

JUDICIAL CONDUCT COMMITTEE



Ref No: JSC/904/21

In the matter between:

ADVOCATE VUYANI NGALWANA

COMPLAINANT

and

JUSTICE JOHANN KRIEGLER

RESPONDENT

RULING

Zondi JA:

Introduction

[1] The complainant, Advocate Vuyo Ngalwana (the complainant) is a senior advocate and the member of the Pan African Bar Association of South Africa. He lodged a complaint of judicial misconduct against Justice Johann Kriegler (the respondent), a retired judge of the Constitutional Court. He lodged a complaint in terms of s 14(1)¹ read with s 14(3)² of the Judicial Service Commission Act 9 of 1994 (the

¹ Section 14(1) provides: 'Any person may lodge a complaint about a judge with the Chairperson of the Committee.'

² Section 14(3) provides: 'A complaint must be –

(a) based on one or more of the grounds referred to in subsection (4); and

JSC Act) premised on the grounds stated in ss 14(4)(b)³ and 14(4)(e)⁴ of the JSC Act read with the relevant articles⁵ of the Code of Judicial Conduct (the Code).

[2] The complaint arises from a number of utterances the respondent is alleged to have made in various media concerning Judge President Hlophe (JP Hlophe) of the Western Cape Division of the High Court, Cape Town. The complainant alleges that the respondent has since 2009, persistently attacked JP Hlophe in his utterances. These attacks, he claims, started as far back as 2009, subsequent to a complaint of gross misconduct against JP Hlophe by the Justices of the Constitutional Court (the ConCourt complaint). The purpose of the complaint, the complainant asserts, is 'to vindicate the integrity, dignity and independence of the Judiciary and the judicial system' which the complainant believes is compromised by the continued public attacks by the respondent on Hlophe JP.

[3] It is common cause that the complainant was part of the legal team which represented JP Hlophe in 2008 and 2009 at the Judicial Service Commission ("the JSC") and in court litigation following the ConCourt complaint. In 2011, the complainant further appeared on behalf of JP Hlophe in the Supreme Court of Appeal (SCA) proceedings in which Freedom Under Law (FUL), chaired at the time by the current respondent, successfully challenged and overturned the decision taken by the JSC in 2009, in terms of which it had dismissed the ConCourt complaint against JP Hlophe. The complainant points out since then he has not acted on behalf of JP Hlophe. In addition to his involvement in the above-mentioned litigation relating to JP Hlophe and the ConCourt complaint, the complainant has critically written and lectured about matters concerning Justices of the Constitutional Court, going as far as criticising

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- (b) lodged by means of an affidavit or affirmed statement, specifying –
- (i) the nature of the complaint; and
 - (ii) the facts on which the complaint is based.'

³ (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).

⁴ (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 The alleged articles breached by the respondent relate to: 4(a); 5; 11; 12(1)(d); 17(2) and 17(3) of the Code.

the judgment dismissing leave to appeal to the Constitutional Court against the judgment of the SCA.

[4] The complainant contends that the respondent's statements about JP Hlophe do not only attack JP Hlophe as an individual, but also the judiciary as a whole and they have further instilled courage, in the form of disobedience, to Judges of the Western Cape Division to defy JP Hlophe's leadership in various ways. In his view, this has not only given judges this 'misplaced' courage but has also prompted ordinary, non-legal persons such as journalists to publicly attack judges.⁶ The complainant is seeking the intervention of the JSC to deprecate the respondent's conduct strong as such conduct hardly conduces to the protection of the dignity, independence and effectiveness of the Judiciary and the judicial system.

[5] It is apparent from the grounds of the complaint that the complaint is anchored on ss 14(4)(b) and 14(4)(e) of the JSC Act. The common element in all the charges raised is the element of either wilfulness or gross negligence in the conduct. Section 14(4)(b) renders wilful or gross negligent breaches of the Code a judicial misconduct. Section 14(4)(e) is much broader than s 14 (4)(b). A judicial misconduct it contemplates is not limited to the breach of a specific provision of the Code. It covers any 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.' The articles

⁶ Complainant in this regard cites an article published in *Daily Maverick* wherein two SCA Judges were allegedly attacked and associated with corruption following the judgement in *Jiba and Another v General Council of the Bar of SA and Another; Mrwebi v General Council of the Bar* [2018] 3 All SA 622 (SCA).

of the Code which are alleged to have been breached by the respondent are articles 4(a)⁷; 5⁸; 11⁹ and 12(1)(d).¹⁰

Impugned statements

[6] The utterances that form the basis for the complaint are alleged to have been made and/or reported in the following publications:

(a) News24 report of 17 April 2021

The complainant alleges that following the finding of gross misconduct by the Judicial Conduct Tribunal against JP Hlophe on 9 April 2021, the respondent is reported in the News24 article of 17 April 2021 to have called not only for the impeachment of JP Hlophe, but also for his being ‘prosecuted and jailed’. Such conduct, the complainant contends, is in direct breach of article 11 of the Code which requires judges to ‘refrain from public criticism of another judge’ and act towards other judges with courtesy and collegiality said to be indispensable attributes of a judge and article 12(1)(d) of the

⁷ Article 4: Judicial Independence

A judge must —

- (a) uphold the independence and integrity of the judiciary and the authority of the courts.

