



JUDICIAL CONDUCT TRIBUNAL

Ref no: JSC/217/2020

In the matter between:

Judge-President Mlambo

Complainant

and

Judge N P Mngqibisa-Thusi

First Respondent

Report in terms of section 26 of the Judicial Service Commission Act 9 of 1994 on allegations of Incapacity, Gross Incompetence and Gross Misconduct against Judge N P Mngqibisa-Thusi

Introduction

[1] This is a report on the investigation and determination of allegations of incapacity, gross incompetence and gross misconduct against Judge N P Mngqibisa-Thusi (the respondent). These allegations arise from a complaint lodged against the respondent by Judge-President Mlambo (the

complainant). If these allegations turn out to be true, it would mean that the respondent is no longer fit and proper to hold the office of a High Court Judge. Therefore, essentially the investigation is about the respondent's fitness to continue in office.

- [2] While this Tribunal is empowered to undertake the investigation and report on the outcome of it, the Tribunal has no power to determine whether the respondent should be removed from office or not. That power lies in the hands of the organs of state. The role of this Tribunal is to investigate, make factual findings and determine the merits of the allegations made against the respondent. All of this is done in order to enable the repository of power to properly determine whether the respondent ought to be removed from office.
- [3] The appointment and removal of a Judge from office are regulated by the Constitution and legislation. Consequently, and for a proper understanding of the report, it is necessary to begin by outlining the relevant legislative framework.

Constitutional Framework

- [4] The Constitution confers the power to appoint Judges of the High Court on the President.¹ Section 174 requires that persons appointed must be appropriately qualified and be fit and proper to be appointed as Judges. The President makes the appointment on the advice of the Judicial Service Commission. Once a Judge of the High Court is appointed on a permanent

¹ See section 174 (6) of the Constitution

basis, he or she holds office until they retire or they are discharged from active service in terms of legislation. In order to safeguard judicial independence, Judges' tenure of office and financial benefits are highly secure. Their salaries and other benefits cannot be reduced.²

- [5] Section 177 of the Constitution governs removal of Judges from office before they retire or are discharged from active service. Since this provision is at the centre of the investigation and findings made by this Tribunal, it is necessary to quote it as a whole and interpret it. The section provides:

'Removal

(1) A judge may be removed from office only if –

- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
- (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)'

- [6] This provision must not only be interpreted purposively but its language must also be read and understood in the context of the whole section and other relevant sections in the chapter in which it is located. This context reveals that section 177 must be assigned a meaning that strikes a balance between judicial independence on the one hand and the removal from office of Judges who should not continue to hold office. This balance may

² Section 176(3) provides: 'The salaries, allowances and benefits of judges may not be reduced.'

only be achieved if the language of section 177 is read restrictively so as to authorise removal from office of the Judges whose ability to perform judicial functions is seriously undermined and as a result they are incapable of properly performing judicial duties.

[7] The language of the section emphatically declares that a Judge may be removed from office only if one of the listed grounds is established. And it lists incapacity, gross incompetence and gross misconduct as grounds for removal. Notably the Constitution does not define each of these grounds and therefore in the absence of a court decision defining them, we must ourselves determine what each means. We will undertake that exercise later. For now, it suffices to point out that under the section the existence of these grounds must be established by the Commission and that incapacity and gross incompetence must be extant as at the time the Commission makes the finding. This is evident from the drafter's choice of words and the tense in which those words are employed: 'the judge suffers from incapacity, is grossly incompetent'. If the ground relied upon is gross misconduct, the Commission must find that the Judge concerned is guilty of gross misconduct.

[8] The section identifies three role players who play different roles in the removal process. These are the Commission, the National Assembly (Assembly) and the President. As mentioned, the Commission determines whether grounds for removal have been established. It does not decide the question whether the Judge concerned should be removed from office. This issue is reserved for the Assembly. However, the decision of the Assembly must be based on the Commission's findings and other relevant information placed before it. Once the Assembly decide that the Judge

concerned must be removed from office, it must pass a resolution which must be supported by two thirds of its members. The President is obliged to remove that Judge from office.

Legislative Framework

[9] The Constitution contemplates that national legislation would be enacted to regulate powers and functions of the Commission.³ In order to discharge this obligation, Parliament passed the Judicial Service Commission Act⁴ (Commission Act). This legislation outlines in detail the procedures and processes to be followed from the moment allegations of incapacity, gross incompetence and gross misconduct are made against a Judge.

[10] The Commission Act empowers any person to lodge a complaint with the Chairperson of the Judicial Conduct Committee.⁵ Under section 14 of this Act, a complaint against a Judge may also be based on incapacity, gross incompetence or gross misconduct, envisaged in section 177 of the Constitution. Section 15 empowers the Chairperson of the Committee to assess complaints lodged with the Committee. If the Chairperson is satisfied that in the event of a particular complaint being established, the Commission is likely to find that the respondent Judge suffers from incapacity or is grossly incompetent or is guilty of gross misconduct, he or

³ Section 178(4) of the Constitution provides: The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation

⁴ Act 9 of 1994 as amended by Act 20 of 2008

⁵ Section 14(1) of the Commission Act provides: Any person may lodge a complaint about a judge with the Chairperson of the Committee.

she is obliged to refer the complaint to the Committee.⁶The Committee is required to determine whether a Tribunal such as the present should be established to probe and report on such complaint.

[11] Upon making the decision to refer the complaint to the Committee for the purpose mentioned above, the Chairperson is obliged to inform both the complainant and the Judge of his or her decision and that they have the right to submit written representations.⁷ These representations are placed before the Committee for its consideration when it determines whether a Tribunal should be established. The Committee may recommend that a Tribunal be established only if satisfied that the complaint, if established, would constitute prima facie proof of incapacity, gross incompetence or gross misconduct by the respondent Judge.⁸

[12] The recommendation must be submitted to the Commission. Having reached a decision, the Committee is required to inform the complainant, the respondent Judge and the Commission about its decision and furnish

⁶ Section 16(1) of the Commission Act provides: (1) If the Chairperson is satisfied that, in the event of a valid complaint being established, it is likely to lead to a finding by the Commission that the respondent suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, as envisaged in section 14 (4) (a) , the Chairperson must-

- (a) refer the complaint to the Committee in order to consider whether it should recommend to the Commission that the complaint should be investigated and reported on by a Tribunal; and
- (b) in writing, inform the respondent of the complaint.

⁷ Section 16(2) of the Commission Act provides: If a complaint is referred to the Committee in terms of subsection (1) or section 15 (1) (b) or section 17 (4) (c) or 17 (5) (c) (iii), the Chairperson must determine a time and a place for the Committee to meet in order to consider a recommendation envisaged in subsection (1) (a) , and must inform the complainant and the respondent in writing that he or she may-

- (a) submit a written representation for consideration by the Committee at that meeting; and
- (b) with the leave of the Chairperson, address the Committee at that meeting.

⁸ Section 16(4) of the Commission Act provides: (4) At the meeting referred to in subsection (2), the Committee must consider whether the complaint, if established, will prima facie indicate incapacity, gross incompetence or gross misconduct by the respondent, whereupon the Committee may-

- (a) refer the complaint to the Chairperson for an inquiry referred to in section 17 (2); or
- (b) recommend to the Commission that the complaint should be investigated by a Tribunal.

them with reasons for such decision. If upon perusal of the recommendation, the Commission is convinced that there are reasonable grounds to suspect that a Judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, then the Commission must request the Chief Justice to appoint a Tribunal.⁹

[13] If the Chief Justice accede to the request, the Commission must record in writing the allegations, including any relevant information, to be investigated by the Tribunal.¹⁰ However, the recorded allegations to be investigated should be those which were recommended by the Committee. These should be the allegations which the Committee had found would likely constitute prima facie proof of incapacity, gross incompetence or gross misconduct.

