

## IN THE JUDICIAL CONDUCT COMMITTEE

In the matter between:

**JUDGE D DAVIS AND OTHERS**

**COMPLAINANTS**

and

**JUDGE MK PARKER**

**RESPONDENT**

and

In the matter between:

**THE CAPE BAR COUNCIL**

**COMPLAINANT**

and

**JUDGE MK PARKER**

**RESPONDENT**

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### DECISION OF THE COMMITTEE IN TERMS OF SECTION 16(4) OF THE JUDICIAL SERVICE COMMISSION ACT, 1994

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**ZONDO DCJ**

#### **Introduction**

1. By a letter dated 23 May 2020 the Chief Justice referred two complaints to this Committee in terms of section 16(1) of the Judicial Service Commission Act,

1994 (Act 9 of 1994) (JSC Act) in order for this Committee to consider whether it should make a recommendation under section 16(4) of the JSC Act to the Judicial Service Commission (JSC) that the two complaints be investigated and reported on by a Tribunal.<sup>1</sup> The Chief Justice did so in his capacity as the Chairperson of the Judicial Conduct Committee (JCC). The one complaint, to which I shall refer as the first complaint, was lodged by ten Judges of the Western Cape Division of the High Court against Judge Mushtak Kassim Parker (respondent), also a Judge of that Division. The other complaint, to which I shall refer as the second complaint, was lodged by the Cape Bar Council against Judge Parker.

2. The ten complainants in the first complaint are Judges D Davis, S Desai, YS Meer, LJ Bozalek, AG Binns-Ward, ET Steyn, PAL Gamble, RCA Henney, OL Rogers and ML Sher. Reference herein to “the complainants” or “ten complainants” will be a reference to the judges who are complainants in the first complaint and reference to “the complainant” will be a reference to the Cape Bar Council. The Chief Justice referred these complaints to this Committee because he took the view that, if established, the two complaints were likely to lead to a finding by the JSC that there was gross misconduct on the part of the respondent. Section 16(1) requires him to refer a complaint to this Committee if he takes that view about it.

### **The complaints and their background**

3. The main affidavit which sets out the first complaint is that of Judge Dennis Davis which was deposed to on 23 March 2020. The other complainants have deposed to affidavits that confirm the contents of Judge Davis’ affidavit in so far as they relate to them. They also associate themselves with the contents of Judge Davis’ affidavit with regard to the grounds upon which it is contended that the

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<sup>1</sup> Unless the contrary appears from the context, references to sections herein, are references to sections in the JSC Act.

respondent's conduct complained of constitutes gross misconduct as contemplated in section 14(4)(a) of the JSC Act. In some of the affidavits certain complainants have elaborated on some of the matters relating to the complaint of which they have personal knowledge.

4. In his capacity as chairperson of the Cape Bar Council Advocate Andrew Breitenbach SC deposed to an affidavit in support of the second complaint. He points out that he does not have personal knowledge of the circumstances that gave rise to the second complaint. He says that he gained the information from court papers in an application instituted by the Legal Practice Council (LPC) against the respondent's former partners or co-directors in the law firm of which he was part before he was appointed as a Judge.
5. The complainants and the respondent were notified that a virtual meeting would be held on 29 May 2020 at 10h00 in order for the Committee to consider whether it should recommend to the JSC that the two complaints be investigated and reported upon by a Tribunal and were also invited to make representations to the Committee. They were also advised that they could address the Committee at the virtual meeting if the chairperson of the meeting allowed them to do so. The complainants accepted the invitation and submitted their written representations. Three of the complainants also attended the virtual meeting. Those were Judges Desai, Davis and Meer. They also instructed an attorney and Counsel who also attended the proceedings. I allowed their Counsel, Mr Maenetje SC, to address the Committee which he did. We are indebted to him for his submissions.
6. Prior to the referral of the complaints to the Committee by the Chief Justice, the respondent's attorneys at the time addressed a letter to me in which they advised that the respondent would, when required to or necessary, respond to the second complaint once he had been formally notified thereof. The letter was written on the basis that he had become aware of the second complaint through the media after the complaint had been lodged even though he had not been officially

notified thereof by the Secretariat of the Committee. He also undertook to give his full cooperation to the investigation of the Committee. However, after the respondent had changed attorneys, he advised the Committee through his current attorneys that he did not intend to deliver any written representations nor did he intend to take part in the meeting. The result is that the respondent has not made any representations to the Committee.

