

JUDICIAL SERVICE COMMISSION OF SOUTH AFRICA

JSC 904/2021

IN RE: JUSTICE JOHAN KRIEGLER

CROSS APPEAL & RESPONSE TO JUSTICE KRIEGLER'S APPEAL

INTRODUCTION

1. I am grateful for this opportunity to respond to Justice Kriegler's "notice of appeal" against the ruling of the Judicial Conduct Committee (the JCC) of 29 July 2022.
2. Just as with Justice Kriegler's response to the complaint, I read the notice of appeal with dismay and disappointment. That Justice Kriegler should see nothing wrong in what he has done – but continues to do it – is regrettable and disappointing in one so senior and a pioneering Justice of the Constitutional Court.
3. Not only do I respectfully submit that the appeal lacks merit; I also submit that the other aspects of the complaint that were dismissed should have been upheld. Thus, I ask that those aspects of the complaint be reconsidered by the appeal panel on their merits.
4. In this response, I thus deal with the appeal and the cross-appeal.
5. I begin with the cross-appeal

CROSS APPEAL

6. I respectfully submit that the JCC erred in dismissing the complaints that Justice Kriegler has, by his conduct and public utterances
 - 6.1 failed to uphold the independence and integrity of the Judiciary in breach of article 4(a) of the Code of Judicial Conduct;
 - 6.2 failed to act honourably in a manner befitting judicial office, compatible with the status of judicial office, and in a manner that enhances public trust in, or respect for, the Judiciary and the judicial system. He did so in breach of articles 5 and 17(2) and (3) of the Code;
 - 6.3 launched an acerbic and public attack on the merits of a judgment of another judge, which are pending before an appeal court, in flagrant breach of article 11(1)(a);
 - 6.4 publicly criticised another judge and the merits of his judgment in flagrant breach of article 11(1)(b);
 - 6.5 failed to avoid personality clashes with Judge President Hlophe, to foster collegiality, and to refrain from public criticism of another judge but, instead stoked controversy and a personality clash with the Judge President on a public platform in flagrant breach of articles 11(1)(e) and (f).
7. For convenience, I recapture the facts that underpin the complaints founded on these articles.

The Facts

8. On 17 April 2021, *News24* reported Justice Kriegler as calling not only for the impeachment of Judge President Hlophe but also for his being

“prosecuted and jailed”. This came in the wake of a guilty finding against Judge President Hlophe by the Judicial Conduct Tribunal on a charge of gross misconduct on 9 April 2021. This conduct by Justice Kriegler breaches numerous articles of the Code of Judicial Conduct, including

8.1 article 11(1)(f) which requires judges, including retired 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;

8.2 article 12(1)(d) which prohibits the use or lending of the **“prestige of judicial office”** for the advancement of private interests of the judge or those of others. It is a matter of public record that a political party, the Democratic Alliance (“the DA”), wants Justice President Hlophe impeached. In a statement published on its website on 12 April 2021, the DA urged the JSC to act **“urgently”** so as to **“get rid of him”**. By publicly calling for the prosecution and jailing of Judge President Hlophe, while the process of his impeachment is still ongoing (and I believe Judge President Hlophe has taken the decision on review), Justice Kriegler is knowingly lending the prestige of judicial office for the advancement of the interests of a political party. This is a breach of article 12(1)(d). Whether Justice Kriegler does so intentionally or inadvertently is an irrelevant consideration. The measure is not so much his intention as the effect that his utterances have in the further conduct of the complaint by the JSC, by the high court, by the SCA and possibly even by the Constitutional Court.

9. This is not the first time that Justice Kriegler has breached the Code in relation to Judge President Hlophe. In a September 2009 report, *Independent Online* quoted Justice Kriegler as saying Judge President Hlophe was a **“manifestation of the problem”** with the judiciary, and warning that judicial independence should not be sacrificed on the **“altar of transformation”**. This amounted to a prejudging of the very issue that the

JSC was yet to determine in relation to a serious and potentially impeachable “charge” against a senior judge. As a result, Justice Kriegler’s prejudging of the complaint was in breach of

