Constitutional Hill
1 Hospital Street
BRAAMFONTEIN
2017

02 April 2021

Mr Sello Chiloane
The Secretariat: Judicial Service Commission
Midrand

Dear Mr Chiloane

NOTICE AND GROUNDS OF APPEAL

This serves to inform you that I have decided, in terms of section 17(7)(b) of the Judicial Service Commission Act 9 of 1994, to exercise my right to appeal against the findings made and remedial steps taken by His Lordship Mr Justice Mojapelo against me.

The brief and expanded Grounds of Appeal accompany this notice.

Yours faithfully

Mogoeng Mogoeng
Appellant

IN THE JUDICIAL CONDUCT COMMITTEE

Ref. No. JSC/819/20

In the matter between:

AFRICA4PALESTINE Complainant

and

CHIEF JUSTICE MOGOENG MOGOENG Respondent

Ref. No. JSC/825/20

In the matter between:

SA BDS COALITION Complainant

and

MOGOENG MOGOENG CJ Respondent

Ref. No. JSC/827/20

In the matter between:

WOMENS CULTURAL GROUP Complainant

and

MOGOENG MOGOENG CJ Respondent

GROUNDS OF APPEAL

Introduction

[1] This is not a matter to which the Uniform Rules of Court apply, although useful guidance could understandably be sourced from them. It is therefore necessary that I preface my notice *cum* expanded grounds of appeal with statements intended to minimise possible and legitimate misunderstanding and to project what I believe to be the correct approach to the production of a properly reasoned decision.

[2] The decision of His Lordship the Honourable Mr Justice Mojapelo is unprecedentedly and needlessly voluminous. And I am constrained to say, that his reasoning is flawed and disturbingly superficial. This is a serious assertion to make about the work of a colleague and must therefore be properly explained and undergirded by appropriate jurisprudential and factual material, hence this relatively long document.

[3] It is through properly reasoned judgments or decisions that Judicial Officers account to interested parties and the public for the execution of their judicial and, as in this case, quasi-judicial functions. Points, rightly or wrongly, believed by any party to be relevant must be logically confronted and agreed or disagreed with on clearly articulated and rational bases. Decisions must never be based on non-existent laws or policies. And reliance must never be placed on legal principles that are in conflict with existing Constitutional Court jurisprudence.

[4] Wholly unmeritorious allegations that border on suspicion or speculation may not be relied on at all, worse still without any attempt at justification. Each party is entitled to assume that a Judicial Officer has the all-essential capacities to differentiate between baseless allegations that amount to nothing more than suspicion or far-fetched inferences

from those deserving of some credibility and weight. I turn to highlight pertinent points of grave concern and some of the key grounds of my appeal. Elaboration will follow later.

Grounds of appeal

[5] His Lordship Mr Justice Mojapelo misdirected himself in a material respect by finding that these complaints are not about, meaning they do not implicate, the constitutional rights to freedom of religion, belief, thought, opinion and freedom of expression.

[6] The learned Judge thus failed to deal with the constitutional right to freedom of expression and freedom of religion, belief, thought and opinion.

[7] His Lordship found me guilty of involvement in political controversy on the basis that I criticised and proposed changes to the official policy of the South African Government towards Israel. This constitutes a material misdirection because the South African Government does not have an official policy towards Israel that is at variance with any of the statements I made on the Jerusalem Post webinar.

[8] His Lordship adopted an approach to the interpretation of a legal instrument that is at odds with the binding principles of interpretation laid down in the Constitutional Court decisions in *Cool Ideas*, *Chisuse* and other cases.

[9] The learned Judge failed to interpret the Code of Judicial Conduct in a way that promotes the spirit, purport and objects of the right to freedom of expression and freedom of religion, belief, thought and opinion and recognises the supremacy of the Constitution over the Code.

[10] The somewhat sarcastic heading "Others did it too" is a consequence of His Lordship's regrettable failure to appreciate the significance and context of a reference to

colleagues, who were not discharging judicial functions, but were "appointed" by the State to be involved in classical cases of political controversies or expressed views seasoned with politics, extra-judicially. This resulted in His Lordship's misconstruction of proscribed "political controversy or activity" in Article 12(1)(b).

[11] His Lordship's reliance on the irrelevant SACC's statement to reinforce his conclusion that I got involved in political controversy is yet another material misdirection. He was required to analyse the facts, the Code and the Constitution to arrive at a conclusion, not to unreflectingly reject everything I said, accept virtually everything the complainants and the SACC said, as he appears to have done.

[12] His Lordship misconstrued the meaning and application of the doctrine of separation of powers, particularly within the context of Article 14(3)(a) of the Code, which is about accepting an appointment that could undermine separation of powers. As a result, he misdirected himself in a material respect by finding that the sub-article was breached.

[13] His Lordship fatally misunderstood Article 12(1)(d) and was thus wrong to conclude that I lent the prestige of my office to advance my interests and those of the Jerusalem Post, contrary to the entrenched meaning of the article in terms of which the learned Judge had related to the media, over the years.

[14] The conclusion that my participation in a webinar or an event organised by a media outlet like the Jerusalem Post amounts to involvement in an extra-judicial activity proscribed by Article 14(1) read with Note 14(i) and Article 14(2)(a) of the Code is a misdirection and flawed. His Lordship Mr Justice Mojapelo himself wrote an article criticising the President's exercise of his constitutional powers to nominate and appoint a Chief Justice and caused it to be published in the Sunday Times in May 2011.

