JUDICIAL CONDUCT COMMITEE

Ref No: JSC/904/21

In the complaint between:

ADVOCATE VUYANI NGALWANA Complainant

and

JUSTICE JOHANN KRIEGLER Respondent

RESPONDENT'S NOTICE OF APPEAL

A. INTRODUCTION

1. The respondent refers to the ruling by Zondi JA, acting as the Judicial Conduct Committee ("**the JCC**"), dated 29 July 2022 and received on 30 July 2022 ("**the ruling**"). Zondi JA dismissed most of the complaints, but upheld one, relating to a statement contained in a media report dated 1 March 2021 to the effect that Judge Hlophe was "*unfit to be a judge*" ("**1 March 2021 statement**"). Zondi JA found that the 1 March 2021 statement contravened article 11(1)(f) of Code of Judicial Conduct, 2012 ("**the Code**") and the respondent was ordered to retract such statement (collectively, "**the order**"). A copy of the media report containing the 1 March 2021 statement is annexed marked "**A**".

2. In terms of section 17(7)(b) of the Judicial Service Commission Act, 1994 ("**the JSC Act**"), the respondent appeals against the aforesaid order. In this regard, a summary of the respondent's grounds of appeal are set forth below.

B. JURISDICTION

The Code does not apply to retired judges in the respondent's position

3. At the outset, the respondent submits that the 1 March 2021 statement must be considered from the position that he is a retired judge of the Constitutional Court. The respondent is not in active service (this has been the case for almost two decades), nor will he be called upon to perform judicial duties. Article 2 of the Code clearly contemplates that the provisions of the Code apply differently to judges performing active service or those who are liable to be called upon to perform judicial duties, from those who are not in active service. The latter are bound by the Code only "*insofar as applicable".*

4. Article 2.1 provides that the Code applies to every judge referred to in section 7(1)(g) of the JSC Act who is performing active service and to a judge released from active service "*who is liable to be called upon to perform judicial duties*". That sets the parameters of the application of the Code. Article 2.2 goes on to state that even where the Code is applicable to retired judges falling within the scope of article 2.1, it is binding on such judge only "*insofar as applicable*."

5. The respondent retired from the Constitutional Court in 2002, upon reaching the age of 70, pursuant to section 3(1)(a) of the Judges' Remuneration and Conditions of Employment Act, 2001 ("**the 2001 Act**"). He was only *liable* to be called upon to perform judicial duties for five years thereafter, as contemplated in section 7(1)(a)(i) of the 2001 Act, ie until the end of 2007. Since retirement, the respondent has not been called upon and has not consented to perform any judicial functions, and there is no reasonable prospect of either event materialising. The entire Code is geared to dealing with situations where a judge is or may be in active service and delineates how those judges, who are in fact serving or may be expected to serve as part of

the judiciary, must conduct themselves: it does not concern itself with those judges who are neither in active service nor liable to resume such service. The Code is thus inapplicable to the complaint in question and the order must be set aside on this basis alone.

Freedom Under Law NPC ("**FUL**") is not before the Judicial Service Commission

6. FUL was created as a non-profit organisation in order to promote democracy under law and to advance understanding of and respect for the rule of law and the principle of legality in Southern Africa, principally by instituting or joining in litigation from time to time to combat and correct institutional conduct in conflict with the rule of law.

7. The respondent is a member of FUL and was acting on its behalf, being its Chairperson, in making the 1 March 2021 statement. FUL has a constitutional right to freedom of expression.[1] FUL's rights, interests and ability to perform its core functions are adversely affected by the ruling: the ruling has ordered that a statement made on its behalf is retracted. Yet, FUL is not, and cannot under the JSC Act be, joined as a party to the complaint proceedings. In those circumstances, the JCC was divested of authority to make the ruling, in the absence of a party with a direct and substantial interest in its outcome.

8. We note that there is nothing in the Code that precludes active or retired judges to associate oneself with entities promoting the rule of law, such as FUL, and the ruling does not suggest otherwise.

[1] *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).

