JUDICIAL CONDUCT COMMITTEE

Ref no.: JSC/894/21

In the matter between:

De Broglio Incorporated **Complainant**

and

Judge D Fisher **Respondent**

Ruling

Judicial Conduct Committee (DCJ Maya, Jafta J, Saldulker JA and Mabindla-Boqwana JA)

[1] This is an appeal lodged in terms of the Judicial Service Commission Amendment Act.[1] Section 15 (5) grants a complainant whose complaint has been dismissed on the grounds listed in section 15 (2) a right to appeal against such dismissal.[2] Acting in terms of this provision, the complainant seeks to appeal against a decision of Mlambo J in terms of which its complaint was dismissed on the grounds that it is solely related to the merits of a judgment or order.

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[1] Act 20 of 2008.

[2] Section 15 (5) of the Act provides that a complainant who is dissatisfied with a decision to dismiss a complaint in terms of subsection (1) may, within one month after receiving notice of that decision, appeal to the Committee in writing against the decision, specifying the grounds for the appeal.

[2] In March 2021, De Broglio Incorporated (the complainant) filed with the Committee a complaint against Judge Denise Fisher (the respondent). The complaint arose from a written judgment issued by the respondent in two civil matters, in which the complainant firm of attorneys represented the plaintiffs. In those matters action was instituted against the Road Accident Fund (the Fund) as the claims arose from road accidents. Pleadings having been closed and the matter enrolled for trial, both cases were allocated to the respondent.

[3] On 13 October 2020, an attorney from the complainant and a representative of the Fund appeared before the respondent. They informed her that the dispute between them had been settled by means of an offer made by the Fund that was accepted by the complainant, on behalf of its client. They proceeded to ask that the matter be removed from the trial roll. The respondent expressed reservations on the parties' settlement. The parties were required to address the court on the settlement that they had reached and the matter was adjourned to the following day to enable the parties to present their agreement.

[4] Argument was indeed presented on that occasion, but the respondent was still not persuaded that the settlement had been properly reached. She directed that the parties should make further submissions on four issues specified by the judge. The matter was postponed to 3 November 2020. Meanwhile the parties prepared heads of argument on the listed response. On 3 November 2020 the hearing resumed and the complainant had briefed counsel to represent its client and present argument. After hearing the parties, judgment was reserved.

[5] Similarly in the second matter, the respondent was assured that the dispute had been settled and she was asked to make that settlement an order of court. The respondent took issue with interim procedural aspects of the case. It was also postponed to 3 November 2020 for argument. Judgment in respect of this matter was also reserved. A single judgment was issued with regard to both matters.

[6] In her judgment the respondent made adverse and damning findings against attorneys who are members of the complainant and their medical expert witnesses. Among other findings, the respondent concluded that members of the complainant's firm of attorneys

were grossly inadequate, corrupt, venial and dishonest. Their expert witness who is an actuary was not spared. That expert was accused of intentionally using his calculations on patently false assumptions and that he produced a contrived report.

[7] The order issued postponed matters *sine die*. The conduct of two members of the complainant, namely Ms de Swart, and Mr van den Barselaar was referred to the Legal Practice Council. The conduct of Dr. Kevin Scheepers was referred to the Health Professions Council of South Africa whereas the conduct of Mr. Ivan Krames, the actuary, was referred to the Actuarial Society of South Africa. The respondent also directed that a copy of her judgment be delivered to the National Director of Public Prosecutions.

[8] As they did not see it coming, the affected attorneys and medical witnesses were surprised by the scathing judgment and the findings made against them, together with the ensuing referrals to various professional bodies and the National Prosecuting Authority. What dissatisfied them the most was the fact that none of them was given a hearing in relation to the conduct found to be unacceptable by the Judge. They were not even cautioned that the Judge was contemplating to make adverse findings against them. Nor were they aware of any evidence that related to their conduct.

[9] All parties affected by the order were unhappy, including the claimants and the Fund, who were litigants before respondent. The affected attorneys and expert witnesses joined the main parties in an appeal to the Supreme Court of Appeal. The court reversed the entire order that was issued by the respondent and replaced with an order that was sought by the parties before the respondent.

[10] With regard to the findings made against the attorneys and the witnesses, the Supreme Court of Appeal said:

> "Whilst Fisher J's industry cannot be faulted, it regrettably has to be said that not a single finding that she made had been open to her to make. Moreover, these findings were made without any admissible evidence… The findings in respect of the settlement agreement and the conduct of the affected persons were based on unspecified knowledge of the Judge of the facts and circumstances of the matter and the pleadings and expert reports in the court files. It is trite that none of these constituted evidence before the court… Thus the Judge decided non-issues

without evidence, to the detriment of all concerned. This injudicious overreach has to be strongly deprecated."[3]

[11] Although the Supreme Court of Appeal set aside the referrals to professional bodies and the National Prosecuting Authority, the findings on which those referrals were based were not expressly reversed. However, the court concluded that none of the findings of dishonesty and impropriety on which the respondent relied were properly made by her.

