



JUDICIAL CONDUCT COMMITTEE

Ref No: JSC/894/21

In the matter between:

JUDGE D FISCHER

APPELLANT

and

DE BROGLIO ATTORNEYS INCORPORATED

RESPONDENT

Date: 5 November 2025

Decision: The appeal is upheld.

RULING

JUDICIAL CONDUCT COMMITTEE (MOCUMIE JA, MUSI AJA AND MAJIEDT J)

Introduction

[1] This is an appeal lodged in terms of the Judicial Service Commission Act¹ (“the Act”). It arises from a ruling of the Judicial Conduct Committee (“the Committee”), per Shongwe JA, delivered on 19 November 2024, following an

¹ Act 9 of 1994.

inquiry held in terms of section 17 of the Act. The inquiry had been referred to him by the Acting Chairperson of the JCC in terms of section 16(4)(a) after the JCC Appeal Committee (per Maya DCJ (as she then was), Jafta J and Mabindla-Boqwana JP) determined that there was a *prima facie* case for Judge Fischer to answer, contrary to the earlier ruling of Mlambo JP (as he then was) who had dismissed the complaint. Shongwe JA found that Fischer J had breached section 14(4)(e) of the Act read with Articles 9 and 16 of the Code of Judicial Conduct (“the Code”) and imposed a reprimand as remedial action in terms of section 17(8)(b) of the Act.

Factual background

[2] Briefly, a firm of attorneys, De Broglio Attorneys Inc. (“the complainant”), lodged a formal complaint against Fischer J of the Gauteng Division of the High Court arising from two civil matters — *Taylor v Road Accident Fund* and *Mathonsi v Road Accident Fund*² — which had been settled between the claimants, both represented by the complainant, and the Road Accident Fund (“RAF”). When the matters came before Fischer J, she expressed concern about aspects of the settlements and declined to make them orders of court. She directed the parties to address her on certain issues concerning the propriety of such settlements and, after hearing argument, delivered a judgment declaring the settlements void *ab initio* and making adverse findings against the complainant and its experts. On appeal, the Supreme Court of Appeal in *Road Accident Fund v Taylor and Other Matters*³ upheld the appeal, set aside Fischer J’s judgment and order in their entirety, and held that her findings were made without admissible evidence and in disregard of the affected parties’ right to be heard.

² *Taylor v Road Accident Fund* 2021 (2) SA 618 (GJ). The *Taylor* and *Mathonsi* matters were heard together and one judgment was delivered for both.

³ [2023] ZASCA 64; 2023(5) SA 147 (SCA) (“*Taylor*”). In the Supreme Court of Appeal too, the two matters were heard together and one judgment was delivered..

[3] In *Taylor*, the Supreme Court of Appeal held, with reference to binding authority including *Eke v Parsons*,⁴ that Fischer J had no power to interrogate the merits of the settlement agreements in the manner that she did. The Practice Directive on which she relied could not override binding precedent from the Supreme Court of Appeal or the Constitutional Court. Relying on the SCA’s findings, the complainant lodged a complaint against Fisher J. The complaint alleged that Fischer J had exceeded her judicial mandate by reopening settled matters, dealing with issues not before her, and introducing extraneous policy concerns such as the RAF’s fiscal position and the public interest into private civil disputes. It was further alleged that she overreached the limits of judicial authority and failed to adhere to the constitutional principle that judges must decide only the cases and issues properly before them.

[4] The complainant lodged its complaint with the Acting Chairperson of the Judicial Conduct Committee, who designated Mlambo JP (as he then was) of the Gauteng Division—where Fischer J serves—to consider it in terms of section 14(2) of the Act. On 29 October 2021, Mlambo JP dismissed the complaint in terms of section 15(2)(c) on the ground that the conduct complained of related solely to the merits of Fischer J’s judgment and order. Dissatisfied with this outcome, the complainant appealed to the JCC Appeal Committee. Having considered the matter under section 15(5), the Committee upheld the appeal and referred the complaint for an inquiry in terms of section 17, noting that when viewed at face value, certain allegations in the complaint could amount to misconduct in breach of the Code, warranting further investigation, even though they did not rise to the level of “gross misconduct”.

⁴ [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).

[5] The JCC Appeal Committee, acting in terms of section 16(4)(a) of the Act, referred the complaint to the Acting Chairperson, who in turn designated Shongwe JA to conduct an inquiry in terms of section 17(1)⁵ of the Act in order to determine the merits of the complaint and whether it had been established.

