creates no duty about briefing. The judgment does not state why Judge Motha thought that section 9(2) was breached. It also does not address how that provision applies specifically in the Peri Formwork context, as opposed to the general situation regarding briefing. No duty about briefing was found by Judge Motha.

[31] According to Judge Flemming:

"Lest it be argued that wrongness of a judgment does not justify JSC attention, the grossness and consistency in being wrong (and the other failings) constitute proof of a personality and disposition that is unfit for the Bench. Pointers are found even in headstrong persistence, contradictory views and statements, etcetera. And maybe intellectual dishonesty, statements without backing by facts or reasoning, overstatements, and more possibilities."

[32] Judge Flemming states that Judge Motha did not put any of his ideas about BEE law or inherent jurisdiction to counsel, which points to a lack of fairness and a failure to follow *audi alteram partem*. Further, the judge made a costs order depriving Peri Formwork, while not being the party accused of the behaviour the judge was against.

Solidarity's complaint

[33] Solidarity alleges that Judge Motha exhibited discriminatory behaviour and disturbing overreach of judicial authority while adjudicating the *Peri Formwork*

matter. It says the judge raised with counsel "irrelevant personal issues in the matter at hand, such as race, ethnicity and/or socio-economic status towards counsel for both parties involved."

[34] Solidarity alleges that after reserving judgment, Judge Motha instructed his secretary to address an email to all counsel involved, as well as the attorneys, requesting counsel "to give a 10-minute submission on the failure to engage not even a single African counsel in the matter." And he further asked: "did that not amount to the violation of section 9 of the Constitution[?]"

[35] According to Solidarity, this amounts to potential judicial overreach, and Judge Motha exceeded his judicial authority and encroached on the rights and liberties of all parties involved. Such actions, it submits, not only erode the public's trust and confidence in the judiciary but also threaten the very foundation of the country's legal system.

[36] It submits that ensuring state briefs are distributed equitably to black practitioners is a procurement and executive policy function which is completely outside judicial control; the judiciary cannot interfere in the processes of other branches of government unless it is mandated to do so by the Constitution. In this regard, it references various judgments of the Constitutional Court.[15]

[37] Solidarity further alleges that Judge Motha made unfounded remarks during the hearing and issued directions that did not align with the parties' submissions or the dispute at hand. It submits that the judge was required to act objectively and impartially by adjudicating matters on the facts, merits, and legal arguments

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[15] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) and *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC).

presented before the court. In this matter, he appeared to advance subjective views on the transformation of the bench and legal counsel and briefs, rather than confining himself to the issues requiring judicial determination.

[38] According to Solidarity, while judges may hold personal views on transformation within the legal profession, those views should not influence case adjudication or improperly influence the composition of the legal teams representing the parties in the matter before the court. The court's function is to interpret and apply the law, not to implement subjective policy objectives or set ideological examples.

[39] If judges actively promote their political views on the racial composition of counsel for litigants, they risk being presumed to be biased or applying favouritism based on race rather than legal merit, destroying the public trust necessary for the rule of law. It says Judge Motha appeared not to apply certain law impartially in light of the ethnicity of the counsel on brief. Such actions undoubtedly created an atmosphere of uncertainty as to whether any judgment would indeed be without fear, favour or prejudice. It says the question is not whether a judge subjectively believes himself or herself to be impartial, but whether the conduct complained of creates an objectively reasonable apprehension that the matter was influenced by considerations extraneous to the law and evidence.

[40] Solidarity further states that where comments, conduct, or interventions create a perception that the matter was adjudicated through a political lens rather than a judicial one, public confidence in the administration of justice is undermined.

Solidarity bases its case on section 14(4)(*a*) and (*e*) of the Act and Article 7 of the Code of Judicial Conduct (the Code).[16]

Judge Motha's response

[41] Judge Motha's initial response to Judge Flemming's complaint was that the complaint was about the obstinate refusal to acknowledge that the briefing patterns, 30 years into democracy, are grossly skewed and that a judge appointed post-apartheid owes his or her allegiance to the Constitution of the Republic of South Africa, unlike a judge appointed in 1977 who became the Deputy Judge President in 1990 (referring to Judge Flemming).