[14] But the Commission's power to request a Tribunal is not limited to circumstances where there is a positive recommendation by the Committee. The exercise of this power is triggered whenever in the Commission's view, there are reasonable grounds to suspect incapacity, gross incompetence or gross misconduct. The Commission may hold this view even where the Committee had decided that the complaint is not impeachable and had recommended an inquiry in terms of section 17 of the

⁹ Section 19(1) of the Commission Act provides: (1) Whenever it appears to the Commission-
(a) on account of a recommendation by the Committee in terms of section 16 (4) (b) or 18 (4) (a) (iii),
(b) (iii) or (c) (iii); or
(b) on any other grounds, that there are reasonable grounds to suspect that a judge-
(i) is suffering from an incapacity;
(ii) is grossly incompetent; or
(iii) is guilty of gross misconduct,

as contemplated in section 177 (1) (a) of the Constitution, the Commission must request the Chief Justice to appoint a Tribunal in terms of section 21.

¹⁰ Section 19(2) of the Commission Act provides: The Commission must in writing state the allegations, including any other relevant information, in respect of which the Tribunal must investigate and report.

Commission Act. The Commission's suspicion may be based on any information at its disposal from whatever source. What is crucial is that the relevant information must give rise to a reasonable suspicion that a particular Judge suffers from incapacity, gross incompetence or is guilty of gross misconduct.

[15] But where the Commission's request for a Tribunal is not based on a recommendation, the Commission is obliged to give notice and also invite the respondent Judge and the complainant to make representations on the contemplated request. The notice and the invitation must be issued before the actual request to the Chief Justice is made. This is a peremptory requirement prescribed by section 19(3) of the Commission Act.¹¹ Put differently, the notice and invitation are conditions for the exercise of the power to make a request which is not based on a recommendation.

[16] Under the Commission Act whenever the Commission requests that a Tribunal be established, it must simultaneously in writing inform the President about the request and also advise him on whether it is desirable to suspend the respondent Judge and outline the conditions, if any, for such suspension.

[17] The Chief Justice must establish a Tribunal and appoint its members 'whenever requested to do so by the Commission'.¹² Each Tribunal

¹¹ Section 19(3) of the Commission Act provides: The Commission must, unless it is acting on a recommendation referred to in section 16 (4) (c) or 18 (4) (a) (iii), (b) (iii) or (c) (iii), before it requests the appointment of a Tribunal, inform the respondent, and, if applicable, the complainant, that it is considering to make that request and invite the respondent, and, if applicable, the complainant, to comment in writing on the fact that the Commission is considering to so request.

¹² Section 21(1) of the Commission Act provides: The Chief Justice must appoint a Judicial Conduct Tribunal, whenever requested to do so by the Commission.

comprises three members, two of whom must be Judges and the third member must be a person who is not a judicial officer. One of the appointed Judges must be designated as the Tribunal President and one of the members of the Tribunal must be a woman.

[18] The purpose of a Tribunal is defined by section 26(1) of the Commission Act which provides:

'26. Objects and nature of Tribunal

(1) The objects of a Tribunal are –

- a) to inquire into the allegations of incapacity, gross incompetence or gross misconduct against a judge, as contemplated in section 177 of the Constitution, by –
 - (i) collecting evidence;
 - (ii) conducting a formal hearing;
 - (iii) making findings of fact; and
 - (iv) making a determination on the merits of the allegations; and
- (c) to submit a report containing its findings to the Judicial Service Commission.'

[19] This section mandates the Tribunal to investigate allegations of incapacity, gross incompetence and gross misconduct, envisaged in section 177 of the Constitution. It complements the Constitution by identifying the body charged with the responsibility of investigating those allegations. It will be recalled that section 177 tells us about the role played by the Commission which is the fact finding exercise. The Tribunal is authorised not only to investigate but also to collect evidence. It carries out these functions through the Evidence Leader, an official appointed by the Tribunal.

[20] The duties of the Evidence Leader in relation to the Tribunal includes investigating the relevant allegations, collecting material evidence and presenting such evidence to the Tribunal at a formal hearing. This means that once the investigation is complete, the Tribunal must hold a formal hearing where evidence is presented to it by both the Evidence Leader and the respondent Judge. The latter is entitled to legal representation at such hearing.

[21] At the conclusion of the hearing the Tribunal must make factual findings in respect of the investigated allegations. These may include credibility findings in relation to witnesses who gave oral testimony at the hearing. The Tribunal is also duty bound to determine the merits of the relevant allegations. The findings made and the legal conclusions reached by the Tribunal must be contained in a report to be submitted by the Tribunal to the Commission.

[22] It is this report, together with the record of the hearing, that forms the basis of the findings the Commission is required to make under section 177 of the Constitution. Having received the report, the Commission must invite the complainant and the respondent Judge to submit written representations to it before the report is considered.¹³ At a meeting specially convened for that purpose, the Commission must consider the report and any

¹³ Section 20(1) of the Commission Act provides:) The Commission must consider the report of a Tribunal at a meeting [d]etermined by the Chairperson, and the Commission must inform the respondent and, if applicable, the complainant, in writing-

(a) of the time and place of the meeting; and
(b) that he or she may submit written representations within a specified period for consideration by the Commission.

representations made to determine whether the respondent Judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct.¹⁴

[23] If the Commission finds that any of the grounds for removal of a Judge from office was established, it must submit its findings and reasons supporting them to the Speaker of the Assembly. These must be accompanied by the Tribunal's report and the record of its proceedings.¹⁵

[24] However, if the Commission finds that although the respondent Judge is incompetent, he or she is not grossly incompetent, it may direct that the Judge in question should attend a specific training or a counselling course or be subjected to a corrective measure deemed appropriate by the Commission. But if the Commission finds that the misconduct the respondent Judge is guilty of does not amount to gross misconduct, it may 'impose any one or a combination of the remedial steps' referred to in section 17 (8) of the Commission Act.¹⁶ The Commission is obliged to notify the respondent Judge of its decision and also furnish him or her with

¹⁴ Section 20(3) of the Commission Act provides: After consideration of a report and any applicable representations in terms of subsection (2), the Commission must make a finding as to whether the respondent-

(a) is suffering from an incapacity;
(b) is grossly incompetent; or
(c) is guilty of gross misconduct.

¹⁵ Section 20(4) of the Commission Act provides: If the Commission finds that the respondent is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct, the Commission must submit that finding, together with the reasons therefore and a copy of the report, including any relevant material, of the Tribunal, to the Speaker of the National Assembly.

¹⁶ Section 20(5) of the Commission Act provides: If the Commission, after consideration of a report and any applicable representations in terms of subsection (2) finds that the respondent-

(a) is not grossly incompetent, but that there is sufficient cause for the respondent to attend a specific training or counselling course or be subjected to any other appropriate corrective measure, the Commission may make a finding that the respondent must attend such a course or be subjected to such measure; or
(b) is guilty of a degree of misconduct not amounting to gross misconduct, the Commission may, subject to section 17 (9), impose any one or a combination of the remedial steps referred to in section 17 (8)

reasons for the decision.¹⁷ What is set out above is the framework within which the current complaint must be evaluated. It is now convenient to outline the relevant facts.

Factual background

[25] The facts are largely common cause. The respondent is a 67 years old female Judge. She was appointed to the Gauteng Division of the High Court in 2009. She is stationed in Pretoria. At the relevant period she was one of the senior Judges in that Division.

[26] During the period of 2017 – 2020, the respondent accumulated a long list of reserved judgments. Various firms of attorneys addressed queries to her office about the reserved judgments and enquired as to when they would be delivered. Most of the queries were not answered. Some of those matters were escalated to the office of the Deputy Judge-President, but outstanding judgments were still not delivered.