7. At my instance and in terms of section 16(3) the Secretariat of the Committee supplied members of the Committee with an affidavit by Judge Derek Wille of the Western Cape Division deposed to on 29 April 2020. Judge Wille had submitted that affidavit to the Judicial Conduct Committee at the request of the Chief Justice in connection with the complaint lodged by Goliath DJP against Judge-President MJ Hlophe, the Judge-President of the Western Cape Division of the High Court.

### **The first complaint**

8. The complainants' complaint against the respondent is that he has given two contradictory and mutually exclusive versions about an incident which appears to have happened in his Chambers on 25 February 2019 between himself and Judge-President Hlophe. The one version is that he was assaulted by the Judge-President and the other is that the Judge-President did not assault him. Six Judges in the Division, some of whom are complainants, have deposed to affidavits to the effect that they were told by the respondent that he had been assaulted by the Judge-President. They are Judges Wille<sup>2</sup>, M Sher, J Cloete, E Steyn, A Le Grange and Henney. Although Goliath DJP has not submitted an affidavit to the effect that she is one of the Judges told by the respondent that he had been assaulted by the Judge President, Judge O L Rogers says in his affidavit that

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<sup>2</sup> Although Judge Wille may not have expressly said in his affidavit that the respondent told him that he had been assaulted by the Judge-President, he has confirmed in one of his affidavits the contents of the complainants' letter of 16 March 2020 addressed to the Judge-President in so far as it relates to him and that letter reflects that the respondent did say either to him or to Judge Goliath, in Judge Wille's presence that the Judge-President had assaulted him.

Judge Wille told him that in October 2019 Judge Parker told Goliath DJP in his presence that the Judge President had assaulted him. According to the affidavits before the Committee the respondent told the Judges concerned at different times over a period of about 12 months that the Judge President had assaulted him.

9. In paragraph 3 of his affidavit of 29 April 2020, Judge Wille says:

“I attach hereto marked ‘A’ a copy of an unsigned affidavit which I retrieved from the ‘time capsule’ in my chambers. Judge Parker approached me shortly after the alleged incident on the 25th of February 2019. Judge Parker entered my chambers and told me about an incident with the Judge-President. Judge Parker asked me if I would assist him to prepare an affidavit to record these events as he was not computer literate and he did not want his registrar to bear any knowledge of the incident.”

From this quotation it is clear that, according to Judge Wille it was on the day of the alleged assault, namely 25 February 2019, when the respondent told Judge Wille, for the first time about the alleged assault. Thereafter, Judge Wille says he assisted the respondent and prepared an affidavit for him. Judge Wille continues:

“Judge Parker then asked me to email the affidavit to his private email address and I obliged. The content of the unsigned affidavit is precisely the same as the content of the affidavit which was subsequently deposed to before a commissioner of oaths by Judge Parker. The unsigned affidavit is a ‘mirror image’ of the signed affidavit and was saved on my laptop and subsequently on my ‘time capsule’.”

10. In his affidavit of 23 March 2020 Judge Henney said:

“That in and during the third term of 2019, in a private discussion Judge Parker informed me that he was assaulted earlier during the year by Judge-President Hlophe, in his Chambers. This happened after Judge-President Hlophe came to his Chambers. He said he was in a very violent manner

pushed by Judge-President Hlophe against a door which resulted in him having sustained an injury against his back.”

The third court term referred to in this quotation would have covered part of July, August and September 2019. This, therefore, means that it was during that period that the respondent allegedly told Judge Henney that he had been assaulted by the Judge President. Judge Sher has said in his affidavit that it was during or about October 2019 when he was told by the respondent that he had been assaulted by the Judge-President.

11. In her affidavit of 23 March 2020 Judge E Steyn said among other things that “shortly after the first term in 2020 towards the end of January or the beginning of February 2020” she went to see the respondent in his Chambers. This was in the context of Judge Steyn having read in the media on 21 January 2020 that Goliath DJP had lodged a complaint against the Judge-President and it was mentioned that a Judge had been assaulted in his Chambers by the Judge-President and other Judges had attempted to persuade him to lay charges or to lodge a complaint. Judge Steyn continues:

“I sympathized about the difficult situation he found himself in and asked if an actual assault had taken place. He related substantially the same version to me that was related to other judges, as apparent, from some of the confirmatory affidavits and from the version of the Judge who had Parker J’s affidavit.”

12. In paragraph 9 of her affidavit, Judge Steyn goes on:

“Parker J confirmed that he had been shocked and distressed by what had happened and that he immediately dictated his version. He had shortly before my visit listened to his dictation again and his extreme distress was obvious, even from the dictation. He said that days after the incident there was still a mark on his back where the broken key had hurt him. He then added that it was not correct that any judge had persuaded him not to lay charges or to

lodge a complaint; it was his decision. He mentioned that there were Judges who were trying to persuade him to lay a complaint.”

