

JUDICIAL SERVICE COMMISSION OF SOUTH AFRICA

IN RE: JUSTICE JOHAN KRIEGLER

REPLY TO JUSTICE KRIEGLER'S RESPONSE

1. I deposed to the affidavit of complaint against Justice Kriegler. I have today been advised by Ms Moretlwe of the Office of the Chief Justice that my reply need not be on affidavit. I am grateful for this as it speeds up my submission of this reply which would likely have been delayed considerably had I needed to go find a commissioner of oaths away from home where I do much of my work and have much work to wade through.
2. I read Justice Kriegler's response (which I received yesterday) with dismay and disappointment, and it is with a heavy heart that I submit this reply. I take Justice Kriegler at his word, as a Judge, when he denies an allegation of fact. I regret only that Justice Kriegler should find it necessary to make accusations against me that seem intended to impinge on my character, and that have no bearing on the substance of the complaint against him.
3. I regret also that Justice Kriegler's attorneys should, in a letter, find it within the bounds of professional conduct to liberally accuse me of bad faith and ulterior purpose, making the complaint about my character instead of assisting their client to answer the complaint lodged against him on its merits. I deny that I lodged the complaint in bad faith or for an ulterior purpose. I have explained, in my complaint affidavit, my purpose for lodging the complaint. I elect not to engage with their personal attack on my character as that has no bearing on the merits of my complaint against Justice Kriegler. If

the JCC should consider it necessary, for the determination of the merits of my complaint, to address specific attacks on my character, I shall do so.

4. I note with concern Justice Kriegler's somewhat turgid response, and I use the term "*turgid*" not in what may be regarded as its otherwise disparaging sense but to convey my dismay at the needlessly lengthy response that is pregnant with a treatment of the merits of what seems to pique Justice Kriegler in the conduct of Justice Hlophe. My complaint is not about the merits of the complaint against Justice Hlophe. It is also not about the conduct of the JSC over the years. Both these issues fall well outside the scope of the determination of what concerns me in lodging this complaint.
5. Justice Kriegler accuses me of many things, including insincerity, skirting the merits of the conduct that piques him, "*deft advocacy*", lacking objectivity in relation to Justice Hlophe, and a politically-driven purpose. In his opening remarks he aligns me with "**a school of thought allied to former President Zuma, Judge Hlophe, Adv Mkhwebane and others**". He does so with reference to the contents of my website www.anchoredinlaw.net. These are not only unfair accusations; they are also irrelevant to the determination of the complaint against Justice Kriegler. My complaint is not about the merits of Justice Hlophe's conduct or the conduct of the JSC; it is about Justice Kriegler's conduct. And I can say, with confidence, that Justice Kriegler's assessment of the contents of *anchoredinlaw.net* as aligning me with the "*school of thought*" he identifies, is inaccurate. I would suggest, with respect, that he subscribes to the website and he will soon discover that its purpose is nothing of what he supposes. I believe a number of Judges follow the website.
6. In my complaint affidavit I disclosed my role as a member of Justice Hlophe's legal team in the past. I have not been part of that team for many years. I also disclosed the lecture I gave about a decision of the Constitutional

Court and its publication. I believe the lecture (and its publication in *Advocate*, the GCB's official periodical, and on anchoredinlaw.net) was in keeping with a culture of continuing legal education that I am keen to foster at the Bar. The case raised a number of legal issues with which I would have engaged with colleagues and law students, whether or not Justice Hlophe had been my one-time client. I have never hidden my criticism of the conduct of the Constitutional Court Justices on the manner in which they dealt with the complaint against Justice Hlophe. I am a firm believer in the adage: "*Injustice anywhere is a threat to Justice Everywhere*". I shall always speak out against what I consider as being unjust and unfair, regardless of the person at the receiving end of that injustice or unfairness, or who the perpetrator may be. This is what I do instinctively and have done for many years since childhood. That another person disagrees with my view on the subject cannot reasonably found a valid basis for attacking my professional integrity. The issue is not me or the JSC or Justice Hlophe's conduct; it is Justice Kriegler's conduct measured against the Code using undisputed facts.

