



JUDICIAL CONDUCT COMMITTEE

REF: JSC/894/21

In the matter between:

DE BROGLIO ATTORNEYS

COMPLAINANT

and

JUDGED FISHER

RESPONDENT

Date: 19 November 2024

Decision: The respondent is found to be in breach of section 14(4)(e) of the JSC Act, read with Article 9 and 16 (2) of the Code of Judicial Conduct and the remedial action imposed is a reprimand in terms of section 17 (8) (b) in writing to be communicated to the complainant within 30 days after receipt of this ruling.

RULING

THE JUDICIAL CONDUCT COMMITTEE (SHONGWE JA)

Introduction

[1] On 6 June 2024, I was designated by the Chairperson of the Judicial Conduct Committee (JCC), in my capacity as a member of the JCC, to deal with the complaint in the above matter, in terms of section 17 of the Judicial Service Commission Act 9 of 1994 (the Act). This follows a ruling made by the Appeal Committee in terms of section 16(4) of the Act, referring the complaint to the Acting Chairperson (as she then was), for an enquiry into the merits of the complaint in terms of section 17(1) of the Act.

[2] Section 17 of the Act deals with inquiry into serious, non- impeachable complaints by the Chairperson or member of the JCC, and provides as follows:

'(1) If-

(a) the Chairperson is satisfied that, in the event of a valid complaint being established, the appropriate remedial action will be limited to one or more of the steps envisaged in subsection (8); or

(b) a complaint is referred to the Chairperson in terms of section 15(1) (b) or section 16 (4)(a), or a section 18 (4) (a)(iii), the Chairperson or a member designated by the Chairperson must inquire into the complaint in order to determine the merits of the complaint.'

[3] Section 17 (3) goes further to state that:

'For the purpose of an inquiry referred to in subsection (2), the Chairperson or member concerned

(a) must invite the respondent to respond in writing or in another manner specified, and within a specified period, to the allegations;

(b) may obtain, in the manner that he or she deems appropriate, any other information which may be relevant to the complaint; and

- (c) must invite the complainant to comment on any information so obtained, and on the response of the respondent, within a specified period'.

[4] Section 17 (4) provides as follows:

'If, pursuant to the steps referred to in subsection (3), the Chairperson or member concerned is satisfied that there is no reasonable likelihood that a formal hearing on the matter will contribute to determining the merits of the complaint, he or she must, on the strength of the information obtained by him or her in terms of subsection (3) -

- (a) dismiss the complaint;
- (b) find that the complaint has been established and that the respondent has behaved in a manner which is unbecoming of a judge, and impose any of the remedial steps referred to in subsection (8) on the respondent; or
- (c) recommend to the Committee, to recommend to the Commission that the complaint should be investigated by a Tribunal'.

Background

[5] On 25 March 2021 De Broglio attorneys (the complainant) lodged a complaint with the JCC, against Judge D Fisher (the respondent). The complaint was as a result of a judgment handed down by the respondent in two matters initiated by the complainant against the Road Accident Fund (RAF). The complainant opined that the respondent had failed to afford the rules of natural justice to them, in the two matters before making prejudicial findings against them and their experts.

[6] The parties had entered into a settlement agreement when approaching the Gauteng Division of the High Court, Johannesburg. The matters served before the respondent, who found that the settlement agreements were *void ab initio* and unenforceable. The respondent went further to make findings of corruption and dishonesty against the complainant and its expert witnesses and referred their

conduct to their respective professional bodies. See the judgment penned by the respondent in *Taylor v Road Accident Fund and a Related Matter* [2020] JOL 48990 (GJ).

[7] The complainant appealed against the judgment and the order to the Supreme Court of Appeal (the SCA), concerning the powers of a court when disputed issues in litigation had been settled. A subsidiary issue (as described by the SCA) related to the rights of persons who were not party to legal proceedings, but whose conduct was referred to the statutory bodies responsible for oversight over the members of the profession that the person belongs to.

[8] The SCA in its judgment, *Road Accident Fund v Taylor and Other Matters* [2023] ZASCA 64; 2023 (5) SA 147 (SCA) made the following relevant findings against the respondent's judgment:

[32] It is convenient to commence with a consideration of the appeals against the referrals. They were based on the findings of dishonesty and impropriety on the part of the affected persons that I have referred to. The referrals are inextricably linked to these findings. The judgment of the court a quo was forthwith made available electronically and subsequently published in the law reports. In the nature of things, it would have spread like wildfire in the relevant communities. There can be no doubt that the referrals had and continue to have grave reputational and practical consequences for the affected persons.

[33] In the circumstances, the age-old principle of *audi alteram partem* required that the affected persons be afforded reasonable prior notice and opportunity to state their cases. In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC) para 11, the following was said with particular reference to s 34 of the Constitution:

'This s 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. The affected persons were not afforded any such notice or opportunity. It follows that the findings and referrals were made in complete disregard of the rights of the affected persons. The referrals are manifestly unjust, cannot stand and must be set aside at this stage.'

[9] The complainant referred a complaint to the JCC against the respondent complaining about her not affording them an opportunity to be heard before making the adverse findings and orders against them. The Acting Chairperson designated Judge-President Mlambo (Mlambo JP) of the Gauteng Division of the High Court as the Head of the Court, to deal with the complaint in terms of section 14(2) of the Act.

