

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No.: 32193/2021

In the matter between:

LEGOABE WILLIE SERITI First Applicant

HENDRIK MMOLLI THEKISO MUSI Second Applicant

and

THE JUDICIAL SERVICE COMMISSION First Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT** Second Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Third Respondent

OPEN SECRETS NPC Fourth Respondent

SHADOW WORLD INVESTIGATIONS Fifth Respondent

FIRST RESPONDENT'S SUPPLEMENTARY HEADS OF ARGUMENT

INTRODUCTION

- 1 These supplementary heads of argument are filed with leave of the Honourable Deputy Judge President Sutherland to address the position regarding the disciplinary liability and jurisdiction of disciplinary committees of judges who are no longer in active service, as contemplated under the Judicial Service Commission Act 9 of 1994 (“the JSC Act”), in selected foreign jurisdictions.
- 2 The concept of disciplinary liability refers to the ability of a judicial system to hold judges accountable for misconduct. The scope of disciplinary liability of judges no longer in active service varies across foreign jurisdictions, with some jurisdictions having more stringent provisions, whilst others being more limited.
- 3 In recent years there has been a trend towards independent and more transparent ethical regulation for sitting judges, which is said to promote public confidence in the judicial institution, and reflect a move towards accountability and transparency as judicial values. However, regimes governing sitting judges largely fall away when the judge retires from the bench. Increasing longevity, the rising numbers of former judges, as well as the distinct concern regarding former judges in established democratic common law systems resigning to avoid investigation (and consequences) of complaints made against them while they were serving on the bench. This conduct has raised complex ethical regulation questions.
- 4 There is a growing international consensus not just around the judicial values that must be protected in judicial design and practice,¹ but in relation to the ethical

1 International Association of Judicial Independence and World Peace, ‘Mt Scopus International Standards of Judicial Independence 2008’ (2015) <<https://www.jiwp.org/mt-scopus-standards>>; International Bar Association, ‘The New Delhi Code of Minimum Standards of Judicial Independence 1982’ (1982) <<https://www.jiwp.org/new-delhi-declaration>>; Conférence mondiale sur l’indépendance de la justice, *Universal Declaration of The Independence of Justice* (1983); United Nations, ‘The Bangalore Principles of Judicial Conduct November 2002’ (2002) <https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf>; United Nations, *Basic Principles of Independence of the Judiciary* (United Nations 1988); P Sands, C McLachlan and R Mackenzie, ‘The Burgh House Principles on the

norms that should govern the behaviour of individual judges to help in achieving these values.² Furthermore, in an effort to ensure full accountability and maintain public trust in judicial systems across various jurisdictions, there is growing international consensus that judges who are no longer in active service should be subject to disciplinary liability for conduct arising whilst in active service, under the mechanisms and bodies designed to regulate the conduct of judges.

- 5 South African jurisprudence has no judicial precedent on the topic of what happens when allegations of improper conduct are levelled against a judge, but the judge leaves office prior to a full inquiry?
- 6 In what follows, we argue that a lack of robust oversight of an investigation into complaints regarding members of the judiciary (whether in active or non-active service) may delegitimise rule of law norms that are necessary to the proper functioning of our country's democracy. Based on trends in selected foreign jurisdictions, we submit, that there are compelling reasons for ethics regulation beyond judicial retirement.

DISCIPLINARY LIABILITY OF RETIRED JUDGES IN SELECTED FOREIGN JURISDICTIONS

Poland

- 7 A retired judge bears disciplinary liability for impairing the dignity of the office at the time they served actively in the office. Retirement is of no importance with regard to the possibility of a judge being held liable for any acts committed during active service, regardless of the date of disclosing the act or instigating the

Independence of the International Judiciary' (2005) 4(2) Law and Practice of International Courts and Tribunals 247 (for the international judiciary).