⁸ Article 5: To act honourably

(1) A judge must always, and not only in the discharge of official duties, act honourably and in a manner befitting judicial office.

- (2) All activities of a judge must be compatible with the status of judicial office.

⁹ Article 11: Restraint

(1) A judge must —

(a) save in the discharge of judicial office, not comment publicly on the merits of any case pending before, or determined by, that judge or any other court;

(b) not enter into a public debate about a case irrespective of criticism levelled against the judge, the judgment, or any other aspect of the case;

(c) refrain from any action which may be construed as designed to stifle legitimate criticism of that or any other judge;

(d) not disclose or use non-public information acquired in a judicial capacity for any purpose unrelated to his or her judicial duties;

(e) avoid any personality issues with colleagues, lawyers and parties, and seeks to foster collegiality; and

(f) unless it is germane to judicial proceedings before the judge concerned, or to scholarly presentation that is made for the purpose of advancing the study of law, refrain from public criticism of another judge or branch of the judiciary.

(2) A judge may participate in public debate on matters pertaining to legal subjects, the judiciary, or the administration of justice, but does not express views in a manner which may undermine the standing and integrity of the judiciary.

(3) Formal deliberations as well as private consultations and debates among judges are and must remain confidential.

¹⁰ Article 12: Association

(1) A judge must not —

...

(d) use or lend the prestige of the judicial office to advance the private interests of the judge or others.

Code which proscribes judges not to ‘use or lend the prestige of the judicial office to advance the private interests of the judge or others.’ With regard to the alleged breach of article 12(1)(d), the complainant links the respondent’s alleged call for the impeachment and jailing of JP Hlophe, while the judicial process is still ongoing, to a statement published on the Democratic Alliance’s (DA) website on 12 April 2021 urging the JSC to ‘*urgently get rid of him*’ (JP Hlophe). The complainant asserts that it is public knowledge that the DA wants JP Hlophe impeached and that the respondent, by calling for prosecution and jailing of JP Hlophe, lent the prestige of his judicial office to advance the private interests of a political party. The complainant contends that the effect of the respondent’s utterances was harmful to the outcome of the complaint against JP Hlophe.

(b) Independent Online: September 2009

The complainant alleges that the respondent is reported to have stated in the Independent Online publication of 4 September 2009 that JP Hlophe was ‘a manifestation of the problem’ within the judiciary and that independence of the judiciary should not be sacrificed on the ‘altar of transformation.’ The respondent’s statement, the complainant argues, amounts to prejudging a serious matter and is in breach of various articles in the Code, namely: Article 4(a) – in that prejudging a serious and potentially impeachable complaint hardly conduces upholding the independence and integrity of the judiciary; article 5 – in that prejudging a matter of this nature eviscerates public trust in the judge implicated and also in the Judiciary and judicial system; article 11 – in that the respondent’s labelling a judge as ‘a manifestation of the problem’ prior to the JSC determining the very issue was not germane to judicial proceedings before JP Hlophe or to scholarly presentation made for purposes of advancing the study of law; article 12(1)(d) – in that the respondent’s utterances lent the prestige of a judicial officer for advancement of the DA, a political party that made it publicly known of their desire to have JP Hlophe removed by way of impeachment; and article 17(2) and (3) – in that the respondent’s alleged attacks on JP Hlophe and prejudgement of a grave complaint are in breach of what is contained in the stated sub-articles.

(c) Media Report: 3 July 2018

In a media report dated 3 July 2018, following a postponement of the hearing of the complaint against JP Hlophe, the respondent is allegedly reported to have expressed ‘disgust’ at the postponement, blaming JP Hlophe for the delay, further stating that: ‘FUL is disgusted but not surprised. Hlophe has attempted for more than 10 years to

defeat the attempts to bring him to justice. This is just the latest attempt.’ This alleged public utterance was further in breach of articles 4(a), 5, 11, 12(1)(d), and 17(2) and (3) of the Code.

(d) *TimeLive: 1 March 2021*

Lastly, the respondent is alleged to have breached article 11(1)(a) of the Code by making a statement in TimeLive in which he is alleged to have said that JP Hlophe, in his acquittal of a politician, employed ‘contrived reasoning.’ The complainant contends that this conduct by the respondent is in breach of articles 11(1)(b), (e) and (f) of the Code which prohibit public criticism by a judge of another judge or judgement or any aspect of the case and enjoin judges to avoid personal clashes with each other. In the same report, the complainant says, the respondent stated that JP Hlophe was ‘unfit to be a judge.’ The complaint asserts that the respondent’s statement is in breach of articles 4(a), 5, 11, 12(1)(d), and 17(2) and (3) of the Code.