7. I repeat that I did not lodge this complaint lightly. I have only ever lodged one other complaint against a Judge, who resigned after her first appearance at the JCC on allegations of racial prejudice against black people in general. Some things are just hard for me to ignore. This is one of them. Regrettably, nothing Justice Kriegler says in his response, in which he and his attorneys attack my character, serves to render the complaint unmeritorious in my submission.
8. The trigger for the complaint was not the finding of the Judicial Conduct Tribunal on 9 April 2021 as Justice Kriegler seems to suggest. I am also not motivated by a defence of Justice Hlophe at any cost, or "*currently deadlocked JSC deliberations*" on Justice Hlophe. I do not know what the latest developments are at the JSC in relation to the complaint against Justice Hlophe. I do not harbour any "*animosity*" towards Justice Kriegler or

Freedom Under Law. My criticism of both does not stem from some “*irrational animosity*”. In fact, Justice Kriegler was one of the Justices I recently recommended to serve on *Pabasa’s Pius Langa School of Advocacy* Board of Directors. The recommendation did not go far and so did not get to a stage of having him contacted in order to sound him out. Ultimately, we went with retired Constitutional Court Justice Nkabinde.

9. Justice Kriegler and his attorneys seem to have trawled my Twitter account to select material that they say demonstrates my partiality towards Justice Hlophe, my stance on Judges’ right to freedom of expression, my motive for lodging the complaint, and my alleged “*animosity*” towards Freedom Under Law and Justice Kriegler personally.
10. What these show, in my submission, is my partiality towards justice and fairness, and my distaste for injustice and unfairness. That I consistently repel what I consider an injustice against a particular person, based on facts known to me, is not evidence of my blind loyalty or partiality towards that person. I am not blindly loyal to any person; I am loyal to the principle of justice as I understand it, and to constitutional principles as I have come to appreciate them. My principled stance on these issues does not bend with popular narrative, whoever the source or perpetrator of that narrative.
11. In any event, even if I were blindly loyal to Justice Hlophe (and I am not) and lodged this complaint in some sycophantic rage, that motivation would not detract from the merits of the complaint. Either Justice Kriegler is by his conduct in breach of the Code or he is not. My motivation for lodging the complaint is irrelevant to that determination. It is for the JCC to determine whether the complaint has merit or not. My motive for lodging it has nothing to do with it. As the SCA said in **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4)**

BCLR 393 (SCA); [2009] 2 All SA 243 (SCA), at para 37, in the context of the making of a prosecution decision:

“The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions”

12. The same applies, I would venture, to complaints lodged with the JSC. So, even if I were motivated by bad faith or ulterior motive (I am not) to which Justice Kriegler and his attorneys devote much of their energy, that would be an irrelevant consideration in the determination by the JCC of whether or not Justice Kriegler has by his conduct breached the Code of Judicial Conduct.
13. As regards freedom of expression by Judges, I regard myself as a champion for that freedom and have raised the issue with numerous senior Judges currently in service both privately and in interviews for my website www.anchoredinlaw.net under the tab “*Legal Voices*”. These include the Chief Justice, the Deputy Chief Justice and the Gauteng Judge President. I have published these interviews on my website. I invite the JCC to view the short videos under the tab “*Legal Voices*” on anchoredinlaw.net. I believe that Judges should not be handicapped by their station or office in their exercise of the right to freedom of expression on socio-economic and political issues. *Non constat* that Judges are free to say whatever they please and in breach of the Code of Judicial Conduct. On this I have been consistent and did not change my view to coincide with any development in the Justice Hlophe complaint. I am strongly against the stifling of Judges’ right to freedom of expression. But that right does not afford Judges *carte blanche*, whether in active service or retired, to breach the Code of Judicial Conduct. On that narrow path I part company with Justice Kriegler and his attorneys.

