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THE PRESIDENCY

No. 1142

27 October 2008

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 20 of 2008: Judicial Service Commission Amendment Act, 2008.



AIDS HELPLINE: 0800-123-22 Prevention is the cure

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.

*(English text signed by the President.)
(Assented to 22 October 2008.)*

ACT

To amend the Judicial Service Commission Act, 1994, so as to establish the Judicial Conduct Committee to receive and deal with complaints about judges; to provide for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct which judges must adhere to; to provide for the establishment and maintenance of a register of judges' registrable interests; to provide for procedures for dealing with complaints about judges; to provide for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Insertion of Preamble in Act 9 of 1994

1. The following Preamble is inserted in the Judicial Service Commission Act, 1994, (hereafter referred to as the principal Act), after the long title:

5

“PREAMBLE

SINCE the Judicial Service Commission has been established by section 178(1) of the Constitution of the Republic of South Africa, 1996:

AND SINCE section 178(4) of the Constitution provides that the Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation;

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AND SINCE section 180 of the Constitution provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including procedures for dealing with complaints about judicial officers;

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AND SINCE section 177(1) of the Constitution provides that a judge may be removed from office only if—

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- (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
- (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members;

AND SINCE section 177(3) of the Constitution provides that the President, on the advice of the Judicial Service Commission may suspend a judge who is the subject of a procedure in terms of section 177(1); 5

AND SINCE it is necessary to create an appropriate and effective balance between protecting the independence and dignity of the judiciary when considering complaints about, and the possible removal from office of, 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; 10

AND SINCE it is necessary to create procedures, structures and mechanisms in terms of which—

- complaints against judges could be lodged and dealt with appropriately; 15
- allegations that any judge is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct could be investigated; and
- information can be placed before the Judicial Service Commission and Parliament in order to enable these institutions to make a finding whether a judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.”. 20

Insertion of heading in Act 9 of 1994

- 2. The following heading is inserted in the principal Act after the enactment clause:

“CHAPTER 1

ADMINISTRATIVE PROVISIONS”. 25

Substitution of section 1 of Act 9 of 1994

- 3. The following section is substituted for section 1 of the principal Act:

“Definitions

- 1. In this Act, unless the context otherwise indicates— 30
- ‘Chairperson’ means the Chief Justice;
- ‘Commission’ means the Judicial Service Commission established by section [105] 178 of the Constitution;
- ‘complainant’ means a person who lodged a complaint against a judge in terms of section 14;
- ‘Minister’ means the Cabinet member responsible for the administration of justice; 35
- ‘prescribed’ means as prescribed in terms of a regulation made under section 35;
- ‘respondent’ means a judge against whom a complaint was lodged in terms of section 14, or who is the subject of an allegation referred to a Tribunal in terms of this Act; 40
- ‘this Act’ includes the Code of Judicial Conduct contemplated in section 12 and any regulations made under section 35; and
- ‘Tribunal’ means a Tribunal appointed in terms of section 21.”.

Substitution of section 2 of Act 9 of 1994

4. The following section is substituted for section 2 of the principal Act:

“Acting Chairperson and vacancies

2. [(1) The members of the Commission designated as such in terms of section 105 (1) (c), (e), (f), (g), (h) and (i) of the Constitution shall hold office for a term not exceeding five years: Provided that—

(a) the President shall remove any such member from office at any time if the designator who or which designated such member, so requests; or

(b) any such member may resign from office by giving at least one month’s written notice thereof to the chairperson.

(2) A member of the Commission designated as such in terms of section 105 (1) (e), (f), (g), (h) or (i) of the Constitution shall vacate his or her office automatically if he or she ceases to be qualified to be so designated.

(3) Subject to section 105 (1) of the Constitution, any person whose term of office as a member of the Commission has expired, may be redesignated.

(4) The Commission shall designate one of the members holding office in terms of section 105 (1) (b), (c), (e), (f), (g) or (i) of the Constitution as deputy chairperson of the Commission, and when the chairperson is not available, the deputy chairperson shall act as chairperson.]

(1) When the Chairperson is for any reason unavailable to serve on the Commission or perform any function or exercise any power, the Deputy Chief Justice, as his or her alternate, shall act as chairperson.

(2) If neither the Chief Justice nor the Deputy Chief Justice is available to preside at a meeting of the Commission, the members present at the meeting must designate one of the members holding office in terms of section 178(1)(b) or (c) of the Constitution as acting chairperson for the duration of the absence.

[(5)] (3) A vacancy in the Commission shall—

(a) not affect the validity of the proceedings or decisions of the Commission: and

(b) be filled in accordance with section [105 (1)] 178(3) of the Constitution, and any member so designated shall, where applicable, hold office for the unexpired portion of his or her predecessor’s term of office.”.

Substitution of section 3 of Act 9 of 1994

5. The following section is substituted for section 3 of the principal Act:

“Remuneration and expenses of members of Commission

3. (1) Any member of the Commission who is **[a judge, a member of Parliament or a Premier of a province]** an office bearer as defined in section 1 of the Independent Commission for the Remuneration of Public Office-Bearers Act, 1997 (Act No. 92 of 1997), may be paid such allowances for travelling and subsistence expenses incurred by him or her in the performance of his or her functions as a member of the Commission as the Minister **[of Justice]** may determine with the concurrence of the Minister of Finance.