13. In paragraph 10 Judge Steyn points out that it was after her discussion with the respondent that Judge-President Hlophe responded to Goliath DJP and lodged a counter-complaint. She says that she did not know until much later “that Parker J had agreed that no assault took place.” She adds: “He never discussed that with me.”

14. In January 2020 Goliath DJP lodged a complaint against Judge-President Hlophe relating to various incidents including the alleged assault of the respondent by Judge-President Hlophe. The complainants point out that in his affidavit of 7 February 2020 Judge-President Hlophe denied having assaulted the respondent and said that he had shown the respondent that part of his affidavit that contained his version on the alleged assault and that the respondent had agreed with his version. The effect of this is that, according to Judge-President Hlophe, the respondent agreed with him that he had not assaulted him.

15. Judge-President Hlophe states the following in paragraph 43 of his affidavit:

“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.”

In the last sentence of paragraph 43, the Judge-President says:

“The Judge concerned has been shown this portion of the affidavit relating to him and he agrees with this version.”

16. The complainants also referred to a letter dated 13 March 2020 which the respondent wrote to Judge A Le Grange. In that letter the respondent suggested that Judge A Le Grange was trying “to influence the proceedings involving the

Judge-President which are currently before the JCC.” He then said in paragraph 3:

“3. Quite simply, having reflected on the narrative with regard to the alleged assault, very soon thereafter, and without anyone having influenced me in any way whatsoever, 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.”

17. In paragraph 4 of the letter the respondent said:

“4. I regard the matter as personal, private, confidential and fully resolved. In this regard I fully align myself with the comments expressed by the Judge-President in his response to the complaint by the DJP, and confirm it as true and correct.”

The respondent said in paragraph 9 of the letter:

“I am satisfied that there is absolutely no basis for a complaint against the Judge- President, and request you once again to respect my decision.”

18. The complainants make the point that, according to Judge Wille, the respondent had visited his chambers soon after the incident and had told him that the Judge-President had assaulted him. They point out also that from that time up to either the end of January or the beginning of February 2020 the respondent had consistently told a number of judges that he had been assaulted by the Judge-President and yet the respondent has now said that he was not assaulted by the Judge-President. As can be seen from the quotations from the affidavit of Judge Wille read with annexure ‘A’ to his affidavit and quotations from the affidavits of Judge Henney and Judge Steyn above that their version is that the respondent told them that the Judge-President had assaulted him.

19. Judge Wille also states that, after the respondent had deposed to the affidavit that he (i.e. Judge Wille) had prepared for the respondent, the respondent brought the affidavit back to him on the same day of the incident and asked him to keep it safely for him. Judge Wille points out that he kept that affidavit in his custody until the 17<sup>th</sup> of February 2020 when the respondent demanded that it be returned to him. Judge Wille says he returned the affidavit to the respondent on the same day. Judge Wille's affidavit therefore reflects that Judge Wille kept the respondent's affidavit in his custody from 25 February 2019 until 17 February 2020. Judge Wille has annexed as annexure "A" to his affidavit an unsigned affidavit the contents of which he says are precisely the same as the contents of the affidavit that he returned to the respondent on 17 February 2020.
20. Paragraph 4 of annexure "A" to Judge Wille's affidavit reads as follows in part:
- "I advised the Judge-President that these allegations were false. The Judge-President lost his temper and struck me with his fist on my chest..."
- In paragraph 5 it is said:
- "I fell down to the ground and in so doing broke the key that was in the cupboard housing some of my legal books."
21. The complainants point out that the respondent has, by telling conflicting versions about the alleged assault, failed to uphold the integrity of the judiciary as he is obliged to do under article 4(a) of the Code of Judicial Conduct and that he has failed to act honourably in the discharge of his duties as he is required to do under article 5 of the Code. They assert that the same is true of the inconsistency between, on the one hand, his assertion that 'very soon after' the incident he had realized that events had not unfolded as he had previously perceived and, on the other, the version he recounted to various judges over a number of months after the incident.

22. The complainants emphasize that integrity is central to an independent judiciary and that judicial dishonesty eviscerates the foundation of an independent judiciary. They say that the respondent's conduct has unquestionably brought the judiciary into disrepute and for this reason they persist in their complaint and ask that it be investigated expeditiously and steps be taken by the Judicial Service Commission that it considers proper in the circumstances.