- 9.1 article 4(a) of the Code of Judicial Conduct which requires judges, including retired judges, to “**uphold the independence and integrity of the judiciary**”. Prejudging a serious and potentially impeachable complaint against a senior Judge in active service hardly conduces to the upholding of the independence and integrity of the judiciary;
- 9.2 article 5 of the Code of Judicial Conduct 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**”. Prejudging such a serious, and potentially impeachable complaint, eviscerates public trust not only in the judge being implicated in impeachable conduct before that determination has even been made by the JSC, but also in the Judiciary and the judicial system as a whole. The processes of the JSC form part of the judicial system. When a retired Justice of the Constitutional Court runs ahead of that process and effectively pronounces on the guilt of a judge in active service by labelling him a “**manifestation of the problem**” with the Judiciary, public trust in, and respect for the judiciary and the judicial system is bound to wane if not evaporate;
- 9.3 article 11(1)(f) of the Code of Judicial Conduct which requires judges, including retired judges, to “**refrain from public criticism of another judge**” and act with courtesy and collegiality (said to be indispensable attributes of a judge) towards other judges. Justice Kriegler’s attack as reported, and labelling a judge as “**a manifestation of the problem**” before the JSC had determined that very issue, was not germane to judicial proceedings before Judge President Hlophe, or “scholarly presentation” made for the purpose of advancing the study of law. It was mean-spirited and seems to have been intended to sting;

9.4 article 12(1)(d) of the Code of Judicial Conduct 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. It is a matter of public record that the DA has not been enamoured to Judge President Hlophe since, at the latest, August 2009 following the dismissal by the JSC of the complaint against him by Justices of the Constitutional Court. In a weekly newsletter dated 28 August 2009, then DA leader (Ms Helen Zille) wrote: ***“What today’s decision cannot be allowed to do is alter the fact that Judge Hlophe’s character and reputation remain fundamentally tainted”***. In a statement published on its website some 11 years later on 12 April 2021, the DA urged the JSC to act ***“urgently”*** so as to ***“get rid of him”***. By his various attacks on Judge President Hlophe over the years, and by labelling him a ***“manifestation of the problem”*** with the Judiciary in relation to conduct that was then yet to be determined by the JSC, Justice Kriegler lent the prestige of judicial office for the advancement of the interests of a political party, the main opposition DA. This is a breach of article 12(1)(d) of the Code of Judicial Conduct;

9.5 article 17(2) and (3) of the Code of Judicial Conduct 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. The sustained public attacks by Justice Kriegler on Judge President Hlophe, prejudging a complaint lodged with the JSC and mounting a public attack not only on his person but also on his reasoning in a judgment that was destined for appeal, is a clear breach of these articles of the Code.

10. In a 3 July 2018 media report, following a postponement of the hearing of the complaint against Judge President Hlophe, Justice Kriegler is reported as having expressed ***“disgust”*** and blaming Judge President Hlophe for the delay. He is quoted as saying: ***“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". What Justice Kriegler omitted was

- 10.1 that the complaint had been finalised by the JSC in August 2009
- 10.2 that Chief Justice Langa had said, under oath, that he did not wish to see Justice President Hlophe impeached
- 10.3 that Justice Jafta had expressed the view, categorically, that **"it would not be wise for anyone to reopen"** the enquiry. He gave the following reason for this view

"I think the matter has done so much damage to the judiciary and to this Commission, as an institution, as well and I think even if one doesn't agree with the outcome, one has to bear in mind that dragging it causes more damage to the institutions, leaving aside the individuals involved. Individuals may come and go but doing damage to the institutions is something that I find unfortunate."

- 10.4 that Justice Kroon, who was acting in the Constitutional Court when the allegations against Justice President Hlophe arose, expressed himself in similar vein when he said

"I think in the interests of the judiciary as a whole, of the Constitutional Court and of Judge Hlophe, the chapter must be regarded as closed."

- 10.5 that Justice Kriegler's Freedom Under Law had unsuccessfully sought to challenge that decision on review in the high court in 2010
- 10.6 that his Freedom Under Law then appealed the high court decision in the SCA in 2011

- 10.7 that the Western Cape Premier also challenged the JSC decision, separately, in the Western Cape High Court in 2009, and that the decision went on appeal to the SCA principally at the instance of the JSC in 2010 and was decided in March 2011
- 10.8 that from 2013 until late 2016, the delay had been occasioned by litigation at the instance of two Justices of the Constitutional Court to which Justice President Hlophe was not party.
11. This public attack on Judge President Hlophe was in breach of numerous articles of the Code of Judicial Conduct, including 4(a), 5, 11, 12(1)(d), and 17(2) & (3).
12. In a news report dated 1 March 2021, *TimeLive* quoted Justice Kriegler as accusing Judge President Hlophe of employing “**contrived reasoning**” following the Judge President’s acquittal of a politician of a criminal charge. This public attack is in flagrant breach of article 11(1)(a) of the Code which says a judge must “**not comment publicly on the merits of any case pending before or determined by [another judge]**”. Quite apart from the fact that the judgment in issue was, to the knowledge of Justice Kriegler, the subject of appeal, the public excoriation by Justice Kriegler of a Judge President of a division of the High Court for his reasoning in a judgment is, in my submission, clearly incompatible with the status of a judge. This conduct is also in flagrant breach of articles 11(b), (e) and (f) of the Code. These articles prohibit the public criticism by a judge of another judge or judgment on any aspect of the case, enjoin judges to avoid personality clashes with one another but rather to foster collegiality, and to refrain from public criticism of other judges.