[7] As regards the remedy, the complainant, for the reasons set out above, asks that the conduct of the respondent be investigated and, in the event that his conduct is found to have amounted to a misconduct, that he should be sanctioned, in a manner that the JCC considers appropriate with the purpose of deterring a repetition of the same conduct in the future.

Respondent’s responses

[8] The respondent’s attorneys, by a letter dated 17 June 2021, responded to the complaint. They raised two preliminary points on which they sought the dismissal of the complaint. They contended, first, that there are no grounds for the complaint under s14(4)(b) and s14(4)(e) for the simple reason that the alleged breaches of the Code do not constitute ‘wilful or grossly negligent’ or ‘conduct...that is incompatible with or unbecoming the holding of judicial office...’

[9] The second point is that article 11(1)(f) of the Code,¹¹ properly interpreted, and in a manner consistent with the Constitution and in particular, the right to freedom of expression, does not deprive a judge of the right to express himself or herself and to

¹¹ Article 11(1)(f) provides: ‘A judge must unless it is germane to judicial proceedings before the judge concerned, or to scholarly presentation that is made for the purpose of advancing the study of law, refrain from public criticism of another judge or branch of the judiciary.’

encourage robust debate on issues which are central to the independence of the judiciary.

[10] In my view, article 11(1)(f) read with article 11(2) does not impose a total prohibition on the judges to express themselves freely on any issues. They are allowed to say anything as long as what they say remains within its confines. It is not suggested that the article is unconstitutional to the extent that it places a restriction on when it is acceptable for a judge to criticise another judge or branch of the judiciary. This is the restriction which the judges including the respondent accepted when they took appointment as judges. In my view article 11(1)(f) serves a legitimate purpose. Its purpose is to enhance judicial independence and accountability by encouraging collegiality among the judges.

[11] Additionally, it is contended on behalf of the respondent that his public comments must necessarily be considered from the position that he is a retired judge.¹² He is not in active service, nor will he be called upon to perform judicial duties. In this regard, it is alleged that the respondent is a public figure and an elder. His views on judicial matters, proceeds the argument, are often solicited by the public because of his expertise. This point must fail simply on the basis that s7(1)(g) of the JSC Act defines a judge to mean any Constitutional Court judge or judge referred to in s 1 of the Judges Remuneration and Conditions of Employment Act 47 of 2001, *which includes a judge who has been discharged from active service in terms of that Act* as well as any person holding office of a judge in a court of similar status of the High Court, contemplated in s 166 of the Constitution, and except for the purposes of s 11, includes any Constitutional Court judge or judge performing judicial duties in an acting capacity (own emphasis).

[12] My conclusion is based on the following. Firstly, legislation is presumed to be intended to promote the best interests of the public. A complaint procedure under the JSC Act was created in order to specify mechanisms, structures and procedures to be

¹² A similar point was taken in the matter between *Shadow World Investigations and Open Secrets v Justice Seriti and JP Musi* and an application was launched in the High Court to have s 7(g) of the JSC Act declared unconstitutional and irrational to the extent that it confers jurisdiction on the JSC to probe a complaint of misconduct against the retired judges. I had hoped that that challenge would have been finalized by now as its outcome would have provided guidance to the JCC.

applied if a judge acts in a manner unbecoming a judge in respect of any of the five grounds spelt out in s 14(4) of the JSC Act so as to make it easier for members of the public to lodge complaints of judicial misconduct against the judges. If the objective underpinning the ethical regulation of serving judges is to maintain 'public confidence' in the integrity of the judiciary, there are strong arguments that the conduct of retired judges might also affect this confidence, and thus the provisions of the Code ought to extend to them.

[13] Secondly, when construing a statute, the same words and expressions must be given the same meaning where they occur in different parts of a statute unless there is a clear indication to the contrary or unless the same meaning in another provision in the enactment is repugnant to the clear intention of the legislature.¹³ There is no indication that the legislature intended the word 'judge' to have a different meaning in the Code. The Code is compiled by the Chief Justice and is tabled by the Minister in Parliament in terms of s 12 of the JSC Act. What emerges from this analysis is that in general the Code is applicable to judges in active service and those who have been released from such service.

[14] Having said this, it is, however, difficult to reconcile the provisions of article 2 of the Code with s 7(g) of the JSC Act. Article 2.1 provides that the Code applies to every judge referred to in s 7(1)(g) of the JSC Act who is performing active service and to a retired judge who is liable to be called upon to perform judicial duties. Article 2.2 provides that a judge not on active service is bound by the Code '*...insofar as applicable.*' Article 2 appears to subject the general rule that the Code applies to every judge to at least two exceptions. The first exception is 'unless the context indicates otherwise' and the second exception is 'in so far as applicable.' The Code, being a regulation, may, however, not make provisions which are inconsistent with the JSC Act, the enabling legislation.