### **Second complaint**

23. The second complaint is also about alleged dishonesty on the part of the respondent. The respondent was appointed as a Judge of the Western Cape Division with effect from 1 November 2017. Prior to that he practised as an attorney for many years in a law firm known as Parker and Khan Inc in Cape Town. In the questionnaire that he had to complete and submit to the JSC when he was nominated for appointment as a judge, the respondent pointed out that he had been the managing director or partner of that law firm. He seems to have practised with Mr Khan as well as his younger brother in the law firm. Mr Khan and the respondent's brother were also partners or directors in the law firm.
24. Mr Breitenbach says in his affidavit that the second complaint arises from and is based predominantly on information recorded in affidavits that have been filed by the LPC in certain motion proceedings in the Western Cape Division of the High Court under case number 22707/2019 and in the answering and replying affidavits also filed in that matter. He points out that the grounds on which the complaint is based are those set out in section 14(4)(b) and/or (e) of the JSC Act, more particularly,

- (a) wilful or grossly negligent breach of articles 4(a) and 5 of the Code of Judicial Conduct, and/or
- (b) other wilful or grossly negligent conduct other than conduct contemplated in section 14(4)(a) – (d) that is incompatible with or unbecoming the holding of judicial office.

25. Mr Breitenbach points out that in the questionnaire that the respondent completed and submitted to the JSC when he was nominated for appointment there were two questions that he was asked which form one of the bases of the complaint. The first question was:

“Are there any circumstances, financial or otherwise, known to you which may cause you embarrassment in undertaking the office of a judge?”

The second was:

“Is there any other relevant matter which you should bring to the attention of the Commission?”

To each one of these questions the respondent answered: “No”. The Cape Bar Council contends in effect that these answers were untrue and the respondent knew them to be untrue when he gave them and, therefore, he answered them dishonestly.

26. Another basis of the second complaint relates to the trust account of Parker and Khan Inc. Mr Breitenbach avers that in the application brought by the LPC in the High Court, the grounds for the relief sought and for the striking off of the respondent’s past partners or co-directors in the law firm relate to the maladministration of the firm’s trust account. He says that there does not appear to be any dispute in those proceedings that funds belonging to the firm’s trust creditors were used to pay the firm’s business and operating expenses (i.e. there was a misappropriation of trust funds) and that there was, therefore, as a result, a shortfall in the funds due for payment to a particular trust creditor. Mr Breitenbach also asserts that there seems to be no dispute that Mr Khan was involved in this alleged maladministration.
27. It is stated in Mr Breitenbach’s affidavit that, according to the LPC, the trust deficits in the trust account of the law firm did not arise from simple accounting errors. Apparently, according to the LPC, the trust account deficits reveal a

continuous pattern of concealing trust deficits by keeping a separate list of the trust deficits. Mr Breitenbach points out that the LPC says that this demonstrates an element of deceit inimical to the honour associated with the profession of an attorney. The LPC emphasises that the attorneys' profession demands of its members complete honesty, reliability and integrity.

28. It is said that in the LPC's application the papers do not include any affidavits by Mr Khan or by the respondent. Mr Breitenbach's affidavit reveals that between 16 June 2016 and 31 October 2017 – one day before the respondent was appointed as a Judge – the shortfall in the law firm's trust account had grown from R4 623 998, 52 to R 7 046 303, 46. Mr Breitenbach refers to various WhatsApp messages exchanged among the directors of the firm both prior to and after the respondent's appointment as a judge. He says that they reveal that at all material times before and after his appointment as a judge, the respondent was aware of the shortfall in the trust account of the firm. He points out that, despite the trust account deficits in his law firm, the respondent accepted acting appointments on a number of occasions as an acting judge and did not disclose the trust account deficits in the JSC questionnaire and in his interview. Mr Breitenbach's affidavit draws attention to the fact that the trust deficit persisted over a long period, that the amounts involved were large and that the respondent was the managing director or partner of the law firm during that period.
29. Mr Breitenbach contends that, while the respondent was practising as an attorney, he was obliged to report the deficit in the trust account of the firm to the then Cape Law Society but did not do so. He contends that this was a breach of the rules of the Cape Law Society. In this regard he refers to various parts of Rule 35 of the Rules of the Cape Law Society by which the respondent was bound as an attorney practising in Cape Town. He also contends that the respondent acted improperly and dishonestly in not disclosing the deficit in his firm's trust account to the JSC in his nomination questionnaire and during his JSC interview.

**Will the complaints, if established, *prima facie* indicate gross misconduct?**

30. The next question to consider is what this Committee should do with the two complaints. The answer lies in section 16(4). Section 16(4) reads:

“(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.”