(2) Any member of the Commission who is not—

(a) **[a judge]** an office bearer as defined in section 1 of the Independent Commission for the Remuneration of Public Office-Bearers Act, 1997;

or

(b) **[a member of Parliament;**

(c) **[a Premier of a province; or**

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(d)] in the employ of the State and subject to the laws governing the public service,
may be paid such remuneration, including allowances for travelling and subsistence expenses incurred by him or her in the performance of his or her functions as a member of the Commission, as the Minister [of Justice] may determine with the concurrence of the Minister of Finance.”. 5

Repeal of section 4 of Act 9 of 1994

6. Section 4 of the principal Act is repealed.

Substitution of section 5 of Act 9 of 1994

7. The following section is substituted for section 5 of the principal Act: 10

“Publication of procedure of Commission

5. The Minister [of Justice shall] must by notice in the *Gazette*, make known the particulars of the procedure, including subsequent amendments, which the Commission has determined in terms of section [105 (4)] 178(6) of the Constitution.”. 15

Substitution section 6 of Act 9 of 1994

8. The following section is substituted for section 6 of the principal Act:

“Annual report

6. (1) The Commission shall within six months after the end of every year submit a written report to Parliament [**a report in writing regarding its activities during that year**] for tabling. 20

(2) The report referred to in subsection (1) must include information regarding—

- (a) the activities of the Commission during the year in question;
- (b) all matters dealt with by the Judicial Conduct Committee referred to in section 8; 25
- (c) all matters relating to, including the degree of compliance with, the Register of Judges’ Registrable Interests referred to in section 13, as reported by the Registrar of Judges’ Registrable Interests; and
- (d) all matters considered by the Commission in the course of the application of Chapters 2 and 3 of this Act, including the number of matters outstanding and the progress in respect thereof.”. 30

Insertion of Chapters 2, 3 and 4 in Act 9 of 1994

9. The following Chapters are inserted in the principal Act after section 6, the existing section 7 becoming section 39: 35

“CHAPTER 2

**OVERSIGHT OVER JUDICIAL CONDUCT AND
ACCOUNTABILITY OF JUDICIAL OFFICERS**

PART I

Establishment and objects of Committee 40

Definitions and interpretation

7. (1) For purposes of this Chapter, unless the context indicates otherwise—

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- (a) "active service" means active service as contemplated in section 1 of the Judges' Remuneration and Conditions of Service Act, 2001 (Act No. 47 of 2001);
 - (b) "Chairperson", means the Chairperson of the Committee;
 - (c) "Commission" means the Commission, acting without the participation of the members referred to in section 178(1)(h) and (i) of the Constitution; 5
 - (d) "Committee" means the Judicial Conduct Committee referred to in section 8;
 - (e) "Head of Court", in relation to a complaint against a judge— 10
 - (i) of the Constitutional Court, means the Chief Justice;
 - (ii) of the Supreme Court of Appeal, means the President of that Court;
 - (iii) of any other court, means the Judge President of that court;
 - (iv) who was performing judicial duties in an acting capacity on the date the complaint arose, means the Head of Court in which such judge acted when the complaint arose; or 15
 - (v) who has been discharged from active service, means the Chief Justice;
 - (f) "immediate family member" in relation to a judge refers to the spouse, civil partner or permanent life partner of that judge and includes dependent children of, and family members living in the same household with, that judge; and 20
 - (g) "judge" means any Constitutional Court judge or judge referred to in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), which includes a judge who has been discharged from active service in terms of that Act, as well as any person holding the office of judge in a court of similar status to a High Court, as contemplated in section 166 of the Constitution, and, except for the purposes of section 11, includes any Constitutional Court judge or judge performing judicial duties in an acting capacity. 25 30
- (2) In this Chapter any reference to a complainant or to a respondent must, unless it is inconsistent with the context, be construed to include a reference to a legal representative of that complainant or respondent.

Establishment and composition of Judicial Conduct Committee 35

8. (1) The Commission has a Judicial Conduct Committee, comprising—
- (a) the Chief Justice, who is the Chairperson of the Committee;
 - (b) the Deputy Chief Justice; and
 - (c) four judges, at least two of whom must be women, designated by the Chief Justice in consultation with the Minister, for the period determined at the time of such designation, provided that such period may not exceed two years. 40
- (2) Any judge designated in terms of subsection (1)(c) may be reappointed once for a period not exceeding two years, but may not serve as such a member for more than four years in total. 45
- (3) The Chairperson may, either generally or in a specific case, delegate any of his or her powers or functions as Chairperson of the Committee to the Deputy Chief Justice.
- (4) When considering a complaint relating to the conduct of a judge who is a member of the Committee, the Committee must sit without that member. 50
- (5) The first designations in terms of subsection (1)(c) must be made within one month of this section coming into operation.
- (6) Any vacancy which may arise in respect of a designation in terms of subsection 1(c) must immediately be filled for the remaining period of such designation in the manner prescribed in this section. 55

Meetings of Committee

9. (1) The Committee meets at any time and place determined by the Chairperson.

(2) (a) The Committee may determine the procedure to be followed at its meetings, but decisions of the Committee must be supported by a majority of its members. 5

(b) In the event of an equality of votes being cast by the Committee members present at a meeting, the person presiding at that meeting has a deciding vote in addition to his or her deliberative vote.

(3) Meetings of the Committee may only be attended by the members of the Committee and persons whose presence are required or permitted in terms of this Act, unless the Committee on account of public interest and for good cause decides otherwise. 10

Objects of Committee

10. (1) The objects of the Committee are to receive, consider and deal with complaints in terms of Part III of this Chapter. 15

(2) The Committee must report on its activities to the Commission at least once every six months.

