



## **JUDICIAL CONDUCT COMMITTEE**

**Ref: JSC/769/2020 and JSC/786/2020**

**HLOPHE JP**

**APPELLANT**

and

**GOLIATH DJP**

**RESPONDENT**

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### **DECISION ON APPEAL IN TERMS OF s 17(7) OF THE JUDICIAL SERVICE COMMISSION ACT 9 OF 1994**

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**DAMBUZA JA**

#### **Introduction**

[1] This is an appeal by Hlophe JP, the Judge President (JP) of the Western Cape Division of the High Court, against two decisions by the former Chief Justice of this country, Mogoeng CJ, in an inquiry conducted in terms of s 17(2) of the Judicial Service Commission Act 9 of 1994 (the JSC Act or the Act).<sup>1</sup> In that inquiry the Chief Justice (CJ) recommended to the Judicial Conduct Committee (JCC or 'the Committee') of the Judicial Service Commission (JSC), first, that it should recommend to the JSC that a Tribunal be established to investigate and report on allegations of assault, use of

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<sup>1</sup> We continue to refer to Mogoeng CJ in this decision as he was when he conducted the inquiry.

abusive language, and abuse of power levelled against Hlophe JP by the Deputy Judge President of the Western Cape Division of the High Court, Goliath DJP (the DJP). Secondly, he dismissed a counter-complaint of gross misconduct by Hlophe JP against Goliath DJP.

## Background

- [2] The recommendation made by the CJ emanated from a complaint of gross misconduct that was laid by Goliath DJP, initially against Hlophe JP and Judge Salie-Hlophe, also a Judge of the Western Cape High Court and the wife to Hlophe JP. The complaint was framed as a composite complaint of gross misconduct founded on various allegations of wrongdoing on the part of the JP and Salie-Hlophe J. The framing of the complaint in this manner may not be ideal to the extent that some of the alleged acts of misconduct asserted therein could well constitute self-standing complaints, as adverted to by the CJ in his decision and the JP in his submissions on appeal. However, given that s 14(3) of the Act makes provision for a complaint based on ‘one or more’ of the grounds referred to in s 14(4),<sup>2</sup> it seems to me that the manner in which the DJP’s complaint was framed, did not result in any disqualifying defect.
- [3] The complaint proceedings were separated in relation to the complaint against Salie-Hlophe J. Deputy Chief Justice Zondo (as he then was),<sup>3</sup> in his capacity as the Acting Chairperson of the Committee (the Chairperson) referred the complaint for investigation under s 17(2) of the Act. I was designated to hold the s 17 inquiry in relation to the complaint against Salie-Hlophe J. I found no evidence to support most

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<sup>2</sup> Section 14(4) of the Act provides that:

‘The grounds upon which any complaint against a judge may be lodged, are any of the following:

- (a) Incapacity giving rise to the 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.’

<sup>3</sup> I continue to refer to him as the DCJ as he was at the time of the events herein.

of the allegations which formed the basis of the complaint against Salie-Hlophe J and recommended that the allegations by Goliath JP that Salie-Hlophe lied about her to Hlophe JP, together with allegations by Salie-Hlophe J of racial utterances made by the DJP to her (Salie-Hlophe J) be referred for investigation by the tribunal. The racism allegation formed the basis of the JP's counter-complaint of gross misconduct against the DJP. The DJP denied the racism allegations asserting that they were lies concocted by the JP and Salie-Hlophe J against her.

- [4] I also served on the Committee which made the determination under s 16(4) of the Act in relation to the complaint against the JP. It is as a result of the recommendation by that Committee that the CJ held the s 17(2) inquiry.

### **The Complaint**

- [5] In her complaint the DJP alleged that the JP had committed various acts of misconduct, namely: improper withdrawal of her powers and functions as Deputy Judge President of the Division, particularly the powers that she has under s 6(6) of the Superior Courts Act 13 of 2013 to perform the functions or exercise the powers of the Judge President in his absence. Instead, the JP delegated those functions and powers (or some of them) to Papier J, to perform in his absence, even though the DJP was available and ready to do what was required. According to the DJP the exercise of those powers by Papier J, which included case allocation, led to unhappiness amongst some senior Judges.
- [6] A further allegation related to the JP's reference to white Judges in derogatory terms, and referring to the DJP as 'rubbish' and 'a piece of shit'. In addition, the JP victimised the DJP and other Judges, manipulated the allocation of cases improperly, and gave preferential treatment to his wife, Salie-Hlophe J, by allowing her to choose the cases that she would sit in and to absent herself from 'work'. According to the DJP, Judge Salie-Hlophe was allowed to participate in the administration of the Division. All of this resulted in an environment of fear, discontentment and divisions amongst the Judges of the Western Cape High Court.
- [7] The DJP also alleged that the JP assaulted a colleague, Judge Parker, in the latter's chambers at the Cape Town High Court building. Further allegations of misconduct made by the DJP included improper, costly, and non-transparent selection of acting Judges by the JP.

