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INTERNAL MEMO

DATE:	31/08/2010	**FILE NR:**	8/6/Regs/2
TO:	S J ROBBERTSE	**FROM:**	MMR MOSIANE/M TLADI

SUBJECT:	**CODE OF JUDICIAL CONDUCT FOR JUDGES IN TERMS OF SECTION 12 OF THE JUDICIAL SERVICE COMMISSION ACT, 1994**

Background Information

1. We are requested to check and evaluate –

(a) the Code of Judicial Conduct compiled by the Chief Justice; and

(b) an alternative Code, which was compiled by the Department of Justice and Constitutional Development ("the Department"); and to advise the Department on the correctness, desirability and comprehensiveness of the provisions of the respective Codes.

Discussion

(a) Code compiled by the Chief Justice

2. We are of the view that the draft Code with track changes ("revised draft Code") compiled by the Chief Justice, reads much better than the first draft Code. Our comments are therefore, based on the revised draft Code. We wish to comment as follows regarding the contents of the draft Code:

***Ad* Preamble**

3. The Preamble should set out the main objects of the Code. Paragraphs 1-7 is already covered in the Constitution of the Republic of South Africa, 1996, (the Constitution) and it is unnecessary repetition. We suggest that they be deleted.

4. The underlying purpose which is served by paragraph 7 beginning with "it is necessary" and ending with "obligations that", does not clearly come across. We would suggest that the clause be reformulated as follows:

> "The judiciary should conform to the ethical standards as set out in the relevant international instruments, in particular the Bangalore Principles of Judicial Conduct, as revised."

5. We are not certain as to what is missing in paragraph 10, but it definitely sounds incomplete. The rest of the clause is coherent and consistent throughout except the part starting with "in respect of" up to the end of the clause. We would suggest that the last clause be broken into two clauses to read as follows:

> "Section 12(5), read with section 14(3)(a) of the Act, specifically provides that the Code of Judicial Conduct shall serve as the prevailing standard judicial conduct, which the judges must adhere to; and
>
> Any wilful or grossly negligent breach of the Code may amount to misconduct which will lead to disciplinary action in terms of section 14 of the Act;"

***Ad* Approval provision**

6. Approval provision must cite the legislative authority and we suggest it be redrafted as follows:

"**BE IT THEREFORE APPROVED** by the Parliament of the Republic of South Africa, as follows":-

***Ad* Application**

7. We agree with the new provisions inserted in the Application provision of the revised draft Code where it stipulates as to the persons to whom it will apply. The provision of the first draft Code was not clear to the persons to whom the Act would be applicable. Clause 3 to 5 of revised draft Code merely relates to the degree or type of negligence on the basis of which a complaint against a judge may be brought. This should be omitted because it is already covered in the Judicial Service Commission Act, 1994 (Act No. 9 of 1994) ("the Act") and serve no purpose as indicated by the Department.

***Ad* Interpretation**

8. We suggest that sub-clauses 3(1) and (2) of the revised draft Code, be reformulated as follows:

> 3. (1) "The objects of the Code are to assist the judges in dealing with ethical and professional issues and to inform the public about the judicial ethos of the Republic of South Africa.
>
> (2) The Code shall –
>
> (a) be applied in consistency with the Constitution and the law, having due regard to the relevant circumstances;
>
> (b) under no circumstances whatsoever, be interpreted as encroaching on the independence of the judiciary or on the doctrine of separation of powers."

9. The purpose of the Code is to provide ethical standards which judges must adhere to. Clause 2 (c) of the revised draft Code provides:

> "Code shall not be interpreted as absolute or precise, nor as exhaustive. Conduct may therefore be unethical which, on a strict reading of this Code, may appear to be permitted and the converse also applies".

The provision is confusing and creates uncertainty. The judges have to know what is expected of them. What is it that they may or may not do? This clause is not contributing much, if anything at all, for purposes of bringing clarity to this issue. We suggest that the provision be deleted or be redrafted to make it clearer.

***Ad* Judicial Independence**

10. Is this clause necessary in the light of the provisions of sections 14, 15, 16 or 17 which extensively cover the manner in which complaints against the judges are to be considered and dealt with?