PART II

Judicial conduct

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Judge not to hold other office of profit or receive payment for any service

11. (1) A judge performing active service—

- (a) may not hold or perform any other office of profit; and
- (b) may not receive in respect of any service 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: 25

Provided that such a judge may, with the written consent of the Minister acting in consultation with the Chief Justice, receive royalties for legal books written or edited by that judge. 30

(2) A judge who has been discharged from active service may only with the written consent of the Minister, acting after consultation with the Chief Justice, hold or perform 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. 35

(3) (a) Written consent as contemplated in subsection (2) may only be given if the Minister is satisfied that the granting of such consent will not— 40

- (i) adversely affect the efficiency and effectiveness of the administration of justice, including the undermining of any aspect of the administration of justice, especially the civil justice system;
- (ii) adversely affect the image or reputation of the administration of justice in the Republic;
- (iii) in any manner undermine the legal framework which underpins the judge for life concept; 45
- (iv) result in any judge engaging in any activity that is in conflict with the vocation of a judge; and
- (v) bring the judiciary into disrepute or have the potential to do so.

(b) The Minister, acting after consultation with the Chief Justice, may, by notice in the *Gazette*, issue guidelines regarding any other criteria to be applied when considering the granting of consent contemplated in subsection (2). 50

(c) Written consent as contemplated in subsection (2) may be granted on the conditions, if any, that the Minister deems appropriate.

(4) The Minister must cause the Registrar of Judges' Registrable Interests referred to in section 13(1) to be informed of all instances where written consent as contemplated in subsections (1) and (2) has been granted.

(5) The Minister must, once every twelve months, table a report in Parliament containing particulars, including the outcome, of every application made in terms of subsection (1) or (2), including any conditions attached to any application granted, during the period covered by the report.

Code of Judicial Conduct

12. (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.

(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).

(5) The Code shall serve as the prevailing standard of judicial conduct, which judges must adhere to, and the Code and every subsequent amendment must be published in the *Gazette*.

Disclosure of registrable interests

13. (1) The Minister, acting in consultation with the Chief Justice, must appoint a senior official in the Office of the Chief Justice as the Registrar of Judges' Registrable Interests.

(2) The Registrar must open and keep a register, called the Register of Judges' Registrable Interests, and must—

(a) record in the Register particulars of Judges' registrable interests;

(b) amend any entries in the Register when necessary; and

(c) perform the other duties in connection with the Register as required in terms of this Act.

(3) Every judge must disclose to the Registrar, in the prescribed form, particulars of all his or her registrable interests and those of his or her immediate family members.

(4) The first disclosure in terms of subsection (3) must be within 60 days of a date fixed by the President by proclamation, and thereafter annually and in such instances as prescribed.

(5) The Minister, acting in consultation with the Chief Justice, must make regulations regarding the content and management of the Register referred to in subsection (2), which regulations must at least prescribe—

(a) the format of the Register;

(b) the kinds of interests of judges and their immediate family members that are regarded as registrable interests;

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- (c) the manner and the instances in which, and the time limits within which, registrable interests must be disclosed to the Registrar;
 - (d) a confidential and a public part of the Register and the interests to be recorded in those parts respectively;
 - (e) the recording, in the public part of the register, of all registrable interests derived from the application of section 11; 5
 - (f) a procedure providing for public access to the public part of the Register and a procedure for providing access to, and maintaining confidentiality of, the confidential part of the Register; and
 - (g) the lodging of a complaint in terms of section 14(1) by the Registrar, 10
in the event of—
 - (i) failure to register any registrable interest by any judge, including any failure to register any such interest within a prescribed time limit; or
 - (ii) disclosure of false or misleading information by any judge. 15
- (6) The regulations may determine different criteria for judges in active service and judges who had been discharged from active service or judges in an acting capacity, including in respect of matters referred to in subsection (5)(d). 20
- (7) The Minister must table the first regulations under this section in Parliament, for approval, within four months of the commencement of this Act, provided that if consensus could not be achieved as contemplated in subsection (5) both versions of the regulations must be tabled in Parliament within the said period. 25
- (8) When the regulations or any amendment thereto is tabled in Parliament, Parliament may, after obtaining and considering public comment thereon, approve the regulations or such amendment—
- (a) without any changes thereto; or
 - (b) with such changes thereto as may be effected by Parliament. 30

PART III

Consideration of complaints by Committee

Lodging of complaints

- 14.** (1) Any person may lodge a complaint about a judge with the Chairperson of the Committee. 35
- (2) When a complaint is lodged with the Chairperson in terms of subsection (1), the Chairperson must deal with the complaint in accordance with section 15, 16 or 17, but in the event of a complaint falling within the parameters of section 15, the Chairperson may designate a Head of Court to deal with the complaint, unless the complaint is against the Head of Court. 40
- (3) A complaint must be—
- (a) based on one or more of the grounds referred to in subsection (4); and
 - (b) lodged by means of an affidavit or affirmed statement, specifying—
 - (i) the nature of the complaint; and
 - (ii) the facts on which the complaint is based. 45
- (4) The grounds upon which any complaint against a judge may be lodged, are any one or more of the following: 50
- (a) Incapacity giving rise to a judge's inability to perform the functions of judicial office in accordance with prevailing standards, or gross incompetence, or gross misconduct, as envisaged in section 177(1)(a) of the Constitution;

- (b) Any wilful or grossly negligent breach of the Code of Judicial Conduct referred to in section 12, including any failure to comply with any regulation referred to in section 13(5);
- (c) Accepting, holding or performing any office of profit or receiving any fees, emoluments or remuneration or allowances in contravention of section 11; 5
- (d) Any wilful or grossly negligent failure to comply with any remedial step, contemplated in section 17(8), imposed in terms of this Act; and
- (e) Any other wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) to (d), that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts. 10

