

## **PROPOSALS**

### **WITH REGARD TO THE DRAFT REGULATIONS RELATING TO SECTIONS 11 AND 13 OF THE JUDICIAL SERVICE COMMISSION ACT 9 OF 1944 AS AMENDED BY ACT 20 OF 2008**

Separate memoranda drawing attention to defects in the Draft Regulations relating to Registrable Interests and the application of section 11 of the Judicial Service Commission Act as amended have been submitted to the Chief Justice. For ease of reference a copy of the memorandum submitted on behalf of the Judges of the Supreme Court of Appeal under the heading "Disclosure Regulations" is annexed marked "A", and a copy of the memorandum submitted on behalf of some concerned judges is annexed marked "B".

In this document we submit proposals that serve to remove those defects. Some of the difficulties referred to in the earlier memoranda arise from provisions of the Act. Others arise from the form in which the regulations have been drafted. The proposals in this document are directed at both.

#### **Contents**

- 1. Proposed Amendments to the Act**
- 2. Proposed Regulations relating to Registrable Interests**
- 3. Schedule 1 to Proposed Regulations**

## **PROPOSED AMENDMENTS TO THE ACT**

### **A: Judges performing active service.**

It is accepted practice for judges to write or edit legal books and, indeed, they contribute to the administration of justice by doing so. It is not appropriate in those circumstances that they should require the consent of the Minister in order to do so. The following amendment should thus be made:

Delete from the proviso to section 11(1) the words 'with the written consent of the Minister acting in consultation with the Chief Justice.'

### **B: Judges who have completed active service.**

A judge who has completed active service has fully performed his or her obligations as a judge. The benefits that they continue to receive do not imply that they remain in the employment of the state subject to the ordinary obligations of a judge and indeed they are not. Having fulfilled their obligations as judges

(a) there are no proper grounds for restricting their ordinary right to engage in activities that do not bring or tend to bring the administration of justice or the judiciary into disrepute and any such restriction would be open to constitutional challenge;

(b) there are no proper grounds for requiring them to continue disclosing their financial affairs and interests and any such requirement would be open to constitutional challenge.

Elaboration upon these points is contained in the memoranda referred to earlier (annexures A and B). The following amendments should thus be made:

1. Delete sections 11(2) and (3) and substitute the following:

**'(2) A judge who has been discharged from active service may not hold any office of profit or engage in any business or other activity if the holding of such office or the engagement in such business or activity will bring or tend to bring the administration of justice or the judiciary into disrepute.'**

**NOTE:** The Code of Judicial Conduct must be altered to bring it into line with these amendments.

2. In section 11(4) delete the words 'subsections (1) and (2)' and substitute 'subsection (1)'.
3. In section 11(5) delete the words 'or (2)'.
4. In section 13(3) delete 'every judge' and substitute 'every judge performing active service'.
5. Delete section 13(5)(e).
6. Insert in each case after the word 'judge' in sections 13(5)(g)(i) and (ii) the words 'performing active service'.
7. Delete section 13(6).
8. The subsections are to be renumbered accordingly.

**C: Acting Judges**

It is neither practical nor necessary for acting judges to disclose their financial interests. Acting judges are in any event required to disclose to the parties matters that might give rise to a conflict of interest in any case that comes before them. The amendments that are required in that respect are catered for by the amendments above.

**D: Family Members**

There are no proper grounds for requiring family members of judges to disclose their personal interests. The only proper grounds for requiring disclosure have been elaborated in the general memoranda that have been submitted separately and do not extend to family members of judges. To the extent that family members hold interests or receive income as nominee for the judge concerned those are interests that the judge must in any event disclose. If a judge were to use a family member dishonestly to hide his or her interests or income then it can be expected that that will not be revealed and no purpose is thus served by a disclosure that will in any event be misleading. Disclosure by family members serves only to invade the privacy of family members for which there is no justification and is open to constitutional challenge. Elaboration upon these points is contained in the memorandum submitted by judges of the Supreme Court of Appeal (annexure A).