- [8] As stated, the JP lodged a counter-complaint against the DJP, alleging that her complaint stemmed from her misconception of the nature of her office and the powers attaching thereto. He contended that the DJP has no independent powers in the management of the Division - she could only exercise such powers as were assigned to her by the JP. He maintained that there was no statutory obligation on him as the JP to delegate duties to a DJP. The DJP could exercise the JP's powers and functions only where the JP's position was vacant. He also argued that he was entitled to withdraw powers and functions that had been previously allocated to a DJP.
- [9] In addition, the JP contended that the DJP was guilty of incompetence; was intent on facilitating the collapse of the Division by creating an administration arm parallel to his; that she undermined him by secretly recording private meetings convened to address work related matters; that she meddled in his domestic affairs, breaching the relationship of mutual trust which the two of them had enjoyed; peddled lies about him; and maliciously leaked her complaint against him to the media. The secret recording allegation related to a mechanical recording made by the DJP, of a discussion between herself and the JP on 2 October 2019. At that meeting the DJP raised with the JP the allegations about the JP which later became the subject of her complaint. The recording was made without alerting the JP thereto.
- [10] The basis for the allegation of incompetence was the reversal by the DJP of an order that had been made by Dolamo J, in terms of which he struck an urgent application off the court roll. The DJP later re-enrolled the application and postponed it even though no new evidence was placed before her.
- [11] A further basis of the counter-complaint by the JP against the DJP was her disclosure of details of a disagreement between the two of them regarding the allocation of a criminal trial in the case of *S v Rohde*. In her complaint the DJP had accused the JP of improper allocation of this case for trial to Judge Salie-Hlophe, a 'junior judge', when the DJP had preferred allocation to a different Judge based on that Judge's experience in adjudication of criminal cases. A similar dispute had arisen when the JP and DJP disagreed about the allocation of the case *Earthlife Africa Johannesburg and Another v Minister of Energy and Others*, the judgment of which is reported at [2017] 3 All SA 187 (WCC). The DJP was of the view that the JP's choice of the Judge who was to preside in the case was sympathetic to former President Zuma, who was allegedly implicated in the dispute in that case. Ultimately, the DJP's preference prevailed. Furthermore, the JP complained that the DJP had leaked her complaint to the media.

[12] All these allegations against the DJP formed the basis of the JP's counter-complaint of gross misconduct and gross incompetence against the DJP.

#### **The s 16 (4) determination**

[13] As I have stated, the Committee, to which the DJP's complaint was referred by the Acting Chairperson of the Committee directed that it be investigated and reported on as provided in s 17(2) of the Act. Pursuant thereto the CJ, having been designated by the Acting Chairperson (the DCJ) to conduct the s 17 inquiry, considered the matter as three complaints: first, with regard to the alleged assault by the JP on Parker J, second, the use of abusive language by the JP, and thirdly, the withdrawal of the DJP's powers and functions. He dismissed the counter-complaint on the basis that the alleged leaking of the complaint to the media, the improper disclosure of confidential information in the *Rohde* matter, and the racial allegations made against the DJP, were unfounded.

[14] With regard to the allegation of assault on Parker J, the CJ considered affidavits filed by fifteen Judges of the Western Cape Division in which they stated that, for over a year (beginning from 25 February 2019 to 7 February 2020) Parker J had consistently told them that the JP had assaulted him. There was also an affidavit (albeit unsigned) settled by Wille J from the same Division, at the request of Parker J, in which he described the assault on him by the JP. As a result of the assault Parker J allegedly sustained an injury on his back and was traumatised.

[15] The CJ reasoned that prior to the fifteen Judges filing affidavits the JP had accused the DJP of fabricating the assault incident, and of relying on rumour and gossip in her report thereon to the CJ and in her complaint. After the fifteen colleagues filed their affidavits alleging that Parker J had also told them about the alleged assault, the JP altered his response to the assault allegation and said Parker J accepted, after a considerable discussion with him, that his perception of the JP's conduct might have been influenced by the fact that he had been 'very emotional'.

[16] The CJ concluded that the version of Parker J about the incident required investigation by a Judicial Conduct Tribunal because many questions were left unanswered in the s 17 inquiry. These included the circumstances of the confrontation, why or how Parker J perceived that he had been assaulted, the reason for recordal of that perception by Wille J and communication thereof to other colleagues, why Parker J had held the

perception over a lengthy period, the circumstances around the discussion that enabled Parker J to understand that he was never assaulted, and the reasons why Parker J did not communicate all these facts to the presider in the s 17 inquiry when an invitation was extended to him.

[17] As to the allegation of use of abusive and derogatory language, the CJ considered that the JP had initially firmly denied these allegations. However, after the disclosure of the transcript of the recording of the meeting of 2 October 2019 his denial changed to a comment that 'if [he] did use the words complained of, it would be understandable because [he] was angry'.

[18] Regarding the JP's withdrawal of powers and functions it was found that the response by the JP, that he did not need a DJP, that he did not trust the incumbent as she was interfering in his domestic affairs, and that she wanted to remove him from his position, required further investigation because the position of the DJP and the powers attached thereto are founded in s 169 (3) of the Constitution and the provisions of s 6 (6)(a)(ii) of the Superior Courts Act. The CJ was of the view that the circumstances 'around this position (the DJP's position) in the Western Cape Division', including how previous DJPs had functioned, required thorough investigation and reporting on by a Tribunal.