11. Clause 3(2) captures what is already in the Constitution. Is it necessary to repeat it in this Code?

12. Note 3C:Is it necessary to expressly state that 'judicial independence' is not a private right? This may suggest that the judges may not be aware as to what this concept entails. This is well understood and our jurisprudence is replete with explanations as to what this entails (**De Lange v Smuts NO and Others 1998 (3) SA 785 at 813; S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening 2002 (5) SA 246 (CC); Valente v The Queeen (1985) 2 S.C.R. 673).** We would suggest that this be deleted.

***Ad* To act honourably**

13. It is a given that a judge has to act honourably when performing his or her duties. Is it important that it be repeated in this clause?

14. It is not part of South African drafting practice to include explanatory notes in subordinate legislation. Normally when principles are considered important enough, they are incorporated into the body of the text. We suggest that the notes should be included in the substantive provisions in instances where they are considered important and not being repetitive of what already stands in the text.

15. Note 3D captures what is already in our Constitution. We do not see the need to make provision for it in this Code.

16. We suggest that the clause be reformulated as follows:

> "Members of the judiciary are at all times expected to conduct themselves in a manner which enhances and deepens respect for judiciary and the administration of the justice system".

***Ad* To comply with the law**

17. This is a given, as it is expected of every judge to comply with the law. Is it really necessary to state this? It is also said that offences involving moral turpitude are inexcusable. What offences are being referred to here? A distinction has to be made between morality and the law. For example, adultery is not a crime in our law even though it may be reprehensible, morally speaking. We would suggest that a distinction be made between a conduct which involves a moral turpitude and the one which amounts to an offence.

***Ad* Equality**

18. Equality is a fundamental right which has been entrenched in the Constitution and the Constitution is the supreme law of the land. Anything done contrary to the Constitution is invalid. We suggest that clause 7 of the revised draft Code be reformulated as follows:

"7. A judge shall at all times –

(a) avoid and dissociate himself or herself from comments or statements made by persons under his or her supervision which are racist, sexist or otherwise clearly manifesting unfair discrimination in violation of the right to equality;

(b) act courteously and respectfully towards others;

(c) act fairly and impartially ;"

19. Note 6B: What is intended by this note and what is the judge expected to do regarding the changing social attitudes of various communities and manifestations of divergent cultural diversities of other groups, other than being aware of such things? We would suggest that the notes be deleted.

***Ad* Transparency**

20. This is a constitutional imperative. In our view, there is no need that it be repeated in this clause.

21. Note 7A and 7B: Law is a difficult and complicated discipline by its very nature and in many instances even people who are well-trained in law may not agree on many issues because their understanding may not always be the same. Some cases are so complicated that it is sometimes difficult to follow them even if one is a trained lawyer. That may not necessarily be a reflection of the inability of the presiding judge to explain himself or herself, but having everything to do with the complexity of the facts or the legal principles involved in the matter. It would thus be grossly unfair to blame the judiciary for the inability of the public or the litigants to follow matters before the courts even if the judges are doing their best to reach them but cannot do so successfully because of the nature of the case before them.

22. Therefore, categorically stating that the legitimacy of the judiciary is dependent on the public understanding them is being simplistic in approach

and ignoring the realities of the law as a discipline and that it will take a considerably long time, if at all, before the general public may follow and understand all the proceedings in a court of law.

23. The fact that matters are heard in an open court should suffice for purposes of transparency. It is not feasible to insist that everybody should understand all the proceedings in court in the same way no one may assume that every member of the public will understand astronomy or astrology as disciplines.

24. Note 7C: What is being conveyed in Note 7C? This sounds very much like an attempt to dictate to the judges. We would suggest that the clause be deleted.

***Ad* Fair trial**

25. That everyone is entitled to a fair trial is a given. What is being conveyed to the judges here? We are not certain that this clause is necessary. The notes seek to descend into the arena of the judges' domain by trying to prescribe how the judge should conduct proceedings and how they have to deal with parties at the trial. A judge is appointed precisely because he is qualified and has considerable experience in the work. Dictation to the judges that they cut short cross-examination of witnesses in certain instances, for example, can hardly be appropriate in those circumstances. What then becomes of judicial independence? We would suggest that the clause be deleted.