² See the Bologna Milano Global Code of Judicial Ethics 2015, approved at the International Conference of Judicial Independence, June 2015; International Association of Judicial Independence and World Peace, 'Bologna and Milan Global Code of Judicial Ethics' (2015) <<https://www.icj.org/wp-content/uploads/2016/02/Bologna-and-Milan-Global-Code-of-Judicial-Ethics.pdf>>.

disciplinary procedure, which is limited basically only with the time-barring of the disciplinary penalty.

- 8 This solution in Polish law results directly from the contents of Article 104.2 of the Law of Organisation of Common Courts.³ The Article states that a retired judge is subject to disciplinary liability for the impairment of the dignity of the judge office during the service.
- 9 The provisions on the disciplinary liability of judges in Poland apply accordingly to the disciplinary liability of retired judges, save that instead of penalties stipulated for judges, the disciplinary body may impose the penalties of: 1) an admonition; 2) a reprimand; 3) reduction of a judge's basic emolument by 5 % to 50 % for a period of six months to two years; 4) a suspension of the increase of their emolument for a period from one year to three years; 5) a deprivation of the right to retirement with the right to the emolument.⁴

England and Wales

- 10 In England and Wales, the position used to be that the Judicial Conduct Investigations Office must dismiss a complaint if it relates to a judge who no longer holds office.⁵
- 11 Beyond this, there was no formal system in place to control former judges' behaviour in England and Wales: the Lord Chancellor and Lord Chief Justice had no authority over judges who have left the bench.⁶

³ Law of Organisation of Common Courts (27 July 2001), as amended.

⁴ Article 104(3).

⁵ The Judicial Conduct (Judicial and other office holders) Rules 2014, r 21(i), although note the limited circumstances in which an investigation might continue in Judicial Discipline (Prescribed Procedures) Regulations 2014 (UK) SI 2014/1919, reg 23.

⁶ G Gee *et al.*, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press 2015) 82.

12 Amendments to the Judicial Discipline (Prescribed Procedures) Regulations during 2013⁷ in England and Wales now address the possibility that a judge subject to a complaint might resign or retire when advice that they be removed from office is proposed, or given, to the Lord Chancellor and Lord Chief Justice. In such a case, a finding of misconduct can still be made notwithstanding the fact that they have ceased to hold office in terms of regulation 23. It therefore allows for the investigation and finding of misconduct notwithstanding that the judge may have ceased to hold office.⁸

The United States

13 In contrast, in the United States, the process for disciplining retired Article III judges is governed by the Judicial Conduct and Disability Act⁹. The Act provides for the investigation of allegations of misconduct and gives the judicial council of the circuit court the authority to take disciplinary action, including reprimands, censures, or removal from office.

14 Under the Judicial Conduct and Disability Act, formal complaints regarding the conduct of circuit, district, bankruptcy and magistrate judges (as contemplated under Article III) are referred to the chief judge of the circuit court where the judge holds office. In a typical matter, the chief judge of the circuit will open an inquiry, investigates the merits of the complaint, and the chief judge or the judicial council concludes with a decision. However, the Act's mandate applies only to judges in active service, which has resulted in some judges retiring or leaving active service to avoid disciplinary accountability.

⁷Which took effect during in October 2013 to regulate the investigation and determination of complaints of misconduct by inter alia judicial officers.

⁸ JDPPR 2013, reg 23.

⁹ Judicial Conduct and Disability Act of 1980.

15 As the Second Circuit Judicial Council explained¹⁰:

“The Act is concerned with individuals who currently exercise the powers of the office of federal judges. Its emphasis is on the correction of conditions that interfere with the effective and expeditious administration of the business of the Courts... Because the now former judge fully resigned [from] the office of the United States circuit judge, and can no longer perform any judicial duties, the former judge does not fall within the scope of persons who can be investigated under the Act.”