14. Justice Kriegler’s attorneys (in para 10.3) point to certain tweets as evidence of my “*rall[ying] stridently against the JCT’s ruling of 9 April 2021*”. The tweets demonstrate nothing of the sort. One would have expected them (in their cherry-picking of tweets to make a particular point aimed at sullyng my character) to have picked a tweet that contained a link to a piece I wrote following that ruling in which I express my professional view on it as a lawyer. (Justice Kriegler does provide a link in footnote 4 of his response.) I submit that the attorneys’ letter is irrelevant for the determination of the merits of my complaint against Justice Kriegler. The letter has one purpose: to sully my character in the hope of casting doubt on my motivation for lodging this complaint. For one thing, my character is nothing of the kind sought to be portrayed by Justice Kriegler’s attorneys. I have never, in over 25 years in the legal profession, been accused of bad faith. Yet a firm of attorneys that I have scarcely worked with in all that time finds it appropriate, on the basis of a handful of a selection of tweets, to accuse me of acting in bad faith and with an ulterior purpose. For another, and as the SCA reminds us, my motive as divined by the attorneys is irrelevant to the determination of the merits of the complaint.
15. The character attack by Justice Kriegler’s attorneys is concerning for another reason. It was within Justice Kriegler’s instructions, as their client, to reign them in. They could not have pushed on with this strategy without their client’s acquiescence. That is regrettable. It also possibly engages article 11(1)(c) of the Code which enjoins Judges, including retired Judges, to “**refrain from any action which may be construed as designed to stifle legitimate criticism of that or any other judge**”. The character attack on me by Justice Kriegler and his attorneys, on matters that have no bearing on the determination of the merits of the complaint, seems to fit the conduct proscribed by article 11(1)(c). Specifically, it seems designed to “*put me in my place*” for daring to approach the JSC for a ruling on the conduct of a very senior Judge of unquestioned ethical probity. The inevitable effect of

this attack on my character is to render me gun-shy and never again dare raise conduct issues with the JSC in relation to Justice Kriegler or another Judge, irrespective of the legitimacy of doing so. That the complaint has not been dismissed out of hand, but has been referred to the JCC for investigation, would seem to indicate that the Acting Chief Justice does not consider it illegitimate. I ask that the JCC considers this conduct, too, by Justice Kriegler in light of the provision in article 11(1)(c).

16. I persist, regrettably, in my complaint, and ask that it be determined on its merits. In this regard, I point out that Justice Kriegler

16.1 does not dispute that he publicly criticised Justice Hlophe’s judgment in the *Bongo* case. On the contrary, he asserts that Justice Hlophe’s conduct in that case “*clearly demanded censure*”. Justice Kriegler seems to consider his public censure of another Judge’s judgment as his “*duty*” as one who is regarded as “*mentor*” and “*elder*” (**paras 3.1.1 & 3.1.2**). This is, with respect, seems to be a flagrant breach of the Code of Judicial Conduct in

- (i) article 11(1)(a) which prohibits a Judge commenting publicly on the merits of any case determined by another Judge;
- (ii) article 11(1)(e) which enjoins Judges to avoid personality clashes with one another but rather to foster collegiality;
- (iii) article 11(1)(f) which enjoins Judges to refrain from public criticism of another Judge;

16.2 seems to regard Justice Hlophe as being separate from the Judiciary, accusing me of “*conflating*” the two. This is instructive of the view Justice Kriegler seems to have of Justice Hlophe (**para 3.1.3**);