***Ad* Diligence**

26. It is to be noted that the Constitutional Court expressed how deeply it was troubled by the conduct of the court in the decision of **Strategic Liquor Services v Mvumbi NO and Others 2010 (2) SA 92 (CC)**, in which, despite repeated requests for reasons, the court simply ignored the requests. In **Mphahlele's** case the Constitutional Court explained clearly that "a reasoned judgment is indispensable to the appeal process. Judges

ordinarily account for their decision by giving reasons – and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons "explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters". The court warned that "*It is a grave matter when courts themselves infringe rights in the Bill of Rights and it must be hoped that this occurrence is and will remain extremely rare".* It is against this background and in context of the **Strategic Liquor Services v Mvumbi NO and Others 2010 (2) SA 92 (CC) and Mphahlele** cases that diligence clause becomes not only necessary but also significant.

27. We suggest that clause 10 (c), (f), (g) and Note 9A and 9B, be deleted because this is unnecessary repetition. We also suggest that the last sentence of note 9B (which provides for amongst other things, that criminal proceedings must be dealt with expeditiously) and Note 9C should be included in the substantive provision as clause 10 (2) and (3).Note 9D is a statement and not a legal provision (provision which imposes duties or confer rights). We suggest that note 9D be deleted.

***Ad* Restraint**

28. We suggest that clause 11(c) of the revised draft Code be reformulated to read as follows " ... refrains from any action which may be construed as designed to stifle legitimate criticism of his or her judgement or that of any other judge." We suggest that the notes be deleted.

***Ad* Association**

29. We agree with the Department that section 11 (1) may be unconstitutional in so far as it prohibits a judge from belonging to a political

party. Section 18 of the Constitution provides that everyone has the right to freedom of association. In the exercise of the freedom of association, a judge may join any political organisation. The *Bangalore Principles of Judicial Conduct (2002)* ("*the Bangalore Principles*"), also entrenches the right to freedom of association. Value 4.6 of the Bangalore Principles provides as follows:

> "A judge, like any other citizen, is entitled to *freedom* of expression, belief, *association* and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary."(Our emphasis)

We suggest that certain restrictions be placed on the judge's right to freedom of association. We are of the view that paragraph 14 (1) of the draft Code compiled by the Department seems to capture the restriction on the judge's right to freedom of association in the best possible way.

***Ad* Recusal**

30. In this instance there are already precedents in our jurisprudence which serve as a good guide as to the circumstances under which a judge may recuse himself or herself from a case. The other important consideration is that the judge exercises discretion to decide what to do in the prevailing circumstances. We do not think that a closed list of grounds upon which a judge may recuse himself or herself from a case, would be helpful in this regard. We would suggest that this clause be deleted.

***Ad* Extra-judicial activities of judges on active service**

31. We suggest that clauses 14(1), 2(a), (b), 3(c) and 4(b) of the revised draft Code be reformulated to read as follows:

> "14.(1) A judge's judicial duties shall take precedence over

all other duties and activities.

(2)...

(a) are not incompatible with the duties of the office of the judge; or

(b) do not affect or may not be perceived as affecting the judge's availability to deal with the matter within a reasonable time.

(3)...

(a)

(b)

(c) not be involved in any undertaking, business, fundraising or other activity which may affect the status, independence or impartiality of the judge or is incompatible with the judicial office.

(4)...

(a)...

(b) be a director of a private family company or member of a close corporation but if the company or a close corporation conducts business, the judge may not perform any executive function in such a company or close corporation or a similar entity;

(c)..."

32. We suggest that notes 13A, 13B and 13C be deleted. We also suggest that note 13E be included in the substantive provision as clause 14(d).

***Ad* Extra-judicial income**

33. We suggest that the clause be deleted as it is unnecessary repetition of the provisions of the Act.

***Ad* Informing**

34. We are of the view that the formulation in par 6.3 of the Department's draft Code is more preferable.

***Ad* Judges not on active service**

35. We suggest that clause 17(1) be reformulated as follows:

> "17.(1) A judge who has been discharged from active service may hold any other office of profit or receive in respect of any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge, only with the written consent of the Minister after consultation with the Chief Justice."
>
> (2) a Judge who is no longer on active service or liable to be called upon to perform judicial duties shall always act honourably and in a manner befitting his or her status as a judge.
>
> (3) All activities of a judge no longer on active service shall be compatible with his or her status as a retired judge.
>
> (4)...
>
> (a) accept any appointment that is likely to affect or be seen to affect the independence of judiciary, or which could undermine the doctrine of separation of powers or the status of the judiciary and may not receive any income incompatible with his or her judicial office;
>
> (b)...
>
> (c) be involved in any undertaking, business, fundraising, or other activity which is incompatible with the status of a judge."