C. ATTRIBUTION AND UTTERANCE

9. The 1 March 2021 statement that Judge Hlophe was "*unfit to be a judge*" in the article in question is attributed as a position adopted by FUL rather than Judge Kriegler. Moreover, it is not cited as an utterance made. It is not quoted and simply reflects FUL's well-known stance as an organisation in court proceedings and elsewhere over many years that, as a result of the events surrounding Judge Hlophe's attempt to influence the work of the Constitutional Court and other circumstances, Judge Hlophe was unfit to hold judicial office. In this regard, the Full Courts recent exposition of FUL's role is instructive: "*FUL has, it is common cause, devoted no little energy over a decade to drive the relevant organs of state to investigate and discipline Hlophe JP. Its investment in the case is palpable. Moreover, by taking the initiative to seek a review of the decision by the JSC in 2009 to decline to institute a disciplinary enquiry, FUL established the very foundation for the chain of events culminating in the 2021 decision of JSC.*"[2]

10. In those circumstances, there is no evidence that any utterance was made for the purposes of publication on or about 1 March 2021, or at all, and the statement in question is not in any event attributed or attributable to Judge Kriegler. The foundational factual premises – both in terms of publication of an utterance and the identity of the utterer – are absent.

11. The order thus falls to be set aside on this additional basis.

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[2] *Hlophe v Freedom Under Law In re: Freedom Under Law v Hlophe; Moseneke and Others v Hlophe In re: Hlophe v Judicial Services Commission and Others* 2022 (2) SA 523 (GJ), para 43.

D. MISAPPLICATION OF *MAMABOLO*

12. In paragraph 5 of the ruling, Zondi JA quotes and relies on a passage from *S v Mamabolo*, being:

> "*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?*"[3]

13. It is not clear in what way that quote, or the *Mamabolo* judgment in general, supports the ruling. If anything, the thrust of *Mamabolo* undermines the ruling. *Mamabolo* makes it clear that freedom of expression enjoys pride of place in our jurisprudence, and that it will only be rare cases where a court would find that the court was scandalised. In this regard, importantly, the judgment stated that the focus is on whether there is a public wrong committed, of sufficient seriousness: "*The crucial point is that the crime of scandalising is a public injury. The reason behind it being a crime is not to protect the dignity of the individual judicial officer, but to protect the integrity of the administration of justice. Unless that is assailed, there can be no valid charge of scandalising the court.*"[4] The sole aim of the crime of scandalising the court is thus "*to preserve the capacity of the judiciary to fulfil its role under the Constitution*".[5] What matters is thus whether the entire institution of the judiciary and administration of justice are brought into disrepute: the scope for conviction is

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[3] *S v Mamabolo* 2001 (3) SA 409 (CC), para [15].

[4] Para [25].

[5] Para [45].

"*narrow*" and the conduct would have to be "*egregious*".[6] The Court went on to state the following:

> "*Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts. And, ultimately, such free and frank debate about judicial proceedings serves more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important aspirational attributes prescribed for the judiciary by the Constitution. …*
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> *However, such vocal public scrutiny performs another important constitutional function. It constitutes a democratic check on the judiciary. The judiciary exercises public power and it is right that there be an appropriate check on such power.*"[7]

14. The 1 March 2021 statement was intended, and would have been seen, to support the independence of the judiciary, the rule of law, the administration of justice and the integrity of the judiciary and judicial officers. It is the very opposite of what *Mamabolo* held should remain proscribed.

15. The actions of individual judges, especially where those actions may undermine the rule of law and judicial independence and integrity, may and must be subjected to criticism and scrutiny. That is precisely what the respondent's interview sought to do. There is no suggestion on the facts that the 1 March 2021 statement impugned

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[6] Paras [45] and [47].

[7] Paras [29] – [30].

the institution of the judiciary or rendered it incapable of performing its functions. The opposite is true. FUL and the respondent sought at all stages to uphold the rule of law, strengthen the independence of the judiciary (actual and perceived) and safeguard it from being undermined. The integrity and public confidence in the judiciary is diminished by the conduct of Judge Hlophe, not the respondent or FUL.

E. MISAPPLICATION OF INTERNATIONAL / FOREIGN JURISPRUDENCE

16. The respondent submits that it is not uncommon for retired judges abroad to criticise and opine on active judges and decisions, and involve themselves in institutions which further the rule of law. This in no way detracts from the integrity of the judiciary or is incompatible with ethical norms applicable to retired judges. Drawing on some of the jurisprudence relied on in the ruling:

16.1 In terms of the United States Code of Conduct for Judges (the "**US Code**"), "*anyone who is an officer of the federal judicial system authorised to perform judicial functions is a judge under this Code*." 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*". Thus, there is nothing that precludes a retired judge from opining or criticising an active judge's decision in the US.

16.2 In relation to activities outside the court, the UK Guide to Judicial Conduct ("**the UK Guide**") clearly stipulates that judges should not air disagreements over judicial decisions in the press. 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*". In this regard, the Times Live article must be read as a whole. It sparks public debate, highlights possible infraction on the independence of the

judiciary and informs the public about issues at the heart of the administration of justice.

