

REVISITING THE JUDICIAL CODE OF ETHICS.

A PRESENTATION BY THE HON L. MALABA, CHIEF JUSTICE

AT THE SECOND TERM JUDGES SYMPOSIUM

NYANGA, 4 AUGUST 2017

Introduction.

The preamble to the Judicial Code of Ethics Regulations records among other ideals, that we have adopted the code of ethics individually and collectively as a beacon of judicial conduct now and in the future. These are high-sounding words and ideals indeed. The idea is not for these to remain as mere words but for them to become our lived reality.

I hope that you were not unduly alarmed when you saw the topic on the programme and were wondering why I had decided to talk on it. I assure you that this is not an exercise aimed at discussing judges who may have been accused of breaching the code.

There are mainly two reasons why I chose the topic. The first one is to remind each and every one of us of the code and that we made a conscious decision that this code was going to regulate our conduct as judicial officers. In my view, we need to constantly review the code and find out ways in which we can improve on its provisions so that we remain cognisant of the fact that a competent, independent and impartial judiciary is indispensable and essential for good governance and the rule of law.

Therefore, at the end of my presentation and during the discussion, I will expect judges to suggest ways and measures that can be taken to improve on the provisions of the Code of Ethics and to subject these suggestions to debate amongst ourselves.

In a moment I shall highlight a few of the provisions of the code that I believe to be important for all judicial officers to always bear in mind as we conduct ourselves in and outside the court room.

The second reason I chose this topic is what I have already referred to, the need to breathe life into the code of ethics.

You will recall that when we came up with the Code of Ethics in 2012, we were not under pressure from anyone to do so. At that time, the Judicial Service Commission had not been granted any power or authority to initiate the removal of judges and other public officers from office. The code was not enacted with that procedure in mind.

Whilst we were not under pressure to enact the code, I do not believe that we enacted it to simply put it away. We wanted to use it and it is my intention that we fully use the code as we planned in 2012 when we enacted it. Therefore, during the second part of my presentation, I will share with you my views on how I intend to give life to some provisions of the code.

1. Some selected provisions of the code.

As the Chief Justice, I do receive complaints against judges. I am happy to note that complaints relating to delayed judgments are getting fewer and fewer. The complaints that are coming in are however worrisome in that they now refer to issues of our competence to hold the office of judge and to our integrity.

Recent developments globally show that there is a growing call upon judges to be accountable to the people whom they serve. Accountability does not only relate to how much work you do, but now includes how you do that work.

As Chief Justice now, you hardly attend a conference or workshop for judges where the topic does not come up in one form or another. It is therefore important as the judiciary in Zimbabwe that we also keep abreast of these developments and discuss these issues amongst ourselves and contextualise them to ourselves taking into account our own circumstances in all respects.

For instance, clause 6 of the Code provides that a judicial officer shall ensure that his or her conduct, in and outside court, is above reproach in the view of reasonable, fair-minded and informed persons.

Clause 7 equally provides that a judicial officer shall avoid impropriety and the appearance of improper

behaviour in all his or her activities, in and outside court and shall avoid any conduct that will bring the judiciary into disrepute.

These are not easy standards to live up to as the values and perceptions of society are not stagnant but evolve with time. What might have been acceptable a few years back may not be acceptable now. Whilst this is not an issue in this jurisdiction, I am aware for instance that other jurisdictions are grappling with issues of whether or not a judge's son can accept gifts at his wedding from prominent law firms in the jurisdiction.

I am not at liberty to give examples of the complaints we have received in this jurisdiction relating to alleged impropriety on the part of judges as these may need to be processed further but I think it is important that we all keep alert and avoid any appearances of improper behaviour as our society is very quick to allege impropriety where they do not understand or lack knowledge of certain procedures.

I have directed the Secretary of the Judicial Service Commission to detach from the statistics that she will present tomorrow all reference to reserved judgments. This is not to say that there are no reserved judgments outstanding but because I have reached an agreement with all of you through your heads of courts that there is a moratorium on reserved judgments up to September 2017 when all 2015 reserved judgments must be cleared. Again, I am glad that this does not apply to quite a number of you who do not have judgements that are more than a year old. We do however have a fair number of 3-year-old judgments that need to be cleared. I will however wish to repeat that the core business of judges is to decide the matters that come before them. A judge who does not write judgments or otherwise determine the cases that are placed before them has in some instances been likened to an undertaker who refuses to dig graves and bury the dead. Not a very pleasant example but one that drives the point home, I think.

I also wish to take this opportunity to remind judges of the elaborate procedures that we have laid out for ourselves when faced with a situation where a judge cannot render a judgment within the stipulated time frame.

- We have always said that where you are quite clear of the outcome of the dispute, you may issue an order, with reasons to follow later.
- Where you are clear of the outcome and you have the reasons ready, you may give an ex tempore judgment, to be supplemented by a written judgment if so requested.
- Where you cannot render a judgment due to the complexity of the case or other good reason, you approach the Judge President or Senior Judge with your explanation.

I wish to encourage all judges to resort to these procedures so that by the end of 2018 we are all current with our judgments and we are fully abiding by the provisions of the Code.

Whilst we are revising the code, I also thought that we need to review our practice regarding judges who bring actions in their own courts and how we have been handling these. I believe that the practice has been to notify the Judge President and the Chief Justice before the action is initiated. Are there any circumstances where the judge should be deterred or persuaded from doing so? Do such suits brought by judges have any impact on the perception of our impartiality as judges?

These are some of the many issues that I thought we could discuss as we revisit the code of ethics.

Let me now turn to the second part of my presentation

2. Establishing an Ethics Advisory Committee and Ad hoc disciplinary committees.

In the introductory part of my presentation, I mentioned the fact that I do not believe that we enacted the code to simply put it away. I still maintain that we wanted to use it. One of the procedures that we agreed upon was the setting up of an Ethics Advisory Committee. This is a committee to be appointed by the Chief Justice of between three and five judges. Their main function is to render opinions to inquiring judges about the acceptability or otherwise of certain contemplated conduct.

It is my intention as Chief Justice to also refer to this committee once it is set up any complaints received about judges for an opinion which may or may not lead to the setting up of a disciplinary committee. In this way, I will benefit from the opinion of other judges before recommending any disciplinary action against a judge.

Similarly, it is my intention to fully operationalize the setting up of ad hoc disciplinary committees to investigate and recommend outcomes in matters relating to complaints received about judges. As is indicated in the Code, the setting up of these two committees will not detract or derogate from the provisions of the Constitution on the procedures relating to the removal of judges from office. Issues that may be referred to the disciplinary committee may include excessive delays in handing down judgments, unacceptably low levels of case disposals even where there are no outstanding judgments and improper behaviour not warranting removal from office.

Conclusion.

These are my very brief views on how we can breathe life into the Judicial Code of Ethics so that it becomes a living document and not one that we promulgated to put away. I now open the issues to debate.

I thank you.