16 On the other hand, complaints referred to state bars are subject to a much broader scope of authority than that provided under the Judicial Conduct and Disability Act. The American Bar Association Model Rules for Judicial Disciplinary Enforcement provides that the commission shall have jurisdiction over former judges regarding allegations of misconduct which occurred before or during service as a judge if such complaint is made within one year following service as a judge.¹¹

17 Therefore in most states the judicial disciplinary commissions’ jurisdiction extends at a minimum to all non-federal judges in the state; and misconduct of resigned or retired judges that occurred before the judge stopped hearing cases.

18 The state bars are also empowered to impose a range of sanctions, including a private or public reprimand, suspension of a former judge’s ability to practice for a limited period of time, or permanent disbarment.¹²

19 The California Commission on Judicial Performance has jurisdiction that includes all judges of California’s Superior Courts; justices of the Court of Appeal and Supreme Court; and former judges with respect to conduct prior to retirement or resignation. Thus, the commission can address complaints which arose prior to

10 Complaint of Judicial Misconduct, Nos. 18-90204-jm, 18-90205-jm, 18-90206- jm, 18-90210-jm (2d Cir. Jud. Council Apr. 1, 2019) at 2.

11 Model Rules for Judicial Disciplinary Enforcement (2020), Section I: Rule 2(2).

12 Model Rules for Judicial Disciplinary Enforcement (2020), Rule 10.

a judge's resignation. The Commission also has the power to censure former judgments, to publicly or privately admonish a former judge, and bar a former judge from receiving future appointments or work in any California State Court.¹³

20 The current gaps in the US legislative regime have unsurprisingly been open to abuse by judges who retire or take up Supreme Court positions to avoid judicial liability.

21 In recent years, several investigations into the conduct of Article III judges have been cut short when the judges left the court before the judicial council concluded its work.¹⁴ This limitation of the Judicial Conduct and Disability Act is problematic for a variety of reasons, in part because it allows judges to avoid judgment. We discuss a couple of examples in turn below.

Judge Maryanne Trump Barry

22 President Reagan appointed Maryanne Trump Barry ("Judge Barry") to the U.S. District Court for the District of New Jersey in 1983. She was then elevated to the U.S. Court of Appeals for the Third Circuit by President Clinton in 1999. Judge Barry went on senior inactive status in February 2017, weeks after her brother, Donald Trump, began his presidency.

23 In 2018, the New York Times published an article alleging that Donald Trump and his siblings - including Judge Barry - created numerous shell companies to

¹³ Californian Constitution art VI section 18(d).

¹⁴ See, e.g., *In re* Complaint of Judicial Misconduct, No. 17-90118-jm, slip op. at 2 (2d Cir. Jud. Council Feb. 5, 2018) [hereinafter Kozinski Order] (citing 28 U.S.C. § 351(d)(1)) (reasoning that Alex Kozinski no longer fit the definition of "judge" after retiring). "Accordingly, the Judicial Council must 'conclude the proceeding because [of] . . . intervening events'" *Id.* at 2–3 (quoting 2E U.S. CTS., GUIDE TO JUDICIAL POLICY, ch. 3, Rule 20(b)(1)(B) (2019) [hereinafter JCDA RULES]); see also *In re* Complaints Under the Judicial Conduct and Disability Act, Nos. 10-18-90038 through 10-18-90067, 10-18-90069 through 10-18-90107, 10-18-90109 through 10-18-90122, slip op. at 2, 6–7, (10th Cir. Jud. Council Dec. 18, 2018) [hereinafter Kavanaugh Order] (citing 28 U.S.C. § 352(b)(1)(A)(i)) (dismissing judicial-conduct complaints against then-Judge Kavanaugh because a circuit court judge is no longer covered by the Judicial Conduct and Disability Act after being elevated to the Supreme Court).

pay lower taxes on the money they received from their father.¹⁵ Based on the allegations, Judge Barry would have received a “windfall” of over \$180 million from the sale of her properties. The article prompted the filing of four judicial misconduct complaints against Judge Barry. On 11 February 2019, shortly after Judge Barry was officially notified of the investigation, she submitted her retirement papers. Once her retirement went into effect, the Judicial Council issued an order, stating that it was ending the investigative proceedings against her given its lack of jurisdiction.