[15] The learned Judge's insinuation that I was possibly involved in some conspiracy with the Israeli Government and "timed" the webinar in such a way as to undermine international law or UN conventions/resolutions, a reliance on events and statements irrelevant to what I said to find aggravation, like the annexation of land by Israel, alleged perpetration of acts of violence against Palestinians, destruction of livestock and olive groves, is a material misdirection. The learned Judge inexplicably ignored my profession of love for both and wrongly held me out as pro-Israel and anti-Palestine.

[16] The conclusion that I was defiant of the JCC authority before it even rendered its decision is also a consequence of a material misdirection. I in effect said that I would not apologise or retract "unless forced by the law" to do so. The plain meaning of this expression should have helped His Lordship to understand that a decision of the JCC falls within the scope or meaning of "the law" since the JCC is a creature of statute that produces "lawful" decisions – right or wrong.

[17] The remedial action with its most unusual characteristics, prescribed mode of execution and all the inadvertent but inescapable effect of humiliating and crushing its target, is unjust, wholly inappropriate and a material misdirection. I turn to elaborate on the grounds of appeal.

Elaboration on grounds of appeal

The right to freedom of expression and the right to freedom of religion, belief, thought and opinion

[18] It bears emphasis, that members of the Judiciary, as citizens, are entitled to the full enjoyment of their rights to freedom of expression, association, religion, belief, thought and opinion. The JCC's poorly reasoned decision is a danger to the proper enjoyment of these rights, hence this appeal.

[19] It is necessary to allow His Lordship to speak for himself here. At para 122 he says:

"Judges must be seen to respect the separation of power where it is necessary for the maintenance of the rule of law. It would for instance not be proper for judges to defer where human rights are imperiled or trampled upon. **The respondent CJ and all Christians are free to practice their belief within the confines of the Constitution and the law**. They, however, like all other citizens, must also observe the lawful restrictions of their chosen profession. **Their chosen profession draws a line somewhere**. The respondent CJ does in fact draw or recognise a line for himself, for instance, when at the webinar he was asked about the role of BDS, he said it would not be appropriate for him to be involved or comment as the Chief Justice. **His profession thus places some restriction for him somewhere**, which is not needlessly censoring, muzzling or gagging. It is a professional restraint which he recognised. **That line, in the present matter, is drawn by the Code, the law and the Constitution, which he accepted upon appointment as a judge**".

The simple question is how and where does the Code draw the line between my profession and my constitutional right to freedom of religion, belief, thought and opinion and the right to free expression? Where and what is the "somewhere" alluded to by the learned Judge? This is not explained at all.

[20] His Lordship went on to say at paras 123 and 124:

"South African judges do in fact enjoy certain rights and freedoms referred to by the respondent CJ like writing articles and books etc and some of these are specifically permitted under the Code. The line is not drawn by the JCC or by the individual judge but by the Code. As the respondent CJ himself points out in paragraph 14 of his first Response, provisions of the Code do 'forbid the involvement of a judge in extra-judicial activities, including those embodied in the rights as citizens subject to certain qualifications'.
In this section of the decision, the writer deals with the restriction in article 12(1)(b) of the Code which forbids the involvement of judges in political controversy or activity unless it is necessary for the discharge of judicial office. **And once it is concluded, as I do, that a particular judge became involved in what is political controversy, the only other**

inquiry is whether such involvement was necessary for the discharge of judicial officer. It is a restricted exclusion, defined by the necessity for 'the discharge of judicial office'. **What was the necessity for discharge of judicial office in the judge (respondent CJ) explaining his personal views in a media interview about what SA policy towards Israel should be? None. This was a plain invitation to be involved in political controversy** (not dictated by the discharge of judicial office) and **it may have been wise to decline the invite in the question**. The basis of the decline, if required, would have been the very caution that the moderator suggested needed to be exercised. The moderator was alive to the need for caution and said so in formulating the question".

[21] What His Lordship failed to do was grapple with why is it permissible for other colleagues to criticise the constitutional powers of the President and for him to write an article critical of the President's exercise of his constitutional powers, virtually on the eve of the President nominating a new Chief Justice, but criticising a policy (in this case a policy that does not even exist) is impermissible and sanctionable? Why is his preferred interpretation that takes away constitutional rights without any meaningful analysis constitutionally permissible? And contrary to His Lordship's attempt to sidestep this reality, this case is fundamentally about the constitutional rights to freedom of expression, and freedom of religion, belief, thought and opinion. All complainants are complaining about my statement (expression) and my Christian belief or reliance on the Bible. Their complaints therefore implicate my right to freedom of expression and freedom of religion. They make this abundantly clear as set out below.

21.1 Africa4Palestine said at para 16 of its affidavit that I "expressed or at least unambiguously implied, that the political posture adopted by the Government of South Africa in relation to the State of Israel is not right, and '**can only attract unprecedented curses upon our nation**'." The highlighted part was also highlighted by them. That is their attack on my faith, belief, thought or opinion which I based on **Genesis 12:1–4** in the Holy Bible.

21.2 BDS said in its unnumbered sixth paragraph of its complaint:

> "In the webinar the Chief Justice used **his personal belief in a particular strand of Christianity** to claim that those who not "love Israel" and "pray for Israel" will be cursed".