Lesser complaints may be summarily dismissed

- 15.** (1) (a) If the Chairperson or the Head of Court designated in terms of section 14(2) is of the view that the complaint falls within the parameters of the grounds set out in subsection (2), he or she must dismiss the complaint. 15
- (b) If the Head of Court designated in terms of section 14(2) is of the view that the complaint should not be dismissed under paragraph (a), he or she must refer the complaint to the Chairperson to be dealt with in terms of section 16 or 17. 20
- (2) A complaint must be dismissed if it—
- (a) does not fall within the parameters of any of the grounds set out in section 14(4);
 - (b) does not comply substantially with the provisions of section 14(3); 25
 - (c) is solely related to the merits of a judgment or order;
 - (d) is frivolous or lacking in substance; or
 - (e) is hypothetical.
- (3) If a complaint is dismissed in terms of subsection (1) by a Head of Court, that Head of Court must inform the Chairperson in writing of that dismissal and the reasons therefore. 30
- (4) If a complaint is dismissed in terms of subsection (1), the Chairperson must inform the complainant in writing of—
- (a) the reasons for the dismissal; and
 - (b) the right to appeal to the Committee against that dismissal in terms of subsection (5). 35
- (5) A complainant who is dissatisfied with a decision to dismiss a complaint in terms of subsection (1) may, within one month after receiving notice of that decision, appeal to the Committee in writing against that decision, specifying the grounds for the appeal. 40

Committee may recommend appointment of Tribunal in respect of impeachable complaints

- 16.** (1) If the Chairperson is satisfied that, in the event of a valid complaint being established, it is likely to lead to a finding by the Commission that the respondent suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct, as envisaged in section 14(4)(a), the Chairperson must— 45
- (a) refer the complaint to the Committee in order to consider whether it should recommend to the Commission that the complaint should be investigated and reported on by a Tribunal; and 50
 - (b) in writing, inform the respondent of the complaint.
- (2) If a complaint is referred to the Committee in terms of subsection (1) or section 15(1)(b) or section 17(4)(c) or 17(5)(c)(iii), the Chairperson must determine a time and a place for the Committee to meet in order to consider a recommendation envisaged in subsection (1)(a), and must inform the complainant and the respondent in writing that he or she may— 55

- (a) submit a written representation for consideration by the Committee at that meeting; and
- (b) with the leave of the Chairperson, address the Committee at that meeting.
- (3) For the purpose of a meeting referred to in subsection (2), the Committee may request such further information from the complainant or any other person as it deems fit. 5
- (4) At the meeting referred to in subsection (2), the Committee must consider whether the complaint, if established, will *prima facie* indicate incapacity, gross incompetence or gross misconduct by the respondent, whereupon the Committee may— 10
 - (a) refer the complaint to the Chairperson for an inquiry referred to in section 17(2); or
 - (b) recommend to the Commission that the complaint should be investigated by a Tribunal. 15
- (5) The Committee must inform the complainant, the respondent and the Commission in writing of any decision envisaged in subsection (4) and the reasons therefore.
- (6) A meeting referred to in subsection (2) must be attended by at least three members of the Committee. 20

Inquiry into serious, non-impeachable complaints by Chairperson or member of Committee

- 17. (1) If—**
- (a) the Chairperson is satisfied that, in the event of a valid complaint being established, the appropriate remedial action will be limited to one or more of the steps envisaged in subsection (8); or 25
 - (b) a complaint is referred to the Chairperson in terms of section 15(1)(b) or section 16(4)(a), or section 18(4)(a)(ii), the Chairperson or a member of the Committee designated by the Chairperson must inquire into the complaint in order to determine the merits of the complaint. 30
 - (2) Any inquiry contemplated in this section must be conducted in an inquisitorial manner and there is no onus on any person to prove or to disprove any fact during such investigation.
 - (3) For the purpose of an inquiry referred to in subsection (2), the Chairperson or member concerned— 35
 - (a) must invite the respondent to respond in writing or in any other manner specified, and within a specified period, to the allegations;
 - (b) may obtain, in the manner that he or she deems appropriate, any other information which may be relevant to the complaint; and
 - (c) must invite the complainant to comment on any information so obtained, and on the response of the respondent, within a specified period. 40
 - (4) If, pursuant to the steps referred to in subsection (3), the Chairperson or member concerned is satisfied that there is no reasonable likelihood that a formal hearing on the matter will contribute to determining the merits of the complaint, he or she must, on the strength of the information obtained by him or her in terms of subsection (3)— 45
 - (a) dismiss the complaint;
 - (b) find that the complaint has been established and that the respondent has behaved in a manner which is unbecoming of a judge, and impose any of the remedial steps referred to in subsection (8) on the respondent; or 50
 - (c) recommend to the Committee, to recommend to the Commission that the complaint should be investigated by a Tribunal.
 - (5) (a) If, pursuant to the steps referred to in subsection (3), the Chairperson or member concerned is of the opinion that a formal hearing is required in order to determine the merits of the complaint, he or she must determine a time and a place for a formal hearing and written notice of the hearing must, within a reasonable period before the date so determined, be given to the respondent and the complainant. 55
 - (b) For purposes of a formal hearing contemplated in paragraph (a)— 60
 - (i) the Chairperson or member concerned has all the powers of a Tribunal; and

