

JUDICIAL CONDUCT COMMITTEE

IN THE COMPLAINT OF:

ANTHONY BRINK

APPLICANT

Against

JUDGE PRESIDENT WAGLAY

RESPONDENT

DECISION

GOLIATH DJP

[1] The complainant, Mr Anthony Brink, is an advocate of the High Court of South Africa. In and during 2009 he applied for a position as a Senior Litigator at Legal Aid South Africa (LASA). On 26 November 2009, he was selected and recommended for the position. However, his permanent appointment was never confirmed. LASA informed him that the post was frozen due to budgetary constraints.

[2] The failure of LASA to appoint him resulted in protracted litigation between the parties. The complainant explained that certain posts were unfrozen during 2010, but his position remained permanently frozen. He disputed the budgetary excuse provided by LASA, and accused them of falsely claiming that LASA had no budget to employ him.

[3] He launched an application in the Labour Court and claimed that he was unfairly

discriminated against on political grounds and that his appointment was irregularly aborted. He indicated that he had filed three PAIA requests under the Promotion of Access to Information Act 2 of 2000 to obtain information of all LASA's critical posts, both filled and vacant. He alluded to the fact that he had certain suspicions when he discovered that his rival for the post, Mzochitwayo Ngcamu AJ (as he then was) had a long professional relationship with the Chairperson of the LASA Board, Judge President Mlambo. It appears that he alludes to a conspiracy involving Mlambo JP, to have Ngcamu appointed to the position. The matter was also raised at ministerial and parliamentary level. According to him his attempts to obtain all the relevant information was obstructed by LASA.

[4] Ultimately his case against LASA was dismissed by the Labour Court. Apparently the court held that he should have taken the LASA's abortion of his appointment on review. He petitioned the Labour Appeal Court, where Waglay JP, Davis J and Sutherland J considered the matter and dismissed the petition for leave to appeal. He complained that he suspected foul play in the disposal of the petition. According to him the panel of judges did not consider the petition, and he avers that the decision was in fact made by a junior clerk. He contends that he had identified a multitude of reversible, fundamental, and critical procedural and evidential errors made by the trial Judge, and believed he had objectively justified sound grounds of appeal.

[5] He criticised the manner in which the petition was dealt with by the Appeal Court. He requested an accountant friend, Christopher Rawlins, to examine the petition file, which he duly attended to on 1 April 2015. Rawlins reported to him that he found no record in the file that the petition had been considered by the Appeal Court judges. Rawlins made an inventory of the court file, which included an anonymous, undated, unsigned memorandum. The memorandum was critical of him and contained information relating to the dispute between him and LASA, and commented on the merits of his petition.

[6] He contends that the panel of judges relied on the memorandum to summarily dismiss his petition prematurely before all the papers were filed in the matter. The complainant provided a very lengthy narrative of the merits and demerits of the facts

surrounding his labour dispute with LASA, the involvement of the Board of LASA, the manner LASA managed his grievance, the ruling of the trial judge, the conduct of Mlambo JP and other relevant issues. The complainant annexed numerous documents to his complaint which included his petition and affidavit in support thereof.

[7] Judge President Waglay responded to the complaint. He submits that the three judges, which included himself duly considered the complainant's petition. They concluded that the petition was without merit and unanimously decided to refuse the petition. He stated that due to this finding they did not consider the condonation application of the respondent. He explained that the registrar of the Labour Court collects the petitions, makes copies of relevant documents, collates them and places them in three individual files and has it delivered to the three judges who are allocated the petitions. All petitions are considered on the same day in the boardroom after appropriate debate. Consequently, the complainant's petition was properly considered and refused, and the complainant was advised accordingly.

[8] Waglay JP commented on the documents allegedly found in the Labour Court file. He explained that the Labour Appeal Court has its own files which are retained by the registrar. The documents referred to therefore have nothing to do with the Labour Appeal Court. Waglay JP also emphasised that Mlambo JP has no role to play in the decisions of the Labour Appeal Court. He therefore denies that any irregularities occurred in the handling of the complainant's petition.

[9] In reply the complainant takes issue with Waglay JP's alleged mischaracterisation of the issues and the absence of an explanation of any knowledge of the memorandum in the court file. He maintains that irregularities occurred surrounding the memorandum and that it was surreptitiously delivered to Waglay JP with the criminal purpose of defeating the ends of justice by improperly influencing him to "throw" his case. He contends that the matter was heard prematurely and that Waglay JP was improperly influenced in dismissing the petition. The complainant also confirmed that the post he had applied for was still vacant.

[10] It is clear that the crux of the complaint relates to the circumstances surrounding

the determination of the petition by the three Appeal Court judges. The complainant concedes that the LASA came to court late to oppose his petition and objects to the fact that he was not given an opportunity to answer to LASA's opposing affidavit. However, Waglay JP indicated that the application for condonation was not considered by the bench. Consequently, the complainant was not prejudiced in any manner, as it is evident that the judges considered the petition on the basis of the trial court record. In other words, the petition was duly considered based on the merits of the case.

[11] The complainant incorrectly assumes that the outcome of the petition would have been different had he been given an opportunity to respond to the condonation application of LASA, as well as their opposing papers. Ultimately, the petition can only be determined on its merits and the complainant was not prejudiced in any manner because the application for condonation was filed late, and not considered by the court.

[12] Similarly, the contents of an anonymous memorandum cannot have any bearing on a consideration of the merits of a petition. In any event, if the complainant is aggrieved by the outcome of the petition, he is at liberty to resort to further legal remedies. The complainant is legally trained and should be fully aware that he should desist from making unsubstantiated statements of improper influence against a judicial officer. Furthermore, the complainant should be alive to the fact that any gross procedural irregularity may be taken on review. Lastly, the complainant also unequivocally referred to the handling of his matter as a violation of his fundamental rights to access to courts which are guaranteed by section 34 of the Constitution, which in itself would trigger constitutional remedies. In my view all the allegations of impropriety on the part of the judicial officers, including Mlambo JP, is unfounded and speculative.

[13] I am satisfied that there is no evidence of any irregular or improper conduct by Waglay JP in the handling of the complainant's petition. It is therefore my considered view that the complaint lacks substance and falls to be dismissed.

Recommendation

The complaint is dismissed in terms of section 15(2)(d) of the Judicial Service Commission Act 9 of 1994.



DEPUTY JUDGE PRESIDENT GOLIATH