36. We suggest that notes 16A, B, and C be included in the substantive

provisions as clauses 17(5), 17(6) and 17(7). With regard to Note 16D please see our previous comments with regard to the aspect of Association.

General

37. The Code has a status of subordinate legislation. The Code must therefore comply with the form and style used for legislation including the question of numbering.

38. The Act uses "must" not "shall". We suggest that for the sake of consistency, "must" be used in the Code as it is done in the Act in order to avoid inconsistency and interpretational problems.

(b) An alternative Code compiled by the Department

39. Section 12 of the Act in so far as it is relevant to the case in point, provides as follows:

> "(1) **The Chief Justice**, acting in consultation with the Minister, **must compile a Code of Judicial Conduct,** which must be tabled by the Minister in Parliament for approval.
>
> (2) The Minister must table the first Code under this section in Parliament within four months of the commencement of this Act, provided that if consensus could not be achieved as contemplated in subsection (1) ***both versions*** of the Code must be tabled in Parliament within the said period." (Our emphasis)
>
> (3) When the Code or any amendment thereto is tabled in Parliament in terms of subsection (1) or (2), Parliament may, after obtaining and considering public comment thereon, approve the Code or such amendment—

(*a*) without any changes thereto; or

(*b*) with such changes thereto as may be effected by Parliament.

(4) The Code must be reviewed at least once in every three years by the **Chief Justice,** acting in consultation with the Minister, and the result of such review, including any proposed amendment to the Code, must be tabled in Parliament, for approval, as contemplated in subsection (3)."

40. The Act unambiguously selects the Chief Justice as the competent person in this instance and also the one best placed to be able to compile the Judicial Code because as the most senior judge in the country, he is the one who is in the best position to protect the judicial independence, as entrenched in the Constitution. It is therefore, very clear that the intention of the legislature is that the Code for the judiciary should be compiled by the judiciary itself. This is consistent with the principle of judicial independence. This is also in keeping with the doctrine of separation of powers, as contemplated in our Constitution because the purpose of the Code is primarily to serve as "*the prevailing standard of judicial conduct.*"

41. However, it is a cardinal principle of our law that legislation confers power on *named officers or bodies*. Even in instances where less definite terms are used, specific offices are intended and they have to be identified by reference to the empowering statute. For example, in the case of **Ensor v The Master 1983(1) SA 843(A),** power had been conferred on two ministers. The court held that where there is a general reference to 'the Minister' without specifying which minister is being referred to, *'it is intended that each minister is to deal only with matters in his own field.'* However, even in such instances, it is still necessary to establish in no uncertain terms as to who has to exercise a specific power. In this case, the Minister of Justice was to regulate matters concerning the Master of the Supreme Court and the Minister of Economic Affairs was to make regulations concerning the Registrar of Companies.

42. In the case of **Van Zyl (Pty) Ltd & Another v Minister for Safety and Security & Others 2010 (2) SA 181 (CC),** at paragraph 22, Mokgoro J had the following to say in this regard:

> "A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. *When confronted with legislation which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required, as discussed above, to declare the legislation unconstitutional and invalid.*"

43. We are of the view that the construction of the provisions of section 12(1) which empowers the Chief Justice to compile the Code, not only seeks to reaffirm the constitutional goal as enshrined in section 165(2) of the Constitution regarding the judicial independence of the courts but is also more consistent with the constitutional goal of separation of powers, than the contrary view which advocates that the Minister is also a competent authority empowered to prepare the 'other' version.

44. "Power is not conferred upon 'the administration' generally, and any power which is conferred may be exercised by the office holder or *body upon which it was conferred alone.* If someone else purports to exercise the power, the latter's act is simply *ultra vires* and invalid." Therefore, in the same vein, power clearly conferred on the Chief Justice to compile the Code in consultation with the Minister, cannot in the same breath be exercised by the said Minister (Baxter: *Administrative Law* (1984) p.426).

45. Therefore, even in our case in point, there must be a competent authority who is charged with the responsibility of compiling the Code. This is the Chief Justice. This responsibility cannot be conferred on the Minister and the Chief Justice at the same time. Besides, we were unable to find any provision in section 12 of the Act which seeks to clothe the Minister with the power to compile the Judicial Code. In the absence of such authority, we are

unable to find any legal basis for the Minister to compile the 'other version' of the Code. This will also undermine the principle of judicial independence upon which the judiciary is founded.