- (ii) the provisions of sections 24, 26, 27, 28, 29, 30, 31 and 32 are applicable with the changes required by the context.
- (c) Upon the conclusion of a formal hearing the Chairperson or member concerned must record his or her findings of fact, including the cogency and sufficiency of the evidence and the demeanour and credibility of any witness, and his or her finding as to the merits of the complaint, and—
- (i) dismiss the complaint;
- (ii) find that the complaint has been established and that the respondent has behaved in a manner which is unbecoming of a judge, and impose any of the remedial steps referred to in subsection (8) on the respondent; or
- (iii) recommend to the Committee, to recommend to the Commission that the complaint should be investigated by a Tribunal.
- (6) The Chairperson or member concerned must in writing inform the Committee, the complainant and the respondent of—
- (a) a dismissal contemplated in subsection (4)(a) or (5)(c)(i); or
- (b) any finding and remedial steps contemplated in subsection (4)(b) or (5)(c)(ii); or
- (c) any recommendation contemplated in subsection 4(c) or (5)(c)(iii), and the reasons therefor.
- (7) (a) A complainant who is dissatisfied with a decision to dismiss a complaint in terms of subsection (4)(a) or (5)(c)(i) may, within one month after receiving notice of that decision, appeal to the Committee in writing against that decision, specifying the grounds for the appeal.
- (b) A respondent who is dissatisfied with any finding or remedial steps contemplated in subsection (4)(b) or (5)(c)(ii) may, within one month after receiving notice of that finding and remedial steps, appeal to the Committee in writing against that finding or remedial steps or both such finding and remedial steps, specifying the grounds for the appeal.
- (8) Any one or a combination of the following remedial steps may be imposed in respect of a respondent:
- (a) Apologising to the complainant, in a manner specified.
- (b) A reprimand.
- (c) A written warning.
- (d) Any form of compensation.
- (e) Subject to subsection (9), appropriate counselling.
- (f) Subject to subsection (9), attendance of a specific training course.
- (g) Subject to subsection (9), any other appropriate corrective measure.
- (9) The state shall not be responsible for any expenditure incurred as a result of, or associated with, any remedy referred to in subsection (8)(e), (f) or (g), unless such remedy was selected from a list of approved remedies or services compiled from time to time by the Minister, after consultation with the Chief Justice, and then only to the extent set out in that list.

Consideration of appeal by Committee

18. (1) The Committee must consider an appeal referred to in section 15(5) or 17(7) at a meeting determined by the Chairperson, and the Chairperson must inform the complainant and the respondent in writing—
- (a) of the time and place of the meeting; and
- (b) that they may submit written representations within a specified period for consideration by the Committee.
- (2) (a) A meeting referred to in subsection (1) must, subject to paragraph (c), be attended by at least three members of the Committee and be presided over by the Chairperson, but no member who made any decision or finding, or imposed any remedial step, that is the subject of the appeal, may participate in the consideration of the appeal.
- (b) In the event of the absence of the Chairperson to preside in a specific appeal, the Chief Justice must appoint an acting chairperson from amongst the members of the Committee, to preside in that appeal.

(c) If any member of the Committee is for any reason unable to participate in the consideration of an appeal in terms of this section and there are not at least three of the other members available to so participate in the appeal, the Chief Justice may appoint any judge as a temporary member of the Committee for the purpose of the consideration of such an appeal.

(3) At the meeting referred to in subsection (1), the Committee must consider—

(a) the reasons for—

(i) the dismissal against which the appeal is brought, as contemplated in section 15(4)(a) or 17(6)(a); or

(ii) the finding or remedial steps, or the finding and the remedial steps, as the case may be, against which the appeal is brought, as contemplated in section 17(6)(b);

(b) the grounds for the appeal, as contemplated in section 15(5) or 17(7)(a) or (b), as the case may be;

(c) any representations submitted in terms of subsection (1)(b); and

(d) such further written or oral argument, if any, as may be requested by the Committee.

(4) After consideration of an appeal in terms of subsection (3), the Committee must—

(a) in the case of an appeal against a dismissal of a complaint as contemplated in section 15(4)(a)—

(i) confirm the dismissal;

(ii) set aside the dismissal and refer the complaint to the Chairperson for an inquiry in terms of section 17; or

(iii) set aside the dismissal and recommend to the Commission that the complaint should be investigated by a Tribunal in terms of section 19;

(b) in the case of an appeal against a dismissal of a complaint as contemplated in section 17(7)(a)—

(i) confirm the dismissal;

(ii) set aside the dismissal, and find that the complaint has been established and that the respondent has behaved in a manner which is unbecoming of a judge, and impose any of the remedial steps referred to in section 17(8) on the respondent; or

(iii) set aside the dismissal and recommend to the Commission that the complaint should be investigated by a Tribunal in terms of section 19; or

(c) in the case of an appeal against a finding or remedial steps, or a finding and remedial steps as contemplated in section 17(7)(b)—

(i) set aside the decision concerned; or

(ii) confirm the decision or set aside the decision concerned and substitute it with an appropriate decision, with or without any amendment of the remedial steps imposed, if applicable; or

(iii) set aside the decision and recommend to the Commission that the complaint should be investigated by a Tribunal in terms of section 19.

(5) The Committee must in writing inform the complainant and the respondent of its decision in terms of subsection (4) and the reasons therefore.

PART IV

Request to appoint Tribunal and consideration of Tribunal report by Commission

Commission to request appointment of Tribunal

19. (1) Whenever it appears to the Commission—

(a) on account of a recommendation by the Committee in terms of section 16(4)(b) or 18(4)(a)(iii), (b)(iii) or (c)(iii); or

(b) on any other grounds, that there are reasonable grounds to suspect that a judge—

(i) is suffering from an incapacity;

- (ii) is grossly incompetent; or
 - (iii) is guilty of gross misconduct,
- as contemplated in section 177(1)(a) of the Constitution, the Commission must request the Chief Justice to appoint a Tribunal in terms of section 21.
- (2) The Commission must in writing state the allegations, including any other relevant information, in respect of which the Tribunal must investigate and report. 5
- (3) The Commission must, unless it is acting on a recommendation referred to in section 16(4)(c) or 18(4)(a)(iii), (b)(iii) or (c)(iii), before it requests the appointment of a Tribunal, inform the respondent, and, if applicable, the complainant, that it is considering to make that request and invite the respondent, and, if applicable, the complainant, to comment in writing on the fact that the Commission is considering to so request. 10
- (4) Whenever the Commission requests the appointment of a Tribunal in terms of subsection (1), the Commission must forthwith in writing— 15
- (a) inform the President that it has so requested; and
 - (b) advise the President as to —
 - (i) the desirability of suspending the respondent in terms of section 177(3) of the Constitution; and
 - (ii) if applicable, any conditions that should be applicable in respect of such suspension. 20

