

CONDUCT OF THE JSC

The FW de Klerk Foundation has taken note of the differing manner in which the Judicial Services Commission of South Africa (JSC) appears to investigate complaints against members of the judiciary.

The JSC is a constitutional body in terms of section 178 of the Constitution (read with the Judicial Service Commission Act 9 of 1994). The primary functions of the Commission are to interview candidates, and make recommendations, for appointment to the bench as well as dealing with complaints brought against the Judges.

The JSC's judicial conduct committee recently rebuked Chief Justice Mogoeng Mogoeng for comments he made during 2020 on the Israeli-Palestinian conflict – in which he criticised SA's foreign policy – as well as his continued defiance after the comments drew a major response. Chief Justice Mogoeng defended himself by saying his comments were made as a Christian. However, Judge Phineas Mojapelo, a member of the JSC's Judicial Conduct Committee tasked with probing three complaints laid against Mogoeng, emphasised that the complaint was not about freedom of religion or freedom of expression but “merely about whether the code of conduct for judges was breached”.

Mojapelo found that comments about the Israeli-Palestinian conflict made by Mogoeng in a webinar hosted by *The Jerusalem Post* amounted to “a breach of the code of conduct for judges and that Mogoeng had got himself involved in a political controversy”. According to Mojapelo “judges are to stay out of politics and are only permitted to pronounce on the legal and constitutional boundaries that may apply to those politics. When called upon to pronounce, they do so on the basis of the Constitution and the law and not on the basis of any preconceived notions – not even religion – however committed to those notions. That is what the Constitution and their oaths or affirmation bind them to”.

The committee also found Mogoeng breached a number of other articles in the code, including one that precludes judges from using the prestige of their judicial office to advance their private interests.

The Chief Justice has been ordered to apologize for his comments.

However, the expeditious manner in which the JSC investigated and concluded this matter stands in sharp contrast to the manner in which it has conducted itself when investigating complaints against other members of the judiciary – most notably judge John Hlope, who is the Judge President of the Western Cape High Court.

Complaints against Hlope –as well as his fitness to be a judge - go back as far as 2005 when he reportedly called an attorney, Mr Josua Greeff, “a piece of white sh*t”. In 2006 the JSC received complaints that Hlope had been receiving a monthly retainer from the Oasis Group and that he had failed to declare this interest – as is required from judges - when ruling in a matter concerning the same group. In 2008 Hlope's fitness for office was again called into question when all the then judges of the Constitutional Court made a complaint to the Judicial Service Commission (JSC) that Hlope had sought to influence Constitutional Court Justices Jess Nkabinde and Chris Jaftha in the outcome of cases pending before that court and connected to the corruption prosecution of former president, Jacob Zuma. After a 12 year delay the JSC reserved its judgment on the case in 2020.

Concerns were again raised during 2019 when Hlope personally intervened in a judgment made against his personal attorney, Barnabas Xulu. The most recent storm involving Hlope is his acquittal of Bongani Bongo, a former Minister in Jacob Zuma's Cabinet, and a senior member of the so-called

radical economic transformation faction in the ANC. The acquittal and the manner in which the case was handled by Hlope, have been widely criticised.

The JSC has a constitutional mandate to determine whether any judge against whom a complaint has been lodged is guilty of gross misconduct. Laws and procedures for doing so have been carefully formulated and these should be applied “diligently and without delay”. If the code of judicial conduct is enforced against one judge, it must be applied equally to another.

In terms of section 177(3) of the Constitution, the President, may, on the advice of the JSC, suspend a judge who is the subject of a (disciplinary) procedure.

The question arises in why this measure has not been invoked with regard to Judge Hlope - in the light of the fact that he has been accused of gross misconduct on numerous occasions -including the complaint against him by all the then justices of the Constitutional Court. The question may also be asked why the JSC has claimed that “it has no say in the matter’ and why Hlope has indeed not been suspended?

The numerous allegations against Judge Hlope must be properly investigated in accordance with the JSC’s Code of Conduct. It is essential that, as the guardian of the integrity and independence of the judiciary, the JSC’s own conduct should be beyond reproach and should be exercised in a manner that is fair, impartial and consistent with the Constitution.