[27] Two of the matters in which judgments were delivered after 18 months involved the narrow issue of costs. In case number 3075/2015, *Gigula v Road Accident Fund*, the issues presented to the respondent for determination were the postponement of the case and whether the party who occasioned the postponement should pay costs on a punitive scale. The respondent took 19 months to deliver judgment in this matter. Yet, in case number 72516/2012, *Shalla v Road Accident Fund*, the only issue that the respondent was asked to determine was whether the costs order to be

¹⁷ Section 20(6) of the Commission Act provides: The Commission must in writing inform the respondent in respect of whom a finding referred to in subsection (4) or (5) is made, and, if applicable, the complainant, of that finding and the reasons therefore.

issued was to include costs of two advocates. This matter was heard on 27 August 2018.

[28] It took the respondent 19 months to deliver judgment. In that judgment only three paragraphs were devoted to the issue of costs. This judgment was delivered after numerous requests for a judgment by the parties' legal representatives, which were not answered. On 5 September 2019, a year after the matter was heard, a letter was delivered by hand to the office of the Judge-President. The plaintiff's attorneys sought the Judge-President's intervention in the matter.

[29] In October 2020, Judge-President Mlambo lodged a formal complaint with the Judicial Conduct Committee, against the respondent. The complainant lists four matters in which judgment was reserved in excess of 12 months, six cases in which judgment had been outstanding for more than six months and 10 matters in which judgment was delivered after a period of time. The periods ranged between seven and 27 months. This list includes the Shalla and Gigula matters mentioned above.

[30] In the complaint the Judge-President states:

'It appears to be an unfortunate norm for litigants to wait an extraordinary long time for the judgments in their matters before Judge NP Mngqibisa-Thusi.

It is my considered view that Judge NP Mngqibisa-Thusi has committed the conduct referred to in section 14(a) and/or (b) of the Judicial Service Commission Act 9 of 1994 (the Act), as amended.

I request that this affidavit be regarded as a formal complaint from myself as Head of Court and therefore request that the process envisaged in the Act be initiated against Judge NP Mngqibisa-Thusi based on what is set out herein.'

[31] It is apparent from the complaint that it is based on the grounds set out in section 14 (4) (a) and (b) of the Commission Act. It will be recalled that subsection (4)(a) lists the grounds of incapacity, gross incompetence and gross misconduct which are envisaged in section 177 of the Constitution. These are the grounds upon which a Judge may be removed from office. While subsection (4)(b) defines a misconduct of a lesser degree which constitutes a breach of the Code of Judicial Conduct that is compiled and approved in terms of section 12 of the Commission Act.¹⁸

[32] Since the complaint included allegations relating to incapacity, gross incompetence and gross misconduct, the Chairperson of the Judicial Conduct Committee referred it to that Committee for purposes of determining whether it should be recommended to the Commission that a Tribunal be established to investigate and report on the complaint. The respondent was afforded the opportunity to respond to the allegations.

[33] On 18 May 2021, the respondent made written representations to the Committee. As this sets out the explanation for her failure to deliver

¹⁸ Section 14(4) of the Commission Act provides:) The grounds upon which any complaint against a judge may be lodged, are any one or more of the following:

(a) Incapacity giving rise to a judge's inability to perform the functions of judicial office in accordance with prevailing standards, or gross incompetence, or gross misconduct, as envisaged in section 177 (1) (a) of the Constitution;

(b) Any wilful or grossly negligent breach of the Code of Judicial Conduct referred to in section 12, including any failure to comply with any regulation referred to in section 13 (5);

(c) Accepting, holding or performing any office of profit or receiving any fees, emoluments or remuneration or allowances in contravention of section 11;

(d) Any wilful or grossly negligent failure to comply with any remedial step, contemplated in section 17 (8), imposed in terms of this Act; and

(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.

judgments it should be quoted in detail. In her representations, the respondent states:

'While admitting and without diminishing the seriousness of the charge levelled against me, I wish to set out an explanation why things have turned out as alleged.

These are the reasons:

For a couple of years, I have been suffering from anxiety and depression due to, amongst others, the issue alluded to in my submission to this Committee, dated 29 January 2020. In that submission I did set out the challenges I am facing with regard to my son who is a drug addict. Inasmuch as it appeared at the beginning of last year that there was some improvement after he re-committed to his counselling sessions after his release from rehabilitation center, during the second half of last year he relapsed. Things got worse than before as he started being involved in criminality in a local area in Soweto.

As my emotional and mental state was as a result deteriorating, I did consult with a psychiatrist as I was negatively affected by my son's worsening situation.

At a stage where I thought I was making progress, an age old problem which I managed to avoid, resurfaced, namely, which requires me to undergo some form of African initiation. In order to try to ameliorate the effects of this attachment, I previously left the Methodist Church and became a member of an African Apostolic church. Over the years this challenge was to some extent kept at bay. However, during the past four years this problem creeping back incrementally. In spite of trying to ignore it as I am not certain of its origin or authenticity. My parents have not been of much help in this regard as they both disavowed any knowledge of its history within their families. It was only in November last year when I had an 'episode' in court while presiding over a criminal matter in Johannesburg that I resolved to explore and respond to this peculiar calling after consulting widely amongst family and some colleagues.

During 2019 and 2020 I have engaged with the Acting Deputy Judge-Presidents of Pretoria and Johannesburg about what I was going through and am grateful in their endeavours to try to assist me where they could.

The progress I was making in trying to work through my judgments backlog was interrupted when towards the end of December last year, I fell and fractured my wrist and elbow. I was not able to use my dominant right hand for two months.

I have decided to resume counselling while undergoing a parallel process of this 'calling'. Due to my work commitments I will only be able to complete the process during winter recess.'

[34] The Committee met on 12 June 2021 to consider the complaint against the respondent. She was invited to that meeting for her to clarify the challenge she faced in relation to the 'African Spiritual Calling'. In particular, the Committee wanted to find out if the Judge-President of the Division was informed about the African Spirituality challenge that affected performance of her judicial functions. She told the Committee that she did not inform the Judge-President about the problem because she did not feel comfortable to discuss the issue with anyone except those who were close to her. However, she pointed out that she talked to the Deputy Judges-President in Pretoria and Johannesburg about the issue. She also informed the Committee that one of her colleagues, Judge Nicolls, had suggested and arranged for her to see Mr Aubrey Matshiqi, the expert on African Spirituality.

[35] She was also asked if she needed help with regard to outstanding judgments and one member of the Committee even offered to assist her. She pointed out that two of her colleagues had already assisted her with proof-reading draft judgments and that as at that time only two of her reserved judgments were outstanding. She had started writing one of them. She also indicated to the Committee that her condition pertaining to the African Spirituality had improved since March 2021.

[36] Later the Committee rendered a written decision on whether a Tribunal should be established. The Committee comprised four members who were split right in the middle on this issue. Two members favoured a Tribunal and recommended that a Tribunal be formed to investigate the complaint. They said:

'In this case there does not appear to be any contestation about the veracity of the allegations on which the complaint is based. Judge Mngqibisa-Thusi proffered an explanation for this turn of events. It does appear that the complaint, if established will indicate incapacity or gross incompetence. The delicate function of investigating the cause fully and any ameliorating aspects can only be properly investigated by a Tribunal, given the seriousness of the matter. Consequently, in terms of s 16(4)(b), I hereby recommend to the Commission that the complaint should be investigated by the Tribunal'

[37] While the other two members recommend that the complaint be referred to a section 17 inquiry that applies to non-impeachable complaints. These members concluded:

'Having regard to the full circumstances, I'm regrettably unable to support a decision that the complaints the two respondent Judges, if established, will prima facie indicate incapacity, gross incompetence or gross misconduct and therefore impeachable.