Commission to consider report and make findings

- 20.** (1) The Commission must consider the report of a Tribunal at a meeting determined by the Chairperson, and the Commission must inform the respondent and, if applicable, the complainant, in writing— 25
- (a) of the time and place of the meeting; and
 - (b) that he or she may submit written representations within a specified period for consideration by the Commission.
- (2) At the meeting referred to in subsection (1) the Commission must consider— 30
- (a) the report concerned; and
 - (b) any representations submitted in terms of subsection (1)(b).
- (3) After consideration of a report and any applicable representations in terms of subsection (2), the Commission must make a finding as to whether the respondent— 35
- (a) is suffering from an incapacity;
 - (b) is grossly incompetent; or (c) is guilty of gross misconduct.
- (4) If the Commission finds that the respondent is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct, the Commission must submit that finding, together with the reasons therefore and a copy of the report, including any relevant material, of the Tribunal, to the Speaker of the National Assembly. 40
- (5) If the Commission, after consideration of a report and any applicable representations in terms of subsection (2) finds that the respondent— 45
- (a) is not grossly incompetent, but that there is sufficient cause for the respondent to attend a specific training or counselling course or be subjected to any other appropriate corrective measure, the Commission may make a finding that the respondent must attend such a course or be subjected to such measure; or
 - (b) is guilty of a degree of misconduct not amounting to gross misconduct, the Commission may, subject to section 17(9), impose any one or a combination of the remedial steps referred to in section 17(8) 50
- (6) The Commission must in writing inform the respondent in respect of whom a finding referred to in subsection (4) or (5) is made, and, if applicable, the complainant, of that finding and the reasons therefore. 55

CHAPTER 3

JUDICIAL CONDUCT TRIBUNALS

Part 1

Introductory provisions

Appointment of Tribunal

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21. (1) The Chief Justice must appoint a Judicial Conduct Tribunal, whenever requested to do so by the Commission.

(2) The Chief Justice must, after consultation with the Minister, designate a place in the Republic as the seat of each Tribunal established in terms of this Act, but a Tribunal may sit at any place for the purpose of a hearing or of deliberating.

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(3) Before appointing any judge to a Tribunal, the Chief Justice must consult with the head of the court on which that judge serves.

(4) Upon appointing a Tribunal, the Chief Justice must give written notice of the composition, terms of reference, and seat of the Tribunal, and the date by which the Tribunal is to commence proceedings, to—

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(a) the members of the Tribunal

(b) the Minister;

(c) the respondent; and

(d) the complainant.

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(5) The Chief Justice—

(a) must delegate the functions assigned to the Chief Justice in terms of this Part or section 10(2) to the Deputy Chief Justice, if the Chief Justice—

(i) is the respondent; or—

(ii) is personally implicated in the allegations against a judicial officer; and

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(b) may delegate any of the functions assigned to the Chief Justice in terms of this Part or section 29(2) to the Deputy Chief Justice, in any other case.

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Composition of Tribunal

22. (1) A Tribunal comprises—

(a) two judges, one of whom must be designated by the Chief Justice as the Tribunal President; and

(b) one person whose name appears on the list maintained in terms of section 23(1).

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(2) At least one member of every Tribunal must be a woman.

(3) If a vacancy arises among the members of a Tribunal, or if a member of a Tribunal for any reason becomes unable to continue to serve on the Tribunal, and—

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(a) there are at least two members remaining on the Tribunal, the Tribunal must continue its functions; or

(b) in any other case—

(i) the Tribunal is dissolved;

(ii) the Chief Justice must appoint a new Tribunal; and

(iii) any evidence gathered by or submitted to the former Tribunal, and any record kept by the former Tribunal, may be considered by the new Tribunal.

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Non-judicial members of tribunals

23. (1) The Executive Secretary must, in the prescribed manner and form, establish and maintain a list of persons who are not judicial officers and who have been approved by the Chief Justice, acting with the concurrence of the Minister, as being suitable to serve on Tribunals in terms of section 22(1)(b).

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(2) The Minister, in consultation with the Cabinet member responsible for finance, may by notice in the *Gazette* prescribe a tariff of allowances to be paid for service as a member of a Tribunal to a person appointed in terms of section 22(1)(b).

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Tribunal investigative and administrative support

24. (1) The President of a Tribunal may, after consulting the Minister and the National Director of Public Prosecutions, appoint a member of the National Prosecuting Authority to collect evidence on behalf of the Tribunal, and to adduce evidence at a hearing;

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(2) The Executive Secretary in the Office of the Chief Justice must assign such other employees of the Office to the Tribunal as may be necessary to assist the Tribunal in the performance of its functions.

Rules and procedure

25. (1) The Chief Justice must make rules regulating procedures before a Tribunal.

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(2) Rules made under subsection (1)—

- (a) are applicable to all Tribunals;
- (b) may be amended or repealed at any time;
- (c) must be tabled in Parliament by the Minister before publication in the *Gazette*; and
- (d) must be published in the *Gazette*.

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(3) The first rules made under this section must be made within six months from the date of the commencement of this section.

(4) Subject to this Act, a Tribunal has the power to regulate and protect its own proceedings.

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PART 2

Hearings of Tribunal

Objects and nature of Tribunal

26. (1) The objects of a Tribunal are—

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- (a) to inquire into allegations of incapacity, gross incompetence or gross misconduct against a judge, as contemplated in section 177 of the Constitution, by—

- (i) collecting evidence;
 - (ii) conducting a formal hearing;
 - (iii) making findings of fact; and
 - (iv) making a determination on the merits of the allegations; and
- (b) to submit a report containing its findings to the Judicial Service Commission.