[42] He said a judge appointed during the Constitutional era must interpret the law with a view to complying with the Bill of Rights, which is the cornerstone of the country's democracy. The Bill of Rights enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Unlike a judge appointed in 1977, a judge appointed in the democratic era neither sentences people to the gallows nor enforces apartheid laws, such as job reservation (etymology of the skewed briefing patterns). His/her role is to interpret the laws with a view to forging a new society founded on equality amongst Blacks, Whites, Coloureds and Indians.

[43] Judge Motha stated that in a constitutional democracy, if a litigant is dissatisfied with the orders in a judgment, in terms of Uniform Rule 49(1), it may bring an application for leave to appeal in terms of sections 16 and 17 of the Superior Courts Act, 2013. If leave to appeal is granted, the matter proceeds to the court of

[16] Code of Judicial Conduct Adopted in terms of Section 12 of the Judicial Service Commission Act 9 of 1994.

appeal, either a full court or the SCA. According to Judge Motha, "the *raison d'être* for the complaint is the question of costs, in as far as the orders are concerned."

[44] Judge Motha then says that outside the orders, the balance of the complaint was replete with pejorative remarks, sometimes downright expletives. He stated that, as a victim of apartheid, these were painful and gut-wrenching. He also mentioned that Judge Flemming commenced practice as an advocate in 1959, a year before black political parties were banned, and was appointed as a judge in 1977, a year after the 1976 Soweto uprising, which, he said, resulted in the murder of many black people by white people.

[45] On appeal, the Committee found that the remarks by Judge Motha about Judge Flemming were not only regrettable but that they lent no assistance at all in adjudicating the appeal. The Committee stated the following:

'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.'

[46] It further found as follows:

'[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.'

[47] Following the upholding of Judge Flemming's appeal and referral to the section 17 inquiry, Judge Motha submitted a further response for the purposes of this inquiry. In it, he stated that it is not unheard of for a court to direct litigants to a legal issue pertinent to the adjudication of a case. In such instances, a court may direct the parties to address it. That is why a presiding officer may, *mero motu*, raise points of law and request that they be addressed. He further stated that he was at pains to address this issue in the first eight pages of his judgment.

[48] As regards costs, he mentioned that it is trite that an award of costs is within the court's discretion, and that discretion must be exercised judicially upon consideration of the facts of each case. If the parties were dissatisfied with the exercise of his discretion, they would have appealed his decision on costs.

[49] He further stated that his judgment was delivered within the prescribed period of three months and he considered and addressed all the pertinent issues raised by the parties. And had he not addressed all the issues, he would, ironically, be criticised for failing to address issues raised by the parties and the issue that he had justifiably raised.

[50] Judge Motha submitted that his court was not the first, and will not be the last, to observe the woeful paucity of black counsel in matters of substance adjudicated before the courts and specialist courts such as the Competition Tribunal and the Competition Appeal Court.

[51] As to the office of the State Attorney, if his comments and submissions were taken to heart, he probably would have stood the matter down to allow the introduction of black counsel, as stated in his judgment, or would have proceeded on the basis of a satisfactory explanation for the absence of black counsel in the matter.

[52] The judge further noted that it often happens that a court expresses concern that a vital voice would not be heard in its proceedings unless invited to participate. He maintained that black counsel would have assisted the court in this matter. It is inimical to the dictates of the B-BBEE Act for the Commission and the Commissioner to brief a team of all-white counsel merely on the basis of experience, and not necessarily on their acumen to advance arguments commensurate with the dictates of the Constitution and the B-BBEE Act.

[53] According to Judge Motha, the insults against him as a person and against blackness in general are palpable. In sketching out his career as an advocate and a judge, Judge Flemming did not allude to having advocated for change from apartheid to democracy and for the advancement of equality and democracy. He took exception to Judge Flemming's language, including the suggestion that he was unbalanced.

[54] He differed with Judge Flemming on the interpretation of section 9 of the Constitution and spent the first 16 paragraphs of his judgment in an attempt to set

out the reasons why it was necessary to address the issue of the failure to brief black counsel in the matter of this nature. In his view, section 9 of the Constitution read with the B-BBEE Act required the respondents not only to promote economic transformation to enable meaningful participation of black people in the economy, but also that the Commission itself practise transformation in its briefing patterns as a consumer of legal services.