#### **The leaking of the complaint (and counter-complaint) to the media**

[19] The CJ dismissed the JP and DJP's accusations that each had leaked his or her complaint to the media. Indeed, there was no evidence to support these allegations other than the fact that members of the media had apparently had access to the complaints. I agree that the allegations and counter-allegations about the leaking of the complaints were based on sheer speculation and were properly dismissed.

#### **The counter-complaint**

##### ***Inappropriate disclosure of confidential information.***

[20] The CJ rejected the allegation by the JP that the DJP had breached ethical prescripts by airing her dissatisfaction with the allocation of the criminal case of *S v Rohde* before finalisation thereof. He found that the alleged misconduct was not based on breach of any ethical rule of conduct and no case was made out as to why it was improper for the DJP to lodge a complaint with the JCC about a matter which she believed deserved its attention, whether the matter was pending before the court or not.

### ***Racism***

[21] The JP alleged that the DJP referred to the him as an ugly old man; that she referred to Africans as 'kaffertjies'; and that she urged his wife, Salie-Hlophe J, to drop his black surname. All these statements were allegedly made by the DJP to Salie-Hlophe J who then relayed them to the JP. The racism allegations first surfaced in a press statement made by Salie- Hlophe J shortly after the DJP lodged her complained against the JP. The press statement was part of the record before me in the s 17 inquiry against Salie-Hlophe J. She repeated them in the affidavits she filed in the proceedings in the composite complaint. The DJP denied making the statements. The CJ's view was that if the DJP had made the statements as alleged, the JP would have confronted her about them at their secretly recorded meeting of 2 October 2019, which he never did. Instead, he merely put to her that she had suggested to Salie-Hlophe J that she stops using her husband's surname. Salie-Hlophe J did not file any affidavit in the s 17 inquiry before the CJ. He found that there was no evidence to sustain the racism allegations and that the JP did not respond to the DJP's pointed rebuttal thereof. For these reasons the racism allegations were also dismissed.

### **The appeal**

#### ***Appeallability***

[22] For full appreciation of the nature of the inquiry that was conducted by the CJ, the powers exercised by him in the inquiry and the contingent appeal it is helpful to set out the relevant provisions of s 17 of the JSC Act. Therein the investigative and remedial powers of the Chairperson or designated member in a s 17 inquiry are set out as follows:

#### **'17 Inquiry into serious non-impeachable complaints by the Chairperson or member of Committee**

- (1) If-
  - (a) The Chairperson if 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 s15(1)(b) or s 16(4)(a) or s18(4) (a) (ii), the *Chairperson or a member* of the Committee designated by the Chairperson must inquire into the complaint to determine the merits of the complaint.
- (2) Any complaint 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.

- (3) For the purpose of an inquiry referred to in subsection (2), the *Chairperson or member concerned*-
- (a) Must invite the respondent to respond in writing or in any other manner specified, and within a specified period, to the allegations;
  - (b) may obtain, in the manner that he or she deems appropriate, any other information which may be relevant to the complaint; and
  - (c) must invite the complainant to comment on any information obtained, and on the response of the respondent, within a specified period.
- (4) If pursuant to the steps specified 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 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.
- (5) (a) If pursuant to the steps referred to in subsection (3) the *Chairperson or member concerned* is of the opinion that a formal hearing is required in order to determine the merits of the complaint, he or she must determine the time and a place for a formal hearing and a written notice must, within a reasonable period before the date so determined, be given to the respondent and the complainant.
- (b) For purposes of a formal hearing contemplated in paragraph (a)-
- (i) the *Chairperson or member concerned* has all the powers of a Tribunal; and
  - (ii) the provisions of sections 24, 26, 27, 28, 29, 30, 31, and 32 are applicable with the changes required by the context.
- (c) Upon the conclusion of a formal hearing the Chairperson or member concerned must record his or her findings of fact, including the cogency and sufficiency of the evidence and the demeanour and credibility of any witness, and his or her finding as to the merits of the complaint, and-
- (i) Dismiss the complaint, and-
  - (ii) 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
  - (iii) Recommend to the Committee, to recommend to the Commission that the Complaint should be investigated by a Tribunal. (emphasis supplied)



...

(7) (a) A complainant who is dissatisfied with a decision to *dismiss a complaint* in terms of subsection (4) (a) or 5(c) (i), may, within one month after receiving notice of that decision, appeal to the Committee against that decision, specifying the grounds of the appeal.

(b) A respondent who is dissatisfied with *any finding or remedial steps contemplated in subsection (4)(b) or 5(c)(ii)* may, within one month after receiving notice of that finding and remedial steps, appeal to the Committee in writing against that finding or remedial steps or both such finding and remedial steps, specifying the grounds for the appeal.’ (emphasis supplied)

[23] Section 17(8) stipulates remedial steps that may be imposed pursuant to a s 17 inquiry. And s 17(9) regulates liability of the state for costs incurred in relation to remedial steps imposed under s 17(8).