[15] The third point raised on behalf of the respondent is that the complaint against the respondent is in bad faith or for ulterior purposes. In this regard it is contended on behalf of the respondent that the complainant is plainly prejudiced against him and

¹³ *More v Minister of Co-operation and Development* 1986(1) SA 102(A) at 115.

FUL in view of the fact that the complainant once acted on behalf of JP Hlophe in a complaint laid by the Justices of the Constitutional Court; that he has demonstrated consistent public support for JP Hlophe and believes that the decision relating to the ConCourt complaint heard by the JSC and the Judicial Conduct Tribunal (JCT) in 2009 when he led JP Hlophe's legal team, is the correct decision thus blaming the respondent and FUL for 'resuscitating' and successfully challenging the matter in the SCA¹⁴; that the complainant, on top of believing that he knows the 'full story' to the ConCourt complaint, omits to say much about the JCT ruling against JP Hlophe in 9 April 2021¹⁵; that up till 1 March 2021, complainant found no fault in retired judges publicly commenting on important issues relating to the rule of law and encouraged more judges to speak out until he portrayed a retroactive change of attitude when the respondent commented on the acquittal of Minister Bongo by JP Hlophe which further coincided with the JCT's decision against JP Hlophe on 9 April 2021.

[16] The respondent challenges the complainant's professed claim that he lodged this complaint because of his desire to vindicate the integrity, dignity and independence of the Judiciary and judicial system on four main grounds. He contends, firstly, that the complainant manifests a blatant partiality towards JP Hlophe, portraying him, in his wrongdoings, as the victim in the matter. Secondly, he says the complainant acted formally as counsel for JP Hlophe to the extent that he gave a public lecture criticising a ConCourt judgment that ruled against JP Hlophe and publishing same in the advocates' professional journal. In the third instance, the respondent says it is apparent from the complainant's website, which contains ideological material in support of JP Hlophe and former President Zuma, that his ardent support for JP Hlophe has not waned. In addition, the respondent alleges that in the current inquiry, the complainant has portrayed active animosity towards the respondent and FUL. Lastly, he alleges that the complaint relates to events dating back to 2009. He argues that it can be inferred that it has been brought solely for the purpose of neutralising Hlophe JP's detractors.

¹⁴ In support of this are tweets by the complainant marked annexures "B", "C", "D" and "F".

¹⁵ In support of this are tweets by the complainant marked annexures "G", "H" and "I".

[17] I will assume in the complainant's favour, without deciding the point, that his complaint against the respondent was not motivated by any ulterior motive but was driven by his belief that he would 'always speak out against what he considers as being unjust or unfair, regardless of the person at the receiving end of that injustice or unfairness, or who the perpetrator may be.'

[18] As regards the statements attributed to him in the media in which he is reported to have said JP Hlophe was a 'manifestation of the problem', the respondent points out that he was able to trace three publications in September 2009 reporting his comments regarding JP Hlophe. He says it is only two of these publications which contain the impugned phrase. The first of the relevant publications relates to a lecture the respondent delivered at Wits Law School on 18 August 2009 which focused on the functioning of the JSC. In that lecture the respondent stated:

'Hlophe is not the problem. Hlophe – Judge Hlophe, let me not speak disrespectfully – Judge Hlophe is a manifestation of the problem. He merely evidences an underlying problem...'¹⁶

[19] The respondent states that the second publication which published the comments he made during the launch of FUL in September 2009 is an IOL publication of 4 September 2009 in which the following appeared:

'The JSC's decision not to probe allegations that Hlophe tried to influence Constitutional Court judges in a ruling involving President Jacob Zuma's former corruption case was "gravely harmful to the rule of law"...he said "unequivocally" that the purpose of the legal challenge was not to have Hlophe impeached, but to compel the JSC to its duty.'¹⁷

[20] Another publication which contains a reference to the impugned phrase is *Mail & Guardian* dated 9 September 2009. The respondent is reported to have said:

'Well, first of all, in principle the current issue is about the JSC not doing its job...Its investigatory job is what we are talking about now, that's the issue...It is obviously related to Judge Hlophe – you cannot think about the matter without thinking about Judge Hlophe, but he is not central to it. He is merely the trigger mechanism that got the JSC into operation, at which it malfunctioned – and its malfunction is the problem...You know the charges against Judge Hlophe are probably as serious as you can possibly level against a judicial officer –

¹⁶ See <https://constitutionallyspeaking.co.za/can-judicial-independence-survive-transformation-a-public-lecture-delivered-by-judge-johann-kriegler-at-the-wits-school-of-law/>.