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(2) A Tribunal conducts its inquiry in an inquisitorial manner and there is no onus on any person to prove or to disprove any fact before a Tribunal.

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(3) When considering the merits of any allegations against a judge, the Tribunal must make its determination on a balance of probabilities.

(4) A Tribunal must keep a record of its proceedings.

Hearing to begin and be concluded without unreasonable delay

27. (1) In the interests of protecting and enhancing the dignity and effectiveness of the judiciary and the courts, a Tribunal must—

- (a) as soon as reasonably practicable after its appointment, determine a date, time and place for conducting a hearing in respect of the allegations referred to it; and
- (b) conclude the hearing without unreasonable delay.

(2) Subject to subsection (1)(b), a Tribunal may adjourn its proceedings at any time, to any date, time and place.

Involvement of judicial officer whose conduct is subject of hearing

28. (1) Notice of a hearing must be served on the respondent within a reasonable period before the date set for that hearing.

(2) The respondent is entitled to attend the hearing and to be assisted by a legal representative, but the Tribunal may begin or continue a hearing, in whole or in part, in the absence of the respondent, or the respondent's legal representative, or both of them, if the Tribunal is satisfied that the respondent was properly informed of the hearing.

(3) The respondent is entitled—

- (a) to give and adduce evidence;
- (b) to call witnesses, and to cross-examine any witness;
- (c) to have access to any books, documents or other objects produced in evidence; and
- (e) to make a submission to the Tribunal before the conclusion of the hearing.

Attendance at hearing and disclosure of evidence

29. (1) A hearing of a Tribunal may be attended only by—

- (a) the respondent;
- (b) the respondent's legal representative, if one has been appointed;
- (c) any person who lodged a formal complaint against the respondent, if that complaint is related to the hearing;
- (d) the legal representative of each person contemplated in paragraph (c);
- (e) any person subpoenaed in terms of section 30, or called as a witness by the respondent, each of whom may attend—
 - (i) with or without a legal representative; and
 - (ii) only for the period that person is required by the Tribunal;
- (f) any person contemplated in section 24(2), if that person's presence is required by the Tribunal; and
- (g) any other person whose presence the Tribunal considers to be necessary or expedient.

(2) Subject to sections 32 and 33, a person may not disclose to any other person the contents of a book, document or other object in the possession of a Tribunal or the record of any evidence given before a Tribunal, except to the extent that the Tribunal President, in consultation with the Chief Justice, determines otherwise.

(3)(a) Notwithstanding subsection (1), the Tribunal President may, if it is in the public interest and for the purposes of transparency, determine that all or any part of a hearing of a Tribunal must be held in public.

(b) A determination contemplated in paragraph (a) must be made in consultation with the Chief Justice.

(c) Subsection (2) does not apply if a determination is made under paragraph (a), but the Tribunal President may prohibit the publication of any information or document placed before the Tribunal if that publication is not in the public interest.

Tribunal may subpoena witnesses

30. A Tribunal may subpoena any person to appear before it in person at a hearing and—

- (a) to produce any book, document, statement or object relating to the hearing; and
- (b) to answer questions under oath or affirmation.

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Evidence to be given under oath or affirmation

31. (1) No person may testify before, or be questioned by, a Tribunal unless the oath or affirmation that is usually administered or accepted in a court of law, has been administered to or accepted from that person by the Tribunal or, if evidence is to be given by such person through an interpreter, by the Tribunal through the interpreter.

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(2) An oath or affirmation administered to or accepted from a person in terms of subsection (1) remains binding on that person until the Tribunal has concluded the hearing or finally excused that person.

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(3) A person giving evidence at a hearing of the tribunal must answer any relevant question.

(4) A tribunal may order a person giving evidence to answer any question, or to produce any article or document, even if it is self-incriminating to do so.

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(5) A self-incriminating answer given or statement made by a person giving evidence to a Tribunal in terms of this Act is inadmissible as evidence against that person in any criminal proceedings against that person instituted in any court, except in criminal proceedings for perjury, or in which that person is tried for an offence contemplated in section 34(1)(b), and then such an answer or statement is admissible only to the extent that it is relevant to prove the offence charged.

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Evidence disclosing offence

32. If the Tribunal is of the opinion that evidence before the Tribunal discloses the commission of an offence by the respondent, the Tribunal President must notify the National Director of Public Prosecutions accordingly during or after the hearing and cause a copy of the record or the relevant part of the record in question to be submitted to the National Director of Public Prosecutions.

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Findings and report

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33. (1) Upon the conclusion of a hearing, the Tribunal must—

- (a) record its findings of fact, including the cogency and sufficiency of the evidence and the demeanour and credibility of any witness, and its findings as to the merits of the allegations in question; and
- (b) submit a report to the Judicial Service Commission, containing—
 - (i) its findings and the reasons for them;
 - (ii) a copy of the record of the hearing; and
 - (iii) all other relevant documents.

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(2) The Tribunal must submit a copy of its report, and all other relevant documents, to the Chief Justice for safekeeping.

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PART 3

Offences relating to Tribunals

Offences

- 34.** (1) A person is guilty of an offence in terms of this Act if the person—
- (a) having been subpoenaed in terms of section 29 to appear before a Tribunal, fails without reasonable excuse to—
 - (i) attend a hearing of a Tribunal;
 - (ii) remain in attendance until excused by the Tribunal; or
 - (iii) produce any book, document, statement or object relating to the hearing which he or she has been subpoenaed to produce;
 - (b) having taken an oath or affirmation as a witness—
 - (i) refuses to answer a question; or
 - (ii) knowingly provides false information to the Tribunal;
 - (c) wilfully hinders or obstructs a Tribunal in the performance of its functions; or
 - (d) other than as contemplated in section 29(2), or in the performance of a function in terms of this Act, wilfully or negligently discloses to any other person the contents of a book, document or other object in the possession of a Tribunal or the record of any evidence given before a Tribunal.
- (2) Any person who is convicted of an offence in terms of this Act is liable to a fine or to imprisonment for a period not exceeding five years.