16.3 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. The respondent in this case has purely expressed himself in the public interest on an issue of paramount importance to the safeguarding of judicial independence, whilst maintaining the dignity and reputation of the judiciary.

16.4 Judges are also allowed to participate in legal public debates and scrutiny of jurisprudence. 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*" (emphasis added).

F. THE INTERPRETATION AND APPLICATION OF ARTICLE 11(1)(f) IS UNSUSTAINABLE AND UNCONSTITUTIONAL

17. The ruling states as follows: "*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.*" (para 10)

18. The respondent respectfully submits that Zondi JA gave an unduly restrictive interpretation of article 11(1)(f), and has misconstrued its purpose.

19. Four principles can be distilled that guide the interpretation of instruments which implicate constitutional rights:

19.1 First, statutes must be interpreted purposively,[8] and taking into account the internal and external context.[9]

19.2 Second, when a legislative provision is capable of two interpretations, if one would render that provision unconstitutional, and the other would not, then the court must adopt the interpretation that would render the provision constitutionally compliant.[10]

19.3 Third, even where one interpretation will not necessarily lead to an infringement of the Bill of Rights, where two interpretations of legislation are possible, the Court should prefer the interpretation that best promotes the spirit, purport and objects of the Bill of Rights.[11]

19.4 Fourth, in applying the constitutional compliance principle and the best effect principle, an interpretation of a legislative provision may not be adopted that the words cannot reasonably bear – the interpretation must not unduly strain the language used.[12]

20. Thus, in summary, constitutional interpretation requires courts to recognise that all legislation must be interpreted purposively and holistically and not only through the

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[8] *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) at para 21.

[9] *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* 2020 (2) SA 325 (CC) at para 42.

[10] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) ("***Hyundai***") at paras 22 – 23.

[11] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) paras 46, 47, 84, and 107; *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC) para 47; and *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 87-89; *Stratford v Investec Bank Ltd* 2015 (3) SA 1 (CC) at para 36

[12] *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) para 117; *Hyundai* para 24; *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at para 22.

lens of the Constitution, but in an endeavour to incline the legislation to the will of the Constitution, within the limits of language. Language can and must be pressed in the service of constitutional compliance and promotion, but not unduly strained or broken.

21. Article 11(1)(f) of the Code contemplates that "*a judge must unless it is germane to judicial proceedings before the judge concerned, or to scholarly presentation that is made for advancing the study of law, refrain from public criticism of another judge or a branch of the judiciary*". As indicated above, this article must be interpreted in a manner consistent with the Constitution, and in particular, as far as possible, to give effect to the right to freedom of expression. It is in fact robust public debate regarding the judiciary which fosters an independent judiciary. Transparency and duties to the truth and the integrity of the judiciary should not be sacrificed on the altar of an unduly restrictive notion of collegiality. The provisions of the Code should not be interpreted in a manner which deprives the respondent (or any other judge similarly placed) of the right to express him or herself and to encourage robust debate on issues which are central to the independence of the judiciary. That, however, is the effect of the ruling.

22. In interpreting the Code in the manner which Zondi JA did, the learned Judge erred in at least the following respects:

22.1 he failed to take into account the provisions of article 11(2) of the Code which expressly preserves the right of a judge to participate in public debate about legal subjects, the judiciary and the administration of justice, subject only to his or her contributions not undermining the "*standing and integrity of the judiciary*". Thus, article 11(1)(f) should be read in context as to allow debate of the nature permissible under article 11(2). Zondi JA, however, failed to

consider whether the 1 March 2021 statement undermined the standing and integrity of the judiciary, or in fact whether the findings in the ruling promoted "*judicial independence and accountability*", which Zondi JA found was the purpose of article 11(1)(f). Had this analysis been undertaken, it would have been apparent that the 1 March 2021 statement merely enhanced the standing and integrity of the judiciary, and sought to safeguard its independence and integrity, and ensure accountability. Indeed, a finding that the objects of the article are undermined flies in the face of the facts. It is *Judge Hlophe's* conduct which is an affront to or subversion of judicial integrity and the rule of law. It is critical that voices speak out against deviant behaviour and that a public debate is sparked concerning issues of fundamental constitutional importance. As stated recently by the Full Court in Judge Hlophe's unsuccessful review application concerning the JSC's decision to find him guilty of gross misconduct: "*Matters of gross misconduct on the part of a Judge and subsequent questions of impeachment lie at the heart of the integrity of our judicial system.*"[13] The system is not enhanced by the elders keeping silent about such matters.

