BEFORE THE JUDICIAL TRIBUNAL OF THE JUDICIAL SERVICE COMMISSION

CASE NO JSC 1059/2022

In the matter of

Ms A Mengo Complainant

And

Judge President S M Mbenenge Respondent

Ruling in terms of Section 29(1) of the Judicial Service Commission Act 9 of 1994

1. The hearing of evidence before the above Judicial Tribunal has been set down from 13 to 24 January 2025. Written submissions have been filed on behalf of both parties on whether or not the hearing should be open to the public and the media. The South African Broadcasting Corporation (SABC) has also filed a request for a public hearing that would include live television coverage. The respondent opposes a public hearing, and argues that the whole of the hearing should be *in camera*.

2. The determination whether or not the hearing should be open to the public and the media, is to be made by the President of the Tribunal in terms of section 29 of the Judicial Service Commission Act 9 of 1994, which reads as follows:

"*29. Attendance at hearing and disclosure of evidence*

(1) A hearing of a Tribunal may be attended only by-

(a) the respondent;

(b) the respondent's legal representative, if one has been appointed;

(c) any person who lodged a formal complaint against the respondent, if that complaint is related to the hearing;

(d) the legal representative of each person contemplated in paragraph (c);

(e) any person subpoenaed in terms of section 30, or called as a witness by the respondent, each of whom may attend-

(i) with or without a legal representative; and

(ii) only for the period that person is required by the Tribunal;

(f) any person contemplated in section 24 (2), if that person's presence is required by the Tribunal; and

(g) any other person whose presence the Tribunal considers to be necessary or expedient.

(2) Subject to sections 32 and 33, a person may not disclose to any other person the contents of a book, document or other object in the possession of a Tribunal or the record of any evidence given before a Tribunal, except to the extent that the Tribunal President, in consultation with the Chief Justice, determines otherwise.

(3) (a) Notwithstanding subsection (1), the Tribunal President may, if it is in the public interest and for the purposes of transparency, determine that all or any part of a hearing of a Tribunal must be held in public.

(b) A determination contemplated in paragraph (a) must be made in consultation with the Chief Justice."

I hasten to add that the consultation referred to above has taken place, followed by this Ruling. Properly understood, section 29(1) makes the hearing *in camera* a default position, while section 29(3) gives the President of the Tribunal, in consultation with the Chief Justice, to rule otherwise or partially so.

3. Both the complainant and the SABC largely base their argument on the importance of a public hearing, and that the matter is of public interest. Their submissions can therefore be dealt with jointly. From the outset, it should be stated that we all acknowledge the importance of holding hearings in public generally; nobody needs a lecture on that. I say in general because even in criminal cases, there are instances where the public would not be allowed in, for good measure. Nobody should therefore parade themselves as being better champions of open hearings than those who hold a contrary view in a particular case. Holding a contrary view in a particular case does not therefore necessarily cast one as being inimical to the idea of a public hearing, or lacks appreciation of the importance thereof. The importance of the role played by the media, as the SABC reminds us, is also acknowledged. As I have said, in the present instance the default position is that the hearing is *in camera.* The complainant and the SABC want to shift the Tribunal from this position, while the respondent argues to the contrary.

4. A number of criminal cases were referred to on behalf of the complainant on the importance of a public hearing, something which, as I have said, is not in issue; but, as I said, even in criminal cases there are exceptions, such as the trial of a minor. The criminal cases, including any others for that matter, referred to on behalf of the complainant and the SABC, are of no assistance in the present

case. It must also be accepted that when the Legislature enacted section 29(1), the Legislator was well aware of the importance of a public hearing; such an appreciation was indicated by the enactment of section 29(3) which provides for the relaxation of section 29(1) under certain circumstances. I return later to the reasons behind this latter provision.

5. Besides referring to the cases, the complainant offers very little of substance in addressing the default point of departure; so too the SABC. An argument is raised about the scourge of abuse or sexual harassment of women (at work). No explanation is given how the fight against this would be undermined by an *in camera* hearing; yet on the contrary, in appropriate circumstances such a hearing may be the best process to address the scourge by indicating to potential complainants that they might be heard in protected proceedings, thereby encouraging them to come forward. The argument by the complainant ventures into the realm of conjecture and also comes very close to attempting to ride on the back of the scourge of violence against women, a very emotive issue. The purpose of these proceedings is not to fight other battles; they are tailormade to deal with complaints against, specifically, judges; they are a *sui generis* process. I come later to the rationale behind the provision. It is to be noted that even the complainant does not press for a live television coverage, as the SABC does.

6. Turning to the respondent, he opposes a public hearing on grounds most of which touch on the merits and which I will therefore not deal with; the merits are the preserve of the full Tribunal. He argues though that some of the allegations against him *"have the potential to cause untold irreparable reputational damage, were they not to be sustained in the final analysis and the proceedings end up*

being accessed by the public and the media" and then adds that those allegations have been denied. Coming to the publication of live proceedings, he says the *"publication of live proceedings and untested evidence has the potential to cause prejudice and irreparable harm to* (him) *and the administration of justice"* (he then veered off to touch the merits).

7. I know the nature of the allegations made against the respondent and, looking at some of them, there is merit in his concern. While he concentrates on possible reputational damage to himself, I will concentrate on possible damage to the Judiciary because he is not just a member thereof, but one of its leaders**.** Damage to him would therefore extend to the Judiciary. I now return to section 29(1).