[55] As regards Solidarity's complaint, Judge Motha denied all allegations made against him and stated that his judgment sought to do the opposite of what Solidarity alleged.

Discussion

[56] For complaints against judges to be valid, they must fall within the grounds laid down in section 14(4) of the Act. The first ground relied upon is section 14(4)(*a*), which states that a complaint may be lodged on the grounds of incapacity, gross incompetence, or gross misconduct as envisaged in section 177(1)(*a*) of the Constitution.

[57] The second basis is section 14(4)(*e*) which provides for any wilful or grossly negligent conduct, other than conduct contemplated in subsections (*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. The provisions require wilfulness or gross negligence in the conduct. Section 14(4)(*e*) is broader than section 14(4)(*b*).[17] The misconduct it envisages is not limited to breaching a specific provision of the Code.[18]

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[17] See JCC Ruling in *Ngalwana v Justice Johann Kriegler*, Ref No: JSC/904/21 at para 5.

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

[58] Solidarity also references Article 7 of the Code. Article 7 provides that:

"A judge must at all times –

(a) personally avoid and dissociate him-or herself from comments or conduct by persons subject to his or her control that are racist, sexist, or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution;

(b) in court and in chambers act courteously and respect the dignity of others;

(c) in conducting judicial proceedings, give special attention to the right to equality before the law and the right of equal protection and benefit of the law; and

(d) in the performance of judicial duties refrain from being biased or prejudiced."

[59] Article 7(d) requires a judge to refrain from being biased or prejudiced in the performance of judicial duties. Articles of the Code are followed by Notes which are for purposes of elucidation, explanation and guidance with respect to the purpose and meaning of the articles.[19] Note 7(i) tells us that the provisions in Article 7 aim to promote courtesy and ensure a degree of courtroom decorum. Note 7 (ii) says judges should strive to be aware of and understand the many differences between persons and to remain informed about changing social attitudes and values; and Note 7(iii) states that the multicultural nature of South African society calls for special sensitivity to the perceptions and sensibilities of all who are affected by court proceedings.

[60] Article 9(a) of the Code requires a judge to 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; and (ii) remain manifestly impartial. Note 9(v), however, recognises that "judges are fallible and can err in relation to fact or law, such errors are dealt with through the normal

[19] See Article 3(4) of the Code.

appeal and review procedures. ... Disenchantment about a judicial decision does not justify disciplinary proceedings." Complaints that are solely related to the merits of a judgment or order of the court must be dismissed in terms of section 15(2)(*c*) of the Act. The complaints in this matter are not about the correctness or otherwise of the judgment or order of the judge in relation to the issues before him. The concerns are about his conduct and remarks during the hearing of the matter and in his judgment.

[61] Like the Appeal Committee, I am not convinced that the findings and remarks in Judge Motha's judgment *prima facie* indicate gross incompetence warranting a recommendation that the complaint be investigated by a Tribunal. The fact that the judge may have considered issues not raised by the parties nor relevant to the matter before him, or spent time on matters the parties had agreed upon (ie where there was no *lis* between the parties) or on statements not supported by evidence, does not make him grossly incompetent. That is a very high threshold, and I am unable to conclude that the facts of this case meet it.

[62] However, the requirements of section 14(4)(*e*) stand on a different footing. The grounds in this section fall within the scope of a section 17 inquiry. What ought to be established is wilful or grossly negligent conduct 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."

[63] In my view, the first leg of wilfulness is established because the judge's intention is clear in the judgment. The question is whether the conduct is "incompatible" or "unbecoming" as envisaged in that section. The judge submits firstly that the complaint is about the orders he made and therefore the only pathway

to challenge the orders is an appeal. That assertion misses the point in my view. As stated, the complaints do not concern the merits of the judgment in relation to the issues for determination before the court. They concern (a) the remarks made by the judge in the judgment and (b) the conduct of the judge in calling for heads of argument to address the matter that was not before the judge.