Judge Alexander Kozinski

- 24 Judge Alexander Kozinski (“Judge Kozinski”) started his federal judicial career as a U.S. Court of Federal Claims judge in 1982. He later sat on the U.S. Court of Appeals for the Ninth Circuit.
- 25 In December 2017, the Washington Post published accusations from two former law clerks that Judge Kozinski engaged in sexual misconduct.¹⁶
- 26 The Judicial Council of the Ninth Circuit issued an order disclosing that a complaint was filed against Judge Kozinski based on the Washington Post’s reporting, and that it was transferring the case to another circuit for review.
- 27 Nine more women came forward accusing Judge Kozinski of sexual misconduct.
- 28 Judge Kozinski issued a statement explaining that he was retiring effective immediately.

¹⁵ David Barstow, Susanne Craig & Russ Buettner, *Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father*, N.Y. TIMES (Oct. 2, 2018), <https://www.nytimes.com/interactive/2018/10/02/us/politics/donald-trump-tax-schemes-fred-trump.html> [<https://perma.cc/36HM-2VKQ>].

¹⁶ Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexualmisconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html [<https://perma.cc/HK3J-NJWW>]. Two former clerks identified themselves for the article while four others remained anonymous out of fear of reprisal. Id.

29 In its February 2018 opinion, the Second Circuit Judicial Council acknowledged the effect that his resignation had on their investigation, noting that it “*preclud[ed] any inquiry by the Judicial Council*” because he was now “*outside the parameters of the Act.*” Accordingly, the Judicial Council was forced to end its investigation.

Judge Brett Kavanaugh

30 Justice Brett Kavanaugh (“Judge Kavanaugh”) became an Article III judge in 2006 after President George W. Bush nominated him to serve on the U.S. Court of Appeals for the D.C. Circuit.

31 In 2018, President Donald Trump nominated Judge Kavanaugh to serve on the U.S. Supreme Court. During his Supreme Court nomination hearings, he was publicly accused of sexually assaulting a woman while in high school.¹⁷ The Senate, however, confirmed Justice Kavanaugh to the Supreme Court on October 6, 2018 by a 50–48 vote.

32 The allegation and his testimony during the nomination process prompted a total of eighty-three judicial complaints filed against him.

33 The Judicial Council noted, however, that under the Judicial Conduct and Disability Act, covered judges include “circuit judge[s], district judge[s], bankruptcy judge[s], [and] magistrate judge[s].” Because Justice Kavanaugh was no longer subject to the Act, the Judicial Council no longer had jurisdiction and thus concluded its proceedings against him, but it did acknowledge that the “*allegations contained in the complaints are serious.*”

¹⁷ Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018, 9:28 PM), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html [<https://perma.cc/F293-Y9AX>].

- 34 Despite allegations that they acted improperly, the aforementioned judges have been able to continue their careers or transition to retirement without undergoing thorough investigations into their actions.
- 35 One of the more concerns associated with the failure to conclude investigations into alleged misconduct in respect of former judges is that it often ensures that the judge will be able to collect his or her pension for life. For example, when Judge Barry retired in response to the complaint filed against her, she continued to collect her pension, which is estimated to be between \$184,500 to \$217,600 a year.

Australia

- 36 With the exception of returning to practice, former judges are unregulated in Australia other than by guidance statements in soft law.
- 37 At the federal level, there is no code of judicial conduct that could apply to former judges, although such a development has been debated at various points.¹⁸
- 38 While a procedure has now been set up for judicial complaints at the federal level (with the exception of the High Court), this only affects serving judges, and not those who have left the bench.¹⁹
- 39 In New South Wales, the Judicial Officers Act 1986 (NSW) section 15 provides that complaints may be made to the Commission “about a matter that concerns or may concern the ability or behaviour of a judicial officer”. This is reinforced by section 20(1)(g) which expressly provides that the judicial commission shall

¹⁸ M Kirby, ‘Discipline of Judicial Officers in Australia’ (The Judicial Group on Strengthening Judicial Integrity Second Meeting, Bangalore, India, 24–26 February 2001) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_judicialgroup.htm>.
¹⁹ Courts Legislation Amendment (Judicial Complaints) Act 2012 (Cth) (Judicial Complaints Act).

summarily dismiss a complaint against a judicial officer if it is of the opinion that the person complained of is no longer a judicial officer.