[6] Shongwe JA considered the complaint together with Fischer J's written response and the complainant's reply, and reflected on section 14 and related provisions of the Act. On 19 November 2024, he delivered his ruling, in which he found, *inter alia*, that:

“[22]. . . [T]he 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”.

[7] Furthermore, he found that:

“[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*

⁵ Sections 17(1) and (2) provide:

“17. Inquiry into serious, non-impeachable complaints by Chairperson or member of Committee. — (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 section 18 (4) (a) (ii), the Chairperson or a member of the Committee designated by the Chairperson must inquire into the complaint in order to determine the merits of the complaint.”

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.” (Emphasis added.)

[8] Following the above findings, he concluded that:

“[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.”

[9] Fischer J was dissatisfied with this outcome and appealed against it on two main grounds. First, she contended that since Shongwe JA had found that the impugned conduct was neither wilful nor grossly negligent, it was not open to him to conclude that a complaint had been established. Second, she argued that Shongwe JA had erred in stating that one of the reasons the JCC Appeal Committee (“the Appeal Committee”) had, on 25 October 2023, upheld the appeal against the dismissal of the complaint by Mlambo JP on 29 October 2021, was that she had “trampled on the parties’ rights”. According to Fischer J, the Appeal Committee made no such finding.

[10] In her view, section 14(4)(e) applies only to the specific instances listed therein, namely: any wilful or gross negligence and any wilful or grossly negligent breach of the Code, including any failure to comply with any regulation referred to in section 13(5), other than conduct contemplated in paragraphs 14(4)(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. She contends that wilfulness or gross negligence is therefore a prerequisite for a valid and sustainable complaint under that provision. Accordingly, she submits that, having found at paragraph [23] of his ruling that the impugned conduct was neither wilful nor grossly negligent, it was not open to Shongwe JA to conclude

that the complaint had been established. In support of this, she relies on section 15(2)(a) of the Act, which provides that a complaint must be dismissed if it does not fall within the parameters of any of the grounds set out in section 14(4).

[11] The nub of her appeal is that, since Shongwe JA correctly found that her conduct was neither wilful or grossly negligent and did not find her in breach of any of the other grounds set out in section 14(4) of the Act, he should have dismissed the complaint as required by section 15(2)(a).

[12] In opposing Fischer J's appeal, the complainant supported Shongwe JA's ruling and remedial action. Their interpretation of section 14(4)(e) of the Act is different to that of Fischer J. In their view, the interpretation that she attaches to section 14(4)(e) — limiting its application only to instances of wilful or gross negligence — would lead to absurd results.

The law

[13] Section 14(4)(e) of the JSC Act provides that:

“(4) The grounds upon which any complaint against a judge may be lodged, are any one or more of the following:

....

(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.”

Issue(s) for determination

[14] The issue for determination before us is whether the conduct of Fischer J was wilful or grossly negligent so as to constitute a breach of the Code, or whether

that wilful or grossly negligent conduct was otherwise incompatible with, or unbecoming of, the holding of judicial office.

[15] To succeed under section 14(4)(e) of the Act, what must a complainant prove? On a reading of the section, three elements must be proved: (a) that the judge engaged in conduct contrary to the Code; (b) that such conduct was wilful or grossly negligent; and (c) that the conduct was incompatible with or unbecoming of the holding of judicial office, or was prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.

[16] There is no dispute between the parties as to the sequence of events in the High Court and the subsequent decision of the SCA setting aside Fischer J's judgment. The dispute lies in whether her conduct falls within the ambit of section 14(4)(e) of the Act and the related provisions of the Code.

[17] Shongwe JA found that the impugned conduct was neither wilful nor grossly negligent. He did not find that Fischer J was in breach of any of the other grounds set out in section 14(4) of the Act. Once he found that the conduct was neither wilful nor grossly negligent, it was not open to him to find the complaint to have been established. It is a contradiction.

[18] It is trite that a judge may not raise and determine issues not placed before the court by the parties, however well-intentioned the judge may be, including out of concern for the public fiscus.⁶ Nonetheless, when Fischer J questioned the settlement agreements concluded between the parties, she did so in the course and scope of her judicial functions and cannot be faulted merely for

⁶ *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) at paras 13-15.

raising concerns. The difficulty, as highlighted by the SCA in *Taylor*, lies in the manner in which she went further to make findings of fraud and corruption against the complainant and its experts without substantiating evidence, and in referring them to their respective professional bodies without affording them an opportunity to be heard. In so doing, she denied them their right to a fair hearing under the *audi alteram partem* principle.

[19] Article 16(2) of the Code declares, “[b]efore 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[s]”. In addition, Article 9 of the Code imposes upon judges the duty to conduct fair hearings. The duty encompasses the obligation to observe the *audi alteram partem* principle. The article 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 the spirit of the *audi alteram partem* rule.”

