



JUDICIAL CONDUCT COMMITTEE

Ref No: JSC/50/06/2024

In the matter between:

DARSHAN GOVENDER

COMPLAINANT

and

JUDGE PHEHANE

RESPONDENT

Date: 20 April 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] Mr Darshan Govender lodged a complaint against Judge Phehane, Acting Judge President Molahlehi (as he then was), Acting Deputy Judge President Savage (as she then was) and Acting Judge Van Niekerk arising from litigation in the

Labour Court and Labour Appeal Court. The complaint was considered by the then Acting Chairperson of the Judicial Conduct Committee (“the JCC”), Acting Deputy Chief Justice Madlanga. He determined that only one discrete aspect of the complaint should be dealt with in terms of section 17 of the Judicial Service Commission Act 9 of 1994 (“the Act”), namely the complaint against Judge Phehane concerning the removal of the matter from the roll. He dismissed the remainder of the complaint, including the complaint directed at the merits of the later judgment and order, and the complaint against the other judges.

[2] The matter now falls to be determined and finalised by me in my capacity as Acting Chairperson of the JCC. This ruling accordingly concerns only the narrow issue identified by Acting Deputy Chief Justice Madlanga, namely whether Judge Phehane’s removal of the matter from the roll discloses conduct warranting a finding under section 17 of the Act.

Section 17 Enquiry

[3] Section 17 provides for an inquisitorial process in relation to serious but non-impeachable complaints. The respondent must be invited to respond to the allegations. Other relevant information may be obtained. The complainant may then be invited to comment on the respondent’s response and on any additional information obtained. The available outcomes are to dismiss the complaint; to find that the complaint has been established and impose one or more of the remedial steps contemplated in section 17(8); or to recommend to the Committee that it in turn recommend to the Commission that the complaint be investigated by a Tribunal.¹

¹ Section 17(4) of the Act provides, “[i]f, pursuant to the steps referred to in subsection (3), the Chairperson or member concerned is satisfied that there is no reasonable likelihood that a formal hearing on the matter will contribute to

[4] The question before me is therefore not whether every procedural or case-management decision taken by the respondent was correct in law. Nor is this process a mechanism for reconsidering how the respondent managed or decided the case in the underlying litigation. The question is whether the material placed before the JCC establishes that, in removing the matter from the roll, Judge Pehane committed a wilful or grossly negligent breach of the Code of Judicial Conduct as contemplated in section 14(4)(b) of the Act, or otherwise engaged in wilful or grossly negligent conduct incompatible with or unbecoming the holding of judicial office as contemplated in section 14(4)(e),² thereby justifying action under section 17 of the Act.

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.”

² 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.”

The Complaint

[5] The complaint arises from proceedings in the Labour Court. The matter was enrolled before Judge Pehane for hearing on 8 September 2022. The complainant states that the date had previously been allocated and that, on 1 September 2022, Judge Pehane's secretary sent an email informing the parties that the matter would proceed in open court on 8 September 2022 and identifying the matters to be heard as the rule 11 application and the review application.

[6] The complainant's case is that, on 7 September 2022, two further emails were sent from Judge Pehane's chambers. The first required the filing, by 15h00 that day, of a comprehensive indexed and paginated notices bundle and a properly constructed and consecutively numbered transcribed record. The second conveyed Judge Pehane's directive that she was not inclined to hear the matter on 8 September 2022, that the matter was to be removed from the roll, and that it should only be re-enrolled once the file was in a proper state.

[7] On the complainant's version, this sequence showed that the respondent had not prepared properly for the hearing, changed course at the eleventh hour, and caused him unnecessary prejudice and expense. He says that legal representatives had already prepared for the hearing and that he incurred costs as a consequence of the matter being removed from the roll. Although the broader complaint also traversed the subsequent order and reasons delivered by the respondent, that part of the complaint is not before me because it was expressly not referred for determination under section 17.

The Response

[8] Judge Pehane's response is detailed. She explains that she had been allocated two opposed matters for the motion week commencing on 5 September 2022, of which the complainant's matter, enrolled for 8 September 2022, was one. She states that her secretary received the files on 31 August 2022 while she was presiding in the urgent court during the preceding week. She says that she considered the complainant's matter on 7 September 2022.

[9] According to the respondent, when she read the file she found that it was not in order. She says there was no notices bundle, the filed record was disorderly, and important pleadings were missing. She further states that, when she considered the heads of argument, it became apparent that the matter involved applications and interlocutory issues that were not properly reflected in the court file. On her account, one application referred to in the papers was not in the file at all, while another appeared only in incomplete form because not all the relevant pleadings had been filed.

[10] Judge Pehane says that, after identifying these difficulties, she directed her secretary to communicate with the parties. At 11h53 on 7 September 2022, her secretary emailed the parties requiring the filing of a comprehensive indexed and paginated notices bundle and a properly constructed and consecutively numbered transcribed record. Later the same day, at 13h18, Judge Pehane sent a directive to her secretary explaining why, in her view, the matter was not ripe for hearing and had to be removed from the roll. That directive was then forwarded to the parties at 13h52.