What is indicated prima facie, is the conditions of Judges that affect the pace in which they are expected to deliver judgments. There is no indication that their working environment accommodates their peculiar conditions and is therefore conducive for their productivity. There is a need for judicial leadership at all levels to understand fully the circumstances that affect the productivity and speed with which the respondent Judges are expected to deliver judgments. That understanding is lacking on the present record of the complaints. It is thus, in my respectful view, premature to suggest that one is dealing with potentially and prima facie with any of the impeachable grounds. An open-minded investigation is therefore more appropriate. Not to do so would mean that

the mental health of Judges is not recognized and factored into their workplace environment whilst society as a whole recognises mental health as a key factor in the workplace.’

[38] The tie in the vote for the support of the divergent recommendations was broken by the Chairperson’s casting vote. This meant that the recommendation in favour of a Tribunal became the majority decision.¹⁹ However, it is important to note that whilst the minority found that the complaint, if established, will not prima facie indicate incapacity, gross incompetence and gross misconduct envisaged in section 177 of the Constitution, the majority found otherwise.

[39] The Committee submitted its decision to the Commission which met on 26 January 2023 to consider the decision in question. Following an extensive discussion, the Commission accepted and endorsed that decision. As a result, the Commission acted in terms of section 19 of the Commission Act and requested the Chief Justice to appoint a Tribunal to investigate and report on the complaint. However, it appears from the papers that the Commission in its request did not confine itself to the grounds mentioned in the Committees recommendation. It added gross misconduct to that list.

[40] As obliged by section 21 of the Commission Act, the Chief Justice appointed this Tribunal and based on the Commission’s request, he formulated its terms of reference. These terms stated that the Tribunal was to investigate and report on the complaint lodged by Judge-President Mlambo against the respondent. In particular it was stated:

¹⁹ Section 9(2) of the Commission Act provides: (2) (a) The Committee may determine the procedure to be followed at its meetings, but decisions of the Committee must be supported by a majority of its members.

‘In respect of Judge Mnqgibisa-Thusi the allegations that the Tribunal is required to investigate and report on are in substance that by reason of her failure to deliver or hand down judgments within the prescribed period or within a reasonable time in the cases referred to below, Judge Mnqgibisa-Thusi is guilty of gross misconduct, gross incompetence or incapacity as contemplated in section 177 of the Constitution.’

- [41] Twenty-seven (27) cases were listed as matters in which the respondent failed to deliver judgments ‘within the prescribed period or within a reasonable time’. In five of those matters, judgments were allegedly delivered within periods that ranged between 12 and 27 months. In 14 cases the respondent allegedly took between 10 and 19 months to hand down judgments. And in seven matters, judgments were allegedly delivered after 7 to 9 months.
- [42] Notably, it is the same conduct on the part of the respondent which is said to support the facts that she suffers from incapacity, she is grossly incompetent and that she is guilty of gross misconduct. That conduct is her alleged failure to deliver judgments within the prescribed time or within a reasonable time.
- [43] Having been established, the Tribunal appointed Adv Adrian Mopp, a senior Deputy-Director of Public Prosecutions, as the Evidence Leader. He was charged with the responsibility of investigating the allegations set out above and presenting evidence relevant to those allegations at the hearing before the Tribunal, as well as submitting argument. Upon the completion of the investigation by the Evidence Leader, the Tribunal held a hearing during the period of 29 – 31 January 2024.

Evidence by the Evidence Leader

[44] At the hearing, the Evidence Leader presented the oral testimony of a single witness, the Judge-President. Judge-President Mlambo informed the Tribunal that the Gauteng Division is the busiest Division in this country. As a result, Judges there individually carry the workload that is higher than in other Divisions. When the Norms and Standards for the Judiciary were adopted, he cautioned the other Heads of Court that it would be difficult for Judges in his Division to meet targets set, due to the heavy workload.

[45] He told the Tribunal that the enforcement of the rule that determines when reserved judgments should be delivered is informed by the circumstances and the workload on Judges in the Division. He does not take action as soon as a Judge fails to deliver a judgment within the period prescribed in the Code of Judicial Conduct. He allows Judges more time to produce and deliver reserved judgments. He said he only asks for an explanation if a reserved judgment was outstanding for more than six months. If the judgment is not delivered, he sends a reminder to the Judge concerned upon the expiry of 9 months. If the judgment continues to be outstanding beyond the period of 12 months, then a complaint is lodged with the Judicial Conduct Committee unless the Judge in question has disclosed to the Judge-President the explanation for the delay and has made arrangements relating to its delivery.

[46] With regard to the respondent, the Judge-President testified that he received complaints from litigants which showed correspondence that was addressed to the respondent that enquired about judgments. Acting upon those complaints, he would send emails to the respondent asking for an indication as to when the judgments would be delivered. But most of his emails went unanswered. On 4 February 2021 the Judge-President sent an email to the respondent. He listed ten reserved judgments and asked the

respondent to indicate when the judgments would be delivered. The respondent replied immediately and informed him that those judgments 'are nearing completion' and that she had thought she would finalise them during recess but she fractured her arm. She concluded by promising to deliver them within two weeks.

[47] However, those judgments were not handed down and the Judge-President was not given any explanation on why the judgments were not delivered within two weeks. Instead, delivery was effected over a period of months, commencing on 28 February up to August 2021.

[48] It is common cause that the Judge-President was not informed about the cause or causes for the respondent's delays in handing down reserved judgments. Even when the Judge-President had indicated that he had received complaints from litigants, the respondent did not take him into her confidence. Eventually, the Judge-President was driven to lay a complaint against the respondent. It was only when the Judge-President read the respondent's reply to that complaint that he learnt for the very first time about the health challenges she had faced.

[49] The Judge-President also testified that he has 'an open door policy' which entails an environment where Judges are encouraged to approach him about any challenge relating to their judicial functions. Meetings are held in every term of the court where Judges are free to raise any matter they wish to discuss. In addition, Judges are allowed to approach him individually whenever they choose. These include by telephone, email or even walking into his office. In the circumstances, it came as a surprise to him that he was not informed about the challenges which the respondent had to deal with.

[50] He was visibly distressed by the process of laying a complaint and having to testify against one of the Judges in his Division and participate in a process which could result in the Judge being removed from office. He even said if the respondent had shared with him the challenges she was facing he could not have laid the complaint against her. If she had responded to his emails and asked to be afforded time to prepare and deliver the reserved judgments, a special arrangement could have been made to enable her to do so. This was done whenever the Judge-President received a request from a Judge with outstanding reserved judgments and it was a well-known practice in the Division.

[51] In addition to the Judge-President's oral evidence, the Evidence Leader presented to the Tribunal four affidavits by legal practitioners who were involved in matters in respect of which judgments were reserved by the respondent. The common feature among them is the fact that numerous enquiries were addressed to the respondent's office, asking about when judgments would be delivered. Many of the queries elicited no reply from the respondent. These affidavits paint a troubling picture of practitioners and litigants who were frustrated by not knowing when judgments in their cases would be delivered so that they could carry on with their lives. The failure to respond to legitimate correspondence compounded an already worrying situation.

Evidence by the Respondent

[52] The Evidence Leader having completed his presentation of evidence, it was the turn of the respondent to lead evidence. Her legal team presented oral testimony of two witnesses, the respondent and Judge Raulinga. In

addition, two expert reports were placed before the Tribunal, one from a clinical psychologist and the other from a spiritual healer.

[53] In her oral testimony, the respondent admitted that she failed to deliver the relevant judgments in compliance with the prescribed periods and within a reasonable time. But she sought to justify her conduct by contending that from 2015 up to 2020 she faced a number of health challenges with a debilitating effect. She said she suffered from severe headaches, insomnia, disorientation and fatigue. In addition to these symptoms, she also had strange visions and dreams.

