dgru Democratic Governance and Rights Unit

DGRU COMMENT ON THE JUDICIAL SERVICE COMISSION AMENDMENT ACT

The Judicial Service Commission Amendment Act 20 of 2008 came into force on 1 June 2010. The Act is of great significance for the governance of the judiciary. In this note, we highlight some of its most important aspects.

Structure and key provisions of the Act

The Amendment sets out to establish a Judicial Conduct Committee ("to receive and deal with complaints about judges"); to provide for a Judicial Code of Conduct (which will be "the prevailing standard of judicial conduct"); to provide for a register of judges' registrable interests to be established and maintained; to provide for procedures to deal with complaints about judges; and to establish Judicial Conduct Tribunals ("to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges").

The complaints procedure

The Act creates a Judicial Conduct Committee for dealing with complaints against judges [s 10]. The Committee comprises of the Chief Justice (the Chairperson of the Committee), the Deputy Chief Justice and four judges designated by the Chief Justice, two of whom must be women [S8(1)]. It is curious that of these members, only the Chief Justice would necessarily be a member of the JSC in terms of s 178 of the Constitution, and yet the Committee is clearly established as part of the JSC – s 8(1) provides that "[t]he Commission has a Judicial Conduct Committee".

Complaints are lodged with the chairperson of the Judicial Conduct Committee [s 14(1)]; less serious complaints may be delegated to a Head of Court [s 14(2)]. Complaints may be made on the grounds of incapacity, gross incompetence or gross misconduct (grounds for impeachment of judges under s 177 (1) (a) of the Constitution); a wilful or grossly negligent breach of the Code of Judicial Conduct (discussed below); holding office for profit or receiving payments without permission; failing to comply with remedial steps imposed under the Act; and any other wilful or grossly negligent conduct incompatible with judicial office [s14 (4)].

The Act establishes a three-tiered approach to dealing with complaints, depending on their severity. Less serious complaints may be summarily dismissed, although a complainant may appeal this to the Judicial Conduct Committee [s 15]. Serious, but non-impeachable, complaints are subject to an inquiry by the Chairperson or a member of the Committee, who may order remedial steps including an apology, a reprimand, and counselling or training [s 17]. Complainants who are dissatisfied with

the dismissal of a complaint, and respondents dissatisfied with findings or remedial steps ordered, may appeal to the Committee [s 17].

Complaints which may lead to impeachment are referred by the Chairperson to the Committee, which may refer the complaint to the Chairperson for investigation; or recommend to the full JSC that a Tribunal investigate the complaint [s 16]. The JSC must request the Chief Justice to establish a tribunal where it is recommended by the Committee, or where it has "reasonable grounds" to suspect that a judge is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct – i.e. if the prerequisites for impeachment are met [s 19(1)].

A Tribunal comprises two judges and a non-judicial member taken from a list approved by the Chief Justice (with the Minister's approval) [Ss 22-23]. The tribunal inquires into the allegations, and submits a report of its findings to the JSC [Ss 26; 33]. The respondent is entitled to attend the tribunal's hearing and to have legal representation; however, seemingly anxious to avoid some of the delays during the controversial dispute between Judge President John Hlophe and the judges of the Constitutional Court, the Act permits the Tribunal to begin or continue a hearing in the absence of the complainant or their representative, if the Tribunal is satisfied that the respondent was properly informed of the hearing [s 28(2)]. Attendance at the hearing is restricted, as will be discussed below.

S 31(4) excludes the privilege against self-incrimination: a tribunal "may order a person giving evidence to answer any question, or produce any article or document, even if it is self-incriminating to do so." However, a self-incriminating answer is inadmissible against that person in criminal proceedings, other than proceedings for perjury or for failing to answer a question or knowingly providing false information to the Tribunal [s 31(5)].

Once the Tribunal makes its report, the JSC is required to make a finding as to whether the prerequisites for impeachment are established [s 20 (3)]. If they are, a report is submitted to the speaker of the National Assembly [s 20(4)]. If not, the respondent judge may nevertheless be sanctioned for lesser misconduct as provided for in s 17.

Disclosure of interests and Code of Conduct

The South African judiciary has in recent years been beset by controversies surrounding judges allegedly receiving payments for activities outside their judicial role. The Act provides some welcome clarity by forbidding judges from holding any other office for profit or from receiving any payments other than their salary or other amounts due to them in their capacity as judges, although royalties may be received, on written consent [s 11(1)]. With written permission, retired judges may hold another office of profit and receive remuneration additional to their salary[s 11(2)], and the Act specifies circumstances which must be taken into account when granting such permission [s 11(3)].

The Act provides for a code of judicial conduct, to be compiled by the Chief Justice in consultation with the Minister [S 12 (1)], and for a Register of Judges' Registrable Interests to be established [s 13]. Judges will be required to disclose, to the Registrar of Judges' Registrable Interests (the official tasked with maintaining the Register), all registrable interests of the judge and his or her immediate family [s 13(3)]. What is to be regarded as a registrable interest, as well as public and confidential parts of the register and how each are to be accessed, are to be prescribed by regulations [s 13(5)].

Analysis.