[11] In the directive, Judge Pehane set out in some detail the applications that appeared from the heads of argument and the respects in which the file was incomplete. She recorded that the application which was missing would have to be dealt with first, but that the pleadings for that application were not in the court file. She also noted deficiencies in relation to another one of the applications and the state of the record. Her position is that the matter could not properly proceed on 8 September 2022 in that condition.

[12] The respondent further states that the matter was not removed from the roll out of indifference or lack of diligence. On her version, the court file was retained so that, once regularised, the matter could be enrolled again at the earliest available opportunity rather than being sent to the back of the queue. The parties were thereafter notified that the matter would be heard on 16 November 2022. She denies that the removal of the matter from the roll amounted to misconduct

Evaluation

[13] The starting point is that this process is not designed to revisit the correctness of a judicial ruling in the same way that an appeal or review would. Section 15(2)(c) of the Act provides that a complaint must be dismissed if it is solely related to the merits of a judgment or order.³ The Code of Judicial Conduct makes the same point. Note 9(v) records that complaints against judges which are related to the merits of a

³ Section 15(2) of the Act provides, “[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);
- (b) does not comply substantially with the provisions of section 14 (3);
- (c) is solely related to the merits of a judgment or order;
- (d) is frivolous or lacking in substance; or
- (e) is hypothetical.”

decision or procedural ruling are to be dismissed at the outset.⁴ That does not mean that every procedural step taken by a judge is immune from scrutiny. A case-management decision may, in an appropriate case, reveal arbitrariness, bad faith, abuse of judicial office, or such neglect as to constitute conduct unbecoming of a judge. The issue is whether this record shows that.

[14] In my view, it does not. The documentary material before me does not show an arbitrary or unexplained removal of the matter from the roll. On the contrary, once Judge Pehane engaged with the file, she identified specific deficiencies and recorded them in detail. Her directive of 7 September 2022 was not a bare statement that the matter would not proceed. It set out, with specificity, why she considered the matter not to be ripe for hearing, including the absence of pleadings in respect of what she regarded as the first application that required determination, and defects in the state of the record and notices bundle.

[15] It is also material that the respondent's explanation is supported by the contemporaneous emails contained in the record. Those emails show first a request for the filing of an indexed and paginated notices bundle and a properly constructed record, and then a fuller directive explaining why the matter would be removed from the roll. Whether the complainant agrees with Judge Pehane's assessment of the procedural posture of the case is not the point. The point is that the record supports her explanation that the removal decision was connected to identified procedural deficiencies in the file, and not to caprice, *mala fides* or disregard of duty.

⁴ Note 9(v) of the Code of Judicial Conduct 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.” [Own Emphasis.]

[16] The complainant’s contention that the respondent had had months to prepare does not alter that conclusion. The respondent explains that she was sitting in urgent court during the preceding week, that the files for the motion week were received by her secretary on 31 August 2022, and that she considered this matter on 7 September 2022. Even if one puts that chronology to one side, the material before me does not show that, when she appreciated the state of the file, she acted dishonestly or for an improper purpose. At most, the complaint reflects dissatisfaction with the timing of the decision and its consequences for the complainant.

[17] Nor do the complainant’s assertions about wasted preparation costs convert the matter into one of misconduct. A litigant may understandably feel aggrieved when a matter does not proceed on the allocated date and costs have already been incurred. But that does not, without more, establish conduct unbecoming of a judge. The question remains whether the judge’s conduct, viewed objectively and on the record, constituted misconduct. I am unable to find that it did.

[18] Indeed, parts of the respondent’s explanation are consistent with the obligations of diligence and proper case management under the Code. Articles 9(c)⁵ and 10(a), (c) and (g)⁶ require a judge to manage proceedings responsibly, to dispose of court business efficiently, and to perform official duties properly and in an orderly

⁵ Article 9(c) of the Code provides that a judge must, “manage legal proceedings in such a way as to—

- (i) expedite their conclusion as cost-effectively as possible; and
- (ii) not shift the responsibility to hear and decide a matter to another judge.”

⁶ Article 10(a), (c), and (g) of the Code provides, “[a] judge must—

- (a) perform all assigned judicial duties diligently;
- ...
- (c) dispose of the business of the court promptly and in an efficient and businesslike manner;
- ...
- (g) perform all official duties properly, timeously, and in an orderly manner.”

manner. A judge who concludes that a matter is not ripe for hearing because the file is materially incomplete is not, without more, acting contrary to those obligations by removing it from the roll and directing that it be re-enrolled once it is in a proper state.

[19] I also bear in mind that Acting Deputy Chief Justice Madlanga deliberately confined this section 17 enquiry to a crisp issue: the removal of the matter from the roll. He did not refer the remainder of the complaint, including the later complaint concerning the judgment and reasons, for section 17 determination. It would therefore be inappropriate for this ruling to stray beyond the narrow issue that remains.

[20] Having considered the complaint, the respondent's response, the contemporaneous email trail, and the material placed before the JCC, I am not satisfied that the complainant has established that Judge Pehane behaved in a manner unbecoming of a judge. The complaint, properly characterised, is a complaint about the management of the litigation and about the consequences of the matter not proceeding on 8 September 2022. On the record before me, that does not amount to judicial misconduct.

Order

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



THE JUDICIAL CONDUCT COMMITTEE