Although this is a misrepresentation of what I actually said, it clearly engages my constitutional rights to free expression and freedom of religion, belief, thought and opinion.

21.3 In this regard, the WCG makes many revealing statements that will be itemised below. At para 10.2.1(a) of their affidavit, they among others say that if the complaint against me is not "properly handled it could have the result that the judiciary will no longer be aloof but become deeply embroiled in every messy political and **religious** dispute. It could have the consequence that a Judge "swears allegiance **to some religious** or other **text** no matter how repugnant to our Constitution".

21.4 In para 10.7 they refer to some view expressed on the inappropriateness of allowing Judges "to **openly declare their loyalty to religious texts**."

21.5 At para 10.8 they seek to make a point that the conduct of a Judge commenting on government policy "is **exacerbated where these statements are based on the precepts of their religious doctrines**".

21.6 At para 14.4 they allude to possible measures adopted by the Government of Israel to counter opposition to illegal policies of Israel "under the guise of legal and **religious authority**" through "a willing . . . Chief Justice of South Africa".

21.7 At para 33.4 they say of me that I said "Any criticism of Israel is against [my] religion, any criticism of [me] is akin to curses". This is again a contorted reference to my reliance and belief in the correctness of **Genesis 12:1–4**.

21.8 At para 33.5 they say "It is untenable for the Respondent (as a Judge and more significantly as a Chief Justice) to disavow the values of a modern democratic State in favour of **his own peculiar view of ancient texts more than 2000 years old**".

21.9 At para 34 they say, among others, "The gravity of the Respondent's behaviour is monumental and poses a risk to our democracy. **The oath that a Judge takes is to uphold the Constitution of South Africa and not the scripture**". A clear reference to and implication of my fundamental right to freedom of religion, belief, thought, opinion and expression.

21.10 Finally and more tellingly, there are several statements of grave concern they make about the exercise of the right to freedom of religion particularly with reference to the Holy Bible. They refer to Deuteronomy 21, Numbers 31 and list in their annexure "SM3" extracts from eleven (11) verses from the Holy Bible to demonstrate how repugnant the Bible is, in their view, to the Bill of Rights or human rights. Interestingly no other Book that others hold out as holy, including the deponent's own holy book, was quoted and thus projected as "similarly" discriminatory, dangerous or unjust. Lip service is however paid to a general possibility of most, not all, being irreconcilable with human rights. Their paras 26.1 and 26.2 are most telling. For what it is worth, the Kingdom life propounded by the Holy Bible, properly understood, is fundamentally about love, peace, forgiveness, generosity, humility, etc. Women Cultural Group clearly lacks the understanding of the Holy Bible but hold themselves out as those who do, based on references to some uncontextualised verses.

21.11 His Lordship Mojapelo J not only endorsed what they said and attested to their friendly disposition towards me but he went on to misdirect himself in law and fact by sweepingly concluding that this matter is neither about freedom of religion, belief, thought and opinion nor about free expression. It is all about the Code.

[22] That the learned Judge knows that these fundamental rights are implicated, is borne by his endorsement of the statement, to that effect in para 175 which says:

> "They contend that if judges were to be allowed **'to openly declare their loyalty to religious texts** or policies that are repugnant and an antithesis to the constitutional foundational values of equality, dignity and ubuntu that permeates the Bill of Rights', such conduct is likely 'to irreparably destroy the standing of the judiciary'.
> The WCG makes strong and direct points that: 'judges should not be making political statements'; they 'must not comment on public policy', because they would encroach impermissibly on the preserve and functions of the executive. In a multicultural and multi-religious society (that we are), **the** legality and **propriety of government acts should be based** on constitutional principles and **not on the tenets of a judge's faith. I am unable to find fault with the principles asserted here**".

[23] Not only is the Holy Bible and the dictates of pure justice at the heart of my statements (expression) on the Jerusalem Post Webinar, but the reproduction of Africa4Palestine, BDS and WCG's unflatteringly critical remarks of my faith or the Holy Bible bears this out. His Lordship's conclusion at para 125 of this decision in the terms set out below is a gross misdirection and cannot therefore be correct:

> "It is necessary to point out that this complaint is, in my respectful view, not about freedom of religion, belief and opinion or freedom of expression under sections 15 and 16 of the Constitution. This complaint is about breach of articles of the Code and their constitutionality have not been impugned".

The complaints plainly implicate these constitutional rights.

[24] His Lordship virtually ignored my responses to the complaints, save for those mistakenly thought to be supportive of the complaints and he endorsed all allegations and speculations against me except for those relating to the recusal complaint. But even then, he is critical of me and appears to be lamenting a missed opportunity to convict me.