¹⁷ See <https://www.iol.co.za/news/south-africa/kriegler-mulls-hlophe-challenge-457396>.

trying to subvert the integrity of the highest court in the land. I don't know whether that is true or not, but what I do know is that nobody knows because the JSC would not examine it. That is the basic malfunction – it has left poor Judge Hlophe with a cloud over his head.¹⁸

[21] The respondent asserts that these passages not only rebut the allegations by the complainant regarding prejudging the issue of JP Hlophe's guilt, but they further demonstrate that the issue for FUL and him has not been JP Hlophe's misconduct, but has been the JSC's failure to fulfil its vital duty of protecting the judiciary's integrity. He contends therefore that the allegations against him are reckless and lack foundation.

[22] The respondent points out that FUL was created mainly due to the JSC's failure to deal with grave allegations like those against JP Hlophe and even though the area of concern for FUL has been the broader aspects of the rule of law and administration of justice generally, the (mal)functioning of the JSC has been the main focus of FUL's attention. The matter relating to the ConCourt complaint against JP Hlophe, the respondent submits, has not been the only case concerning the JSC in which FUL has become involved in, it has, however, been the most important. He emphasises that the issue is not only attributed to the enormity of the alleged misconduct against JP Hlophe but also due to JP Hlophe being the head of one of the busiest Divisions of the High Court which ultimately affects the image of the Western Cape Judiciary along with the morale of the judges of that division. The respondent argues that FUL's concern with JP Hlophe's alleged misconduct has only been that such conduct brings the judiciary into disrepute.

[23] Against this background the respondent responds to the charges laid against him as follows:

(a) Alleged attacks on the judiciary

The respondent denies that his utterances concerning JP Hlophe amount to attacks on the judiciary. He asserts that nothing he or FUL have published concerning JP Hlophe or the JSC's failure to deal with his conduct properly can fairly be seen as an attack on the judiciary. He emphasises that their cause has at all times been presented and propounded on the express distinction between JP Hlophe and the honourable

¹⁸ See <https://mg.co.za/article/2009-09-11-kriegler-saddles-up-for-rough-ride/>.

institution to which he belongs and the image of which the respondent contends JP Hlophe has consistently tarnished.

(b) Prejudging the issue and related contentions

This particular charge arises from the September 2009 publication in which the complainant alleges that the respondent labelled JP Hlophe as a 'manifestation of the problem' which was perceived by the complainant as amounting to prejudging the serious complaint the JSC was investigating. The respondent denies the charge. He asserts, first, that the impugned statement was made after the JSC had taken a decision to shelve the matter and that being the case he cannot be said to have prejudged the matter when the JSC had made its finding. Secondly, he says in his lecture he made it clear that JP Hlophe was under a cloud as the serious allegation against him had not been determined which ultimately meant that the 'problem' was not JP Hlophe but the JSC shirking its duty.

(c) News24 report on 17 April 2021

The complainant alleges that following the JCT ruling on the ConCourt's complaint against JP Hlophe the respondent called for JP Hlophe to be 'prosecuted and jailed' in a publication by News24. In response to this charge, the respondent states that shortly after the JCT ruling, he conducted numerous telephonic, radio and television interviews about the ruling and responded as simply and as fully as he could. He says he has no recollection of what was said during any particular interview but a common question that was asked related to the implications of his 'conviction' for JP Hlophe. He says in response thereto he mentioned that whatever the JSC and/or Parliament decided, on the findings of the JCT, JP Hlophe could face prosecution and possible imprisonment.

(d) Lending judicial prestige to a political party

The respondent denies that he and FUL have any connection with any political party. He rejects, as ludicrous, the suggestion that there is some connection between his statement and the DA's policies. In my view this charge must be dismissed. There is no evidence of an association between the respondent and the DA or that when he made the impugned statement, he did so with an intention of advancing its interest.

(e) Giving heart to Western Cape Judges

The respondent rejects the suggestion by the complainant that his 'attack' on JP Hlophe 'has given heart to some judges of the Western Cape High Court...to defy his leadership, including refusing to sit with another judge seen by them as sympathetic' to JP Hlophe. He says this specific event referred to by the complainant relates to a

stand-off in the Western Cape High Court in which several judges refused to sit with a fellow judge due to his alleged dishonesty either in telling his colleagues of an assault on him by JP Hlophe when that was not in fact true or recanting such telling and maintaining that no assault had taken place when it had. The respondent asserts that there is no link between his conduct and that of the judges concerned. This charge must also fail. I agree with the respondent that there is no connection between what the respondent said about JP Hlophe and the stance taken by the judges of the Western Cape High Court. Their conduct is unrelated to the respondent's statements.