[54] Over time she realised that she was suffering from depression which she attributed to her son's addiction to drugs and his criminal behaviour. She tried to help him beat this addiction by placing him in a rehabilitation centre. But after a discharge from such a centre, her son would resume using drugs and would steal household items to fund his addiction. He would also invite members of a criminal gang to the respondent's home and thereby compromise the family's security.

[55] The visions and dreams were attributed to an ancestral calling she has had since childhood and which she had resisted owing to her strong Christian beliefs. The symptoms relating to the spiritual calling intensified. She started feeling tremors internally in her body and she would belch persistently and also visualise flashes of shadows going past her. Sometimes she would experience these symptoms whilst in court, presiding over cases. On one occasion while having similar symptoms she made a strange sound that caught everybody by surprise, including herself. She felt so embarrassed that she adjourned the proceedings to recollect herself.

- [56] After that episode in court, she managed the condition by adjourning the proceedings whenever she felt tremors inside and she would go back to the privacy of her office and take snuff to calm herself down. She would drink water to stop belching. After a while she would go back to court and resume proceedings.
- [57] The symptoms also had a devastating effect in her social life. She avoided being in the company of other people, fearing that these symptoms would manifest themselves and she would have to explain her condition to those people. She feared that once her condition was known, she would be stigmatised for it.
- [58] At work she did not tell her colleagues, except those who were close to her. Among those in the leadership, she informed Acting Deputy Judges-President, both in Pretoria and Johannesburg. She did not tell the Judge-President because she did not feel comfortable to talk to him about her spiritual condition.
- [59] Commendably she was able to perform her judicial duties effectively despite her condition. The exception was her accumulation of reserved judgments which kept piling up. Even with regard to reserved judgments she managed to produce and deliver sound judgments during the relevant period. She managed to do her judicial functions because her depression and the spiritual condition would come and go. There were intervals when she would be fine.
- [60] At the beginning of 2023, she was advised by her family doctor to see a clinical psychologist. He referred her to Dr Haroon Essa who

comprehensively assessed her over a period of time and diagnosed that she suffered from a Post-Traumatic Stress Disorder and depression. For the spirituality challenge, a colleague of hers suggested that she should see a spiritual healer by the name of Aubrey Mongameli Matshiqi also known as Gogo Matshiqi. Both Dr Essa and Gogo Matshiqi prepared expert reports which were presented to the Tribunal.

[61] In his report Dr Essa concludes that the respondents' post-traumatic stress and depression were compounded by the fact that she was facing an investigation into her fitness to hold office. This investigation rendered her more psychologically vulnerable. Dr Essa pointed out that the respondent needs a comprehensive psychotherapeutic intervention. He recommended:

'Considering the symptoms discussed in the report, it is recommended that the patient be considered for a reinstatement at her position as a Judge. Judge Mnqgibisa-Thusi requires intensive neuropsychological rehabilitation. I estimate that she would require psychotherapy on an ongoing basis every week for the first year and then every two weeks depending on the progress she makes.'

[62] In his report Gogo Matshiqi defines the African Spirituality in these terms:

'African spirituality centres around two central beliefs, namely the belief in the existence of God and the ancestors and the fact that the ancestors were created by God. Africans worship God and venerate the ancestors. Therefore, the idea that we worship the ancestors is erroneous. We also believe that we all have one life, and that life is eternal. We further believe that there has been a time when one's spirit will not exist. One of the most important things that constitute a key pillar of African spirituality is the belief that, in addition to the fact our spiritual journey is eternal, our spiritual is about reaching for our higher and better selves and the fact that this is eternal. In short, during our eternal lives there is never a time when we are not in need of healing. The time our spirits spend in our human bodies in this life, we will, from time to time be in

of healing. Even after the death of our natural lives (i.e. our body) the need for healing continues. It is the need for healing which necessitates the existence of healers as part of the human condition because it is human beings, and by extension the human conditions that are in need of healing and healer.

Were ancestors to have bodies, they remain part of the human condition and would do the healing work themselves. After the death of their natural lives they become spirit and they no longer have bodies through which they would be able to do this healing work as part of the human condition. It is for this reason they must work through our bodies, and it is therefore for this reason that calling the living to be healers becomes necessary.

When those of us who are called upon to be healers resist the calling, or reject the calling, or do not understand that they are being called upon to be healers, the ancestors, as we have indicated earlier herein, will, by dramatic means alert us and those around us to our calling. When, as a result, we go through difficult spiritual challenges, it is not because the ancestors wish to harm us. For them, the imperative is to work in the interest of humanity by putting amongst us those they have chosen as healers to do their work on their behalf given the fact that they no longer have bodies to do it themselves. Paradoxically, it is out of love for humanity that they put those of us who are called upon to be healers through the spiritual challenges. The challenges are meant to distract us from other engagements or even disable us from performing them so that we may seek the answer from them as to why we are suffering those challenges.'

[63] Gogo Matshiqi also tells us that having accepted to help and guide the respondent spiritually, he battled to connect with the respondent's ancestors. Gogo Matshiqi's own ancestors guided him to consult a friend of his and fellow spiritual healer, Amanda Mawela, who is based and practises in the United States of America. Both of them had consultations with the respondent and individually consulted their own ancestors and those of the respondent, in order determine the cause for what had spiritually afflicted the respondent. It was revealed to them individually

that a conflict of a spiritual nature was central to the debilitating spiritual episodes experienced by the respondent.

- [64] That conflict was caused by two opposing groups of the respondent's ancestors. Those who had embraced Christianity in their life time wanted her to be a faith healer but the other group who did not convert to Christianity wanted her to be a sangoma. However, as she did not accede to any of those wishes, her ancestors sought to communicate their demands by disrupting her life, including professional life, in order to have her pay attention to their demands. Consequently, Gogo Matshiqi diagnosed:

'It is our conclusion that in an attempt to highlight the fact that Judge Mngqibisa-Thusi had a calling from the age of 9, and later in her life, her ancestors pronounced themselves through spiritual communication that made her sick mentally by being depressed, feeling hopeless and alienated. She was made to suffer physically through headaches. She became spiritually bereft in that she suffered self-doubt and felt that ushiywe amadlozi (amadlozi have left her). The ancestors also communicated in a manner that had a negative impact in material respects; in the ability to perform judicial functions; and, on her son who, as a result, struggles with drug addiction.'

- [65] Since the respondent has recently accepted the calling of a faith healer, undergone some mentorship towards that goal and has started practising as a faith healer, the affliction from which she suffered diminished. As a result, Gogo Matshiqi in his report concluded:

'Judge Mngqibisa-Thusi has a bright continued judicial career ahead of her. We have been informed that she had finalised most, if not all the judgments that are a subject of complaint by the date of complaint in November 2023. This is attributable to the fact that at the time of writing the judgments she was already practising in the faith paradigm under the auspices of her church.'

[66] Lastly, the oral evidence of Judge Joseph Raulinga was largely of a general nature, relating to conditions and workloads under which Judges in the Division operate. To the extent that his testimony was relevant to the present issues, it may be summarised as follows: If a particular Judge fails to deliver reserved judgments within the prescribed period and litigants start making enquires, the matter is brought to the attention of the Deputy Judge-President first. The latter would engage with the Judge concerned and find out when the judgment would be delivered. If time passes and the judgments are still not delivered, then the Judge-President may intervene and speak to the Judge in question and inform him or her that if the judgments are not delivered within a certain period, the matter may have to be reported to the Judicial Service Commission.

[67] He also said that in his capacity as the Acting Deputy Judge-President he once had a discussion with the respondent about her spiritual challenges and their impact on her ability to attend to reserved judgments. Judge Raulinga did not report to the Judge-President about their discussion because it was an informal discussion he had with her and out of it he did not get the view that the respondent was not coping.