40 The Australasian Institute of Judicial Administration's Guide to Judicial Conduct does contain some material on post-judicial activities and closely reflects the terms of the Bologna Milano Global Code of Judicial Ethics.²⁰ However, it is made clear that these provisions are not intended to 'dictate to retired judges, but to give guidance to serving judges who are contemplating or planning for their retirement'.²¹

41 Thus, the Commission has no jurisdiction to investigate complaints upon the resignation of a judicial officer.

New Zealand

42 An exclusion from the system is also made for retired or former judges in New Zealand under the Judicial Conduct Commissioner and Judicial Conduct Panel Act (2004) where the term 'Judge' is expressly defined to exclude a retired judge or a former judge.²² The NZ Guidelines for Judicial Conduct 2013 also contain no mention or consideration of the position of former judges.

43 This has been described as having 'uncomfortable' consequences in circumstances where a judge resigns prior to a panel being convened, as the judge has lost his job and his reputation has been severely damaged without the justifications for the complaints being tested by a full judicial conduct panel process. The complainants have also not had their concerns considered by the

²⁰ Australasian Institute of Judicial Administration, *AIIA Guide to Judicial Conduct* (2nd edn, 2007).

²¹ Judicial Conduct Commissioner Act 2015 (SA).

²² Judicial Conduct Commissioner and Judicial Conduct Panel Act, 2004, section 5.

panel. The wider community is also left without an authoritative pronouncement as to whether there was misbehaviour that warranted censure.²³

44 The purpose of the Judicial Conduct Commissioner and Judicial Conduct Panel Act is specified as being “*to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by ... (a) providing a robust investigation process to enable informed decisions to be made about the removal of Judges from office*” (section 4). While the first part of the section could be broad enough to include the conduct of former judges, a more narrow interpretation of the scope of the Act appears to have been adopted.

45 Thus, on 5 November 2010, when Justice William Wilson resigned from his position on the New Zealand Supreme Court in the midst of an investigation into his failure to disclose his financial indebtedness to counsel who was appearing before him when he was a judge of the Court of Appeal,²⁴ the Commissioner and Judicial Conduct Panel ceased investigations almost immediately. Justice Wilson had fought the investigation from the start, having been successful in a judicial review against the Judicial Conduct Commissioner’s initial decision to refer the matter to a Judicial Conduct Panel. Once it looked like the disciplinary proceedings would continue against him, he resigned.²⁵ The misconduct investigations terminated, Justice Wilson received a year’s pay upon leaving office, and the government paid his legal fees, amounting to \$475,000.

23 G Appleby and S Le Mire, ‘Judicial Conduct: Crafting a System that enhances Institutional Integrity’(2014) 38 MULR 1, 54.

24 See final decision in the matter: *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* (No 2) [2010] 1 NZLR 76 (NZSC) (Saxmere No 2).

25 BV Harris, ‘New Zealand: Supreme Court Judge Resigns—Saga Raises Questions about Recently Enacted Judicial Complaints Legislation’ [2011] PL 436.