[24] Prior to the hearing of this appeal we invited the parties to make submissions on whether the recommendation of a referral to a Tribunal made by the CJ was appealable. This was in view of the fact that s 17(7) does not provide for an appeal against a recommendation that a complaint be investigated by a Tribunal. The section only provides for an appeal against dismissal of a complaint (s 17(4)(a)) and a finding that a complaint has been established coupled with remedial step (s 17(4)(b)).<sup>4</sup> In addition, provision is made for appeals against any *finding and remedial step made in a s 17(5)(c)(i) or (ii) inquiry* – i.e. where, in addition to the filing of affidavits, a formal hearing has been held – which did not happen in this case .

[25] The submissions made on behalf of the JP did not specifically deal with the issue of appeal against a recommendation. Instead, an overarching submission was made, that the ‘cumulative effect of the irregularities committed by the CJ, together with the other grounds of appeal were ‘so egregious that the ruling should be set aside as a nullity in its entirety’.

[26] I am of the view that ordinarily the recommendation that the complaint against the JP be investigated by a Tribunal, is not appealable. It is not final in effect. The JSC can still reject it. Moreover, no provision for an appeal against a recommendation is

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<sup>4</sup> Provision is made in s17(7) for appeal against decisions made in an inquiry conducted in terms of s17(5) –formal hearings. However, that section is not applicable in this appeal as no formal inquiry was held.

provided for in the JSC Act. However, a dismissal of a complaint is appealable under s 17(4)(a). This means that the dismissal of the JP's counter-complaint is appealable. In this case the allegations which form the basis of the complaint and the counter-complaint are inextricably intertwined. For practicality and a full comprehension of the issues that require determination we have to consider the allegations in full context. So would a Tribunal. I therefore do the same in this appeal.

### **The CJ's disqualification**

#### ***Lack of necessary authority***

[27] First, it was contended that the CJ had delegated his powers as the statutory Chairperson of the JCC to the Deputy Chief Justice (DCJ). Once that delegation was made and the DCJ began the process in terms of s 14 of the Act, he became seized with the complaint as chairperson in relation thereto. The CJ therefore had no authority to deal with the complaint as Chairperson of the s 17 inquiry, so it was argued.

[28] I do not agree that the CJ was disqualified from conducting the s 17 inquiry. This assertion was premised on an erroneous understanding of the powers exercised by both the CJ and the DCJ in relation to the complaint. The delegation of the CJ's powers to the DCJ was a general delegation effected in terms of s 8(3) of the JSC Act. It was not limited to this complaint. Duly authorised, and acting in terms of s 14(2) read with s 16(1)(a) the DCJ, having satisfied himself that, in the event of the complaint being established it was likely to lead to a finding by the Commission that the JP was guilty of gross misconduct, referred the complaint to the Committee to consider whether a recommendation to the Commission that the complaint be referred for investigation by a Tribunal would be appropriate. This consideration of the complaint by the DCJ, under s 16(a) did not result in him being seized with the complaint as was contended by the JP. This is borne out by the fact that under s 17(1)(b) the Chairperson (who would have considered the complaint under s 16(a)) may still conduct the s17 inquiry himself, *or designate another committee member to conduct the inquiry*. In this case the Chairperson of the Committee delegated another member of the Committee, Mogoeng CJ, to conduct the inquiry. It is in this capacity (as a delegated member of the Committee) that the CJ was designated to conduct the s 17 inquiry in this case.

#### ***Partiality or bias***

[29] It was asserted that the manner in which the CJ dealt with the complaint showed bias against the JP; that he was not an impartial adjudicator and was conflicted because he had previously granted private audience to the DJP regarding allegations which later

formed the basis of the complaint. In addition, the CJ's strong belief in the Christian faith disqualified him from adjudicating the s 17 inquiry. The reasoning was that because the complainant was a Christian and the respondents (the JP and Salie-Hlophe J) together with the other Judge involved, Parker J, were of the Muslim faith, the CJ was disqualified from adjudicating the complaint.

- [30] In dealing with the disqualification argument the CJ considered, first, that all the other members of the JCC had considered the complaint in the proceedings under s 16 of the Act, a process which resulted in the s 17 inquiry over which he presided. It therefore became 'inescapable' that he (the CJ) became involved; particularly that the only other member of the Committee, the DCJ was the delegated Chairperson of the Committee who had directed that a s 17 inquiry be held. The CJ concluded that it became *necessary* that he handle the s 17 inquiry even though he had reservations about his involvement in the matter.
- [31] The principle of necessity is founded on the recognition that a Judge who may have had some prior involvement in a case and could be considered not impartial in relation thereto, is preferable than no Judge at all (i.e. in the absence of a Judge with no prior knowledge of the matter). I do not think that the principle of necessity applies in this case. The receipt of the report made by the DJP did not render the CJ partial in relation to the relevant allegations. Apart from the fact that there is no evidence that the CJ considered the merits of the complaint when the report was made to him, as I discuss in para 37 below, structural construct of the JSC Act and the Judicial Code of Conduct entrust to the CJ, as head of the judiciary, the responsibility to receive formal and informal reports about challenges that confront Judges. In addition, he is the statutory chair of the JCC which formally deals with those complaints against Judges that fall within the provisions of s 14(4) of the JSC Act. This is all by design. Giving credence to bald assertions of bias, based on *mere* receipt by the CJ of reports of misconduct by Judges would only serve to paralyse the judiciary disciplinary process.
- [32] In *the President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>5</sup> the Constitutional Court considered comprehensively the test for perceived bias. In essence there must be a basis on which a reasonable, objective and informed person would reasonably apprehend that the adjudicator (the

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<sup>5</sup> *The President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).