(f) Acting dishonourably

The complainant further alleges that the respondent has breached article 17(2) and (3) of the Code by publicly attacking JP Hlophe, not only on his person but also on his reasoning in a judgment that was destined for appeal thereby prejudging the JSC complaint against him. The respondent denies these allegations levelled against him. He argues that his comment regarding complaints lodged with the JSC or regarding a court judgment cannot be inherently unlawful or improper.

(g) Media report on 3 July 2018

The respondent says he has no recollection of the specific oral statement and cannot confirm or deny the accuracy of the report or the complainant's reproduction but is of the opinion that he would probably have said something of the kind to express his displeasure.

(h) TimesLive news report dated 1 March 2021

This charge is rejected as false by the respondent. He maintains that the judgment on which FUL commented in a media statement was not 'the subject of appeal.' He avers that leave to appeal in the matter was filed after the comment had been published. The respondent however points out that the judgment concerned is a matter of great public importance with serious consequences for whistle-blowers and effectiveness of South Africa's criminal justice system vis-à-vis combating corruption.

[24] In the reply, the complainant rejects the suggestion that he has lodged the complaint in bad faith or for ulterior purpose. He asserts that his complaint is not about the merits of the complaint against JP Hlophe. He maintains that it is about the respondent's conduct measured against the Code using undisputed facts.

[25] As regards freedom of expression by judges, the complainant asserts that he believes judges should not be handicapped by their station or office in their exercise of right to freedom of expression on socio-economic and political issues. The complainant contends that the character attack on him by the respondent and his attorneys, on matters that have no bearing on the determination of the merits of the complaint, constitutes a conduct proscribed by article 11(1)(c) and is designed to 'put me in place' for daring to approach the JSC for a ruling on the conduct of a very senior judge of unquestioned ethical probity. These allegations form the basis of the additional charge against the respondent.

Discussion

[26] In terms of article 2, the Code applies to every judge as defined in s 7(1)(g) of the JSC Act, including judges who have been discharged from active service. Article 17 of the Code deals with retired judges or judges who have been discharged from active service. In terms of this article, a retired judge who is no longer in active service *or liable to be called upon* (emphasis added) to perform judicial duties shall at all times conduct themselves in an honourable manner which befits his/her status.¹⁹ A retired judge's activities must be at all times consistent with their status as a retired judge.²⁰ This is so because former judges continue to benefit from their former positions.

[27] Article 12 deals with association and how a judge should behave in social associations.²¹ Of particular importance in this regard, is Note 12(i) which states that social associations, including associations with members of the legal profession should be such as not to create the impression of favouritism or enable the other party to abuse it. Article 11 of the Code prohibits judges (including retired judges) from publicly criticising another judge or another branch of the judiciary, unless, it is relevant to judicial proceeding before the judge concerned or to academic presentation made for the advancement of legal education.²² Article 11 goes further and states that judges are allowed to participate in public debates related to legal topics, the judiciary or the

¹⁹ Article 17(2) of the Code of Judicial Conduct for Judges.

²⁰ Ibid Article 17(3).

²¹ Ibid Article 12.

²² Ibid Article 11(1)(f).

administration of justice, however they must not express these views in *a manner that may undermine the standing and integrity of the judiciary*.(Own emphasis)

[28] It is clear that, subject to qualifications in article 2, the provisions of the Code apply to all judges, including retired judges. Although the Code does allow judges to associate themselves with legal associations, such as FUL, there is a manner in which the associating judge must still conduct themselves. At all times, a judge must ensure that their activities are in line with their status as a judge and that their association does not appear to take more preference over their position as a judge.

Comparative and International perspective

[29] International standards and those that apply in comparable jurisdictions in relation to the retired judges in particular provide a useful source of reference for interpreting, understanding and applying our Code even though they are not directly applicable.

The position in the USA Code of Conduct for Judges

[30] In terms of the United States Code of Conduct for Judges (US Code), ‘anyone who is an officer of the federal judicial system authorised to perform judicial functions is a judge’ under this Code.²³ It goes on further to state that all judges should comply with this code except: (a) part-time judges; (b) judges pro tempore; and (c) *retired judges*.²⁴ A retired judge under this Code, *who is eligible to recall or is recalled* to judicial service should comply with all the provisions of the US Code, (with the exception of cannon 4F which allows a judge to accept law related government appointments). It is only bankruptcy judges and magistrate judges who are eligible to be recalled but decline such recall, who do not have to comply with the US Code. Therefore, it is safe to assume that all retired judges who are *no longer eligible* to be recalled for judicial service are not obligated to comply with the US Code.

[31] Cannon 4 of the US Code, allows a judge to participate in extrajudicial activities which include legal pursuits, charitable, educational and governmental activities. They may speak, write and lecture on both legal and non-legal matters.²⁵ A judge must,

²³ Guide to Judiciary Policy, Vol 2A, Ch 2: Code of Conduct to for United States Judges at 19

²⁴ Ibid at 19-20.