JCC Dismissal and grounds for Cross Appeal

13. The JCC dismissed all these complaints on the following bases:

- 13.1 In relation to the 17 April 2021 *News24* report that Justice Kriegler had called for Judge President Hlophe to be “**prosecuted and jailed**”, the JCC accepted Justice Kriegler’s bare denial. That, in my restful submission, was a misdirection. There is no evidence of Justice Kriegler having challenged the correctness of the words attributed to him by the publication in question. Justice Kriegler does not deny that he saw and read the *News24* report. Why did he not seek to correct it? Why did he not lodge a complaint with the Press Ombud or other relevant media regulator? Since when has a bare denial been a complete defence to a serious charge such as this in these circumstances? These are some of the questions the JCC does not address. I ask that the appeal panel address them.
- 13.2 In relation to the September 2009 *IOL* report that Justice Kriegler had accused Judge President Hlophe of being a “**manifestation of the problem**” with the judiciary, the JCC took the view that this was a criticism not of the Judge President but of the JSC, and that it was an *ex post facto* criticism of the JSC’s failure to deal with a complaint of judicial misconduct against the Judge President. For that reason, says the JCC, there was no prejudging of the decision of the JSC as the decision had already been made not to investigate the complaint against Judge President Hlophe.
- 13.3 This finding and reasoning is with respect incorrect for the following reasons:
- (a) Justice Kriegler did not dispute that by his utterances, reported in September 2009, he prejudged the determination of the complaint against Justice Hlophe **by the JCT of the JSC which came only on 9 April 2021.**
 - (b) Justice Kriegler disputes **only** that he commented on a 2009 decision of the JSC “**to shelve the matter**”, and says his

utterances came **“after”** that decision (para 3.2.2 of Response).

- (c) **But that is plainly not the decision to which the complaint relates. The complaint self-evidently relates to the final determination of the Constitutional Court Justices’ complaint against Judge President Hlophe 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 Judge President Hlophe was, in September 2009, a **“manifestation of the problem”** with the judiciary was yet to be determined by the JSC in April 2021. By making that public utterance in September 2009, Justice Kriegler **prejudged** the determination of that issue by the JSC in April 2021. By so doing, Justice Kriegler was by his conduct**
- (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 DA example;

- (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.

13.4 Justice Kriegler seemed in his response to draw a distinction between JSC decisions or processes, on the one hand, and court decisions or processes, on the other, and then conclude that he is free to criticise JSC decisions (**para 3.1.3 of Response**). But my complaint was never about Justice Kriegler criticising the processes of the JSC. The complaint in this respect was always about Justice Kriegler prejudging the findings of the JSC on the merits of the complaint lodged by Justices of the Constitutional Court against Judge President Hlophe. To that complaint, Justice Kriegler did not provide any answer in his written response.

I ask the appeal panel to reconsider this complaint on these facts which were before the JCC.

13.5 In relation to the 3 July 2018 media report that Justice Kriegler expressed “**disgust**” and blamed Judge President Hlophe for the postponement by the JSC of a consideration of the judicial misconduct complaint of the Justices of the Constitutional Court against Judge President Hlophe, the JCC does not appear to have made a finding, even though it seems to have found that

“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 19 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.”

13.6 The JCC seems to accept that Justice Kriegler

“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”.

13.7 The precise words attributed to Justice Kriegler by the media report are these:

“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,”

13.8 I ask that the appeal panel reconsiders this complaint on these facts and make a finding.

THE APPEAL

14. Regrettably, Justice Kriegler’s appeal is characterised by obfuscation and bravado. I find almost every argument advanced in this notice of appeal meritless. But I shall not engage with every one of them as there are far too many and they are all meritless. I shall pick a few of them, illustratively, and submit that the appeal falls to be dismissed on the grounds I advance.