Chief Justice in this case) would not bring impartial mind to bear on the adjudication of the complaint before him or her.

[33] In this case, significantly, the JP did not rely on any act of actual bias on the part of the CJ. I understand his case to be that of perceived bias, based on the report that was made to the CJ about the allegations that later became the basis of the complaint against him. But the report is not the only factor to consider. The CJ's response thereto is equally relevant. The meeting between the CJ and Goliath DJP became a matter of public knowledge pursuant to a media statement issued by the CJ on 10 May 2020 (subsequent to the lodging of the complaint by the DJP). In the relevant part the statement read:

'Deputy Judge President Goliath informed the Chief Justice that her relationship with Judge President Hlophe had become difficult. She also said that the two judges had informed her about an alleged assault on one of them by Judge President Hlophe. Although she said nothing about her intention to lodge a complaint against the Judge President concerning their relationship, she however indicated that the Judge who was assaulted by the Judge President was thinking about doing so. She also informed the Chief Justice that the alleged victim was uncertain about the appropriateness of reporting the alleged assault to the police and the Judicial Conduct Committee. This was so, she said, because the alleged victim thought the Chief Justice would view reporting the alleged assault to the police and the Judicial Conduct Committee as conduct that would bring the Judiciary into disrepute. At the request of the alleged victim of the assault and another Judge she had come to find out from the Chief Justice whether he would have any principled objection to the allegations being reported to the police and the Judicial Conduct Committee. The Chief Justice told her that any allegation of misconduct against any Judge must, in terms of the Code of Judicial Conduct and the Judicial Service Commission Act, be reported to the Judicial Conduct Committee.

Additionally, any allegation of a commission of a crime must, without hesitation, be reported to the South African Police Service.

He also informed the Deputy Judge President that failure by any Judge to report these allegations to the structures with the legal authority to address them, would be a betrayal of what Judgeship and the Judiciary is all about. The Chief Justice stands by this position and would always encourage any alleged wrongdoing or alleged crime to be reported promptly.

As the Chief Justice has previously iterated, he never has, nor has he now the legal authority to personally deal with these issues outside of the processes under the JSC Act. To suggest otherwise could either be actuated by nefarious reasons (e.g. a long standing

desperation to find fault) or misapprehension of the law. So far none of those who have asked the Chief Justice to intervene in the Western Cape High Court could, when he pertinently asked them to, point to any provision in the Constitution, Judicial Service Commission Act, or any other Act of Parliament, any Regulation or rule that empowers him to discipline a Judge or cause him or her to be suspended as many have suggested. Instead they have suggested that he either pleads with Judge President Hlophe to go on leave or somehow use his “prestige” or his office to “normalise” the Western Cape situation.

Yes the Chief Justice has been aware of the allegations against Judge President Hlophe since late 2019. But those allegations can only be resolved through the application of the law. It is necessary to emphasize that he does not have power to resolve these challenges and cannot therefore exercise power he does not have.’

[34] Apart from what appears in this extract of the statement by the CJ or on his behalf, there was no direct evidence of any other utterances by him at his meeting with the DJP. The high watermark of what the CJ said, on the evidence, is that the CJ said a complaint should be filed regarding the alleged conduct. The JP’s version that Parker J told the DJP that he would not be filing any complaint as he had not been assaulted and that the DJP ‘appeared disappointed by this response, hence her decision to submit the complaint of the alleged assault in her own name’ has not been reliably confirmed by those with first-hand knowledge thereof. I may add that it is not clear whether the allegations and conclusion were made by the JP based on information allegedly relayed to him by Parker J. The JP contended that:

‘If what Parker informed [me] is correct, and I have no reason to doubt it, the conduct of Mogoeng CJ and Goliath DJP in relation to this matter lacks the attributes of integrity. What it means is that the Chief Justice heard a rumour from Goliath DJP in that private meeting that I had allegedly assaulted Parker J, actively engaged with her on the rumour by approaching her to approach Parker J with the assurance of his support, if he were to file a complaint against me of the alleged assault’.

Parker J filed no affidavit in support of what he had allegedly told the JP.

[35] The JP argued that the conduct of the CJ and DJP was inimical to the elementary requirements of judicial ethics and constituted gross judicial misconduct in that they connived to have Parker J lodge a complaint against him. He contended that the CJ’s conduct, demonstrated not only bias, but that he was also a witness to the DJP’s misconduct.

[36] I cannot find any basis for these accusations. The DJP's report to the CJ was not only a reasonable step, it is encouraged under Article 16 of the Judicial Code of Conduct which provides that: 'A judge who reasonably believes that a colleague has been acting in a manner which is unbecoming of judicial office must raise the matter with that colleague or with the head of the court concerned'.