²⁵ Ibid Cannon 4 at 12.

nonetheless, ensure that such extrajudicial activities do not diminish the dignity of the judge's position, does not disturb their judicial functions, reflect negatively on the judge's impartiality, lead to frequent disqualification or violate the limitations set forth. According to this canon, 'a judge may speak, write, teach, and participate in other activities related to the law, the legal system and the administration of justice'.²⁶ '... A judge may participate in and serve as a member, officer, director, trustee, or non-legal advisor of a non-profit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. . .'.²⁷

Guide to Judicial Conduct published by the Judges' Council of England and Wales

[32] In relation to activities outside the court, the UK Guide to Judicial Conduct (UK Guide) clearly stipulates that judges should not air disagreements over judicial decisions in the press.²⁸ However, the UK Code *does not object to judges participating in public debate*, provided the 'issue directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice'.²⁹ 'Care should be taken about the place at which and occasion on which a judge speaks so as not to cause the public to associate the judge with a particular organisation, group or cause. The participation should not be in circumstances which may give rise to a perception of partiality towards the organisation'.³⁰ Furthermore, the UK Code also warns against 'judges expressing conflicting views in debate', because '*a public conflict between judges, expressed out of court may bring the judiciary into disrepute and diminish the authority of the court*'.³¹ The terms of appointment may provide that a retired judge may 'provide services as an independent arbitrator/mediator and may receive remuneration for lectures, talks or articles'.³² The UK Code further states that, even in retirement a former judge may still be viewed by the general public as 'a representative of the judiciary and any activity that may ruin the reputation of the judiciary should be avoided'.³³

²⁶ Ibid Canon 4(A)(1) at 13.

²⁷ Ibid Canon 4(A)(3) at 13.

²⁸ Judges' Council of England and Wales: Guide to Judicial Conduct at 21 clause 8.1.

²⁹ Ibid fn 27 at 21 clause 8.2.1.

³⁰ Ibid fn 27 at 21 clause 8.2.2.

³¹ Ibid fn 27 at 22 clause 8.2.3.

³² Ibid fn 27 at 28 clause 9.1.

³³ Ibid fn 27 at 28 clause 9.2.

Bangalore principles of Judicial Conduct

[33] According to the Bangalore Principles of Judicial Conduct, a judge is entitled to freedom of expression, belief, association and assembly just as anyone is, but a judge is expected to conduct themselves in a way that maintains the dignity of the judicial office and the impartiality and independence of the judiciary when exercising those rights.³⁴

[34] It is clear from the US and the UK codes of conduct that judges, irrespective of whether they are in active service or not, are still regarded as judges who are expected to conduct themselves in a manner that does not undermine the integrity of the judiciary. However, what is also quite common from other jurisdictions is the freedom given to judges to participate in legal public debates and criticism of other judges. As correctly phrased in the UK Code, 'many aspects of the administration of justice and of the functioning of the judiciary are the subject of necessary and legitimate public consideration and debate in the media, legal literature and at public meetings, seminars and lectures, and appropriate judicial contribution to this consideration and debate can be desirable'.³⁵

[35] In *S v Mamabolo*, the Constitutional Court raised the following questions regarding public criticism of judges:³⁶

'Why should judges be sacrosanct? Is this not a relic of a bygone era when judges were a power unto themselves? Are judges not hanging on to this legal weapon because it gives them a status and untouchability that is not given to anyone else? Is it not rather a constitutional imperative that public office bearers, such as judges who wield great power, as judges undoubtedly do, should be accountable to the public who appoint them and pay them?'

[36] With this background, I turn to consider whether the respondent committed judicial misconduct by making the impugned statements concerning JP Hlophe in September 2009, 3 July 2018, 1 March 2021 and 17 April 2021 and whether the views he expressed in his utterances undermined the standing and integrity of the judiciary.

³⁴ Value 4 of The Bangalore Principles of Judicial Conduct 2002 para 4.6.

³⁵ Judges' Council of England and Wales: Guide to Judicial Conduct at 21, clause 8.2.1.

³⁶ *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 15.

The objective underpinning the ethical regulation of judges is maintaining 'public confidence' in the integrity of the judiciary. Public confidence in the judiciary and in the moral authority and integrity of the judiciary is of utmost importance in a modern democratic society. It is therefore essential that judges – both serving and retired - individually and collectively, respect and honour judicial office. The conduct of the former judges has the capacity to undermine the public confidence in the judicial institution and thus its capacity to fulfil its functions. Confidence might be harmed where the former judge criticises his or her former colleagues on the bench, particularly when those colleagues remain on the bench.

[37] Article 17 specifically deals with judges discharged from active service. It requires of a judge discharged from active service to act honourably and in *a manner befitting his or her status* and that his or her activities must be compatible with his or her status as a retired judge (Own emphasis).