22.2 Zondi JA also erred in law in finding that the respondent, in publishing the truth or a considered opinion about a judicial matter of great public interest, breached article 11(1)(f) of the Code. Such a finding is simply not consistent with the requirements of judicial independence, integrity and accountability. Judge Hlophe is, in fact, unfit for office, and the JSC itself has found it so. The suggestion that the respondent could not speak this truth, when it was plainly in the public interest to do so is unsustainable;

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[13] *Hlophe v Judicial Service Commission and Others* [2022] 3 All SA 87 (GJ), para 56.

22.3 Zondi JA also erred in finding that because the JCT had not yet published its finding that Judge Hlophe was guilty of gross misconduct, it constituted a breach of article 11(1)(f) publicly to contend that he was unfit to be a judge. Again, this is precisely the type of public debate and considered views that the Code safeguards. Such a view is also based on considerable legal advocacy and factual analysis, over many years, concerning the nature and severity of Judge Hlophe's transgressions: an aspect in relation to which the JSC has been unable to fulfil its constitutional function for over 13 years. It strains the bounds of credulity to suggest that the Code bars comment on such an issue of foundational public importance, towards the end of the 13th year of inadequate institutional action in relation to the most serious of allegations of impropriety by a senior judge.

22.4 Zondi JA also failed to take account of the context within which the 1 March 2021 statement was alleged to have been made, where there was a further instance of what in FUL's reasoned view (based on an analysis of the circumstances and legal reasoning employed by Judge Hlophe) was deviant conduct underscoring the disqualification of Judge Hlophe as a judicial officer. There is a palpable public interest in commentary on the high profile corruption case and how it has been handled by Judge Hlophe. His conduct evoked wide criticism and comment, spanning far beyond FUL and the respondent.

Public interest, and personal interests of a judge

23. The interpretation of the Code and the circumstances should also be informed by the following.

24. The respondent is a public figure and an elder and his views on judicial matters are often solicited by the public because of his expertise. To stifle his ability to comment

on such matters would not only amount to an infringement of his right to freedom of expression, but would deprive the public of robust debate which is in the public interest.

25. As citizens, judges must be expected to participate in public discourse as societal issues affect them too. Judges are not protected by an invisible cloak from absorbing the shocks experienced by all individuals in society, especially retired judges who are not bound by the Code in certain circumstances. They too have the right to freedom of speech, and the ruling effects an unjustifiable limitation of that right.

Judges have a duty to speak out

26. As a branch of government, the courts must naturally be accountable for the exercise of their power. The means of achieving their accountability does not detract from, but enhances their independence. Thus, a retired judge, albeit maintaining the status of a judge, has a duty to speak out against injustices and inefficiencies which threaten the rule of law, trust in the judiciary and judicial independence. This is also done in the public interest. A particularly superficial view of collegiality cannot over-ride the importance of the rule of law and holding the judiciary accountable. Moreover, as elders and inhabitants of the judicial system for years, retired judges are uniquely placed to comment on the judiciary and highlight issues of concern.

G. GRAVE CONSEQUENCES OF THE RULING

27. As indicated above, the 1 March 2021 statement has not brought the judiciary into any disrepute. On the contrary, the respondent's 1 March statement entails the truth about the *Bongo* case and about Judge Hlophe, and promotes transparency and accountability. The respondent clearly made such a statement in the interest of the

public and justice, and ought not to be sanctioned for the positive and informative conduct.

28. Moreover, should the order be upheld, judges would be barred, on retirement, from participating in civil society. The ruling effectively bars retired judges in the respondent's position, who want and have the energy and expertise to contribute to the betterment of society and the justice system, from commentary and advocacy, even where this is plainly in furtherance of the public interest. This is not what the Code provides for or the consequences it, on a proper interpretation, may seek to achieve.

H. RELIEF IS NOT COMPETENT

29. We submit that the relief is not competent or appropriate:

29.1 retraction of a statement is not a remedy contemplated by section 17(8) of the JSC Act;

29.2 the subsection in any event does not contemplate retraction of a statement that is true and the publication of which was in the public interest;

29.3 the 1 March 2021 statement was made, if it was made at all, by FUL and the JCC has no jurisdiction to order a retraction of a statement made on behalf of FUL without FUL being a party to the proceedings before it;

29.4 the retraction is also manifestly inappropriate given the full set of circumstances and considerations set forth in the preceding paragraphs, and the fact that Judge Hlophe is in fact guilty of gross misconduct and liable to be removed.

I. CONCLUSION

30. The respondent submits that the order falls to be set aside and the ruling overturned insofar as it upheld any part of the complainant's complaint.

Dated at JOHANNESBURG on 30 AUGUST 2022

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