

IN THE JUDICIAL CONDUCT COMMITTEE

In the matter between:

GOLIATH DJP Complainant

and

HLOPHE JP Respondent

and

HLOPHE JP Complainant

and

GOLIATH DJP Respondent

DECISION IN TERMS OF SECTION 17(4) OF THE JUDICIAL SERVICE COMMISSION ACT, 1994

MOGOENG CJ:

Introduction

[1] In his capacity as the Acting Chairperson of the Judicial Conduct Committee (JCC), Zondo DCJ referred the complaints against Hlophe JP by Goliath DJP and Hlophe JP's counter-complaints against Goliath DJP to a panel of JCC Members comprising Zondi JA, Dambuza JA and Mojapelo DJP.

[2] The panel was directed to reflect on whether a recommendation in terms of section 16(4) of the JSC Act, that the complaints be investigated and reported on by a Tribunal, would be appropriate. They decided that the complaints by the DJP against the JP and his counter-complaints against her be referred for a section 17(2) enquiry.

[3] Because all Committee Members were disqualified from entertaining this matter by reason of their prior involvement, it became inescapable that I get involved. Failure to do so would have meant that the matter be left unresolved for a long time or forever. Additionally, considerations of necessity dictate that I handle this matter, regardless of whatever reservations some might have, since there is no one else to do so. And this leads me to the JP's allusion to the possible inappropriateness of my involvement because of the meeting I had with the DJP, about aspects of this enquiry, in October 2019.

[4] The JP expresses what appears to be a concern in these terms:

“62.3 . . . The fact that the Deputy Judge President made *ex parte* representations to the Chief Justice about a complaint that he is now considering could compromise the integrity of the adjudicative process of this matter”.

[5] But, the disclosure of the fact of that meeting by the DJP was a response to the following statement by the JP himself:

“22. . . . if Goliath felt that I have performed badly as a manager of this division **by treating her (or her colleagues) with insufficient respect** or poorly allocated matters between judges, **she could have approached the Chief Justice** under the terms of the ‘Norms and Standards for the performance of judicial functions’ . . . Under clause 6 of those norms and standards, the Chief Justice is charged with the performance review of every judicial officer (including myself) against those norms and standards”.

[6] The DJP appears to have acted in line with what the JP says she ought to have done. Her meeting with me and what it was about cannot therefore constitute any threat

to the integrity of these proceedings. My responses to the letters from the Cape Bar Council, which are attached to the JP's affidavit, ought to put any possible concern about my impartiality to rest. Just as my handling of the Cape Bar Council representations was informed by nothing but principle and integrity, so was my meeting with the DJP and so is the enquiry into and determination of these complaints.

Applicable legal framework

[7] Section 17 of the JSC Act, which regulates the enquiry, provides—

“(2) Any inquiry contemplated in this section must be conducted in an inquisitorial manner and there is no onus on any person to prove or to disprove any fact during such investigation.

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

- (a) must invite the respondent to respond in writing or in any other manner specified, and within a specified period, to the allegations;
- (b) may obtain, in the manner that he or she deems appropriate, any other information which may be relevant to the complaint; and
- (c) must invite the complainant to comment on any information so obtained, and on the response of the respondent, within a specified period”.

[8] The fact that no person bears the onus to prove or disprove any fact and that the enquiry is inquisitorial in nature, does not mean that complainants are thereby incentivised to lodge facts-free or frivolous complaints. It is not to be assumed that the Chairperson or Member concerned would pursue even the emptiest of complaints. This regime exists to dispel an appearance of judicial untouchability and enforce judicial propriety, integrity or competence. It is however not to be abused just to soil the integrity of Judges as a way of settling some scores. Allegations of judicial misconduct must be made and backed up with the necessary information so that complaints may be expeditiously disposed of. That way the public won't be kept in an inordinate suspense about the integrity, mental or physical capacity or competence of a respondent Judge to dispense justice to them. For, no one should be left with a reasonable doubt about the suitability or ability of a Judge to do justice to their case. For it often happens that a

respondent Judge continues to serve pending the finalisation of the JCC or Tribunal processes. Complainants and respondents must therefore do everything within their power to help accelerate the inquisitorial process to its desirable end. Each owes it to his or her complaint or defence to do what obviously needs to and can be done to help move the process forward without unnecessary delay. For this reason, a reckless disregard for one's basic and commonsensical responsibility to do what is undoubtedly within his or her means and knowledge could attract a disadvantage. That is why parties are invited to assist the process by commenting on or responding to what has been said. In sum, section 17(2) must never be understood as absolving any party of his or her intrinsic responsibilities in matters of this kind.