The Act is to be welcomed for providing a comprehensive procedure for dealing with complaints against judges, and for dealing with the issue of judges holding other offices and receiving other income – with the potentially corrosive consequences of the conflicts of interest entailed – and thus closing a destructive loophole which has caused much harm to the reputation and credibility of the judiciary. However, as will be apparent from the discussion above, fundamental aspects of the new governance regime are to be fleshed out elsewhere – particularly, the Code of Conduct to be drafted by the Chief Justice, and the definition of "registerable interest", to be determined by the Minister in regulations. The Act does provide that both these regulations and the Code must be tabled in Parliament, and it is to be hoped that broad consultation and careful drafting will enable the best possible Code and definition to be produced.

Another striking feature of the Act is the extent of the powers given to the Chief Justice. These include:

- The chief Justice is a member of the Judicial Conduct Committee [S8(1)(a)] and designates four of the judges on the Committee, in consultation with the Minister [s 8(1)(c)];
- He must be consulted by the Minister when allowing active judges to receive royalties [s 11(1)]; when determining whether to allow a retired judge to hold another office or receiving additional payments [s 11(2)]; and when further guidelines for allowing retired judges to hold office or receive payments are issued [s 11(3)(b)]. The granting of consent under s11 (2) is circumscribed by the requirements set out in s 11(3)(a);
- He must draft the Code of Conduct [s 12(1)];
- He must be consulted by the Minister when making regulations relating to registrable interests [s 13 (5)];
- He must appoint Judicial Conduct Tribunals [s21];
- He must approve non-judicial members of the Tribunals (with the concurrence of the Minister) [s 23(1)];
- He must make rules to regulate the proceedings of the Judicial Conduct Tribunals [s 25];
- He must be consulted before the President of a Judicial Conduct Tribunal may determine that a Tribunal hearing be heard in public – s 29(3)(b). In this instance, s 29(3)(a) provides for specific circumstances when hearings may be opened to the public – which provide parameters for the decision, although – as will be discussed below – we would have preferred to see this the other way round with a presumption of openness;
- He must (along with the Treasury) approve any other use of funds defrayed for the JSC by the Department of Justice, and must be consulted by the Minister regarding the funds needed for the administration of the JSC [ss36(2),(3)];
- He supervises, controls and directs the Registrar of Judges' Registrable Interests [s 37(3)]; and

- The office of the Chief Justice provides the staff for the secretariat of the JSC (s37).

Thus, considerable and extensive authority is vested with the Chief Justice. It is, therefore, essential that clear boundaries are set within which the powers are to be exercised. This is done in respect of several of the powers vested in the Chief Justice.

Furthermore, the Act clearly envisages a close working relationship between the Chief Justice and the Minister, which also requires vigilance from a separation of powers standpoint, but which also provides a check and balance on the powers vested in the Chief Justice.

Moreover, a strong office of the Chief Justice may well be a necessary if not sufficient condition for judicial independence. The capacity to lead, with adequate authority vested in the head of the judicial arm of government, with adequate resources attached to the performance of functions, is critical to the ability of the judiciary to self-govern in an effective as well as legitimate manner.

A major issue, alluded to above, concerns the openness of disciplinary proceedings. S29(1) limits who may attend a hearing of the Conduct Tribunals. The default position is that they are closed to the general public – under s29(3)(a), the Tribunal President may determine that all or part of the hearing be held in public, if it is in the public interest and for the purposes of transparency. The wording of this section ("may... if") suggests, on a restrictive reading, that the elements of public interest and transparency must be present in order for the Tribunal President to exercise her discretion to determine that a hearing must be held publically.

Furthermore, s 29(3)(b) provides that any determination that a hearing be held in public must be made in consultation with the Chief Justice. Similar limitations apply in respect of the proceedings of the Judicial Conduct Committee – s 9(3) provides that meetings may only be attended by its members and persons whose presence is required or permitted under the Act, "unless the Committee on account of public interest and for good cause decides otherwise."

The effect is thus to set a presumption against open hearings. This is unfortunate and, we suggest, should have been the other way around. We can appreciate the need for hearings to take place in private in certain situations, but these could be dealt with by allowing for hearings to be closed to the public in certain specified circumstances, but otherwise to be open and accessible. In effect, a hearing is an inquiry into the suitability of a judge to hold office, which is a matter of the greatest possible public interest, and which ought therefore not to be shrouded in secrecy.

The preamble to the Act acknowledges the need to "create an appropriate and effective balance" between protecting the independence and dignity of the judiciary" when considering complaints against judicial officers, and "the overriding principles of openness, transparency and accountability that permeate the Constitution and that are equally applicable to judicial institutions and officers". Public confidence in the judiciary, we suggest, is more likely to benefit from an open enquiry into possible impeachable conduct, rather than having it hidden away from scrutiny, which may serve to encourage rumour-mongering and provide a cloak to the malevolent in this respect. It is to be hoped that tribunal presidents and the Chief Justice will use their powers under s 29(3) to hold hearings publically as often as possible, in order to facilitate greater openness. When the hearings concerning Judge Hlophe and other such matters were removed from public purview the impact was

to further diminish public confidence in the process and in the credibility and integrity of the outcomes.

A final point to note is that the Act takes gender transformation very seriously, with provisions expressly prescribing a role for women. For example, s8(1)(c) demands that at least 2 of the judges on the Judicial Conduct Committee must be women; and s 22(2) requires that at least 1 member of a Tribunal must be a woman. Given that the JSC repeatedly emphasises the struggle to achieve adequate gender transformation when interviewing candidates for judicial appointment, it is only fitting that the Act should require the JSC to 'walk the walk' and ensure that significant positions within its own structures are filled by women.