[68] Judge Raulinga testified further that if a Judge has difficulties that adversely affect his or her performance of judicial functions, he or she is duty bound to inform the Judge-President so that they can get help. He said the Judge-President had helped many Judges who had personal problems that impacted on performance of their functions. This concludes evidence that is relevant to the issues to which we now turn.

[69] However, before addressing the issues we wish to acknowledge the positive contribution made by the Evidence Leader and the Legal Team

which represented the respondent. Their thorough investigation of the complaint, their presentation of evidence at the hearing and their helpful written submissions have made an otherwise difficult task, less difficult. We thank them for their valuable assistance.

Issues

[70] The issues we are called upon to investigate and determine are defined in the Commission's terms of reference which reads:

- '1. The Tribunal is required to conduct an enquiry into whether or not Judge Mngqibisa-Thusi is guilty of gross misconduct, gross incompetence and/or incapacity under section 177 of the Constitution
2. The allegations that underpin the above charge are as set out in the letter by Judge-President Mlambo dated 26 May 2021 inclusive of judgments summarised in Part A and Part B.
3. You are required to take into consideration the representations made by Judge Mngqibisa-Thusi which are enclosed.
4. The Judicial Service Commission following a recommendation made by the Committee, decided in terms of section 19(1) of the JSC Act, to request the Chief Justice to establish a Tribunal to investigate and report on Judge-President Mlambo's complaint.'

[71] Evidently the issues are delineated in the terms of reference as gross misconduct, gross incompetence and incapacity as envisaged in section 177 of the Constitution. All three issues arise from a single fact which is the respondent's failure to deliver 27 judgments within the prescribed period. It is also apparent from the terms of reference that in requesting the Chief Justice to appoint this Tribunal, the Commission acted in terms of section 19(1) of the Commission Act.

[72] However, in the written submissions the respondent disputed the inclusion of gross misconduct by the Commission in the terms of reference. She contended that the recommendation of the Committee mentioned that, if established, the complaint will indicate incapacity and gross incompetence. There was no reference to gross misconduct. Since the Commission acted in terms of that recommendation in requesting the establishment of the Tribunal, the argument continued, the complaint to be investigated by this Tribunal was limited to the grounds of incapacity and gross incompetence.

[73] While it is true that the relevant recommendation refers to incapacity and gross incompetence only, the reason for excluding gross misconduct is not clear from the recommendation. It is apparent from the ruling by the minority that the Committee actually considered whether, if established, the complaint will show all grounds for removal, including gross misconduct. On this issue the minority stated:

‘Having regard to the full circumstances, I am regrettably unable to support a decision that the complaints against the two respondent Judges, if established, will prima facie indicate incapacity, gross incompetence or gross misconduct and therefore impeachable.’

[74] This statement suggests that the majority had reached the decision that, if established, the complaints will indicate ‘incapacity, gross incompetence or gross misconduct’, hence the minority was expressing the divergent view it held on the issue. The fact that gross misconduct was omitted from the recommendation appears to have been an oversight. If the majority had reached the opinion that the complaint will not prove gross misconduct it is more likely than not that this would have been expressly stated and the minority would not have referred to a decision that covered all grounds for

removal from office. Therefore, there is no basis for concluding that gross misconduct should have been omitted from the terms of reference.

[75] This brings us to the specific issues which we intend to consider individually. We will begin by defining each ground envisaged in section 177 of the Constitution and proceed to measure against each ground, the conduct relied on in support of the proposition that the respondent suffers from incapacity, is grossly incompetent and that she is guilty of gross misconduct.

Incapacity

[76] In the context of section 177, incapacity means a permanent inability that prevents a Judge from performing judicial functions. The Judge concerned must be afflicted by a permanent infirmity of mind or body which renders him or her incapable of performing judicial duties. The drafters of the Constitution could not have intended any incapacity to apply, including temporary incapacity. This is why. Judges, like every person, are susceptible to diseases and accidents. Consequently, every Judge at some point during their tenure of office do suffer from temporary incapacity that disables them from doing their judicial work. But when they recover from that incapacity, they resume to perform their functions. If temporary incapacity were to be a ground for removal from office, every Judge would be removed whenever they suffer temporary incapacity. This would lead to a complete collapse of the Judiciary as an arm of the state and would also create chaos in society.

[77] The facts here show that the respondent during the relevant period suffered from illness and spirituality challenges that had a debilitating effect on her

ability to perform one of her judicial functions, namely producing judgments. However, that inability did not affect other duties. The complaint against her was that by failing to deliver judgments within the prescribed period, she suffers incapacity envisaged in section 177 of the Constitution.

[78] But the facts indicate that her disability was of a temporary nature. The suffering from illness and the other challenges occurred at intervals. There were times when she was able to perform her judicial functions, including writing and delivering judgments. Her major difficulty was that she could not have all reserved judgments delivered within the prescribed time. As a result, some of the them remained outstanding for long periods of time.

[79] However, the facts also show that her mental health has improved since undergoing therapy and embracing the African spirituality. She has managed to deliver all judgments which were the subject-matter of the complaint. In the circumstances we conclude that the respondent does not suffer from incapacity contemplated in the section 177 of the Constitution.

Gross incompetence

[80] A Judge may be removed from office on account of gross incompetence and not on the basis of ordinary incompetence which may be remedied by requiring that the Judge concerned should undergo a specific training. Section 177 implicitly acknowledges the reality that Judges may generally not have forensic skills and expertise in all branches of the law, hence the standard for removal from office is raised to the high level of gross incompetence.

[81] Properly construed, gross incompetence in the context of section 177 means a general inability on the part of a Judge to conduct properly judicial proceedings and determine disputes fairly and impartially, applying correct legal principles to the facts placed before him or her. This includes being unable to write and deliver proper judgments. These shortcomings must be of such severity as to destroy public confidence in the Judge's ability to perform judicial functions.

[82] This interpretation of gross incompetence accords with the need to strike a balance between judicial independence on the one hand and the removal from office, on the other. It is a balance that is maintained in other democratic jurisdictions similar to ours. For example, the United Kingdom follows a similar approach in these matters. In *Chief Justice of Gibraltar*²⁰, Lord Philips stated:

'While the highest standards are expected of a Judge, failure to meet those standards will not of itself be enough to justify removal of a Judge. So important is judicial independence that removal of a Judge can only be justified where the shortcomings of the Judge are so serious as to destroy confidence in the Judge's ability properly to perform the judicial functions.'

[83] A similar approach is also followed in Canada. The Canadian Supreme Court defined the standard for removal of a Judge from office in these terms:

'[B]efore making a recommendation that a Judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the

²⁰ Re Chief Justice of Gibraltar[2009]UKPCH3

confidence of individuals appearing before the Judge, the public in its justice system, would be undermined, rendering the Judge incapable of performing the duties of his office. of performing the duties of his office”²¹

[84] The test as set out in the foreign decisions referred to above was approved and applied by the Supreme Court of Appeal in *Freedom Under Law*.²² In that matter the Court was asked to determine whether the conduct in respect of which the affected Judge was found guilty, satisfied the standard of gross misconduct. The Supreme Court of Appeal reached the conclusion that the conduct of the Judge in question had eroded public confidence in the judiciary and rendered that Judge ‘incapable of performing the duties of his office’.

[85] As it was rightly conceded by the Evidence Leader, the present facts do not support a finding of incompetence. Accordingly, we conclude that it has not been established that the respondent is grossly incompetent as envisaged in section 177 of the Constitution.