16.3 does not dispute that by his utterances, reported in September 2009, he prejudged the determination of the complaint against Justice Hlophe, which determination came only on 9 April 2021. He disputes only that he prejudged a 2009 decision of the JSC “*to shelve the matter*”, and says his utterances came “*after*” that decision (**para 3.2.2**). That is plainly not the decision to which the complaint adverts. The complaint self-evidently relates to the final determination of the Constitutional Court Justices’ complaint on its merits. It is Justice Kriegler’s utterances that tended to bear on the merits of that complaint before they had finally been determined by the JSC that is at issue. That determination came only in April 2021. The question of whether or not Justice Hlophe was, in September 2009, a “*manifestation of the problem*” with the judiciary was yet to be determined by the JSC. By making that public utterance at the time that he did, Justice Kriegler prejudged the determination of that issue by the JSC. By so doing, Justice Kriegler’s conduct seems to be

- (i) in breach of article 4(a) which requires Judges, including retired Judges, to “**uphold the independence and integrity of the judiciary**”;
- (ii) in breach of article 5 which requires Judges, including retired Judges, to behave “**in a manner that enhances public trust in, or respect for, the judiciary or the judicial system**”;
- (iii) in breach of article 11 which requires Judges, including retired Judges, to “**refrain from public criticism of another judge**”;
- (iv) in breach of article 12(1)(d) which proscribes the use or lending of the prestige of judicial office for the advancement of private interests of the Judge or those of others, as demonstrated by the Democratic Alliance example (in para 16(2)(d) of the complaint);

(v) in breach of article 17(2) and (3) which requires a retired Judge to always act honourably and in a manner that is befitting his status and compatible with his status as a judge;

16.4 seems to draw parallels between JSC decisions or processes, on the one hand, and court decisions or processes, on the other, and then concludes that he is free to criticise those decisions (**para 3.1.3**). That was never my complaint. The complaint was never about Justice Kriegler criticising the processes of the JSC. The complaint was always, and is still in this regard, about Justice Kriegler prejudging the findings of the JSC on the merits of the complaint lodged by Justices of the Constitutional Court against Justice Hlophe. To that complaint I do not see any answer from Justice Kriegler in his written response;

16.5 seems to adopt a “*confess and avoid*” approach to the allegation that he called, as the media report in question suggests, for Justice Hlophe to be “**prosecuted and jailed**” (**para 3.3**). If Justice Kriegler says he has no recollection of his saying that to the media, I cannot in good conscience insist that he did say it. I was not there. I relied on a media report and stated that to my knowledge Justice Kriegler had neither denied nor corrected the media report attributing these words to him (see para 11 of the complaint). Justice Kriegler does not categorically deny that he may have said this to *News24*. He simply says he has no recollection. In the circumstances, I leave the determination of this specific issue to the JCC;

16.6 seems to suggest that I accuse him of supporting a political party (**para 3.4**). This is self-evidently not so. Article 12(1)(d) is clear. It proscribes the lending of judicial gravitas by a Judge’s conduct to interests of third parties, whether by design or inadvertence. I made it clear in the complaint that it is the effect of such judicial conduct that

is of importance, whether or not the Judge in question intended the result. The point I make is that by his sharp utterances on Justice Hlophe, Justice Kriegler has given heart to a political party and others to attack Justice Hlophe. Such attack, in my submission, cannot reasonably be divorced from an attack on the judiciary itself;

16.7 asserts that I ascribe a motivation to some Justices in the Western Cape High Court for defying Justice Hlophe (**para 3.5**). The point I make in this regard in the complaint is that conduct by a senior retired Constitutional Court Justice (by his own account regarded as a “*mentor*” and “*elder*” by some) tends to influence the conduct of those who hold him in high esteem. If they see him conducting himself in a particular way towards a particular Judge, it is not hard to imagine that those who hold him in high esteem may take their cue from that conduct. In that context, the link is not “*imagined*”;

16.8 seems uncertain of the substance of the complaint that engages articles 17(2) & (3). The complaint relates to prejudging the outcome of the merits of the complaint lodged by Justices of the Constitutional Court against Justice Hlophe. The case “*destined for appeal*” is the judgment of Justice Hlophe in the *Bongo* case. It is concerning that Justice Kriegler still considers it “*certainly not inherently unlawful or improper*” for him, as a retired Judge who is still subject to the Code, to criticise publicly the merits of a judgment of a sitting Judge as “*contrived reasoning*” (**para 3.6**). This conduct seems in breach of all the articles cited in the complaint, particularly articles 11(1)(a), (e) and (f);