[64] On the latter question, the judge responds that he was within his rights to call for argument *mero motu* to address the composition of counsel in his court in a B-BBEE matter. That was not the issue before the court. Indeed, briefing patterns in our country remain a challenge that needs to be addressed. It is true that decades have passed and meaningful change is yet to be seen.

[65] Judge Motha is correct that many judges in different fora have raised the issue of a lack of women and black practitioners representing litigants, particularly in the Superior Courts. However, in none of the instances did the judges he refers to, compel the parties to file arguments on why no African counsel was on brief.

[66] The difficulties with the directive to file heads of argument are manifold. First, counsel are briefed by attorneys who act on litigants' instructions. The litigant must testify or provide evidence as to why it did not brief African counsel. That encroaches on the litigant's rights, if the issue at hand is not "relevant" to what the court is called to determine. The court must establish a legal duty for a litigant to do so.

[67] Secondly, when argument is called, the court would be required to make findings and consequent orders (as the case may be) on the issues at hand; otherwise, there would be no point in having the matter argued if no findings or orders follow. It is one thing to raise the issue of untransformed legal teams appearing in court as a

concern and implore parties to do something about it, as is often done out of concern about the lack of transformation; it is another to make it a dispute for the parties to argue.

[68] The judge says he was entitled to do so, as judges may, *mero motu*, raise *points of law* that the parties have not raised in the dispute. Those matters, however, relate to disputes the court is called upon to determine. In this instance, the absence of an African counsel and the possible violation of section 9(2) of the Constitution were not before the court. This approach, may, in and of itself, appear not to warrant a sanction or remedial steps under section 17(8) of the Act. The issues raised in the complaints are beyond this. They are not just about judicial overreach, because judges often err, are accused of overreach, or may be found by an appeal court to have violated the separation of powers principle in their judgments. Judge Motha went a step further.

[69] The issue is that Judge Motha's concern was demonstrably directed at the organs of state, which he says are populated by black professionals who, as vanguards of black economic empowerment, lacked appreciation of the imperative to brief African counsel. It is perplexing that he refers only to the absence of African counsel in a B-BBEE matter, when the definition in section 1 of the B-BBEE Act, on which the judge bases his reasoning, refers to "black people" as a generic term that includes African, Coloured, and Indian people.

[70] This is puzzling because the judge correctly quotes the definition in paragraph 42 of the judgment, as inclusive of all three groups. The basis for excluding other groups in the category is not explained by the judge in his response. What makes the remarks objectionable is that, even if the judge was justified in calling for an African counsel in a B-BBEE matter, as the court, he owed it to other groups to explain why

they were omitted from the representation the judge required. He was acting as a court and not simply making remarks in passing.

[71] The court has a responsibility to guard against perceived bias. It may have been an omission, but the judge does not tell us that. To accentuate the point, it would not be appropriate for a judge who classifies himself or herself as Coloured to bemoan the absence of Coloured counsel on brief on the basis that such counsel would provide input that counsel of other races could not provide.

[72] The judge suggests that, without African counsel in B-BBEE-related matters and without women counsel in gender equity matters, the court will not be adequately assisted. This presents difficulties because it is based merely on the race and gender of counsel, and on the assumption that their submissions would provide, or be unable to provide nuances the court would otherwise not have had. The judge rejected heads of argument apparently presented by an African counsel (who had not previously participated in the proceedings), as pointed out earlier. This illustrates the difficulty with the judge's remarks.

[73] As stated, these statements were not made in passing; they were part of the court's reasoning, on an issue not brought before the court as a dispute. The absence of African counsel, while lamentable in various matters before the courts of our country, was not a matter relevant to the issue at hand. The judge's sentiments are understood, but he went too far. Principles permitting a court to regulate its own process and those allowing a court to raise a point of law *mero motu* were not applicable in the context of this case.

[74] The judge further equated the directive he issued with instances where a court would require assistance of an *amicus curiae* for proper adjudication of a matter.

That scenario is different. In the present matter, the court did not call for assistance by an *amicus curiae*, which would have been permissible. It called for heads of argument from all parties, including Peri Formwork, which was later not awarded costs in its favour because of the behaviour of counsel (it appears) for the State respondents.