Involvement in a political controversy

[25] At the outset it is absolutely necessary to reiterate that foundational to my statements during the Jerusalem Post Webinar and at the heart of all complaints against me is the exercise of my constitutional right to freedom of religion, belief, thought and opinion as well as the right to freedom of expression. It is also necessary to state that there is nothing anti-Palestine or anti-anybody in any of my statements. Mine is a positive message that is about loving Israel, loving Palestine and loving all. For this love I relied on Matthew 5:44; for attracting curses I relied on Genesis 12:1–4; for praying for the peace of Jerusalem (Israel) I relied on Psalm 122:6 and for the need for a negotiated peaceful and mutually beneficial coexistence between Israel and Palestine I relied on Hebrews 12:14 (although I only quoted it in my affidavit). This cannot properly be wished away and should give context to all complaints against me. (See also para 9 of my second response)

[26] It is also necessary to be somewhat generous in quoting what His Lordship Mojapelo J laid down as the bases for his conclusion so that he speaks for himself. Before I do, it must be said that all five "convictions" revolve around my alleged involvement in political controversy in that I criticised the official policy of the South African Government towards Israel. The learned Judge said this was the all-important complaint on which all others are based. Mojapelo J said:

26.1 "The first complainant avers that 'the issue whether the State of Israel should be subjected to diplomatic, economic and cultural boycott, disinvestment and sanctions is political controversy'. The first complainant describes it as 'one

of the greatest political controversies in South Africa and the world'. They allege that during the webinar, the respondent CJ commented on this political controversy when he expressed or implied that the political posture adopted by the government of South Africa is not the right one, and **can 'attract unprecedented curses upon our nation'**." (See para 97)

This is an objection to or criticism of my reliance on Genesis 12:1–4.

26.2 "What, in my view, distinguishes the present complaint, is that the question and **utterances of the respondent CJ in issue here, related to the policy of South Africa towards Israel.** It concerns international relations **but importantly, it is about the policy of South Africa, . . . The political controversy in the present case relates to the policy of the South African government** and is therefore of concern to South Africans." (See para 120)

26.3 "They (Women Cultural Group) accuse the respondent CJ for **publicly rebuking the foreign policy of his own government** and siding with a foreign power." (See para 173)

I repeat that I "sided" with a mutually beneficial coexistence between Israel and Palestine driven by my love for both.

26.4 "The WCG makes strong and direct points that: 'judges should not be making political statements'; **they 'must not comment on public policy'**, because they would encroach impermissibly on the preserve and functions of the executive. . . . **I am unable to find fault with the principles asserted here.**" (See para 175)

And

26.5 "There could have been no question of lack of awareness. That is, of lack of willfulness, or for any accidental statement. The express intention in the response was **to criticise South African policy** and to **suggest** [that] it should be changed and how it should be guided **in contrast** to **how it actually is** as positioned by the constitutionally mandated arm of the state." (See para 219)

[27] In sum, I was found guilty of contravening Article 12(1)(b) of the Code on the bases that I criticised, commented on or suggested a change to "**South African Government policy**" contrary "**to how it actually is as positioned by the constitutionally mandated arm of the State**".

[28] At least two questions arise. Is there any tension or contradiction between what I **actually** said and any official policy of the South African Government towards Israel? Does the policy on the basis of which I was found guilty of five complaints, even exist? The answer is, the learned Judge was unable to point to any contradiction, alluded to at para 185 of his decision, between what I **actually said** and what any official policy of South African Government towards Israel **in fact provides for**. And two, **the policy His Lordship relied on to find me guilty does not even exist**. This is as egregious as finding someone guilty of contravening a law that does not exist or for killing someone who was never born.

[29] The Executive Arm of the State, led by the President, is constitutionally mandated to develop and implement national policy in terms of section 85(2)(b) of the Constitution. The only constitutionally acceptable proof of the existence of any such policy should be in the form of a document envisaged by section 101(1) and (2) of the Constitution. And that is, a document signed by the President and countersigned by the Minister responsible for the relevant portfolio. After a diligent and thorough search, I vouch for the fact that there

is no official policy of the South African Government toward Israel that contradicts **any part of what I actually said**, as opposed to what has been and is being put in my mouth. Even the two agreements signed by President Mandela and President Mbeki with Israel do not contradict anything that I have said.

[30] I was therefore found guilty of five complaints or counts of misconduct that turn on a **non-existent official policy of the South African Government towards Israel**.

Other possible basis for involvement in proscribed political controversy

[31] On the assumption that there could be other basis or bases for the possible return of a guilty finding on involvement in political controversy, several precautions need to be sounded at this stage to avoid the trap that His Lordship Mr Justice Mojapelo unreflectingly allowed himself to fall into.

31.1 It is necessary to distinguish between the official Government policy and the policies of lobby groups or NGOs.

31.2 And it is necessary for the decision-maker(s) to tell the difference between politics and policy, which His Lordship failed to do.

31.3 The supremacy of the Constitution and the entitlement of all citizens, including Judges and Magistrates, to enjoy fundamental rights cannot be wished away. Where these rights are limited by legislation or the Code, a proper explanation is called for regarding (i) why the Code cannot be interpreted in a way that is consistent with or gives expression or recognition to constitutional rights or (ii) why the Code ought to be construed as limiting those rights to the proposed extent.

31.4 Finally, contrary to His Lordship's findings, there is no contradiction between what I said and what the South African Government and Deputy Minister Botes stands for and said.

[32] The South African democratic constitutional State does indeed comprise three Arms. The Judiciary (unelected) and two political arms (the Executive and Parliament or Legislature). To keep the demarcation lines that define their constitutionally-defined spheres of operation visible, it is necessary that the Judiciary, unlike in some jurisdictions around the world where one may seamlessly move from Minister to Judge and *vice-versa*, steers clear of party politics, political controversy and political activity. The intertwinement of these three facets of prohibited conduct ought to guide the construction of the Code.