Gross Misconduct

[86] In the context of section 177 not all acts of misconduct amounts to a ground for removal from office. The bar is higher and this ground as well has two essential elements, namely misconduct and gross. The word gross qualifies the misconduct committed by the Judge who is the subject of the investigation such as the present. Therefore, we need first to determine if the conduct the respondent is accused of constitutes a misconduct. If it does

²¹ *Therrien v Canada (Ministry of Justice) and Another* [2001] 2SCR 3

²² *Freedom Under Law v Judicial Service Commission and Another* [2023] ALL SA 63 (SCA)

not, then that should be the end of the inquiry. However, if it does, we should proceed to consider whether that misconduct is gross.

[87] The exercise of determining whether the conduct complained of amounts to misconduct must of necessity begin with the consideration of the Commission Act. This is because the complaint we are dealing with was lodged in terms of that Act and up to the stage it was referred to this Tribunal, the complaint was processed in terms of that Act. This Tribunal too was established under the same legislation and was mandated to investigate and determine the complaint under that piece of legislation.

[88] Section 15(2) of the Commission Act marks the scope of what should be considered to be misconduct. However, this provision must be read with section 14 which prescribes that a complaint against a Judge must be based on the grounds listed on section 14(4). When read in this way, section 15(2) plainly tells us that any complaint that does not fall within the parameters of any of the grounds set out in section 14(4) must be summarily dismissed.

[89] Section 14(4) of the Commission Act provides:

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

- (a) Incapacity giving rise to a judge’s inability to perform the functions of judicial office in accordance with prevailing standards, or gross incompetence, gross misconduct, as envisaged in section 177 (1)(a) of the Constitution;
- (b) Any wilful or grossly negligent breach of the Code of Judicial Conduct referred to section 12, including any failure to comply with any regulation referred to in section 13(5);

- (c) Accepting, holding or performing any office of profit or receiving any fees, emoluments or remuneration or allowances in contravention of section 11;
- (d) Any wilful or grossly negligent failure to comply with any remedial step, contemplated in section 17 (8), imposed in terms of this Act; and
- (e) Any other wilful or grossly negligent conduct, other than conduct contemplated in paragraphs (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.’

[90] This provision echoes section 177 of the Constitution. But the difficulty is that the Constitution does not define misconduct and if we want to determine whether the relevant conduct amounts to misconduct, section 177 is not of much help. It does not address the question whether a failure to deliver a judgment constitutes misconduct. Ordinarily reserving judgments by a Judge does not constitute misconduct. Judgments are frequently reserved in order to afford the presiding Judge time to reflect on the matter before taking a decision. At what stage does the act of reserving a judgment become misconduct? This is the question we must answer.

[91] The Code of Judicial Conduct regulates the reservation of judgments. Article 10(2) of the Code stipulates that a Judge must deliver all reserved judgments before the end of the term in which the hearing of a matter was completed. According to this article all reserved judgments picked up by a Judge during a particular term must be delivered before that term ends. However, this general injunction admits of two exceptions. First, if the hearing of the matter was within two weeks from the end of the term, the Judge is not obliged to deliver judgment before the end of the term. Second, if the matter is complex or with the consent of the head of the court and for some cogent and sound reason, it is not possible to deliver the judgment,

the Judge concerned may not comply with the obligation. However, in any of these situations, the judgment must be delivered before the next term ends.

[92] Therefore, a failure to deliver a judgment within the term in which the hearing of the matter was completed, amounts to a breach of the Code unless the matter falls under one of the exceptions mentioned above. No evidence was led on the issue whether the 27 reserved judgments fell under the general obligation or the exceptions in Article 10(2) of the Code. But even if the matter is approached on the footing that all 27 of them fell under the exceptions, the long periods for which the judgments remained undelivered show that there was a breach of the Code. Those periods extended beyond two consecutive terms within which these judgments should have been delivered.

[93] However, it does not follow as a matter of course that this breach by the respondent constitutes misconduct. Under the Commission Act simple breaches of the Code are not misconduct. Not even a negligent breach amounts to misconduct. It is only a wilful or grossly negligent breach which gives rise to misconduct²³. Paragraph 10 of the Preamble to the Code states:

‘Section 12(5), read with section 14(4)(b) of the Act, specifically provides that the Code of Judicial Conduct shall serve as the prevailing standard of judicial conduct, which judges must adhere to and that any wilful or grossly negligent breach of the Code may amount to misconduct which will lead to disciplinary action in terms of section 14 of the Act.’

²³ This is what section 14(4)(b) of the Commission Act stipulates.

[94] The real issue is whether that breach was wilful or grossly negligent. There is no evidence on record which suggests that the violation was wilful. But there is evidence which points to negligence. In the first place the respondent knew or ought to have known that her failure to deliver her reserved judgments within the term following the one in which the hearings were completed, would constitute a breach of article 10(2) of the Code. However, in respect of 27 judgments which form the basis of the complaint, she took no reasonable steps to avoid that outcome, when she could and should have done so.

[95] The illness and the spirituality challenges she suffered did not prevent her from taking corrective steps because there were periods when she was free from that suffering and she could and did perform her functions properly. Her suffering lasted for limited periods. In these circumstances her failure to take reasonable steps to avoid the breach can only be negligent. For example, she could have approached the Judge-President and asked for time to write those Judgments. She failed to do this.

[96] The next question that needs to be considered is whether the negligence we are concerned with was gross because simple negligence does not lead to misconduct. Put differently, the issue is whether the respondent acted grossly negligent when she failed to deliver judgments over long periods of time. Her conduct in relation to the situation reveals a troubling picture.

[97] The respondent correctly conceded that when she realised that judgments remained undelivered over long periods, she had an obligation to ensure that those judgments were prepared and delivered. However, all that she did was to attempt to reduce the backlog by writing some of them while she continued to attend to other judicial functions and judgments kept

piling up as she picked up new ones along the way. It must have been clear to her that her strategy could not produce the result of delivering the long list of outstanding judgments.

[98] Numerous queries were sent to her office by attorneys who sought to know when they could expect delivery of the outstanding judgments. She did not change course despite knowing that she could be relieved of other duties so as to prepare and deliver outstanding judgments. It was well-known in the Division that the Judge-President allowed Judges time to write judgments if they asked for it. Indeed, the respondent in her representations to the Commission dated 17 February 2023 stated:

‘Despite the challenges I have experienced and which led to my being overwhelmed by the load of work within the Division, I continued to diligently perform my duties and hand down judgments in numerous other matters without requesting time off to enable me to write the outstanding judgments’.

[99] What makes matters worse is the fact that over the entire period during which the judgments remained outstanding, the respondent never even once went to the Judge-President to report her situation. She could not give a sound and cogent reason for this unacceptable conduct on her part. The explanation that she was uncomfortable to talk to the Judge-President about her spirituality challenge for fear of stigma is unsatisfactory. She could have told the Judge-President about her other challenges excluding the spirituality issue. Indeed, when pressed on this at the hearing she merely said she was not comfortable to speak to the Judge-President about personal matters but her failure to deliver judgments was not a personal matter.

[100] The respondent's behaviour was exacerbated by her failure to respond to correspondence from attorneys who enquired about judgments. She also failed to respond to the emails from the Judge-President. The explanation she gave to the effect that the emails she did not reply to were not brought to her attention by her secretary must be rejected as improbable. The overwhelming evidence shows that she did not bother to respond to those who made enquiries even where she had responded to the first query. For example, on 4 February 2021 the Judge-President sent an email to her, enquiring about 10 outstanding judgments. She immediately responded to it and informed the Judge-President that most of them were about to be completed and that they would be delivered within two weeks. When this did not happen, she did not go back to the Judge-President. First, to explain why judgments were not delivered within two weeks as previously promised. Second, to update him on when she would deliver them.

[101] All this illustrates unquestionably that the respondent was grossly negligent in her violation of the Code which required her to deliver Judgments within two terms from the date of completing a hearing. Consequently, her failure to deliver reserved judgments in the context of the present facts, constitutes misconduct envisaged in section 14(4) of the Commission Act.