[20] It follows from the above provisions that Fischer J ought to have afforded the parties an opportunity to be heard, in accordance with the *audi alteram partem* rule, before she took such drastic steps. However, all this was done in the exercise of her discretion. She held the view that any affected party would have an opportunity to address the relevant professional bodies in the course of their subsequent inquiries, if called upon to do so.

[21] To the extent that Fischer J went overboard with her remarks about fraudulent and/or corrupt conduct based on collusion between legal practitioners and the RAF, she should have been more circumspect. Without taking away anything from the judgment in *Taylor*, subsequently confirmed by the

Constitutional Court,⁷ it must be emphasised that she was not entitled to interrogate the merits of the settlement agreements or the pre-settlement negotiations that led to them. However, in this matter, her conduct cannot equate to wilful or gross negligence.

[22] The term “wilful” is defined in the Oxford English Dictionary as “intentional or deliberate”, and in legal usage denotes conduct done intentionally or with knowledge that harm is likely to result.⁸ Gross negligence, on the other hand, is described as “[a] severe degree of negligence taken as reckless disregard. Blatant indifference to one’s legal duty, [and] other’s . . . rights.”⁹

[23] Wilful or grossly negligent is a very high threshold which the legislature intentionally crafted into the provision to avoid situations where judges are silenced even in the face of unethical conduct in their courts. The legislature had in mind cases of intentional or grossly negligent conduct. Shongwe JA was conscious of this very high threshold when he found in paragraph 22 that “I am unable to conclude that the breach was wilful or grossly negligent”.

[24] Considering the evidence presented and considering that at the time of this incident there was a Practice Directive in the Gauteng Division guiding judges to inquire into such agreements before confirming them, it is difficult to conclude that a judge who raised concerns in court can be wilful or grossly negligent. The finding of Shongwe JA that Fischer J’s conduct is not wilful nor grossly negligent is correct. It cannot be faulted. What drives this point home further is that there is no cross-appeal by the complainant. It follows, therefore, that the complainant

⁷ *Mafisa v Road Accident Fund and Another* [2024] ZACC 4; 2024 (4) SA 426 (CC); 2024 (6) BCLR 805 (CC) at paras 50-54.

⁸ *Black’s Law Dictionary* (4 ed, Henry Campbell Black ed, West Publishing Co 1951).at 1773.

⁹ *The Law Dictionary* (based on *Black’s Law Dictionary*, West Publishing Co) at ‘Gross Negligence’, available at <https://thelawdictionary.org/gross-negligence/>.

has failed to clear the high threshold created by section 14(4)(e), read with section 14(4)(b). Finding otherwise is to stifle judges from raising concerns head-on when they are faced with same in their courts.

[25] Judges should not be stifled from voicing their concerns about matters before them. While expected to maintain impartiality, they also have a responsibility to uphold the law and express their opinions on issues before them; sometimes during robust engagement with counsel, as affirmed in *AfriForum v EFF*,¹⁰ albeit in the context of an application for recusal of a judge for the remarks a judge made about one of the parties. Judges raising concerns where they arise promotes public trust as it speaks to transparency and the ability of judges to openly discuss their concerns showing fairness therein. If a judge believes that something is wrong or amiss in a case, they have a duty to speak up to ensure fairness and justice.

[26] Note 4(i) of Article 4 of the Code expresses it as follows:

“A judge acts fearlessly to his or her conscience because a judge is only accountable to the law.”

[27] This goes along with the duty to treat counsel and all who appear before the court with respect and dignity. The complaint did not include counsel being treated unfairly, in an undignified or disrespectful manner. Nor does the record reveal any such underlying factors in the manner in which Fischer J presided over the two matters. The remarks she made were made “in open court and in good faith as part of a robust exchange with counsel.”¹¹ At worst, the remarks may be regarded as being *obiter dicta*.

¹⁰ *AfriForum v Economic Freedom Fighters* [2024] ZASCA 82; 2024(6) SA 1 (SCA).

¹¹ *Id* at para 31.

[28] In the result, we find that Fischer J's conduct was not *wilful or grossly negligent* as contemplated in section 14(4)(e) of the Act.

[29] Consequently, the appeal succeeds, and in terms of section 17(7) of the Act, the ruling of Shongwe JA is set aside and substituted with the following:

“The complaint against Fischer J is dismissed.”

A handwritten signature in black ink, appearing to read 'Rajesh', is positioned above a horizontal line.

FOR JUDICIAL CONDUCT COMMITTEE