[33] Judges have the constitutional right to freedoms of expression, association and religion, belief, thought and opinion. As is the case with all other citizens, these rights may be limited. But the limitation must broadly speaking be reasonable and justifiable. It cannot be arbitrary or whimsical. In other words, the essentiality of these rights forbid their easy and unexplained denial to any citizen. You take them away for good reason and that reason must be capable of being explained and easily understood with due deference to the supremacy of the Constitution as well as the imperative to promote the spirit, purport and objects of the rights in the Bill of Rights, demanded by section 39(2) of the Constitution.

[34] Article 12(1) provides in relevant parts:

> "A Judge must not–
>
> (a) belong to any political party or secret organisation;
>
> (b) unless it is necessary for the discharge of judicial office, become involved in any political controversy or activity."

[35] What then is the correct approach to adopt in the construction of this Article, the aspect of political controversy in particular? In *Cool Ideas* 1186 *CC v Hubbard* 2014 (4) SA 474 (CC) at para 28 the Constitutional Court had this to say about the correct approach to a constitutionally-inspired interpretation of a legal instrument:

> "A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
> (a) that statutory provisions should **always** be interpreted **purposively**;
> (b) the relevant statutory provision must be **properly contextualised**; and
> (c) all statues must be **construed consistently with the Constitution**, that is, where reasonably possible, legislative provisions ought to be **interpreted to preserve their constitutional validity**. This proviso to the general principle is closely related to the purposive approach referred to in (a)".

Although this judgment and others generally deal with statutory interpretation, the approach applies with equal force to a legal instrument like the Code of Judicial Conduct. *Bato Star* at para 72 and *Chisuse* at para 55, both decisions of the Constitutional Court, would have been most helpful to His Lordship.

[36] This means that the Article ought not to have been interpreted as narrowly as the learned Judge did. It is important to have regard, not only to individual words or expressions in the text but also, to the entire provision at times even to the chapter or the scheme of the legislation or legal instrument being construed. This, His Lordship failed to appreciate and wrongly settled for a rather superficial textual interpretation that does not even accord with his own and other most senior Judges' years-long understanding of what the Article means, properly construed.

[37] A "properly contextualised" and purposive interpretation of Article 12(1)(a) and (b) that is not at war with the spirit, purport and objects of the rights in the Bill of Rights, but is in sync with the constitutional obligation to promote them (sections 7 and 39(2) of the Constitution) is at odds with His Lordship's meaning of this Article. The correct approach is one that is alive to the reality that the mischief sought to be addressed by the Article is a Judge becoming so involved in the politics of his or her country so much so that his or her independence from political structures and players and the possibility to be impartial is reasonably questionable. This Article is all about preserving judicial independence and impartiality. It is not about the mere possibility of justiciability and prohibition of anything that smacks of political controversy. After all, constitutional, legal, economic, religious and other controversies are just as justiciable and involvement in them would, on His Lordship's reasoning, also have been proscribed. But because they stand very little chance of compromising or undermining judicial independence or impartiality by reason of their marked distance from raw State or political power, the Code does not prohibit them. As set out in my response, talking about the politics of China, the USA or Russia cannot affect these judicial attributes, without more. This issue of involvement in political controversy is therefore not about a question of whether Judges would in any event want to be involved in the politics of other countries, as posed by Mojapelo J. And that is how to "properly contextualise" and determine a purpose-informed meaning of political controversy. That is also why even something as strong as "political activity" shares the same space with "membership" and "controversy". The involvement in any of these two, "controversy" and "activity", have to be so sufficiently close to membership as to raise a concern. For emphasis, it is necessary to repeat that this is about ensuring that a South African Judge is not entangled in the politics of his or her country.

[38] It has always been open to South African Judges to exercise their constitutional right to freedom of expression to criticise the Constitution or the exercise of powers thereof by any constitutional office-bearer, and to criticise laws including policy. Policy is not sacred. It is therefore not taboo to comment on it or criticise it. Just as the Constitution and

legislation are made by functionaries in the political Arms of the State, so is policy. Policy does not occupy any peculiar status above legislation and the Constitution. It is not untouchable. It cannot be open to Judges to comment on, and criticise or propose a change to the Constitution or a statutory provision and the exercise thereof extra-judicially but be forbidden to comment on policy. That proposition is not only illogical but also unconstitutional.

[39] This after all is what His Lordship, Mojapelo J, has always known to be the case. To illustrate this point, I will cite several examples of how Judges, including Mojapelo J himself, got involved in "political controversy" that is not proscribed by Article 12(1)(b). This I do knowing that Mojapelo J misunderstood this on-point illustration as an ill-considered and nuanced borrowing from a certain homeland President who reportedly said: "so and so did it, why can't I did it".