16.9 does not seem to deny making the statement attributed to him in para 16.3 of the complaint as sourced from a media report of 3 July 2018. Instead, Justice Kriegler accuses me of advancing “*political*

argument” (**para 3.7**). This is regrettable. I am not interested in playing politics. My interest is the integrity of judicial function and asserting the foundational values of the Constitution, even if Justice Kriegler does not accept my *bona fides*. Because Justice Kriegler does not seem to deny the statement attributed to him in para 16.3 of the complaint, I submit that this paves the way for the JCC to make a determination of his “guilt” in relation to articles 4(a), 5, 11, 12(1)(d), and 17(2) & (3);

16.10 does not seem to deny that he made adverse comments publicly on a judgment that Justice Hlophe delivered in the *Bongo* case. This seems in breach of article 11(1)(a) of the Code. I ask the JCC to make a final determination on that question. Justice Kriegler denies that he commented on the merits of that case (**para 3.8**). But since he does not deny that he may have said, publicly, that Justice Hlophe employed “**contrived reasoning**”, it is difficult to imagine how that cannot reasonably be said to be anything other than adverse comment on the merits. Justice Kriegler also does not seem to deny that he may have said Justice Hlophe is “**unfit to be a judge**”. This statement prejudices the impeachment process both of the JSC and the National Assembly. I ask that the JCC make a final determination of whether this does not render Justice Kriegler in breach of articles 4(a), 5, 11, 12(1)(d), and 17(2) & (3);

16.11 denies that he attacked the judiciary and accuses me of commenting “*darkly*” on social media without citing utterances that I allegedly attribute to him (**para 3.9**). As regards attack on the judiciary, this observation seems to stem from Justice Kriegler’s belief that Justice Hlophe is not [part of] the judiciary, and that public attack on one Judge is not an attack on the judiciary. I respectfully do not share his understanding of how far the concept of “**the judiciary**” extends. My

understanding is that an attack in public on one Judge – especially public attack of a sustained kind over many years – in what seems to be breach of various articles of the Code of Judicial Conduct, is an attack on the judiciary. Each Judge, as I understand it, is an embodiment of the institution in which s/he serves and continues beyond the years of active service in retirement. As regards “dark” comments, I make no comment surreptitiously or with foreboding. That is why I do not hide my identity on social media. I started the website www.anchoredinlaw.net in 2019 for the specific purpose articulated in the introductory short video on the website: to demystify the law for the lay person. It is intended as a tool for information on matters of law.

17. In conclusion, I stress that there is no malice in my approaching the JSC in relation to Justice Kriegler’s conduct. There is no ulterior motive. There is no bad faith. There is no “*stratagem*”. By leaving it to the JSC to determine the appropriate sanction (which could include an apology to Justice Hlophe and the JSC, and an undertaking not to breach the Code in similar respects) if it should find that Justice Kriegler conducted himself in breach of the Code, I sought to avoid precisely that of which Justice Kriegler now accuses me in his concluding remarks. I have no desire to stifle legitimate debate on matters of law or rule of law or administration of justice. I particularly welcome and encourage Judges expressing their views publicly on these matters, always mindful (of course) of the necessary strictures put in place by the Code to which Judges are subject.
18. Finally, the irony is not lost on me that Justice Kriegler, citing a Constitutional Court judgment in which he wrote the lead judgment, believes that “[i]t is every citizen’s right to comment on the behaviour and performance of judges and may in given circumstances be any citizen’s duty”

(**para 4.1**); yet he attacks my character for doing precisely that in relation to his “*behaviour*” as a Judge. This is regrettable.

VUYANI NGALWANA SC

22 June 2021