[9] The Chairperson or Member concerned is, in terms of section 17(3)(b) at large to obtain any relevant information, from any source in any manner deemed appropriate. Relevance to the complaint applies with equal force to the response or defence to the complaint. This means, for example, that information concerning another complaint, pending before or disposed of by the JCC may be obtained for the purpose of another enquiry as long as it is reasonably believed to be relevant. In this case, information in the *Davis and Others v Judge MK Parker* may be and was legitimately obtained in terms of this subsection because it is relevant to the assault complaint.

[10] Turning to the decision-making powers in relation to this enquiry, section 17(4) of the JSC Act provides for three possible outcomes. They are: (i) a dismissal of the complaint; (ii) a finding that the complaint has been established as sanctionable conduct unbecoming of a Judge and an imposition of any of the appropriate remedial actions listed in subsection (8); or (iii) recommending to the Committee to in turn recommend to the Commission that the complaint be investigated and reported on by a Tribunal.

[11] When the information gathering process has been finalised, the absence of evidence to sustain a complaint should ordinarily result in a dismissal of a complaint. It is in the exercise of this section 17(4)(a) power that some complaints will be dismissed.

[12] What would then inform a referral to a Tribunal in terms of section 17(4)(c) of the JSC Act? Section 16(1) provides for circumstances under which a complaint may be referred to a Tribunal in these terms:

“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 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 be investigated and reported on by a Tribunal; and
- (b) in writing, inform the respondent of the complaint”.

[13] In the matter of *Judge Davis and Others and Judge MK Parker*; and *The Cape Bar Council and Judge MK Parker*, writing for a unanimous Committee to which complaints were referred in terms of section 16(1), Zondo DCJ eruditely explained the approach that the Committee is required to adopt to determine whether to recommend a Tribunal investigation, in these terms:

“33. Section 16(4) requires this Committee to make a value judgment as to whether, if the complaint is established, it will, *prima facie*, indicate incapacity, gross incompetence or gross misconduct. It does not require this Committee to express a view or make a finding on whether the complaint is established or is likely to be established in another forum in the future. That is not our task. That will be the task of a Tribunal if the complaint is ultimately referred to a Tribunal or the task of a section 17(2) enquiry if it ends up in such an enquiry. Section 16(4) requires the Committee to take a view whether, if the complaint is established, this will *prima facie* indicate gross misconduct on the part of the respondent.

34. To take a view on whether or not, if the complaint is established, it will, *prima facie*, indicate gross incompetence or gross misconduct requires this Committee to consider the seriousness of the misconduct entailed in the complaint. The more serious

the misconduct, the greater the chances that this committee will consider that gross misconduct will be indicated. The less serious the misconduct, the less likely it is that this Committee will consider that, if the complaint is established, it will *prima facie* indicate gross misconduct. If a complaint is established, this will also mean that certain facts necessary for the complaint will have been established and the Committee must form its view on the basis of those facts”.

I stand guided by this authoritative and lucid pronouncement on the correct decision-making process for a possible recommendation for the establishment of a Tribunal.

[14] Satisfied as I am, that there is no reasonable likelihood that a formal hearing would contribute to a proper determination of the merits of the complaints, I informed the parties that this matter would be decided on the papers before me.¹ Findings on complaints that lack substance will be made known in the course of narrating the relevant facts.

[15] It is not easy to tell what exactly the DJP and the JP regard as a complaint. So much is alleged without identifying what the complaint is. It is thus not always easy to tell which allegation is intended to be a complaint and which is meant to be a mere reinforcement of a complaint. Be that as it may, allegations which stand out as complaints will generally be dealt with as such and the findings of only those complaints whose lifespan goes beyond this enquiry would be disclosed under “Other findings”. All other complaints that are not itemised for attention, will also be pronounced upon under “Other findings”.