The following amendments should thus be made:

1. Delete from s 7 the definition of 'immediate family member'.

2. Delete from s 13(3) the words 'and those of his or her immediate family members'.
3. Delete from s 13(5) (b) the words 'and their immediate family members'.
4. The amendment required in relation to s 13(6) has been catered for by the deletion of that subsection as above.

## **PROPOSED REGULATIONS**

### **Definitions**

1. In these regulations any word or expression to which a meaning has been assigned in the Act shall bear the meaning so assigned and, unless the context otherwise indicates –

'judge' means a judge performing active service;

'Register' means the Register of Judges' Registrable Interests created by the Registrar in terms of regulation 2.

'Registrar' means the Registrar of Judges' Registrable Interests appointed in terms of section 13(1) of the Act;

'registrable interest' means an interest referred to in Part 1 of Schedule 1 whether held directly by the judge concerned or by any other person on

his or her behalf including a trust in which the judge has a beneficial interest in respect of either capital or income;

'the Act' means the Judicial Service Commission Act, 1994 (Act No. 9 of 1994) as amended by Act 20 of 2008).

### **Register of Registrable Interests**

2. The Registrar must establish a Register of Judges' Registrable Interests comprising Part A and Part B substantially in the form set out in Schedule 2.

3. Part A of the Registrar shall be open to inspection by the public at the office of the Registrar during office hours and under the supervision of a person designated by the Registrar.

4. Part B of the Register shall be open to inspection only by the Registrar, the Chief Justice, and, in relation to a particular judge, the head of the court in which that judge serves, except as provided for hereafter.

### **Disclosure by Judges of Registrable Interests**

5. A judge must disclose particulars of all his or her registrable interests on a form that corresponds substantially with Form 1 and must lodge that disclosure with the Registrar.

**[Form 1 must be divided into two parts: Part A and Part B. A judge must enter in Part A of the form the information listed in Part 2 of Schedule 1. He or she must enter in Part B of the form the information listed in Part 3 of Schedule 1]**

6. Subject to section 13(4) of the Act a judge must lodge the first disclosure with the registrar within 30 days of his or her appointment as a judge.
7. The registrar must enter the information disclosed by a judge in the register as follows:
  - (a) the information listed in Part A of Form 1 must be entered in Part A of the Register;
  - (b) the information listed in Part B of Form 1 must be entered in Part B of the Register.
8. During March each year a judge must inform the registrar in writing of any amendments that are required to be made to the register.
9. If the registrar has reason to believe that a judge \_
  - (a) has failed or is failing to comply with a provision of these regulations; or
  - (b) may have disclosed incorrect or misleading informationthe Registrar must without delay invite that judge in writing to comply the provision in question or to correct any information so disclosed.
10. If, after a period of 30 days has elapsed after a judge received a written invitation in terms of subregulation 9 the Registrar still has reason to believe that the judge
  - (a) has failed or is failing to comply with a provision of these regulations; or
  - (b) may have disclosed incorrect or misleading information

the Registrar must without delay lodge a complaint against the judge in the manner contemplated in section 14 (3) of the Act.

### **Access to Information in Part B of the Register**

11. Any person other than the Chief Justice and the head of the court concerned who wishes to have access to any information recorded in part B of the Register must apply in writing for such access on a form that corresponds substantially with Form 2 and lodge the application in duplicate with the Registrar.

**[Form 2 must require the applicant to state specifically what information he or she requires and for what purpose the information is required.]**

12. Upon receipt of an application contemplated in subregulation 11 the Registrar must open a file in the name of the judge concerned and file all documents relating to the application on that file.

13. Within 10 days of receipt of such an application the Registrar must transmit a copy of the application to the judge concerned and invite him or her to respond to the application by a stated date.

14. The judge concerned may, in writing, advise the Registrar that he or she –

- (a) does not object to the application being granted; or
- (b) does not object to the application being granted provided that the applicant complies with stated conditions; or
- (c) objects to the application being granted.