46. In the absence of that legal authority for the Minister (Department) to compile the other version of the Code, we are having grave difficulties regarding the status of the alternative draft prepared by the department. It is obvious from the provisions of the section 12(1) of the Act that the Chief Justice must consult the Minister in compiling the Code. It would seem that the Chief Justice has submitted his draft in compliance with this provision. We would have thought that the Minister would then revert to the Chief Justice regarding those areas of the draft with which he has difficulties or is uncomfortable and either together explore ways of resolving such or make suggestions to the Chief Justice to address such concerns. From our preliminary discussions with the officer involved in this matter, it does not seem that this process of consultation has been followed and concluded. We would suggest that this process of consultation be followed in order for the Chief Justice to become aware of the Minister's concerns regarding his draft and the solutions proposed by the Minister. Other than finding no legal basis for the authority to compile the other version of the Code, the process of having to prepare another draft even before the Chief Justice has been consulted as required by the statute, seems to be premature.

47. However, it needs to be stated that the draft prepared by the Department is the one with which we experienced the least problems as regards its consistency with our drafting conventions.

Clause 3

48. How does a judge permit others to create the impression that they are in a special position? What does this seek to convey?

Clause 5

49. The latter part of this clause starting with "A judge must accept restrictions on personal conduct...might be viewed as burdensome by ordinary citizens", is not very clear. It has to be reformulated in order to ensure that it is clearer or be removed if it cannot be improved.

Clause 7(1)(c)

50. The idea of a judge appearing before the executive or parliament to answer to matters relating to the administration of justice, on the face of it, sounds like a serious inroad into the sphere of the judicial independence which is or ought to be the domain of the judges. What would be the purpose of the judges being called upon to appear before the executive or the legislature? It is vitally important that even at this early stage parameters are clearly drawn regarding the details as to what the judges would be expected to answer to, when they appear before the executive or parliament.

51. We cannot put it more eloquently than how it was expressed by the court in the case of **Valente v The Queen (1985) 2 S.C.R 673** ("**Valente** case"), where the court remarked as follows regarding the importance of judicial independence:

> "*Independence of the judiciary has normally been thought of as freedom from interference by the Executive or Legislature in the exercise of the judicial function.* This, for example, was the conception expressed by the International Congress of Jurists at New Delhi in 1959 (*The Rule of Law in a Free Society*, 11 (Report of the International Congress of Jurists, New Delhi, 1959, prepared by N. S. Marsh)) and arises from the fact that *historically the independence of the judiciary was endangered by parliaments and monarchs.* In modern times, with the steady growth of the corporate giants, it is of utmost importance that the independence of the judiciary from business or corporate interests should also be secured (*Accord* G. Borrie, *Judicial Conflicts of Interest in Britain*, 18 Am. J. Comp. L.

697 (1970)). *In short, independence of the judiciary implies not only that a judge should be free from governmental and political pressure and political entanglements but also that he should be removed from financial or business entanglements likely to affect, or rather to seem to affect, him in the exercise of his judicial functions"* (paragraph 17)(Our emphasis).

52. It is clear from **Valente** case that the court regards judicial independence as implying that a judge should be free from governmental and political pressure and political entanglements. Clause 7(1)(c) as currently couched, is not clear as to what it entails. On the face of it, it seems to go to the very root of the judicial independence. We would suggest that this clause either be reformulated in relation to the issues we are raising to clarify it or have it deleted.

Clause 7.3(a)

53. The latter part of this sub-clause starting with "that would...", is not clear. It needs to be reformulated to make it clearer.

Clause 7.6(a)

54. We would suggest that the phrase "cast reasonable doubt", be replaced by "negatively impact...".

Clause 7.7

55. The last part of the sub-clause starting with "provided...", introduces uncertainty into the clause which may lead to confusion. We would suggest that it be removed or else reformulated in a manner which would create certainty.

Clause 8

56. This clause suggests a closed list as regards the circumstances under which a judge or a member of his or her household may receive a gift, bequest, favour or loan. Would there be no other instances in the future which may not necessarily be covered by this closed list? We would have thought that it would be advisable to formulate the clause in a more general tone to cover even instances in the future which may not be foreseen at this stage. This may be problematic in the future.

57. We hope that these comments would be helpful.

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