The DJP’s complaints

[16] Essentially, the DJP has three complaints against the JP that I was able to make out.

¹ See Section 17(4) of the JSC Act.

- 16.1 The first is the alleged assault. The JP allegedly assaulted Judge Parker, inside his Chambers, which is obviously located within the High Court building and apparently during office hours. More than ten Judges of the Western Cape Division of the High Court, Cape Town deposed to affidavits and some even wrote letters relating to the alleged assault. From 25 February 2019 until around 7 February 2020 Judge Parker had, according to fifteen of his colleagues, consistently told the same assault story. And that version is captured in an affidavit settled by Judge Wille at Judge Parker's request. The unsigned copy thereof has been filed and it basically says that: (i) the JP went to Parker J's Chambers on 25 February 2019; (ii) the JP was very angry; (iii) he accused Parker J of wanting to "screw" his wife; (iv) he struck Judge Parker with a fist on the chest and caused Parker J to fall, hit the book cabinet with his back, break its key and injure his back in the process; and (v) Parker J was traumatised by that incident. Neither the JP nor Parker J have denied that the affidavit exists, came into being as alleged by Wille J, and contains these allegations.
- 16.2 The version of Parker J apparently changed almost a year after being consistently relayed by him to some of his colleagues. And it was changed in a way that accords with the JP's denial of an assault ever having taken place.

16.2.1 Before his colleagues spoke openly about the alleged assault and at the time when the DJP had not yet disclosed the name of the alleged victim and the details of the alleged assault, this is how the JP chose to refute the allegation of assault levelled against him by the DJP:

"40. However a recent confrontation arose out of an incident between my wife and the colleague which I suspect the Deputy Judge President is referring to. The colleague, with commendable haste, immediately sought to resolve the issue with my wife . . . I . . . cautioned him against being **perceived** to be inappropriate in his interaction with women colleagues. In our discussion, we disagreed on a related issue involving the fact that I am an African, from KwaZulu and married to a Muslim woman".

“42. If this is the matter that Deputy Judge President Goliath seeks to rely on to suggest that I assaulted a colleague, **again she has told an untruth** because she relied on rumour and gossip. The untruth scandalised and undermined the integrity of my leadership of the Division”.

16.2.2 After being furnished with the affidavits and letters of about fourteen Judges and the more detailed second affidavit of the DJP on the assault,² this is how the JP responded:

“7.4 . . . Parker J, as a judge is ordinarily expected to know when he has been assaulted and when he has not. That judges of the Western Cape High Court should seek to hold him to what he informally told them in confidence is undesirable in the circumstances”.

“7.5.5 Believing that I had acted in an inappropriate manner, Parker J raised his concerns of **what he perceived to be assault** on, not just his person, but integrity”.

“7.5.8 I explained my actions to Parker who, **after a considerable discussion**, accepted that **his perception of my conduct** may well have been influenced by the fact that the **dispute** between him and I **was very emotional**”.

16.2.3 And Judge Parker himself said:

“ . . . **I realised that events may not have unfolded in the way I had initially perceived**. This is quite understandable, given my emotional state at the time. I therefore came to the same but inescapable conclusion, that a complaint of any nature in this regard will be both inappropriate and unnecessary”.

16.2.4 The JP then went on to say:

“7.6 Had [the complainant Judges utilised Article 16(3) of the Code of Judicial Conduct], Parker and I would have been able to explain the **circumstances in which**

² The Judges who were either told by Parker J that the JP had assaulted him or were informed by others and decided or were made to do something about the assault are: D. Davis, S. Desai, Derek Wille, M. Sher, J. Cloete, E. Steyn, A. Le Grange, R.C.A Henney, D. Goliath DJP, O.L Rogers, L.J Bozalek, P.A.L Gamble, Savage, Y.S Meer and A.G Binns-Ward.

it was believed that I had assaulted Parker without making this private incident an international incident of judicial misconduct”.

