

JUDICIAL SERVICE COMMISSION

IN RE: *REPORT OF THE JUDICIAL CONDUCT TRIBUNAL IN THE ENQUIRY AGAINST JUDGE MNGQIBISA-THUSI*

REPORT OF THE JUDICIAL SERVICE COMMISSION

1. On 26 January 2023 the Judicial Service Commission (“the Commission”) requested the Chief Justice to appoint a Judicial Conduct Tribunal in terms of sections 19 and 21 of the Judicial Service Commission Act 9 of 1994 (“the JSC Act”) to enquire into allegations of incapacity, gross incompetence, and gross misconduct against Judge Mngqibisa-Thusi.

1.1 These allegations are based on a complaint from the Judge President of the Gauteng Provincial Division, that on at least 27 occasions, Judge Mngqibisa-Thusi failed to deliver judgments within a reasonable time.

1.2 In the above regard, in five matters, judgments were delivered in a period ranging between 12 to 27 months, in 14 matters, judgments were delivered within 10 to 19 months and in seven matters judgments were delayed by between 7 to 9 months.

2. Section 19 of the JSC Act empowers the Commission to request the Chief Justice to appoint a Tribunal in one of two instances. First, where there is a recommendation to that effect by the Judicial Conduct Committee acting in terms of section 16(4)(b) or 18 (4)(a)(iii), (b)(iii) or (c)(iii). The second instance is where there are reasonable grounds to suspect that a judge suffers from an incapacity,

or is grossly incompetent, or is guilty of gross misconduct as provided for in section 177(1)(a) of the Constitution.

3. The Chief Justice appointed a Tribunal¹, which has delivered its report. The report of the Tribunal has concluded that:

3.1 The allegations of the failure by Judge Mngqibisa-Thusio to render judgments timeously are established as a matter of fact.

3.2 Judge Mngqibisa-Thusi does not suffer from incapacity. She is also not grossly incompetent or guilty of gross misconduct in terms of section 177(1)(a) of the Constitution.

3.3 The Report of the Tribunal has been referred to the Commission in terms of section 20 of the JSC Act.

4. The basis for the findings of the Tribunal appears from its report. In summary, the Tribunal drew a distinction between the provisions of section 14 of the JSC Act and section 177(1) of the Constitution. Section 14 of the JSC Act entitles any person to lodge a complaint against a judge to the Chairperson of the Judicial Conduct Committee. In terms of section 14(4) there are five grounds on which a complaint can be lodged.² By contrast, only three grounds are recognised in the Constitution

¹ The Tribunal comprised Justice Jafta, Judge Davis and Adv Rajab-Budlender SC.

² Section 16(4) of the JSC Act states:

“(4) 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

to justify the removal of a judge.³ Of relevance for the analysis of the Tribunal is section 16(4)(b) of the JSC Act which provides that a complaint can be lodged against a judge in respect of “[a]ny 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)”. Gross negligence is not a ground for the removal of a judge in terms of section 177(1) of the Constitution.

5. The Tribunal made the following findings against Judge Mngqibisa-Thusi:

5.1 Her failure to deliver judgements timeously was a breach of article 10(2) of the Code of Judicial Conduct (“the Code”). She took “no steps” to avoid the delays when she could have “and should have done so”.⁴

5.2 Although she was ill and had spirituality challenges, these “lasted for limited periods”.⁵ She could have asked the Judge President for time to write the judgments but failed to do so.

5.3 Judge Mngqibisa-Thusi realised that she was unable to produce the judgments timeously, but did not take adequate steps to ensure that the judgments were delivered. Instead, she picked up new reserved judgments. Numerous enquiries were sent by attorneys concerning the reserved judgments, but she did not change course. She did not have a proper explanation for not engaging

(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.”

³ Section 177(1) of the Constitution provides:

“(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.”

⁴ At para 94 of the Ruling.

⁵ At para 95 of the Ruling.

with the Judge President. While it was so that she did not wish to speak to the Judge President about personal matters, the failure to deliver judgments was not a personal matter.⁶ The conduct of Judge Mngqibisa-Thusi amounts to “gross negligence” which is also misconduct in terms of section 14(4) of the JSC Act.⁷

6. The conduct of Judge Mngqibisa-Thusi, however, did not amount to “gross misconduct” under the Constitution, because (a) she had a spiritual illness; (b) she delivered a substantial number of judgments when she recovered from her illness; (c) the evidence did not show that the public had lost confidence in her judicial abilities; and (d) in 2023 there were no outstanding judgments.

7. For these reasons, the Tribunal held that Judge Mngqibisa-Thusi is guilty of misconduct, and not gross misconduct.

8. The Commission has considered the findings of the Tribunal. The views of the Commission are as follows:

8.1 The Commission does not endorse the distinction drawn by the Tribunal between gross negligence and gross misconduct. The Commission finds that this distinction is unsupported by the JSC Act and the Constitution.

8.2 The Commission finds that Judge Mngqibisa-Thusi committed misconduct, in failing to deliver judgments timeously in the circumstances outlined in the Report of the Tribunal, more specifically her failure to report to the Judge President that she was unable to produce the judgments timeously. The

⁶ At para 99 of the Ruling.

⁷ At para 101 of the Ruling.

Commission notes the submission of Judge Mngqibisa-Thusi that she had reported to an Acting Deputy Judge President about her failure to deliver judgments on time. The Commission does not consider this as sufficient, and it notes that the Judge President should have been informed.

8.3 The Commission finds that there are strong mitigating factors. Firstly, Judge Mngqibisa-Thusi suffered from her spiritual illness. Secondly, the illness was temporary. Thirdly, when she recovered from her illness, she was able to complete the judgments. Fourthly, in 2023 there were no complaints about outstanding judgments.

9. Therefore, the Commission finds, in terms of section 20(5)(b) of the JSC Act, that Judge Mngqibisa-Thusi is guilty of misconduct not amounting to gross misconduct.

10. The Commission also considers that an appropriate sanction should be imposed. In imposing a sanction, a number of considerations must be taken into account. Firstly, Judge Mngqibisa-Thusi is a senior judge. Secondly, she was aware of the applicable Code, the need to deliver judgments timeously, and the obligation to report the reasons for not delivering judgments to the Head of Court. Thirdly, her conduct has the potential to bring the proper administration of justice into disrepute.

11. It was considered whether the sanction should entail an immediate financial loss. It was decided that such sanction would not be appropriate in the current

circumstances, especially where the judge concerned has begun a process to redress her past misconduct.⁸

12. In the circumstances the appropriate sanction which must be imposed is as follows:

12.1 Judge Mngqibisa-Thusi is directed to write a letter of apology to the Judge President of the Division, and to the attorneys of all affected parties within 14 days of this decision.

12.2 The Judge President of the Division should formally reprimand Judge Mngqibisa-Thusi.

12.3. Written Warning

⁸ Section 176(3) of the Constitution seems, in any event, to present an absolute bar to the suspension of a salary of a judge, to the extent that such a suspension can be deemed as a reduction of a judge's salary. The section states: "*The salaries, allowances and benefits of judges may not be reduced.*"