15. In the event that the judge concerned advises the Registrar that he or she does not object to the application being granted, or does not object to the application being granted but only on stated conditions and the applicant accepts those conditions in writing, the Registrar must –

- (a) inform the applicant that the application has been granted; and
- (b) make the necessary arrangements for the applicant to have access to the requested information subject to any such stated conditions.

16. In the event that the judge concerned

- (a) advises the Registrar that he or she objects to the application; or
- (b) the applicant does not accept the conditions upon which the judge concerned is willing to permit access; or
- (c) the judge concerned does not respond to the request

the Registrar must transmit the application to the Chief Justice and to the head of the court in which the relevant judge serves.

17. The Chief Justice and the head of the court concerned must, after affording both parties a reasonable opportunity to make submissions in relation to the application, direct either –

- (a) that the application is granted, with or without conditions; or
- (b) that the application is refused.

18. An application for access may only be granted if the Chief Justice and the head of the court concerned are satisfied that the granting of access is necessary for the proper administration of justice or to maintain the standing of the judiciary.

19. (a) Upon receipt of the direction referred to in regulation 17 the Registrar must inform the applicant accordingly and if the application has been granted make the necessary arrangements for the applicant to have access to the relevant information subject to any conditions that have been imposed.

(b) Any access granted in terms of this regulation must occur under the direct supervision of the Registrar.

20. The Registrar must keep a record of all applications made in terms of these regulations and of the outcome thereof.

21. (a) If an application for access is granted the applicant shall use the information concerned only for the purpose for which access was sought as stated in the application and shall comply with any conditions upon which access has been granted.

(b) Contravention of paragraph (a) shall constitute an offence for which the applicant upon conviction shall be liable to a fine or imprisonment for a period not exceeding five years or both.

### **Offences**

22. Any person who discloses information in the Register other than in accordance with these regulations commits an offence and shall be liable upon conviction to a fine or imprisonment for a period not exceeding five years or both.

## SCHEDULE 1

## PART 1

- (i) Directorships or other offices of profit in any enterprise.
- (ii) Shares or other interests in public companies and other public enterprises.
- (iii) Shares or other interests in private companies or other private enterprises.
- (iv) Immovable property.
- (v) Sponsorships, including financial assistance from any source other than the income earned by a judge in his or her judicial capacity.
- (vi) Gifts, other than gifts received from family members, with a value of more than R1000 or gifts received from a single source with a cumulative value of more than R1000 in a calendar year, including hospitality intended as such.
- (vii) Income not derived from the holding of judicial office.

## PART 2

- (i) Identity of enterprise referred to in Part 1(i) and nature of office.
- (ii) Identity of public companies and other public enterprises referred to in Part 1(ii) and nature of interests.
- (iii) Identity of private companies or other private enterprises referred to in Part 1(iii) and nature of interests.
- (iv) Nature and general location of immovable property referred to in Part 1(iv).
- (v) Source and nature of sponsorships referred to in Part 1(v).

- (vi) Source and nature of gifts referred to in Part 1(vi).
- (vii) Source and nature of income referred to in Part 1(vii).

### PART 3

- (i) Amount of income derived from directorships or offices of profit referred to in Part 1(i) for year immediately preceding date of disclosure.
- (ii) Number of shares and current value of other interests referred to in Part 1(ii) at date of disclosure.
- (iii) Number of shares and current value of other interests referred to in Part 1(iii) at date of disclosure.
- (iv) Identity and acquisition cost of immovable property referred to in Part 1(iv).
- (v) Amount of sponsorships referred to in Part 1(v) for year immediately preceding disclosure.
- (vi) Amount of gifts referred to in Part 1(vi) for year immediately preceding disclosure.
- (vii) Amount of income referred to in Part 1(vii) for year immediately preceding disclosure.

## GENERAL NOTES

1. The principle applied in the Schedule is that only the general nature of assets and income should be disclosed for public scrutiny and that the extent and value of assets and income should be reflected only in the confidential part of the Register.
2. The necessary Forms will need to be drafted in conformity with the regulations above.
3. Forms should not require personal details of the judge to be disclosed. It is sufficient for the relevant form to require the judge to state only his or her name and the court in which the judge serves.