[37] Article 16.3 of the Code envisages that in the ordinary course, reports of the nature made by the DJP to the CJ will be made to the Judges President. Logically, where a Judge President is the Judge about whom the report is made, the matter should be raised either with the JP concerned or with the Chief Justice as the Head of the Judiciary. This was not lost to the legislature when it decreed that the Chief Justice would (still) be the Chairperson of the Judicial Conduct Committee and in that capacity deal with complaints against Judges. To disqualify the Chief Justice from performing his duties under Parts 1 and III of the Act on account only of a report made to him or her prior to lodgement of a complaint would not only be unreasonable, it would impede the oversight and accountability objectives of the Act.

[38] The suggestion by the JP that the President of the Supreme Court of Appeal could have been appointed, on an ad hoc basis, to conduct the s 17 inquiry has no legal grounding. The Committee has exclusive oversight jurisdiction in respect of judicial misconduct under ss 7 to 18 of the Act. Its members are specified<sup>6</sup> in s 8 of the Act as follows:

**8. Establishment and composition of the Judicial Conduct Committee**

- (1) The Commission has a Judicial Conduct Committee, comprising-
  - (a) the Chief Justice, who is the Chairperson of the Committee;
  - (b) the Deputy Chief Justice; and
  - (c) four Judges, at least two of who must be women, designated by the Chief Justice in consultation with the Minister, for the period determined at the time of such designation, provided that such period may not exceed two years.'

We were not referred to any provision in the Act which provides for appointment of additional or *ad hoc* members.

**Religion**

[39] The JP's contention that the CJ's world view, which is deeply rooted in his interpretation of the Bible, and his strong belief in the Christian faith, rendered him unsuitable to

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<sup>6</sup> See also the appointment of Judicial Tribunals under s 21 of the Act.

adjudicate the complaint in which the complainant was a Christian and the respondents (the JP and Salie-Hlophe J together with Parker J), were Muslims, was an equally long shot. No evidence was tendered to show a Christianity based and anti-Muslim decision making pattern on the part of the CJ that would justify apprehension. The perceived strong Christian belief, on its own, is not sufficient to disqualify the CJ from adjudicating matters involving persons of Muslim faith.

***Failure to hold a formal (oral) inquiry***

- [40] The JP contended that the CJ misapplied s 17 in that he conducted the inquiry as a mere screening process and reached conclusions without conducting an inquiry in an inquisitorial manner (as the JP put it, the CJ viewed the s 17(3) process as merely a further level of screening on the way to the Tribunal p19 of Heads). The starting point is that a s 17 inquiry is sanctioned under the Act in circumstances where the Chairperson is satisfied that the applicable remedial action, if the complaint is proved, will be limited to those set out in s 17(8). These are: apology to the complainant, a reprimand, a written warning, compensation, counselling, attendance of a training course, and any other appropriate corrective measure. Where the Chairperson is not satisfied that any these remedies would be appropriate or where he or she satisfied that the complaint, if established, could prove impeachable conduct, it would not be proper to conduct a formal s 17(5) formal inquiry.
- [41] Section 17(3) specifies the information gathering steps which the Chairperson or member conducting the inquiry *must* take (and those which they *may* take) to obtain information. At the end of the information gathering steps specified under s 17(3) the Chairperson or member makes an assessment as to the likelihood that a formal hearing will contribute to determination of the merits of the complaint in light of the three determinations he or she may make as specified in s 17(4), i.e.: (a) dismissal of the complaint, or (b) a finding that a complaint has been established together with imposition any of the remedial steps referred to in s 17(8), or (c) a recommendation that the complaint be referred for investigation by a Tribunal. It follows from the reading of s 17(3) that if, at the end of the information gathering exercise specified in s 17(3) the member conducting the s 17 inquiry is of the view that impeachable conduct would be proved if the allegations were established from the information obtained, then a formal inquiry and determination of merits under s 17(5) would be impermissible.

Instead, a recommendation of referral to a Tribunal for investigation would be the correct decision.<sup>7</sup>

- [42] It is evident from the CJ's recommendation that at the end of the steps specified under s 17(3) he was satisfied that a complaint of gross misconduct would be established if the allegations were proved. Regarding the allegation of use of abusive language, the CJ said:

'It is still not clear whether the JP admits or denies that he said to the DJP "you are a rubbish and a piece of shit, get out of my office"'. Initially the JP focused only on confirming that the meeting took place as alleged, that he asked the DJP to leave his Chambers and not to interfere in his marriage. He later denied what is alleged in paragraphs 44 to 51 of the DJP's affidavit, which includes the "rubbish-shit" allegation. After the release of the transcript, he did not admit or deny the allegation. But said no more than "If I said this . . . I was angry". To have it established against someone who occupies the exalted office of Judge President that he said to a woman DJP that she is "rubbish" and a "piece of shit", in an era when women abuse even at the workplace is reportedly on the rise is likely to result in a finding that the JP is guilty of gross misconduct unless lip service is being paid to the fight against women abuse. We Judges must lead by example in this connection. I say this alive to the fact that the JP's alleged anger might well serve as sufficient mitigation to bring the complaint down to a level of seriousness that is below "gross".'