16.2.5 Several unanswered questions arise. What form did the “confrontation” take? What led Parker J to believe that the JP acted “in an inappropriate manner”? What is it about that “manner” that led Parker J to “perceive” that both his person and integrity were assaulted by the JP? Why did Parker J, a Judge who is well over 60 years of age, believe or state as a fact that he was assaulted by the JP, that that assault caused him to fall and injure his back and hold onto that understanding for almost one year? Why did he cause Wille J to record his experience in an affidavit while it was still fresh? Why did he tell so many of his colleagues over such a long period of time that the JP had assaulted him? And why was it necessary for the JP and other Judges to have a “considerable discussion” with Parker J before he could understand that what he had apparently experienced and conveyed to his colleagues as an assault committed with the instrumentality of a fist, was not really an assault but an incorrect perception of an assault? Which “actions” or “conduct” of the JP were “explained” to Parker J? What are the “circumstances” under which it was believed that the JP had assaulted Parker J? Since those circumstances would have been explained to other Judges by the JP and Parker J, had they been approached in terms of Article 16(3) of the Code of Judicial Conduct, why are they not being explained to the JCC when an explanation is required to clarify the issue?

16.2.6 So far, both the JP and Parker J’s latest explanations of what happened lack of clarity. In their attempt to help me understand what happened in relation to the simple matter of the alleged assault their language seems to be somewhat coded or parabolic. The following statement by the JP leaves one none the wiser:

“7.11 ... When Parker informed these judges of what had allegedly transpired between him and I, it was in circumstances where we had not resolved the issues. It has nothing to do with judicial integrity in recanting his recollection of what happened”.

- 16.3 The second complaint relates to the alleged use of abusive language. The DJP says that the JP addressed her as “rubbish” and “a piece of shit”. Although the JP initially sought to deny this allegation, he left it unchallenged in his subsequent affidavit filed after reading a transcript of his secretly recorded conversation with the DJP and listening to the audio recording thereof. There, she pertinently raised the use of this abusive language twice, and the JP did not at any stage deny that he abused her as alleged. In his latest affidavit he addresses aspects of the content of the transcript but leaves the alleged use of this strong language unchallenged, save for the following possible qualification:

“288. I have addressed this alleged outburst in 2017 in my previous affidavit. **If I said this**, it is quite understandable that I was angry. It was a single incident in which I was deeply offended by her meddlesome actions which caused unbelievable pain in my marriage and family”.

- 16.4 The last complaint is that the JP caused a very junior Judge, Papier J, to discharge duties that would ordinarily have been carried out by the JP, had he not been out of the office. At that time the DJP was admittedly available to deputise for the JP. Her contention is that section 6(6)(a)(ii) of the Superior Courts Act creates an automatic obligation or entitlement for her to act as JP when the JP is absent. She alleges that Papier J discharged functions of the JP, like case allocation, at the time when the JP was absent and that some senior Judges took exception to being led or allocated work by a junior Judge. She also alleges that whereas there was an established practice for the JP to assign certain duties to the DJP, the JP inexplicably stopped doing so.

- 16.5 On the JP’s version he stopped allowing the DJP to discharge those functions because he does not need a DJP; he does not trust the incumbent; she wants to

remove him from his position as JP; she meddles in his private life; and interferes with his allocation of cases. He says the law empowers him to assign or not to assign responsibilities to the DJP. He also contends that he was on circuit, but not “absent” as envisaged in section 6(6)(a)(ii), when he assigned some of his duties to Papier J. He says he did so because Papier J was well-suited to discharge those functions. For the sake of completeness I quote part of what the JP said—

“136. The fact that I delegated some of my functions to Justice Papier is not an irregularity, nor is it unlawful. The reason I did so is because Justice Papier is a dependable colleague who is able to perform those functions. As a matter of fact, Justice Papier was able to hold the respect of the Bench and the practitioners. He is a humble and effective judge who I can trust to perform certain duties when not in the office”.

The JP’s complaints

[17] Here too, I will confine myself to those allegations that I believe constitute a complaint and thus warrant my specific attention in this enquiry.