Summary

- 46 The position, illustrated by the cases mentioned above, reflects that in most jurisdictions with disciplinary bodies, where the disciplinary process stops if the judge no longer holds office, the complaint remains unresolved and without remedy.
- 47 The inability to fully investigate and sanction potential judicial misconduct raises a whole host of questions,²⁶ but perhaps the most important one is whether a failure to investigate claims of misconduct by a judge harms people's acceptance of the rule of law and the role of the judiciary within it? The legitimacy of judicial decision-making comes from the populace's decision to accept judicial pronouncements and to act accordingly.²⁷
- 48 When a complainant and the public are aware of general information about potential judicial misconduct and an investigation into the alleged misconduct is initiated but then closed without a decision on the merits, it may create the perception that judges are above the law.²⁸
- 49 Further, it may send a message that ordinary people are required to undergo the indignity of having their actions interrogated and investigated, but the very individuals charged with overseeing those sorts of examinations can avoid similar intrusions into their own conduct.

26 See David T. Welsh, Lisa D. Ordóñez, Deirdre G. Snyder & Michael S. Christian, *The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions*, 100 J. APPLIED PSYCH. 114, 124 (2015); MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 93 (2011).

27 James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 487 (1989)

28 See Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 617 (2020) (noting that "some federal judges believe that the general rules of the workplace do not, in fact, apply to them").

- 50 If the public begins were to believe that judges are above the law, the legitimacy of the judicial system and the respect for the rule of law, which tie together the very fabric of our society, would be severely undermined.²⁹
- 51 When people perceive decision-makers, like judges, as legitimate, it impacts their level of compliance with those decision-makers' pronouncements and orders. Who will obey a judiciary that fails to police itself?
- 52 In addition to the potential harm to the public's belief in and adherence to rule of law norms, unchecked misconduct within the judiciary may also impact the judges themselves in a myriad of undesirable ways. In particular, it may yield the entrenchment of the occurrence of misconduct.

REVISITING THE SOUTH AFRICAN POSITION

- 53 When judges - the literal arbiters of justice within society - are able to elude oversight of their own potential misconduct, it puts the legitimacy of the judiciary and the rule of law in jeopardy. The judicial enterprise relies upon its legitimacy, and its legitimacy turns on the character of its judges. Thus, the judicial enterprise rises and falls with the character of its judges.
- 54 As demonstrated above, foreign jurisdictions, such as Australia, New Zealand and the US contain express exclusions in their legislation, alternatively, limitations (in the case of England and Wales) of the judicial liability of retired judges or judges no longer in active service.

²⁹ James L. Gibson & Michael J. Nelson, *The Least Accountable Branch?*, 55 CT. REV. 30, 30 (2019) (discussing the ways in which the public's disagreement with a judge's decision might impact its view of whether the judiciary is held accountable for its actions).

- 55 In contrast section 7(g) of the Judicial Services Act expressly contemplates the commission's disciplinary authority over judges who are no longer in active service. We submit that the current formulation of section 7(g) is in keeping with international norms and standards.
- 56 The Commonwealth Latimer House Principles confirm that in order to uphold the rule of law and dispense justice, the judiciary must be independent, impartial, honest and competent. The Principles also require that judges be appointed on the basis of clearly defined criteria and by a publicly declared process in executing a fundamental commitment to transparency.
- 57 The Bangalore Principles of Judicial Conduct ("the Bangalore Principles") are intended to establish standards for ethical conduct of judges.³⁰ They are designed to provide guidance to judges and to offer the judiciary a framework for regulating judicial conduct. Six core values are recognized: independence, impartiality, integrity, propriety, equality and finally competence and diligence. The Code of Judicial Conduct for South African Judges, promulgated under section 12 of the JSC Act ("The Code"), is expressly based on the Bangalore Principles.
- 58 Article 91 of the Bangalore Principles, although in the context of "offers of post-judicial employment" states that there is a risk that the judge's self-interest and duty may appear to conflict in the eyes of a reasonable, fair minded and informed person considering the matter. A judge should examine such overtures in this light, particularly since the conduct of former judges often affects the public's

30 The Bangalore Principles

perception of the judiciary that continues to serve after the judge has left.” (our emphasis).

59 In other words, even the Bangalore Principles recognise that the conduct of a judge, whether in active or non-active service affects the public’s perception of the judiciary.