- [43] On the allegation of withdrawal of powers and functions of the DJP, the CJ considered that the position of the DJP is a an office created in terms of s 169(3) of the Constitution<sup>8</sup> and s 6(6)(a)(ii) of the Superior Courts Act, that the latter confers on the DJP certain responsibilities in the 'absence' of the JP, and that 'the position is a creature of the Constitution and statute and does not seem to exists at the pleasure of the JP'. Then he said:

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<sup>7</sup> The second stage, where referral to a Tribunal is provided for under s 17 is in s 17(5)(c) – 'upon the conclusion of a formal hearing'. This stage would be reached if, after completion of the information gathering steps under s 17(3) the Chairperson or member would be satisfied that complaint is one which, on establishment, could be dealt with in terms of s 7(8).

<sup>8</sup> Section 169 of the Constitution provides:

'(3) Each Division of the High Court of South Africa-

- (a) has Judge President;
- (b) may have one or more Deputy Judges President; and
- (c) has the number of other judges determined in terms of a national legislation'.



'If it were to be established that the JP bypassed the DJP and assigned to Papier J duties that ought to [have been] discharged by the DJP in terms of section 6, at the time when the JP was in reality 'absent', that could qualify as abuse of power or abuse of judicial office. Abuse of power by those charged with the duty to stem the tide of abuse of power or corruption is in my view very serious indeed. This needs to be fully ventilated. Who acts as a Judge President should never be made to look like a consequence of some patronage system. Those deserving to act must be identified on an objective and credible basis or criteria. It cannot be arbitrary'.

[44] With regard to the allegations of assault on Parker J, the evidence was that the DJP first learnt about the alleged assault on Parker J from Judge Wille. This was in the presence of Parker J who, according to the DJP, confirmed the assault, described how it happened and what the JP said to him, and then remarked that he 'had never been treated in such an undignified manner in [his] life'. The alleged assault was discussed on two occasions by the DJP and Judges Parker and Wille. It was suggested that the DJP report the matter to the Chief Justice. Apart from what the JP alleges Parker J told him, neither of the two Judges (Parker and Wille JJ) disputed the DJP's version of how she came to know of the alleged assault and that it was agreed that she report it to the CJ.

[45] The CJ considered that over a period of about a year Parker J had consistently related the 'assault story' to fifteen of his colleagues, and thereafter changed it to a 'perception of assault'. But he (Parker J) then failed to give input to the S17 inquiry. As stated above the CJ referred to a number of questions that emanated from Parker J's version of the assault or his perception of what happened on the day of the incident. He considered the JP's response to the allegations, particularly that his response changed from an outright denial of the 'rumour' to which, according to him, the DJP sought to give credence, to a suggestion that the DJP should have utilised Article 16.3 of the Judicial Code of Conduct so that both him and Parker J would be afforded opportunity to 'explain the circumstances in which it was believed that [he] had assaulted Parker J'. Nevertheless, the JP insisted, on appeal, that he did not need the assistance of a Deputy Judge President. He also insisted that he could no longer work with Goliath DJP because he did not trust her following her interference in his family affairs, and that the DJP's interpretation of the law relating to her powers and functions was contrived.

- [46] It was common cause that when the DJP was absent from the Division, acting in the Constitutional Court, Desai J was appointed as Acting Deputy Judge President. According to the JP, he worked so well with Desai J that the Western Cape Division was recognised as the best performing Division in terms of the norms and standards. From this it appears that, contrary to the JP's assertion, assistance by a Deputy Judge President is beneficial to the Division.
- [47] The JP described his allocation of duties to Papier J as a once-off event which happened when he was 'working from outside the Division – on circuit – for a day or two'. During that period Papier J signed court orders. However, he did not sign them as the Acting Judge President, so said the JP. He argued that the word 'absent' in s 6(2)(a)(ii) of the Superior Courts Act means 'more than geographical absence' and connotes a vacant (JP's) office. Hence his argument that a Deputy Judge President would be entitled to exercise the powers and functions of a Judge President only if the Judge President's position was vacant. According to him he was not absent from the Division when he was performing circuit functions in George and requested Papier J to perform 'minor administrative functions'. In any event, so he asserted, as the JP, he had a right to delegate his powers and functions to whichever Judge is trustworthy and efficient.
- [48] From the time of Goliath DJP's appointment to that position, until she left for an acting stint at the Constitutional Court she had exercised certain powers and functions delegated to her by the JP. Prior to her appointment as Deputy Judge President those powers and functions were exercised by her predecessor, Traverso J. According to the JP, at some stage during Traverso J's term of office as DJP he temporarily withdrew the delegated powers from Traverso J when the two of them had some misunderstanding.
- [49] I agree with the CJ that the manner in which the delegation was exercised and withdrawn in this case (re: Goliath DJP), including the reason for the withdrawal, requires closer examination. I also agree that the question whether it was open to the JP to decide that he did not need a Deputy Judge President when that position is a statutory creation requires an investigation by a Tribunal. Included in that the inquiry on this aspect would be reasons for and propriety of the withdrawal of the powers and functions and whether those reasons need be or were related to the DJP's performance of her functions.