[75] Judge Motha correctly points out that awarding costs is a matter within the court's discretion. That is, however, not the point of the complaint. The objection lies in the justification for depriving Peri Formwork of costs. Firstly, it was based on an issue unrelated to the one the court had to determine, and in circumstances where Peri Formwork was substantially successful. Secondly, the behaviour condemned by the judge was that of counsel for the State Attorney and directed at the respondents, as organs of state. Thirdly, Peri Formwork's counsel complied and offered arguments as directed by the court, although they disagreed that section 9(2) was applicable.

[76] While judges, as citizens, may express themselves on important matters in society, they have to exercise restraint. In *Advocate Vuyani Ngalwana SC v Judge Johann Kriegler*[20] the Appeal Committee of the JCC said:

'. . . [T]he issue here is not so much about the interpretation of the relevant article of the Code but that Judges as a class do not enjoy some of the rights in the Bill of Rights in the same way as other citizens do. The Code regulates the manner in which Judges, because of their unique position in society, may exercise some of those rights and in some instances even deny them such rights. For example, article 12 prohibits Judges from being members of a political party. Yet, section 19 of the Constitution confers political rights on every citizen of the Republic, including Judges.

[20] *Advocate Vuyani Ngalwana SC v Judge Johann Kriegler*, Ref no: JSC/904/21.

When Judges accept appointment to the judiciary, they voluntarily give up the enjoyment of certain rights in the Bill of Rights so as to enable the judiciary to function properly and efficiently. The enjoyment of some of the rights in the Bill of Rights by Judges is not compatible with the exercise of judicial power which under the Constitution may be exercised by Judges and other judicial officers only."[21]

[77] On the material before me, the judge's remarks could give rise to a reasonable apprehension that in certain cases he may hold bias in favour of or against counsel on the basis of race and gender. The judge's conduct not only falls within section 14(4)(*e*) by acting in a manner that was prejudicial to the impartiality of the courts; but the judge also breached Articles 7(d) and 9(a) of the Code. I accordingly find that the complaints have been established and that Judge Motha behaved in a manner unbecoming of a judge as contemplated in section 17(4)(*b*) of the Act.

[78] Turning to the remedial steps to be taken, an apology may not be appropriate in this case because the complainants are not the parties that were in the proceedings before Judge Motha. The appropriate step is a warning and a reprimand by the Head of Court in which the judge serves.

[79] In conclusion, I must address this concern. The language used by Judge Flemming in his complaint and Judge Motha in his responses is unfortunate and must be deprecated. It not only undermines the stature of judges and the judiciary in the public eye but may also erode public confidence in the judiciary. It is not good for judges to be slating each other in this manner; it does not augur well for the judiciary and must be censured. Left undeterred, it may set a damaging precedent. I am aware that I am not dealing with a complaint against Judge Flemming; I am expressing my displeasure at the tone of his complaint.

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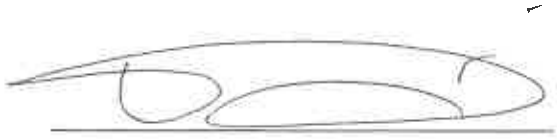
[21] Ibid paras 20-21.

[80] Judge Flemming could raise his allegations against Judge Motha in collegiate terms. Expressions such as "relevant parts of both [documents] are in much plainer language than the "high English" that Judge Motha uses" are unacceptable.

[81] Judge Motha, in his initial response to the complaint, hardly dealt with the issue at hand apart from a comment on costs. The remaining part of his response sought to cast aspersions on Judge Flemming, who he says commenced practice as an advocate and was appointed as a judge in the apartheid era, when all black political parties were banned and when black people were murdered by white people during the Soweto uprising.

[82] In the result, the following remedial steps are imposed in terms of section 17(8) of the Act:

1. In terms of section 17(8)(*g*) of the Judicial Service Commission Act 9 of 1994 (the Act), Judge Motha is issued with a warning against repeating the conduct identified in this ruling.
2. In terms of section 17(8)(*b*) of the Act, Judge President Ledwaba must reprimand Judge Motha for his conduct within 15 days of this ruling.



MABINDLA-BOQWANA JP

MEMBER OF THE JUDICIAL CONDUCT COMMITTEE