[40] I begin with Mojapelo J himself to underscore the known truth or reality that Judges' right to freedom of expression extend to criticising the Constitution and the Executive's exercise of constitutional presidential powers. He authored an article and caused it to be published in at least the Sunday Times in May 2011, criticising the President for nominating one candidate for Chief Justiceship and not allowing for more than one nomination. And he did so knowing, as a former member of the JSC (a fact borne out by a note at the end of the article), that Chaskalson CJ, Langa DCJ, later Langa CJ, Moseneke DCJ, Howie P and Mpati DP and later Mpati P had been appointed through the same process – a nomination of one candidate by the President. With his own pen he wrote, *inter alia*:

> "In the last appointment of the chief justice, the JSC did not announce the vacancy and invite nominations. . . . The public did not nominate candidates. They were not afforded an opportunity to do so. **The decision-making process of the JSC was robbed of an**

> **important element of legitimacy**, that is, public participation at its initial stages. Consequently, **the process was, I submit, critically impoverished.**
> **There was understandably public outrage when the process was opened by a presidential nomination. The public rightly felt excluded** from participation at inception. **The process was so unsatisfactory** that 'nomination' was confused and conflated with 'appointment' not only in the public mind, but also in the vocabulary used by public representatives or spokesmen.
> . . .
> **South Africa must not allow the process of appointing** our highest judicial officer **to again be tainted by lack of proper consultation**. We cannot afford the risk of a lack of public support in this field where legitimacy and public accountability are crucial."

His Lordship knew that the "robbery" had been going on even while he was a member of the JSC. Why it only occurred to him now that the public must nominate a Chief Justice to legitimise the appointment process and why he suddenly thought there was an oddity about "the process [being] opened by a presidential nomination" is difficult to understand.

[41] On the learned Judge's decision against me, he must be charged and convicted of involvement in political controversy and be made to read a scripted apology and retraction for undermining separation of powers, and for criticising the President for exercising his constitutional powers in terms of section 174(3). According to Mojapelo J's decision he held himself out as better placed or wiser than the President or the Executive by **suggesting** what should have been done when Ngcobo CJ was nominated and how I was to be appointed. He used somewhat strong words like "robbed of an important element of legitimacy", the "process" being "critically impoverished" and process "tainted by lack of proper consultation". He could even be reasonably understood to be trying to incite public outrage if the next Chief Justice were not to be nominated as he thought wise. This appears to be borne out by expressions like "South Africa must not allow the process . . . to again be tainted by lack of proper consultation". He was, again to borrow His Lordship's WCG preferred language, "brazenly defiant" of the Executive, the President in particular.

[42] By writing and publishing that article he, in terms of his decision, became involved in proscribed extra-judicial activity and lent the prestige of his office for the advancement of his interests and those of the newspaper(s) that published it so that it could enjoy a larger readership.

[43] It is my understanding that Mojapelo J was exercising and enjoying his constitutional right to freedom of expression as all other Judges have always been and still are entitled to do in terms of the proper understanding of Article 12 of the Code. I cite more examples to make the point that his new-found understanding is at odds not only with his own pre-existing and correct understanding but also with that of other even more senior Judges. Some of the incidents involving Judges that I refer to now were already mentioned in my previous responses and I add three new incidents.

[44] On 12 November 2014 Moseneke DCJ, addressing a Conference shared some reflections on the land issue and "concentrated executive power on our public institutions". Among other things he said:

> "Nearly 70 years ago, in *The Wreched of the Earth*, Frantz Fanon observed that '[F]or a colonized people the most essential value, because it is the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity'. Fanon's remarks were apt but not a new 'insight, if one remembers that the organising principle at the formation of the African National Congress in 1912 was the impending wholesale land confiscation prefigured in the 1913 Land Act. The land dispossession, coupled with urban spatial apartheid, led to immeasurable social devastation recorded in many invaluable studies".

He went on to say, on the land issue:

"The cutting question is whether our democratic consolidation has achieved urban and rural land equity? ... The [land] claims are also beset by **bureaucratic inadequacies**. ... On another front, there is **very scant evidence of the use by government of expropriation to achieve land equity**".

[45] That the Deputy Chief Justice, even after cautioning himself in his opening remarks that he was a Judge and will as he should stay in his judicial lane, quoted not just a politician but a revolutionary, Dr Frantz Fanon, in relation to the land issue, referred to the formation of the ANC (a political party) around the land issue, lamented "bureaucratic inadequacies" and effectively criticised the Executive for not using "expropriation to achieve land equity" are, on the authority of Mojapelo J's decision, enough grounds to find him guilty of involvement in political controversy and prohibited extra-judicial activity, undermining separation of powers and lending the prestige of his office to advance his own interests and/or those of the organisers of the Conference. It does not end there.

[46] At the same Conference the DCJ also had this to say about constitutional executive power and the need to change the Constitution:

". . . I suggest that in the next two decades we may have to revisit the dispersal of public power.

. . .

The anecdotal account is that at the time of the formulation of the final Constitution, whenever there was a dispute about who should appoint a public functionary, the negotiating parties were happy to leave the power in the incumbent President, Nelson Mandela. He, after all, will do the right thing.

. . .

The vast powers of the appointment of the national executive bring to the fore the debate whether the democratic project will be best served by a powerful central executive authority. Our courts have had to adjudicate challenges against the rationality of several appointments made by the President. **It is self-evident that an appointment by a deliberative collective is less vulnerable to a legal challenge of rationality than an**

appointment by an individual functionary. The ultimate question is how best we may shield appointments of public functionaries to institutions that gird our democracy. The question may be asked differently. How best must we safeguard the effectiveness and integrity of public institutions indispensable to the democratic policy? Finally, an equally important debate should be whether appointing members of the Cabinet exclusively from the ranks of members of Parliament best advances the duty members of Parliament have to hold the Executive to account. If their career logical advancement is within the national executive, are members of Parliament likely to rattle the executive cage? Will they fulfil their constitutional mandate by holding the national executive to account? This uncanny concentration of power is a matter which going forward we may ignore but only at our peril".