- [50] In addition, the JP's interpretation of the word 'absent' in s 6(2)(a)(ii) requires interrogation by a Tribunal. Such interpretation goes to the heart of the working relationship of the two most senior Judges in each Division of the High Court in this country. In *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) the court held that the meaning of 'absence' was: 'the state of being absent, that is to say physically absent' rather than 'legally incapacitated'. This meaning appears inconsistent with the JP's understanding of the meaning of the word. A Tribunal would be the appropriate forum to investigate this issue further.
- [51] Included in the allegations dismissed by the CJ were claims relating to change in the management style of the Division which resulted in unhappiness amongst the judges. These related to discontinuation of regular Judges meetings, allegations of improper allocation of cases by the JP, improper appointment of Acting Judges, victimisation of Judges, including DJP, and preferential treatment extended by the Judge President to Salie-Hlophe J. I investigated these allegations in the s17 inquiry in relation to the complaint against Salie-Hlophe J and could not find evidence of misconduct in this regard. Nothing has changed in these proceedings.
- [52] There are two issues on which I hold a different view from the CJ. The first relates to the utterances allegedly made by the DJP to Salie-Hlophe J, referring to the JP as the ugly black man and suggesting that Salie-Hlophe J stop using her husband's surname. The DJP insisted that these allegations are lies which constitute gross misconduct on the part of the JP and Salie-Hlophe J. On the other hand, the allegations are one of the grounds for the JP's racism counter-complaint against the DJP. As I said earlier these utterances were relayed to the JP by Salie-Hlophe J. Although in these proceedings Salie-Hlophe J did not file a confirmatory affidavit in relation to what was said to her by the DJP she did file one in the s 17 inquiry relating to the complaint against her. The CJ dismissed the complaint in this regard on the basis that if the utterances were made the JP would have raised them with the DJP at their meeting on 2 October 2019. I do not think that the issue can be resolved on paper. Particularly at this stage of the proceedings. If the allegations of racism against the DJP were established, including the allegation that the DJP referred to some Judges as 'kaffertjies' or that the JP and Salie-Hlophe J lied in imputing the allegations to the DJP, gross misconduct could be proved either way. The DJP remains aggrieved by the imputation of racism which she denies. For that reason, I would refer these allegations as part of the investigation by the Tribunal. To this extent I uphold the JP's appeal against the dismissal of his counterclaim that was based on these allegations.

- [53] The next issue is whether it was proper for the DJP in her complaint to divulge the different opinions that she and the JP held in relation to the allocation of the *Rhode* criminal trial. The CJ found nothing improper about the manner in which the DJP had dealt with the matter. His view was that nothing in the Code proscribes the divulging of this information. Although Article 16.3 urges that judges must act on a belief that a colleague has been acting in a manner unbecoming of judicial office, Note 16.1 provides that: ‘The Judge must usually await the conclusion of the proceedings before informing the relevant professional body or a Director of Public Prosecutions of such misconduct of professional incompetence’. It seems to me that the circumstances in which the DJP divulged this information requires proper ventilation and determination by a Tribunal. Careful consideration may be required when a Judge considers making a report under Article 16.3 that relates to a case that is pending before the courts. Considerations of the effect of delay or undue haste in making the report may be relevant, depending on the facts of each case. But the warning issued under Note 16.1 cannot be ignored. This issue is complicated and not unimportant.
- [54] The propriety of the recordal of the meeting of 2 October 2019 and the admissibility of the evidence obtained by the DJP by recording the discussion between the JP and herself would also be determined by the Tribunal.
- [55] Consequently, the following order shall issue:
- 1 Save to the extent indicated below, the appeal against the recommendation by the CJ to the Committee in terms of s 17(4)(c) of the Judicial Service Commission Act 9 of 1994, is dismissed.
  - 2 To the extent indicated below the appeal against the dismissal of the counter-complaint by Hlophe JP against Goliath DJP in terms of s 17(4)(a), succeeds.
  - 3 The recommendation made by the Chief Justice in terms of s 17(4)(c) of the Judicial Service Commission Act 9 of 1994 is set aside and replaced by the following:  
‘It is therefore recommended to the Committee, in terms of s 17(4)(c) to consider recommending to the Commission that a Tribunal be established to investigate and report on:
    - a. The allegations of assault, use of abusive language, abuse of power in relation to the office of the DJP levelled by Goliath DJP against Hlophe JP; together with
    - b. The allegations of racism, improper disclosure of information pertaining to a pending case, and the propriety of the secret recording made by Goliath DJP of the discussion between her and Hlophe JP at the meeting of 2 October 2019.’

***(Electronically transmitted)***

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Dambuza JA  
Member of the Committee

I agree

***(Electronically transmitted)***

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Zondi JA  
Acting Chairperson of Committee

I agree

***(Electronically transmitted)***

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Mojapelo DJP  
Member of the Committee

**Date: 20 September 2022**