31. Section 16(4) requires this Committee, when dealing with the referral of a complaint by the Chairperson to the Committee in terms of section 16(1), to consider whether, if established, the complaint will *prima facie* indicate incapacity, gross incompetence or gross misconduct on the part of the Judge concerned. If the Committee considers that, if the complaint is established, this will indicate incapacity, gross incompetence or gross misconduct, the Committee is required to recommend to the JSC that the complaint be investigated and reported upon by a Tribunal. If, however, the Committee does not consider that, if established, the complaint will *prima facie* indicate incapacity or gross incompetence or gross misconduct, the Committee is required to refer the complaint to the Chairperson for an enquiry under section 17(2).

32. The reason why the Committee is required to recommend to the Commission that a complaint that the Committee believes will *prima facie* indicate incapacity or gross incompetence or gross misconduct should be investigated by a Tribunal is that in terms of the JSC Act a Tribunal is the only forum that has jurisdiction to investigate complaints relating to incapacity, gross incompetence or gross

misconduct. The reason why the Committee is required to refer to the Chairperson for a section 17(2) enquiry any complaint which it does not consider will, if established, *prima facie* indicate incapacity, gross incompetence or gross misconduct is that such complaints are to be investigated by the Chairperson or a member of the Committee designated by the Chairperson under section 17(2). In this regard, it is important to bear in mind that incapacity, gross incompetence and gross misconduct are the only three grounds upon which a Judge may be removed from office in terms of section 177 of the Constitution.

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) inquiry if it ends up in such an inquiry. 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.
35. If the first complaint is established, it seems that it will mean that the respondent has acted dishonestly in giving two contradictory and mutually exclusive

versions about the incident that happened in his Chambers between himself and Judge-President Hlophe on 25 February 2019. Our view can only be based on the facts presently before us. On these facts, if the first complaint is established, the position will be that the respondent has no explanation for giving these contradictory versions one of which has to be untrue. Given that Judge Wille has effectively said in his affidavit, read with annexure “A” thereto, that the respondent deposed to an affidavit in which he said the Judge-President had assaulted him, if the respondent maintains that he agrees with the Judge-President’s version, that will mean that the respondent falsely implicated the Judge-President under oath.

36. To the extent that there may not have been any assault on the respondent by Judge-President Hlophe, it would mean that the respondent went around telling a number of Judges that the Judge-President had assaulted him when he knew quite well that there had been no such assault. To the extent that there may have been an assault on him by Judge-President Hlophe, it would mean that, when he confirmed Judge-President Hlophe’s version, he did so with the full knowledge that he was corroborating a version that he knew to be untrue. If the complaint is established, it will also mean that, when the respondent changed his version early in February 2020 and said that the Judge-President had not assaulted him, he did so knowing that there was an affidavit in Judge Wille’s custody in which he had said under oath that the Judge-President had assaulted him.
37. If the complaint is established without the respondent having given a valid reason or an acceptable explanation as to why he changed his version early in February 2020, his conduct in changing his version would be seen as extremely serious, particularly because he is a Judge. Furthermore, the respondent would have known that he was corroborating a version that Judge President Hlophe was going to place before the Judicial Conduct Committee. That would be very serious. Given the above and all the facts in the affidavits before us, we consider that, if the first complaint is established, it will, *prima facie*, indicate gross misconduct by the respondent.

38. With regard to the second complaint, we consider that, if it is established, it will *prima facie* indicate gross misconduct on the part of the respondent. The existence of a trust deficit could indicate that the respondent and/or his partners misappropriated the funds of their trust creditors while he practised as attorney. If established, misappropriation of funds would be a serious conduct that may *inter alia* reflect negatively on the integrity of the respondent. It will also *prima facie* indicate that the respondent would have acted in breach of the rules of the law society over a long period by not disclosing to the law society when there was a trust deficit in the trust account of his law firm. The respondent's failure to disclose in his nomination questionnaire and in the interview before the JSC that the trust account of his law firm had had a deficit for a long time while he was the managing director is extremely serious.

### **Conclusion and outcome**

39. Given all of the above, we consider that both individually and cumulatively the two complaints will, if established, *prima facie* indicate gross misconduct on the part of the respondent that will be seen as bringing the judiciary into disrepute. In the circumstances, we recommend to the Judicial Service Commission that these two complaints be investigated and reported upon by a Tribunal.

Zondo DCJ, Acting Chairperson

I agree.

Zondi JA, Member

I agree.

Dambuza JA, Member

I agree.

Mojapelo DJP, Member

Date of decision: 11 June 2020