[38] As regards the charge based on the September 2009 statement, it is alleged that the respondent, by stating that JP Hlophe was 'a manifestation of the problem', prejudged the complaint against JP Hlophe in violation of articles 4(a), 5, 11, 12(1)(d) and 17(2) and (3). This charge must fail. The comments related to the manner in which the JSC handled the ConCourt complaint and were made after the JSC had taken a decision to not proceed with the complaint. The respondent's criticism of the JSC was based on what he says was its failure to investigate the allegations of judicial misconduct. The criticism was not directed at JP Hlophe but at the JSC.

[39] In relation to the charge arising from the respondent's statement of 3 July 2018, it is alleged that following the postponement of the hearing of the complaint against JP Hlophe the respondent is allegedly reported to have expressed 'disgust' at the postponement and blamed it on JP Hlophe. The respondent, contends the complainant, violated articles 4(a), 5, 11, 12(1)(d) and 17(2) and (3). In relation to this charge the respondent says he has no recollection of the specific words he used and cannot confirm or deny the accuracy of the report but thinks that he would probably have said something of the kind to express his displeasure. It is not correct that JP Hlophe was responsible for all of the delays that occurred after the JSC had decided not to proceed with the complaint in August 2009. Thereafter, in 2010 FUL launched

the legal proceedings in the high court challenging the JSC decision. When that challenge failed it appealed to the SCA. There was also a related litigation involving the two justices of the Constitutional Court to which JP Hlophe was not party.

[40] The complainant relies on the same provisions of the Code in his complaints based on the 1st March 2021 and 17th April 2021 statements. In relation to his comment relating to the Bongo matter, the respondent alleges that he can no longer recall precisely what he said at the particular time and to which media entity, nor would he be confident to identify the context in which he is alleged to have made the impugned utterances. The respondent goes on to state:

'...I do know, however, that the case attracted widespread media attention and Judge Hlophe's foreshortening of the outcome created quite a stir. The identity of the accused and the gravity of the charge were noteworthy but the focus was more on Judge Hlophe, on his having allocated such a politically charged case to himself, this together with his conduct and comments from Bench during the trial. In that context Judge Hlophe's fitness to preside in such a case was being publicly debated and I might well have made a critical comment. I am confident that whatever I said would have been germane to the situation, appropriate and abundantly warranted.'

[41] I am satisfied that a breach of article 11 (*f*) of the Code has been established. It is clear that the respondent's statement that Hlophe JP was unfit to be a judge in circumstances where the JCT had not found him guilty of gross misconduct, amounted to public criticism which is a conduct proscribed by article 11 (*f*) of the Code. Note 11 (*iv*) states that courtesy and collegiality towards colleagues are indispensable attributes of a judge. The respondent's utterances about his fellow colleague were unfortunate and were not germane to scholarly presentation made for the purpose of advancing the study of law which is an exception recognised by article 11 (*f*).

[42] As regards the remedy, I am of the view that it would not be appropriate in this matter to order the respondent to issue an apology in view of the fact the complainant is not a person about whom the statement was made. Given the circumstances of the matter, I consider that an order directing the respondent to retract his statement that Hlophe JP is unfit to be a judge will be an appropriate remedial step in terms of s 17(8)(*g*) of the JSC Act.

[43] As regards the comments he made following the JCT ruling on the ConCourt's complaint, the respondent denies that he called for JP Hlophe to be 'prosecuted and jailed.' His explanation that his comments related to the implications of the JCT verdict may reasonably possibly be true. Sections 14(4)(b) and 14(4)(e) of the JSC Act stipulate that to constitute a judicial misconduct the breach must be wilful or grossly negligent. These elements are lacking in the charge arising from the utterances of 17 April 2021. This charge must therefore fail.

[44] In conclusion, with the exception of a complaint arising from the utterances made by the respondent on 1 March 2021, all the other complaints are dismissed in terms of s 15(2) of the JSC Act on the ground that they are lacking in substance.

Order

[45] In the result the following order is made:

- 1 The complaints arising from the respondent's statements made on 4 September 2009; 3 July 2018 and 17 April 2021 are hereby dismissed in terms of s 15(2) of the JSC Act;
- 2 The respondent has breached article 11(f) of the Code through his utterances of 1 March 2021;
- 3 The respondent is ordered within fourteen days (14) days of receipt of this ruling, to retract a statement he made in the TimeLive publication of 1 March 2021 that Hlophe JP is unfit to be a judge. This corrective measure must be in a form of an email to the complainant.
- 4 The complainant is advised pursuant to s 15(4)(b) of the JSC Act that he has the right to appeal to the Judicial Appeal Committee against the dismissal of the complaints referred to in para 1 of this order.

(Electronically transmitted)

ZONDI JA

MEMBER OF THE JUDICIAL CONDUCT COMMITTEE

29 JULY 2022