[12] Meanwhile the current complaint was referred to Mlambo JP in terms of the relevant provision of the Act. Having considered it Judge President Mlambo dismissed the complainant in accordance with section 15 (2) on the ground that the complaint is solely related to the merits of the judgment or order.

[13] Dissatisfied with this outcome, the complainant appealed to this Committee. The grounds of appeal are the following:

(a) Although the conduct of Judge Fisher complained of informed the merits of her judgment and order, it does not solely relate to those merits.

(b) It is a direct result of the Judge's conduct, set out fully in the complaint, that "she trampled on the parties' rights and ignored the basic principles of *audi alteram partem.*"

Issues

[14] The first issue that arises in this appeal is whether the complaint, as Mlambo JP concluded, is solely related to the merits of the judgment or order. If it does, the appeal must be dismissed. However, if it does not the next issue that arise is whether there is sufficient cause for recommending that the complaint be referred to a formal inquiry on the matter.

[3] Supreme Court of Appeal judgment, *Road Accident Fund v Taylor and Other matters* 2023 (5) SA 147 (SCA) at para. 30.

Whether complaint solely relates to merits

[15] It is apparent from the language employed specifically in section 15 (2)(c) of the Act, that it is not all complaints that relate to the merits which ought to be summarily dismissed. A dismissal is limited to a smaller category of complaints which are "solely related" to the merits. The word "solely" marks the parameters of complaints that should be dismissed. Therefore, properly construed, the section means that complaints which may be dismissed are those that are exclusively relating to the merits. They must be concerned exclusively with the merits.

[16] This interpretation does not only accord with the language employed in the provision, but it is also consistent with the articles of the Code of Judicial Conduct which require affected parties to be heard before referrals can be made. The Code itself acknowledges that a Judge may in the process of writing a judgment, commit misconduct. In this regard, article 16 (2) of the Code declares:

"Before commenting adversely on the conduct of a particular practitioner or prosecutor in a judgment, the judge must give that person the opportunity to deal with the allegation."

[17] In addition, article 9 of the Code imposes upon Judges the duty to conduct fair hearings. The duty encompasses the obligation to observe the *audi alteram partem* principle. Article 9 provides:

"A judge must-

(a) resolve disputes by making findings of fact and applying the appropriate law in a fair hearing, which includes the duty to
(i) observe the letter and the spirit of the *audi alteram partem* rule".

[18] The complainant specifically refers, amongst other matters, to these two articles and asserts that the respondent breached them by failing to give the attorneys a hearing before the adverse findings on their conduct and referrals were made. It was accepted by the Supreme Court of Appeal in *Taylor* that those attorneys and expert witnesses were not afforded a hearing before the Judge made the prejudicial findings. That Court stated:

"In the circumstances, the old-age principle of *audi alteram partem* required that the affected persons to be afforded reasonable process, notice and opportunity to state their cases… The affected persons were not afforded such notice or opportunity. It follows the findings and referrals were made in complete disregard of the rights of the affected parties."[4]

[19] What is outlined above illustrates that the judgment in question was not limited to the merits of the dispute between claimant of damages and the Fund. The judgment was also concerned with the conduct, as found by the Judge, of practitioners and expert witnesses. But more importantly in dealing with such conduct, the Judge did not follow the Code of Judicial Conduct.

[20] Therefore, when taken on face value the part of the allegations contained in this complaint may support the claim that the Judge has committed misconduct in the form of a breach of the Code, which although not rising to the level of "gross misconduct" does warrant further probing. And this complaint was not determined by the Supreme Court of Appeal, because it fell outside the scope of the appeal.

[21] Therefore, Mlambo JP erred in concluding that the complaint should be dismissed on the basis that it relates solely to the merits of the judgment. It follows that the appeal must succeed.

[22] In terms of section 16 (4) of the Act, the present complaint is referred to the Acting Chairperson for purposes of an inquiry into the merits of the complaint in terms of section 17 (1) of the Act.[5]

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[4] Supreme Court of Appeal judgment, ibid para 33-34.

[5] Section 17 (1) provides that if-

(a) the Chairperson is satisfied that, in the event of a valid complaint being established, the appropriate remedial action will be limited to one or more of the steps envisaged in subsection (8); or

(b) a complaint is referred to the Chairperson in terms of section 15 (1) (b) or section 16 (4)(a) or section 18 (4)(a)(ii), the Chairperson or a member of the Committee designated by the Chairperson must inquire into the complaint in order to determine the merits of the complaint.