60 A judiciary of undisputed integrity is the bedrock of democracy and the rule of law. Even when all other protections fail, the judiciary provides a bulwark to the public against any encroachments on rights and freedoms under the law. These observations apply both domestically and globally.

61 The following principles which have been distilled from a consideration of the various authorities support the current position in South Africa, which includes judicial disciplinary liability of judges no longer in active service.

61.1 The purpose of judicial disciplinary proceedings is to protect the public, preserve the integrity of the process, maintain public confidence in the judiciary, and create awareness of proper judicial behaviour on the part of judges, that purpose is not only served by the removal or suspension of a sitting judge but also by the ability of the judicial commission to hold a public hearing and to levy sanctions other than removal, such as censure.³¹

61.2 Even after leaving office, an ex-judge retains the status of the judicial office on his resume. The public is therefore entitled to know if the record is tarnished.³²

³¹ In re Thayer, 761 A.2d 1052 (N.H. 2000) at 1055.

³² In re Steady, 641 A.2d 117 (Vt. 1994), a case in which a judicial conduct complaint was filed after a judge left the bench. See also Snow’s Case, 140 N.H. at 621, 674 A.2d at 575 (citing Flint’s Case, 133 N.H. 685, 688, 582 A.2d 291, 293 (1990)).

- 61.3 The power to discipline judges is exercised for the protection of the public from further acts of misconduct and to protect the integrity of the judiciary.
- 61.4 The integrity of the judicial system is fostered not just by the removal or suspension of a judge who has violated the Code of Judicial Conduct, but also by the investigative process of the JCC and the JCC's ability "*to hold a public hearing on a statement of formal charges, and the availability of sanctions other than removal from office, such as public censure*".³³ Another way to protect the public (in addition to removing offending judges from office) is to keep it informed of judicial transgressions and their consequences, so that it knows that its government actively investigates allegations of judicial misconduct and takes appropriate action when these allegations are proved.³⁴
- 61.5 A viable and continuing JCC investigative process is an integral source of confidence upon which public perception may be based. When members of the public are informed as to judicial misconduct, they are better able to recognize, report, and otherwise protect themselves against future instances of similar misconduct.³⁵
- 61.6 Judicial discipline is warranted to maintain the public's confidence in the integrity of the judiciary as an institution and the goal of maintaining public confidence in the integrity of the judiciary is served by permitting the Commission on Judicial Conduct to follow through with removal proceedings whenever a Judge engages in serious misconduct while in

33 Snow's Case, 140 N.H. at 628, 674 A.2d at 579-80.

34 Matter of Probert, 308 N.W.2d 773, 776 (Mich. 1981); In re Kneift, 351 N.W.2d 693, 700 (Neb. 1984); In re Eastburn, 914 R2d 1028, 1035 (N.M. 1996).

35 Thayer, 1055.

office and despite a Judge's resignation or pledge not to seek a future judicial post."³⁶

61.7 It would be ill-advised to establish a precedent that would allow a judge ... to escape punishment for [ethics violations] by resigning from office.³⁷

61.8 In many instances conduct that may be inappropriate while a judge is on the Bench is no longer, or less, controversial if it occurs after the judge has retired. In some circumstances, post-retirement misconduct may endanger public confidence in the character of those who hold judicial office and therefore might be the subject of proper complaint and investigation. With the individual a former judicial officer, there will necessarily be limits to the consequences that might attach to a finding of misconduct in these circumstances.³⁸

61.9 A retired judge may be subject to disciplinary responsibility "for offending judicial dignity", either after retiring or during his or her time in service.³⁹

61.10 The disciplinary liability of judges who have retired and are no longer active is based on the assumption that they are still remaining in service, only the nature of the service has changed as a result of the retirement. A retired judge must still abide by the rules applicable to their professional group. They must remain impeccable,⁴⁰ otherwise their negative conduct could impair the good name of the administration of justice and the interest of the judicial service.⁴¹

36 Backal, 660 N.E.2d 1104, 1107 (N.Y. 1995).

37 West Virginia Judicial Hearing Board v. Romanello, 175 W.Va. 577, 336 S.E.2d 540, 541 (1985).

38 Gabrielle Appleby & Suzanne Le Mire, *Judicial Conduct: Crafting a System that Enhances institutional integrity*, pg. 27 – 28.