17.1 I begin with the alleged leaking of the affidavit to the media. The JP alleges that because the media had access to the DJP’s affidavit shortly after it was filed with the JCC, she must have leaked it to the media. This he says is a gross misconduct. This allegation is based on sheer speculation. It remains unsubstantiated and the DJP has denied it. She too speculatively contends that the JP leaked his own affidavit to the media because she was contacted by the media before she was furnished with a copy of his affidavit and journalists said they received it from the Office of the Judge President. No confirmatory affidavit is filed to support this and to say who exactly gave it to them. I am satisfied that there is no merit in this complaint and it stands to be dismissed.

17.2 The second complaint relates to her alleged inappropriate disclosure of confidential information concerning active matters. No ethical rule of conduct,

based on our own Code, allegedly breached by the DJP, has been cited. And it is not explained why it is not open to her to lodge a complaint with the JCC about any active matter in relation to which she, rightly or wrongly, believes that there are ethical or other concerns that deserve the attention of the JCC. If there is an active matter running and a Judge, rightly or wrongly, believes that an injustice, serious impropriety or misconduct or corruption could be or is being committed either in the allocation or processing or adjudication of the case, why wait until all the damage that could have been avoided is done? I am satisfied that there is no merit in this complaint and it too will be dismissed.

- 17.3 The third complaint is of gross incompetence. This is what it entails. Dolamo J struck a matter from the roll. On the same day the parties approached the DJP³ for the further management of the matter and she ordered that the matter be set down for hearing nine days later. On that day two Judges, Erasmus J and Slingers AJ, struck the matter from the roll with costs. The JP relies on that one set down order made by the DJP to conclude that she is grossly incompetent. I am satisfied that there is no merit in this allegation. Decisions of Judicial Officers are routinely set aside by higher courts. But here, all the DJP did was to re-enrol the matter for other Judges to pronounce on its merits. She did not set aside Dolamo J's order without following due process (an appeal) as was initially alleged or make an irregular order that was later set aside by other Judges. These facts do not support the complaint of gross or any form of incompetence. It too falls to be dismissed.

- 17.4 The most serious allegation levelled against the DJP is that of her alleged racist disposition. She allegedly said of the JP that he is an old black man, urged his wife to drop his black surname and said of other African people that they are "kaffertjies". This is a serious allegation that should ordinarily be pursued to the

³ The DJP alleges that counsel informed her that they first went to the JP and approached her only when they could not find the JP.

highest level possible. And it is, if established, likely to constitute a gross misconduct.

17.5 The JP did not hear her say this. He did not mention the racist part when they had a meeting in his Chambers on 02 October 2019. According to the transcript, he only said: “Oh yes, you even suggested to Gayaat why can’t she change her name and drop the Hlophe”. He relies on an unsigned and unauthenticated media statement apparently issued by his wife, Judge Gayaat Salie-Hlophe, in response to the allegations made by the DJP against her and the JP. But, the JP did not secure confirmatory affidavit from his wife to support this media statement. He missed out on two opportunities to do so, when he filed his affidavits. He chose to file only his wife’s media statement. Even then, why this conduct that seems to be unbecoming of a Judicial Officer had to wait for a complaint against Salie-Hlophe J and the JP before it could surface, is concerning. The DJP denies these hearsay-based allegations in paragraph 113 of her last affidavit. She contends that had she said what she is accused of, the JP would have long been told, by his wife, and confronted her with the allegations.

[18] All the affidavits filed by the JP reveal that he pays particular attention to detail. This allegation of a racist disposition is potentially his most serious and damaging complaint against the DJP. Yet, information to sustain it is conspicuous by its absence. The JP did not respond to a pointed rebuttal by the DJP in paragraph 113 where she says he is only relying on his wife’s media statement. Allegations of racism are very serious and should therefore not be made lightly. This complaint must suffer the same fate as the others – it must be dismissed.

Other findings

[19] The JP does have a case to answer on the complaint of assault. I am satisfied that in the event of it being established that he assaulted Judge Parker as alleged, within the court building and during working hours, it is likely to lead to a finding that the JP is guilty of gross misconduct. It is simply unthinkable that a Judge President, however

angry he or she might be, would commit a crime of violence against another person, talk less of a fellow Judge within an institution that exists to rid society of criminality – a court of justice.