15. Justice Kriegler

15.1 denies that he did anything wrong in publicly attacking a Judge President as being ***“unfit to be a judge”*** in light of a complaint by Justices of the Constitutional Court the determination of which was still pending. This is unfortunate. The provision of the Code is clear: a judge, including retired judge, must refrain from public criticism of another judge. Not only did Justice Kriegler do this, he also breached numerous other related provisions, including

- 15.1.1 articles 5, 17(2) & 17(3) which prescribes that judges, including retired judges, must act honourably in a manner befitting judicial office, compatible with the status of judicial office, and in a manner that enhances public trust in, or respect for, the Judiciary and the judicial system;
- 15.1.2 article 4(a) which prescribes that judges, including retired judges, must uphold the independence and integrity of the Judiciary;
- 15.1.3 article 11(1)(e) which prescribes that judges, including retired judges, must avoid personality clashes with other judges and rather seek to foster collegiality;
- 15.2 claims that the rule in question [11(1)(f)] does not apply to retired judges. This is not correct and article 2 is clear in this regard. Justice Kriegler seems to suggest that the rule does not apply to him because he is unlikely to be called to judicial duty. It is not clear to me where in the Code Justice Kriegler sources this reasoning. It cannot be correct that retired judges are at large to insult or defame serving judges by reason of their own ineligibility (or being unlikely to be invited) for judicial duty. Such reasoning runs against the ethos of the Code. As rightly pointed out by the JCC

“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.”

(my emphasis)

- 15.3 claims that the ruling of the JCC finding him guilty of breaching article 11(1)(f) stifles his freedom of expression. This is an unfortunate argument. Justice Kriegler will know, better than most, that the rights in the Bill of Rights – not least the right he now asserts – are not absolute. Freedom of expression can be no reasonable justification for a senior retired judge acting in flagrant breach of the Code by excoriating a Judge President in public as being “unfit to be a judge” by reason of a complaint against that judge that is still pending for final determination;
- 15.4 claims to have a duty to speak out “*in the public interest*”. Justice Kriegler seems to have convinced himself that he is the keeper of judicial morals and standards. I say so because I know of no other retired judge quite as publicly enraged by Judge President Hlophe as Justice Kriegler. He seems to have taken it upon himself to act as a one-man “Privy Council” to the JSC, especially in matters concerning Judge President Hlophe. This is, with respect, inappropriate. Justice Kriegler must respect the constitutional institutions – such as the JSC – that have been established to perform specific functions. If he is not happy with their performance, there are legal avenues for him to challenge their conduct as he has done through FUL on several occasions. While everyone, including retired judges, have a right to speak out against what can generally and objectively be regarded as a threat to our constitutional democracy – from whichever source – he, as a judge, needs to respect the rules governing the manner by which judges can speak out. Until those rules have been changed, he is bound by them and must respect them;
- 15.5 claims that his statement that Judge President Hlophe “***unfit to be a judge***” was true because the JCT has now found him guilty of misconduct. Again, Justice Kriegler would know, better than most, that one cannot validly use ***ex post facto*** reasoning to justify an

impugned statement. On 1 March 2021, when Justice Kriegler made the impugned statement, the JCT had not yet found Judge President Hlophe guilty of judicial misconduct. Justice Kriegler cannot its finding to justify his statement;

- 15.6 now claims [at para 29.3 of the notice] that he may not have made the statement after all. This is surprising because Justice Kriegler has not before denied making the statement. What appears in the JCC ruling as his response in that regard is this:

“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.”

- 15.7 claims that the statement was attributed to FUL, an organisation of which he is a member (perhaps even still chairman at the time of making the statement). Justice Kriegler will have us believe (and accept, because he says so) that when a judge speaks on behalf of an organisation of which he is a member, the Code of Judicial Conduct does not apply to him as a judge. Justice Kriegler does not cease being a retired judge subject to the Code when he speaks on behalf of FUL. In my respectful submission, a judge is not at large to breach the Code by wearing the hat of an organisation. The proposition Justice Kriegler advances can be used, if accepted, *in fraudem codis*. That which he cannot do as a judge, he cannot do as a judge representing a voluntary organisation;
- 15.8 claims that FUL, his organisation, cannot be barred by the JSC from speaking freely not least because the JSC has no jurisdiction over

FUL. This, with respect, is an Aunt Sally argument. The complaint was never directed at FUL. The judge is the object;

15.9 says the retraction relief is incompetent. I would not go that far. My submission is that the relief is inappropriate but not for the reasons advanced by Justice Kriegler. An appropriate relief is in my respectful submission, an apology and a retraction to Judge President Hlophe, not to me as the complainant.

CONCLUSION

16. In conclusion, I stress again 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 any accusation that I lodge this complaint out of malice towards Justice Kriegler.
17. Again, 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. I ask that the appeal be dismissed and that the cross-appeal be granted.



VUYANI NGALWANA SC
25 November 2022