This otherwise acceptable exercise of a Judge's constitutional right to freedom of expression would not escape the guillotine erected by Mojapelo J through his decision.

[47] My Brother Dennis Davis hosted speakers, including politicians, on his then *Judge For Yourself* eNCA television programme, about the Israeli-Palestinian political situation and a range of political controversies to which leaders of political parties were invited and participated. He was exercising his constitutional right to free expression although different views might be expressed about being a regular anchor or host of a tv programme.

[48] As stated from paragraphs 21 to 31 of my first response and paragraph 20 of my second response to the complaints, Langa CJ was deployed by the Commonwealth to resolve real political controversies in Fiji. Moseneke DCJ and Khampepe J were involved in political controversies around the most volatile electoral processes in Zimbabwe and Moseneke DCJ was appointed to resolve the latest nerve-wrecking political and security challenges in Lesotho. And my dear Brother Cameron J essentially said what I said on the Israeli-Palestine situation, the real difference being, unlike me, he did not rely on the Bible. My assertions at paras 16 to 20 of my first response are most relevant here and deserve proper attention.

[49] All these are in line with how Judges have always understood and exercised their fundamental right to free expression, the Code notwithstanding. Mojapelo J now wants to silence them but has not been able to explain why. This, in circumstances where he did the same thing, if not worse. **None of these colleagues, including him, were discharging judicial functions when they got "involved in political controversy". The proscription and meaning of political controversy that applies to Mogoeng must be identical to that which has always applied to and continues to apply to Mojapelo J and all other Judicial Officers. There cannot be a Mogoeng-special.**

[50] Mojapelo J makes some of his most loaded, yet unsubstantiated, remarks at para 229 of his decision in these terms:

> "In his answer to the question on SA policy towards Israel and in order to advance his personal view, the respondent CJ entered into the area of the executive authority of the state on international relations in order to criticise its foreign policy towards Israel publicly on an international platform. This was done **on the eve** before the appropriate SA executive authority was to make a statement **on the same issue** in the UN Security Council. He therefore undermined and failed to show respect for the constitutionally ordained separation of powers in contravention of Article 14(3)(a) as elucidated by Note 14(ii). . . . **He elected to criticise the official position of the state and put forward his own views.** It has been stated, and there has been no contrary suggestion, that **his criticism flew in the face of several UN resolutions** of the same topic. **It is also in contradiction with the position taken by the Secretary General of the UN in his statement issued on 24 June 2020**".

[51] It is woefully incorrect to conclude that any part of what I said on the webinar is at odds with any UN resolution or anything said by the UN Secretary General on 24 June 2020, or international law or the official policy of the South African Government towards Israel. The UN Secretary General urged for a peaceful settlement of the Israeli-Palestinian

conflict. Otherwise he talked about annexation of land and the two-State solution that I did not address. I could not therefore have contradicted him or been contradicted by him.

[52] It was wrong of His Lordship to conclude that I contradicted or was contradicted. Also, that I not only criticised the official position of the State and official Government policy towards Israel but also suggested "that it should be changed and how it should be guided **in contrast to how it actually is** as positioned by the constitutionally mandated arm of the State". It was His Lordship's duty, **as a decision-maker**, to ensure that the facts and legal instruments on which he relies exist and say what he understands them to mean – not to assume.

[53] Deputy Minister Botes addressed the UN Security Council on the imminent land annexation, violation of international law, daily sufferings of Palestinians, and the construction of Israeli settlements. I did not touch on any of those issues. Where then is the criticism and embarrassment of the Executive on the eve of that address? Where is the conflict? Mojapelo J simply assumed the correctness of what the complainants said in this regard, without the necessary engagement with the facts, that it existed. The reasoning is flawed and highly presumptuous.

[54] Even at governmental relations, as opposed to policy, level there is no contradiction between what I actually said and what, at the highest level, the President said. What follows is a classical example of congruence as opposed to conflict of opinions. In September 2018 and on the occasion of Rosh Hashanah (Jewish New Year) Celebrations, President Ramaphosa *inter alia* said:

> "As we grapple with our own challenges we must continue to **play a constructive role in the quest for peace in the Middle East**.
> We are clear and unequivocal in our support for the achievement of a Palestinian State alongside the right of the State of Israel **to exist in peace and security with its neighbours**.

> We owe the success of our own struggle against apartheid and our peaceful emergence as a democracy to our **determination to find one another** as South Africans, and to a sustained programme of international solidarity.
> It remains our hope as South Africa that the people of Palestine and Israel will work with each other and with the international community **to achieve lasting peace, stability and prosperity**".

The attainment of mediated, enduring and mutually-beneficial and peaceful coexistence is what I talked about. Playing a "constructive role in the quest for peace in the Middle East" alluded to by the President, is on all fours with what I said. No contradiction.

[55] A call for a peaceful settlement of a dispute and not antagonising any of the parties is what is now tagged as my "anti-Palestine" stance when my stance is just as pro-Israel as it is pro-Palestine. Even my professed love, backed by Scripture, for both Israel and the Jews as well as Palestine and the Palestinians did not help the learned Judge to realise that you can't love and be anti the same thing or person. You can't love someone and not care about their human rights or well-being – the two propositions are logically irreconcilable. Mine is an irrefutably pro-Israel and pro-Palestine stance grounded on the God-kind of love, which is by no means in conflict with any part of the Constitution, international law or UN resolution.