8. The very purpose of the prosecution of complaints against judges in proceedings of this nature is to protect the image of the Judiciary as an institution. But section 29(1) was enacted to ensure that, while that is being done, we do not end up having unwittingly caused irreparable damage to the very image sought to be protected. This could happen where the damaging allegations, aired in public, are later found not to be true; hence the above default position. In other words, the proceedings should not be conducted in such a way that whatever the outcome (that is, even if a respondent is acquitted) damage to the institution would still ensure. This would, surely, be the result if a decision was made to hold proceedings in public – I refer later to the issue of irreparable harm. That the prevention of such damage was paramount in the mind of the Legislature is born out by the requirement that the decision of the Tribunal's President be taken *"in consultation"* with the Chief Justice, the ultimate guardian of the image of the

Judiciary. Any other purposes behind the prosecution of complaints in terms of these proceedings, are extraneous of the proceedings and must be pursued before the relevant fora. Considerations relative to such extraneous purposes should therefore not be allowed to cloud the interpretation and application of section 29(1). I take the liberty of burdening this Ruling by quoting from submissions for the complainant in order for me to illustrate my point:

"This matter is an opportunity for other women to finally speak out and come forward with their experiences of sexual harassment in the legal profession and we therefore ask that the Tribunal committee consider this request in light of the national context and pervasive statistics of sexual violence against women in South Africa and the need for women to speak out against such abuse." The submissions referred to certain statistics, and then continued: *"These statistics are alarming and should, in our submission, be an important consideration in how this particular inquiry is conducted."* In my view, there are appropriate fora to deal with such alarming statistics; not these proceedings. We must be careful not to, as it is sometimes colloquially expressed, "weaponize" these proceedings to fight other battles; doing so may lead me to stray away from the true purpose of these proceedings and thus to a wrong application of the section. In any case, the argument misses an important point. By merely holding these proceedings, a strong and unequivocal message has already been sent out there that it does not matter how junior you are in a work place (the complainant), your sexual harassment complaint would be diligently investigated and appropriate steps taken against the accused person irrespective of their seniority such as the very head of the institution (the respondent). I do not see how this message can be nullified by an *in camera* hearing; not even by any outcome of the proceedings.

Let me also add that as we speak, the respondent has been placed on special leave; a clear message.

Having said all the above though, this is not to say that hearings must always be *in camera* or, as shown in my conclusion below, that all of it should be *in camera;* it would depend, largely, on the nature of the allegations.

9. The argument raised by the SABC that the matter is already in the public domain and the media, misses the point. It is one thing to read about allegations in the media, and quite another to have them canvassed publicly, in the full glare of the media and live television coverage, orally and under oath! One does not know how much the public believe what is reported in the media; but when they actually hear the evidence from the horse's mouth directly, the impact should be different.

10. The acquittal of the respondent would not repair any possible damage to the Judiciary. After all, after the acquittal, there is not going to be a public cleansing ceremony during which the damaging allegations would be erased or retracted by the complainant (likewise under oath). A contrary argument would show a failure to appreciate the full nature and impact of a damage to the Judiciary. As it has been said before, the courts have no army or sword to enforce their judgments; they rely largely on their moral authority. We all know the importance of the role played by the Judiciary especially in a constitutional state. Respondent also makes the point in this context (that is, in the event of an acquittal) that where proceedings are held in public, the record of proceedings would likewise be accessible to the public.

11. Finally, it is trite law that where irreparable damage may ensure, protection is afforded. In enacting section 29(1), the Legislature was having in mind irreparable damage.

12. As already mentioned, section 29(3) vests the discretion in the President of the Tribunal whether a hearing should be held in public. It says the President *"may"* so rule if *"it is in the public interest and for the purposes of transparency"* (own underlining). The second underlining indicates that both elements must be met; this is the effect of the use of the cumulative conjunction *"and".* The underlined *"may"* conveys that even if the two elements were met, the discretion would still be there, otherwise the word *"must"* would have been used to take away the discretion in such a case. But I need not go that far. The request for a public hearing falls at the first of the two hurdles; that is, the requirement of *public interest."* I have already fully canvassed possible irreparable damage to the Judiciary if all of the hearing were to be in public. Damaging the image of the Judiciary can certainly not be in the public interest. The conclusion I come to is a hybrid proceeding; i.e. partially public, and partially *in camera*. This comes after looking at the nature of the allegations, and what is or is not in dispute. Here is my Ruling:

    12.1 There are WhatsApp messages which the respondent does not deny the contents thereof, and that they came from him; with regard to them, evidence is allowed to be heard in public, including live television coverage.

    12.2 There are WhatsApp messages and/or pictures which the respondent denies came from him or his cellular telephone; *prima facie*, the contents

thereof would be damaging to the Judiciary if the respondent's argument were to be upheld in the end. It therefore follows that evidence relating to them including the contents, must be heard *in camera* in terms of section 29(1).

12.3 There are WhatsApp messages and/or pictures relating to some alleged indecent incidents claimed to have occurred in the respondent's chambers; these WhatsApp pictures and/or messages, are not to be availed to the public, and evidence relating to them will also be *in camera* in terms of section 29(1).

12.4 Media coverage, when allowed, should not be too intrusive or in any way interfere with or hamper the proceedings. More directives may be issued in this regard.

Dated this 9th day of December 2024.

Judge B M Ngoepe, President of the Judicial Tribunal.