[20] It could be even worse if untruths were deliberately told by the Judges involved. If it were to be established that the JP convinced Parker J, through a considerable discussion and with the help of other Judges, to change the version whose correctness he appeared to be sure of for a long time, that could be viewed as conduct so serious as to also strike at the very heart of what judgeship is about – integrity or honesty and justice. This assault complaint is unprecedentedly serious within judicial circles and must be looked into thoroughly. If it were to be established as a valid complaint, it is very likely to result in the JP being found guilty of gross misconduct.

[21] It is still not clear whether the JP admits or denies that he said to the DJP “you are a rubbish and a piece of shit, get out of my office”. Initially the JP focussed only on confirming that the meeting took place as alleged, that he asked the DJP to leave his Chambers and not to interfere in his marriage. He later denied what is alleged in paragraphs 44 to 51 of the DJP’s affidavit, which includes the “rubbish-shit” allegation. After the release of the transcript, he did not admit or deny the allegation. But said no more than “**If I said this . . . I was angry**”. To have it established against someone who occupies the exalted office of Judge President that he said to a woman DJP that she is “rubbish” and “a piece of shit”, in an era when women abuse even at the workplace is reportedly on the rise, is likely to result in a finding that the JP is guilty of gross misconduct unless lip service is being paid to the fight against women abuse. We Judges must lead by example in this connection. I say this alive to the fact that the JP’s alleged anger might well serve as sufficient mitigation to bring the complaint down to a level of seriousness that is below “gross”.

[22] Finally, the position of DJP owes its existence and role primarily to section 169(3) of the Constitution and the provisions of section 6(6)(a)(ii) of the Superior Courts Act. The latter not only clothes the DJP with certain responsibilities in the

“absence” of the JP but is arguably not open to being discountenanced by the JP. The position is a creature of the Constitution and statute and does not seem to exist at the pleasure of the JP. Taxpayers foot the bill to sustain that post for good reason. Circumstances around this position in the Western Cape Division of the High Court thus require a thorough investigation and report by a Tribunal. It may well have to be established from the previous DJP how she functioned in that capacity; whether there were indeed functions that have been traditionally associated with the Office of the DJP over a period of 16 years as alleged, and what conditions, if any, were attached to their being assigned to the DJP.

[23] If it were to be established that the JP bypassed the DJP and assigned to Papier J duties that ought to be discharged by the DJP in terms of section 6, at the time when the JP was in reality “absent”, that could qualify as abuse of power or abuse of judicial office. Abuse of power by those charged with the duty to stem the tide of abuse of power or corruption is in my view very serious indeed. This needs to be fully ventilated. Who acts as Judge President should never be made to look like a consequence of some patronage system. Those deserving to act must be identified on an objective and credible basis or criteria. It cannot be arbitrary.

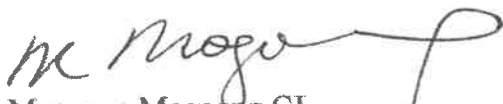
[24] This is arguably a borderline case between gross misconduct and conduct so unbecoming of a Judge as to be sufficiently grave to warrant serious consequences although it may not quite rise to the level of gross misconduct. All these complaints are in any event so inter-related that due sensitivity to the scarcity of JCC resources and the need to present a complete picture of the JP’s conduct demand that they all be entertained by the same forum at the same time.

[25] Any other allegation meant to be a complaint by the DJP against the JP that is not dealt with here must be regarded as meritless or as having been brought to the wrong forum and therefore dismissed. For example, not holding regular Judges’ meetings like before or case allocation or not consulting Judges. All these are capable of being resolved internally by the entire body of Judges in that Division.

[26] As for all of the JP's complaints, including the one about the absence of the DJP on 11 October 2019 which was raised for the first time in one of his very last set of affidavits, none of them has merit and are thus dismissed.

Conclusion

[27] I therefore recommend to the Committee, in terms of section 17(4)(c), to consider recommending to the Commission that a Tribunal be established to investigate and report on allegations of assault, use of abusive language and abuse of power in relation to the office of DJP, levelled by Goliath DJP against Hlophe JP.

A handwritten signature in black ink, appearing to read 'M Mogoeng', with a long, sweeping horizontal stroke extending to the right.

Mogoeng Mogoeng CJ
Chairperson of the Judicial Conduct Committee