[102] What remains for determination is whether her conduct amounts to gross misconduct, contemplated in section 177 of the Constitution. It is tempting to simply conclude that the present misconduct was gross because we have already found that the breach of the Code was grossly negligent. However, such a course would not be a consequence of a proper interpretation. The answer to the question raised lies in the interpretation of section 177 of the Constitution which cannot be construed through the lens of the Commission Act. The conclusion that the breach of the Code was grossly

negligent was based on the language of the Commission Act. It is a settled principle of our law that a statute may not be used to interpret the Constitution, just as a regulation cannot be employed to construe a statute.

[103] Moreover, the word gross is used in the Act in a sense that differs from how it is employed in the Constitution. In the Act gross qualifies negligence and not the breach itself. In other words, it describes the manner in which the breach occurred. Yet in section 177 of the Constitution, gross defines the misconduct itself and not how it was committed. And what justifies removal of a Judge from office is gross misconduct.

[104] This illustration explains the point. If a Judge drives his official vehicle in a grossly negligent manner and crashes it against another vehicle on the road, causing a minor damage, he would have violated the traffic laws. And this would amount to a breach of article 6 of the Code. This article declares that a Judge must at all times comply with the laws of the land.²⁴ Assuming that a complaint is lodged against the Judge in question and it is found that he has breached the Code in a grossly negligent manner, it can hardly be argued that he is guilty of gross misconduct as envisaged in section 177 of the Constitution and that he should be removed from office. This is because the traffic offence committed by the Judge does not rise to the level of gross misconduct contemplated in section 177.

[105] In the context of section 177, what does gross misconduct mean? It means conduct which erodes public confidence in the ability of the Judge concerned to continue to perform judicial functions impartially and with

²⁴ Article 6 of the Code provides "A judge must at all times, also in relation to extra-judicial conduct, comply with the law of the land".

integrity. It is misconduct that is so serious as to destroy confidence in the ability of a Judge to properly perform his or her judicial duties.

- [106] The question whether conduct complained of in a particular case amounts to gross misconduct must be determined with reference to the entire evidence. In *Freedom Under Law* we were reminded that the conduct of the affected Judge must be assessed 'against the conspectus of all the evidence'.²⁵
- [107] Without a reasonable explanation or excuse, the failure by a Judge to deliver reserved judgements over a long period of time would ordinarily constitute gross misconduct. This is because such failure erodes public confidence in the judiciary and leaves the public with no option but to resort to self-help. Moreover, non-delivery of judgments constitutes a breach of the primary duty of Judges. Significantly such conduct is also inconsistent with the Constitution in a number respects. First, it impacts adversely on the affected litigants' constitutional right of access to courts. Second, it is a breach of the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.
- [108] A total of 27 judgments were not delivered and remained outstanding over periods that varied between 7 and 27 months. As a result, the affected litigants were seriously prejudiced. These litigants included people who were victims of road accidents. The prejudice suffered by these litigants could have been avoided if the respondent had reported the challenges she was facing to the Judge-President. The source of all these delays was her negligent failure to inform the Judge-President about her personal health

²⁵ *Freedom under Law* above note 22 para 41

circumstances which impacted upon the performance of her judicial functions. It is disquieting that the respondent failed to report and seek help from the Judge-President for no reason other than that she felt uncomfortable to speak to him about her personal affairs.

[109] As a Judge, she had a duty to ensure that she performed judicial functions diligently and where this was not possible, she had an obligation to take reasonable steps to remove the obstacles. She also knew that if she had asked for time to write the outstanding judgments, she could have been afforded time to do so. All these facts underscore the seriousness of the respondent's failure to deliver the 27 judgments.

[110] Litigation is instituted to seek resolution of a dispute which the parties have themselves failed to resolve. Therefore, it is important that a Judge should render a judgment without undue delay after the hearing has been completed. A Judge who fails to perform this function ought to be removed from office unless there are good mitigating circumstances for the undue delay. This is because delays of this kind undermine the effectiveness of courts and erode public confidence in them as structures that are established by the Constitution to resolve disputes.

[111] We now turn to consider whether those circumstances exist here. There is extensive evidence on record that explains why 27 judgments were not delivered. First, there is evidence on the respondent's mental health. From time to time, she suffered from depression caused by her son's drug addiction and criminal behaviour. Added to this was looking after her husband who had covid 19. During the relevant period she also fell and fractured the arm she uses to write.

[112] In addition, she had spirituality challenges which had a debilitating effect on her and caused her to be ashamed. The issue of the African spirituality cannot be tossed aside or discarded when evaluating the seriousness of the respondent's misconduct. She is an African first and when she became a Judge, she did not lose her identity and heritage. African spirituality is common among African communities. It does not cease to exist when one becomes a Judge. African Judges are not forbidden from practising African religion., like other groups, they have guaranteed rights to form or join religious associations and practise their religion.

[113] Embracing African spirituality will enhance diversity within the judiciary if it is practised in a manner that is consistent with the holding of a judicial office. Writing a dissent in the Judicial Conduct Committee, Mojapelo J appositely remarked:

“The Judiciary in South Africa should get out of the ivory tower and embrace and accommodate the truth of existence of African spirituality and African culture, tolerate, accommodate, and live side by side with all other forms of religious spirituality. The colonial Eurocentric and afro pessimistic judiciary will not sit comfortably in a diverse society.

A diverse Judiciary will be richer with a deeper understanding of the African culture and spirituality than without and will therefore be in a better position to perform its function in a multicultural South Africa.”

[114] But it must be stressed that as an African himself, the Judge-President recognises that Judges may go through the African spirituality process like the one experienced by the respondent and that he was willing to accommodate a Judge who is undergoing the process. The difficulty here was not a rejection of the African spirituality but the respondent's failure to raise the issue with the Judge-President.

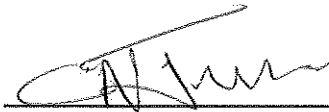
[115] However, even at the time that spirituality symptoms were intense, the respondent devised means to calm herself down and this enabled her to continue to perform her functions. During the intervals when she was fine, she was able to deliver 101 judgments as opposed to 27 judgments that formed the basis of the current complaint. Even the latter judgments were all delivered before this Tribunal commenced its work. In fact the evidence on record shows that during 2023, the respondent had no outstanding judgments that could be a cause for complaint. This was largely due to the fact that she is receiving health care for her mental condition and has embraced the African spirituality by becoming a faith healer.

[116] All attorneys who deposed to affidavits that were placed before the Tribunal, attested to the fact that they continue to have confidence in the respondent's ability to perform judicial functions. The examination of the entire evidence does not show the loss of public confidence in her ability to do judicial duties. Consequently, we are not convinced that she is guilty of gross misconduct. Instead she is guilty of a grossly negligent breach of article 10(2) of the Code of Judicial Conduct. While this is a serious misconduct, it falls short of gross misconduct envisaged in section 177 of the Constitution.

[117] The misconduct on which the respondent is found guilty cannot support her removal from judicial office. On the contrary, it attracts remedial steps listed in section 17(8) of the Commission Act. But this Tribunal has no authority to impose any of those steps. It is the Commission which is empowered to do so.

[118] The matter will be forwarded to the Commission so that it can be processed further in terms of section 20 of the Commission Act.

DATED IN JOHANNESBURG ON THE 29TH DAY OF APRIL 2024.



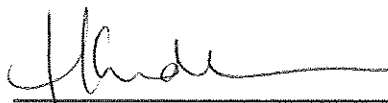
**JUSTICE C N JAFTA
TRIBUNAL PRESIDENT**

I agree.



For ¹ **JUSTICE D M DAVIS
MEMBER OF THE TRIBUNAL**

I agree



**ADV N RAJAB-BUDLENDER SC
MEMBER OF THE TRIBUNAL**