

# CAPE BAR COUNCIL

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24 January 2011

**URGENT**

Mr V Ramaano  
Committee Secretary  
Ad Hoc Joint Committee on Code of Judicial Conduct and  
the Regulations on Judges' Disclosure of Registrable Interests  
email: [vramaano@parliament.gov.za](mailto:vramaano@parliament.gov.za)

Dear Mr Ramaano

## **COMMENT: CODE OF JUDICIAL CONDUCT AND REGULATIONS ON JUDGES' REGISTRABLE INTERESTS**

We refer to our letter of 18 January 2011 and your response thereto, namely that we would have time till 24 January 2011 to submit our comments.

Attached please find a report on the abovementioned bill for your urgent attention and appropriate circulation.

Yours sincerely



**ALASDAIR SHOLTO-DOUGLAS SC**  
**Chairperson: Parliamentary Committee**  
**of the General Council of the Bar of South Africa**

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## **COMMENT ON THE CODE OF JUDICIAL CONDUCT AND REGULATIONS ON JUDGES' REGISTRABLE INTERESTS**

### **Introduction**

We have been asked to comment on the proposed Code of Judicial Conduct ("the Code") to be adopted in terms of section 12 of the Judicial Service Commission Act 9 of 1994 ("the JSC Act") and on the proposed regulations governing the disclosure of registrable interests as provided for in section 13 of the aforementioned Act ("the Regulations").

As members of the Cape Bar we have focussed our comments on their application to acting judges, with particular emphasis on the disclosure by acting judges of the registrable interests described in the Regulations. We do, however, also make general comments on the proposed Code and Regulations.

### **The proposed Code of Judicial Conduct**

We note that the provisions of the Code are modelled on the Bangalore Principles of Judicial Conduct (2001) as revised at The Hague (2002). A perusal of the Bangalore Principles reveals that a number of general principles are stated, followed by a series of imperative provisions that give effect to the principle in question. It appears to us that the drafters of the Code have sought to achieve the same result by making a general statement of the principle and then dealing with the application of the principle in the notes following the sections in question.

We believe that there is a risk that some confusion may result from the proposed format of the Code as it is not clear whether the notes are simply explanatory or in themselves impose binding obligations on judges. There are also a number of notes that should clearly be rules, such as note 10B. In our view it would be better either to follow the format of the Bangalore Rules, or to do away with the notes and to couch the obligations imposed on judges by the Code in imperative terms. For example, the equivalent of Note 3A in the Bangalore Principles, Value 1, after having stated the principle of judicial independence, applies the rule as follows:

"A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason."

We are also concerned that some of the provisions of the Code are vague and may be very difficult, if not impossible to enforce. For example, how does one enforce an obligation on judges to avoid "any personality issues with colleagues" as is provided in section 10(5). What is a "personality issue"?

We proceed to discuss those provisions of the Code that we believe require comment.

#### 1. Rule 2:

1.1. We note that in the preamble to the Code and in section 2 it is proposed that the Code should be applicable to all judges as defined in section 7(1)(g) of the Judicial Service Commission Act, 1994. (It is to be noted that the definition of "judge" is contained in section 7(1)(f) of the Afrikaans version of the JSC Act).

1.2. In rule 2(2) much of section 7(1)(f) of the JSC Act is repeated, unnecessarily, we believe.

1.3. There is a small typographical error in rule 2(3).

#### 2. Rule 3:

Note 3D does not appear to impose any duty upon judges and we question whether it is appropriate to include the note in the Code which deals with the conduct of judges.

#### 3. Rule 8:

There does not appear to be an equivalent to this section in the Bangalore Principles. The obligation imposed by judges to observe the *audi alteram partem* principle is imposed by law and is therefore covered by rule 5 of the Code. The furnishing by a judge of reasons for decisions is

dealt with in the rules governing the procedure of the various courts. We therefore question whether these duties should be included in the Code.

4. Rule 12:

There is a small typographical error in the second line of Note 12D.

5. Rule 14:

In the light of the prohibition imposed on judges performing active service in section 11(1) of the JSC Act, we question whether there is any need to repeat the provisions of the Act in this rule.

6. Rule 16:

6.1. The reference to section 12(2) of the JSC Act should be a reference to section 11(2).

6.2. In the light of the fact that section 11(2) of the JSC Act prohibits judges discharged from active service from holding any other office of profit or from receiving other remuneration apart from his or her salary or any other amount payable to him or her in his or her capacity as a judge without the written consent of the Minister, we believe that there is no need for this section.

6.3. Circumstances may dictate that a judge discharged from active service, such as a judge who resigns rather than retires, should be permitted to take up practice again as an advocate, attorney or legal advisor, or as a director of a public company. Are there not already judges discharged from active service who are directors of public companies? We believe that it is appropriate for the Minister, in consultation with the Chief Justice, to have the power to permit judges so to act if the circumstances permit. Rule 16(5) and Notes 16B and 16C restrict and interfere with the discretion given to the Minister in section 11(2) of the JSC Act.

6.4. There is a small typographical error in Note 16D.

### **The regulations governing disclosure of financial interests**

We note that the regulations impose an obligation to disclose registrable interests, not only on permanent judges, but also on acting judges and judges who have been discharged from active service.

Firstly, we can see no reason why an obligation to disclose registrable interests should be imposed on judges who have been discharged from active service and who are no longer serving in a judicial capacity. The financial interests of judges who are no longer adjudicating on matters, and whose impartiality is accordingly no longer an issue, are of no relevance to the public.

Secondly, and most importantly, we believe that the obligation imposed on acting judges to disclose registrable interests is far too wide. The obligation imposed on acting judges, who nowadays come from all walks of life, may well discourage people from making themselves available to act. This would have a harmful effect on the ability of our courts to administer speedy justice.

In the Western Cape High Court many members of the legal profession make themselves available on a *pro bono* basis to act as judges to assist in reducing the backlog of criminal appeals from the lower courts that arises from time to time. These appointments are on an *ad hoc* basis and are only valid for one day. If an obligation is imposed on practitioners who are otherwise prepared to make themselves available to perform this function which is without remuneration and solely in the public interest, this is likely to result in such practitioners no longer being prepared to make themselves available.

We perceive that it may be advisable for an acting judge who serves for a reasonably substantial period to be obliged to disclose registrable interests. However we believe that there should not be a requirement that an acting judge who serves for one court term or less be obliged to disclose the registrable interests described in parts 3 and 4 of annexure "A" to the proposed regulations.

We accordingly would strongly recommend that the definitions in regulation 1 include a definition along the following lines:

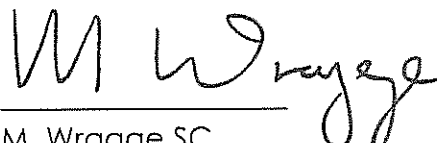
""acting judge" means any judge as described in section 7(1)(g) of the Judicial Service Commission Act, 1994 (Act No. 9 of 1994) who has been

appointed to perform judicial duties in an acting capacity for a period longer than one court term of the court in which the judicial duties are performed."

If our recommendation relating to acting judges set out above is not accepted, we have difficulty in seeing how regulations 3 are to be applied to acting judges.



H. M. Carstens SC



M. Wragge SC

Chambers  
23 January 2011