[10] Mlambo JP dismissed the complaint on the grounds that it was solely related to the merits of a judgment or order. The complainant was duly informed of the dismissal. Subsequently the complainant lodged an appeal against this decision. Before the Appeal Committee could hear the appeal, the respondent filed a response to the notice of appeal.

[11] In her response, the respondent concluded by endorsing the provisions of section 15(2)(c) and concurred with the dismissal by Mlambo JP. At the beginning of her response, she related the history of the complaint, which I do not think need

be repeated in this ruling, the history has been exhaustively dealt with in the judgment of the SCA and the Appeal Committee's ruling. However she stated that the complaint centres around two legal questions: 'First, whether or not a court is entitled to interrogate the basis for a settlement agreement; and second, whether a court is obliged to notify a person that it intends to refer a matter to his/her professional body for investigation so as to allow such person to be heard on whether or not it should do so.'

[12] On the first question she relied on a practice directive (:Practice Directive 2.1) which was in force in the Gauteng Division of the High Court, in relation to RAF matters. She also relied on, what she referred to as 'the law as it stood at the time in relation to RAF settlements, was binding on me... '. She also relied on the matter of *Maswanganyi*¹ and other legal authorities as precedents. However, it would appear that she subsequently discovered that the majority in *Maswanganyi* had been overruled.

[13] On the second question she was of the view that the complainant had been given enough opportunity to deal with its obligations, as the legal practitioner in relation to the concerns raised by her. The response clearly shows that she was of the view that there was no clear legal position on the question of giving the other party a hearing before referring the matter to the professional body. I say so because she refers to the *Taylor*² matter where the SCA stated the legal position to be that 'even when a court does not, itself, determine that there has been misconduct but refers a matter to a professional body for investigation and determination, it must

¹ *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA)

² *Road Accident Fund v Taylor and Other Matters* [2023] ZASCA 64; 2023 (5) SA 147 (SCA)

still inform the person of such intention and hear the person as to why such referral should not be made.'

[14] The respondent further stated in her response:

'[I] did not previously understand this to be the position especially in the light of the prevalence of such referrals, without notice in our courts at all levels, including the SCA.'

In this regard, she referred to *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* [2021] ZASCA 24 (19 March 2021) and other authorities)

She continued to say:

'[I] made no final findings as to professional misconduct. I simply referenced (undisputed) conduct which I considered warrant referral. The determination of the nature of the conduct was left to the LPC.'

[15] The Appeal Committee heard the appeal against the dismissal of the complaint on 25 October 2023 and concluded that Mlambo JP erred in concluding that the complaint be dismissed on the basis that it relates solely to the merits of a judgment, therefore it upheld the appeal.

[16] The Appeal Committee's reasons for upholding the appeal were, *inter alia*, that:

'(a) Although the conduct of Judge Fisher complained of informed the merits of her judgment and order, it does not solely relate to those merits. (b) It is a direct result of the Judge's conduct, set out fully in the complaint, that "she trampled on the parties' rights and ignored the basic principles of *audi alteram partem*.'"

[17] What is clear from the ruling of the Appeal Committee is that the issue for referral does not relate to the merits of the judgment or order, ie the question whether the court could inquire into the compromise between the parties, or if it was legally

justified to do so. The respondent correctly submits she acted in accordance with the law as she saw it, on that aspect, whether rightly or wrongly.

[18] The issue to be determined is what the SCA described as the subsidiary issue, which is whether the respondent breached Articles 16(2) read with Article 9 of the Code of Judicial Conduct (the Code) by failing to give the attorneys a hearing before making adverse findings in respect of their conduct and referring it to the professional body.

[19] Article 16(2) states the following:

'Before commenting adversely on the conduct of a particular practitioner or prosecutor in a judgment, the judge must give that person the opportunity to deal with the allegation.'

[20] Article 9 provides:

'A judge must -

- (a) resolve disputes by making findings of fact and applying the appropriate law in a fair hearing, which includes the duty to
 - (i) observe the letter and spirit of the *audi alteram partem* rule.'

This aspect of the complaint also engages article 9 and 16 of the Code in relation to fairness and reporting inappropriate conduct, which in essence do not solely relate to the merits of the judgment.

[21] Even the SCA *in Taylor* commented adversely on the conduct of the respondent in that she made findings without notice or opportunity, thereby disregarding the rights of the affected parties.

[22] I find that the judgment handed down by the respondent was not limited to the dispute between the plaintiff and the RAF in the high court but it also engaged a breach by the respondent as envisaged in the Code, particularly Articles 9 and 16 (2) as indicated. The facts in this matter, taken together with the respondent's response clearly indicate a breach of the Code. The attorneys were not given the opportunity to deal with the adverse findings prior to them being made. The fact that the conduct was referred to the LPC did not detract from the fact that the court had made findings of impropriety and as the SCA found

[23] Based on the assessment of the complaint, the response of the respondent and the comments of the complainant on the response of the respondent, and the relevant findings in the judgment of the SCA, I am satisfied that there is no reasonable likelihood that a formal hearing on the matter will contribute to determining the merits of the complaint. On the strength of the information obtained by me in terms of subsection 3 and subsection 4 (b), I find that a complaint has been established. I am unable to conclude that the breach was wilful or grossly negligent, however, I am satisfied that there was a breach of the Articles of the Code I have referred to.

[24] Having considered the nature of the complaint, I am of the view that an appropriate remedial step would be a reprimand in terms of section 17 (8) (b) in writing to be communicated to the complainant, within 30 days after receipt of this ruling.



THE JUDICIAL CONDUCT COMMITTEE