39 United Nations, General Assembly A/75/172 20-096632/24, Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán 17 July 2020 pg. 7. (<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/186/73/PDF/N2018673.pdf?OpenElement>); See also J. R. Kubiak, *Odpowiedzialność dyscyplinarna sędziów*, *Przegląd Sądowy* 1994, No 4, p. 67 et seq.

40 M. Laskowski, *Ustawowe pojęcie „nieskazitelnosci charakteru”*, *Prokuratura i Prawo* 2008, No 6, p. 53.

41 A. Korzeniowska-Lasota, *Odpowiedzialność dyscyplinarna sędziego w stanie spoczynku*, *Studia Warmińskie* 2012, No 49, p. 288.

- 62 Although it is important for a judicial officer in active service to decide matters and execute his/her duties without worrying about liability: To hold judges exempt from professional misconduct proceedings would deprive members of the public of any remedy. Moreover, to hold that judges may not be sanctioned for actions which exceed their lawful authority would totally disregard the protection of the public, the administration of justice, the maintenance of professional standards, and the deterrence of similar conduct. Therefore, there is a need to ensure that judges (whether in active service or discharged from active service) are disciplined to reassure the citizens that the judiciary of is dedicated to the principle that ours is a government of laws and not of men.
- 63 It is imperative that the existing mechanisms built into the JSC Act and Code are retained to ensure that investigations into judicial misconduct are completed, even in circumstances where the judge is no longer in active service due to retirement. To do otherwise would have serious implications for rule of law norms.
- 64 If the existing authority over retired judges were to be dispensed with, it could potentially result in a judicial system where judges are able to act without fear of meaningful oversight or sanction much of the time (by resigning or retiring) knowing that the only discipline they would face is the stain on their reputation.
- 65 If the judiciary fails to police itself, the principles and ideals that form the foundation of the judicial system will inevitably crumble and fall, as has occurred in the USA, for example.⁴²

⁴² Michael Berens & John Shiffman, Special Report: Thousands of U.S. Judges Who Broke Laws, Oaths Remained on the Bench, REUTERS (June 30, 2020, 7:06 AM), <https://www.reuters.com/article/ususa-judges-misconduct-specialreport-idUSKBN2411WG> [<https://perma.cc/NN7C-UY9A>].

- 66 When judges are able to circumvent their own conduct, it has the potential to erode the public's view of the Courts as legitimate.
- 67 For these reasons, it is submitted that inclusion of retired judges under section 7(g) of the JSC Act should be interpreted correctly to include judges no longer in active service and any attempts to interpret it otherwise or declare it unconstitutional would lead to dire consequences, some of which have been illustrated above.

CONCLUSION

- 68 The conduct of former judges has the capacity to undermine 'public confidence' in the judiciary and many other often constitutional principles that protect judges and the judiciary's capacity to fulfil its obligations. This is so because the JSC Act, much like the public, makes little distinction between a former judge and a judge in active service in so far as misconduct is concerned.
- 69 Former judges often continue to benefit from their former positions. They often remain publicly funded, many drawing not insignificant government-funded pensions. They will often be appointed to roles—such as heading commissions—not only based on their experience and expertise as legal practitioners, but because they hold the status of a former judge.
- 70 A survey of the jurisdictions which have not yet adopted a formalised system for receiving and investigating complaints against judges no longer in active service,

demonstrates an inadequacy in the mechanisms, as best illustrated by the untenable situation in the USA.

71 Accordingly, we respectfully submit that the application falls properly to be dismissed with costs including those consequent upon the employment of two counsel.

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24 FEBRUARY 2023