CHAPTER 4

MISCELLANEOUS PROVISIONS

Regulations

- 35.** (1) The Minister—
- (a) must make the regulations required to be made in terms sections 13 of this Act; and
 - (b) may make regulations regarding any matter that may be necessary or expedient to prescribe regarding—
 - (i) the finances and financial management and accountability of the Commission and Office of the Registrar of Judges Registrable Interests;
 - (ii) the manner in which a judge may apply for written consent of the Minister as contemplated in section 11 (1) and (2); and
 - (iii) the administration and functioning of the Commission or Conduct Committee, the Secretariat of the Commission, or any other aspect of this Act.
- (2) Any regulation made under this section must be tabled in Parliament before publication thereof in the *Gazette*.

Finances and accountability

- 36.** (1) Expenditure in connection with the administration and functioning of the Commission must be defrayed from monies appropriated by Parliament for this purpose to the Department of Justice and Constitutional Development vote (hereinafter referred to as the Departmental vote) in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- (2) Monies appropriated by Parliament for this purpose—
- (a) constitute earmarked funds on the Departmental vote; and

- (b) may not be used by the Department for any other purpose, without the approval of Treasury and the Chief Justice as Chairperson of the Commission.
- (3) The Minister must consult with the Chief Justice on the funds required for the administration and functioning of the Commission, as part of the budgetary process of departments of state, in the manner prescribed. 5
- (4) Subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), the Director-General of the Department—
- (a) is charged with the responsibility of accounting for monies received or paid out for or on account of the administration and functioning of the Commission; and 10
- (b) must cause the necessary accounting and other related records to be kept, which records must be audited by the Auditor-General.

Secretariat of Commission

- 37. (1) The Executive Secretary in the Office of the Chief Justice must assign an appropriate number of personnel, one of whom must be designated as the Secretary of the Commission, from the staff in the Office of the Chief Justice to provide administrative support to the Commission. 15
- (2) Subject to section 36, the Secretary of the Commission, under the supervision, control and direction of the Executive Secretary, must— 20
- (a) provide secretarial and administrative services to the Commission, the Committee and any Tribunal;
- (b) cause all records of matters dealt with by the Commission in terms of this Act to be safeguarded;
- (c) maintain a register of all complaints dealt with in terms of Chapter 2;
- (d) perform such functions as may from time to time be prescribed; and 25
- (e) generally, perform such secretarial and administrative tasks related to the work of the Commission, Committee or any Tribunal, as may from time to time be directed by the Chief Justice.
- (3) Subject to section 36, the Registrar of Judges' Registrable Interests, under the supervision, control and direction of the Chief Justice, must— 30
- (a) maintain the Register of Judges' Registrable Interests;
- (b) cause all records of matters dealt with in relation to the Register in terms of this Act to be safeguarded;
- (c) perform such functions as may from time to time be prescribed; and 35
- (d) generally, perform such secretarial and administrative tasks related to maintenance of the Register, as may from time to time be directed by the Chief Justice.

Protection of confidential information

- 38. (1) No person, including any member of the Commission, Committee, or any Tribunal, or Secretariat of the Commission, or Registrar or his or her staff, may disclose any confidential information or confidential document obtained by that person in the performance of his or her functions in terms of this Act, except— 40
- (a) to the extent to which it may be necessary for the proper administration of any provision of this Act; 45
- (b) to any person who of necessity requires it for the performance of any function in terms of this Act;
- (c) when required to do so by order of a court of law; or
- (d) with the written permission of the Chief Justice. 50

Act No. 20, 2008

JUDICIAL SERVICE COMMISSION
AMENDMENT ACT, 2008

(2) Any person who contravenes a provision of subsection (1) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years.

(3) Every member of the Commission, the Committee, any Tribunal and every member of the secretariat of the Commission and Office of the Registrar must, in the prescribed manner—

- (a) before assuming office or duty; or
- (b) if he or she is holding such office on the date of the commencement of this section, make and subscribe to an affirmation of secrecy in the following form:

“I, solemnly declare:

- (a) I have taken cognizance of the provisions of section 38(1) and (2) of the Judicial Service Commission Act, 1994.**
- (b) I understand that I may not disclose any confidential information or document obtained by me in the performance of my functions in terms of that Act, except in accordance with the provisions of section 38(1) of the Act.**
- (c) I am fully aware of the serious consequences which may follow any breach or contravention of the above-mentioned provisions. (Signature)”.**

(4) Any person who wilfully or negligently in any manner discloses any confidential information that came to his or her knowledge by means of a person who conveyed that information in contravention of subsection (1) is guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding a period of five years.”.

Substitution of long title of Act 9 of 1994

10. The following long title is substituted for the long title of the principal Act:

“ACT

To regulate matters incidental to the establishment of the Judicial Service Commission by the Constitution of the Republic of South Africa, [1993] 1996; to establish the Judicial Conduct Committee to receive and deal with complaints about judges; to provide for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct which judges must adhere to; to provide for the establishment and maintenance of a register of judges’ registrable interests; to provide for procedures for dealing with complaints about judges; to provide for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges; and to provide for matters connected therewith.”.

Short title

11. This Act is called the Judicial Service Commission Amendment Act, 2008, and comes into operation on a date fixed by the President by Proclamation in the *Gazette*.