Separation of powers

[56] Paragraph 93 of the 2016 *EFF* decision of the Constitutional Court would have been helpful to His Lordship on the meaning and application of the doctrine of separation of powers. And it is one of those decisions I commend to the appeal panel on this subject.

[57] Article 14 on which the separation of powers complaint and finding of guilt are based reads, in relevant part:

> "3. A Judge must not–

(a) **accept any appointment** . . . that could undermine the separation of powers".

Even the Note to this Article explains that this is about a Judge being approached, by for example, the State, to perform a non-judicial function on its behalf. Acceptance of that appointment would have to be on condition that judicial independence or separation of powers are or could not thereby be undermined. More importantly, Article 14(3)(a) is fundamentally about accepting an appointment. I was neither offered nor did I accept any appointment by the Jerusalem Post or the Israeli Government. More tellingly, there is no way in which I could change the policy (if it existed) or tamper with the power that has been constitutionally-allocated to the Executive on a Jerusalem Post webinar platform. I was not "developing and implementing national policy" in terms of section 85(2)(b) of the Constitution.

[58] Also, the remarks in *Kaunda* by Ngcobo J do not address what His Lordship thinks they do. They are about a court seeking to effectively change the decision of another arm of the State or to exercise powers that are constitutionally-assigned to another Arm of the State. It is not about expressing an ineffectual view or levelling criticism. The need for a court of law, not an individual Judge or Magistrate making extra-judicial remarks, to "be careful not to attribute [to self] superior wisdom in relation to matters entrusted to other branches of government" must also be properly contextualised. I don't suppose that Mojapelo J, when he criticised the President for the way he nominated and appointed Ngcobo CJ in a newspaper article, was thereby seeking "to attribute to [himself] superior wisdom in relation to matters entrusted to other branches of government". This is about cautioning a court which may, under constitutionally-permissible circumstances, effectively change what resorts under the domain of the other Arms, not to venture into doing what is not permissible.

[59] But, the learned Judge reasoned as follows:

59.1 ". . . If the impugned utterance by the respondent CJ at the webinar constitutes proscribed involvement in political controversy in breach of Article 12, because he delved into an area which is the constitutional preserve of the executive, his conduct will at the same time breach the spirit and purpose of Article 14(3)(a) of the Code". (See para 153.3)

59.2 "The respondent CJ is being asked to declare **whether he agrees** with the **foreign policy** of his country towards Israel. **He cannot enter that terrain without entering the field of political activity**; and **he cannot differ** with those who are in charge of that policy, i.e., **expressly wish for a different stance, without controverting political leaders in that field**". (See para 206)

Assuming for argument's sake that His Lordship's proposition is sound, I ask rhetorically: where is the difference between what I actually said and any official policy of the South African Government towards Israel? Surely, it cannot be hypothetical. More seriously, how can a wish be proscribed and sanctionable? Why did Mojapelo J's wish or advocacy for public participation in the nomination of a Chief Justice, his agitation of the public not to allow the President to nominate, as in the past, the next Chief Justice, and his criticism of the President's exercise of his constitutional power to appoint a Chief Justice in line with established practice, not constitute involvement in political controversy? Again I say, this is so because, as His Lordship and all other senior Judges have always known, he has the right to freedom of expression which has to trump the Code, properly understood.

[60] National policy developed in terms of the Constitution is not, without more, politics. But even if it was, not everything that smacks of political controversy is proscribed and sanctionable. My comment during the JSC interview of Advocate Donnen SC when asked about "the demand for an independent State of Palestine" does not support the complainants' contentions and Mojapelo J's conclusion. I never talked about the demand

for an independent Palestinian State during the webinar. That much I made clear in my responses. Sadly, the learned Judge does not seem to have noticed it.

[61] Where the doctrine of separation of powers is properly understood this statement of mine quoted at para 218 of Mojapelo J's decision would be accepted as being at war with any disrespect for separation of powers:

> "I acknowledge without any equivocation that the policy direction taken by my country, South Africa, is binding on me. So, whatever I have to say should not be misunderstood as an attempt to say the policy direction taken by my country in terms of their constitutional responsibilities is not binding on me".

[62] Shockingly, the learned Judge's response was:

> ". . . The express intention in the response was to criticise **South African policy** and to suggest what it should be changed and how it should be guided in contrast to how it actually is as positioned by the constitutionally mandated arm of the state". (See para 219)

How can what is unequivocally acknowledged as binding and done constitutionally be regarded as undermining separation of powers? The quality of reasoning that characterises His Lordship's decision is unbelievably poor. So, criticism of national policy is not permissible. And a Judge impermissibly encroaches in the terrain or "field of political activity" when he or she makes critical remarks about national policy, extra-judicially. Just imagine what in terms of this reasoning should have happened or could still happen to Mojapelo J and Moseneke DCJ for criticising the President's constitutional powers and the exercise thereof. What is even worse, is His Lordship's assertion that a President is not entitled to criticise a binding court decision or order. There is no legal basis for this. In the enjoyment of his or her right to freedom of expression a President is entitled to criticise a court judgment. What a President, like any other citizen, may not do is to refuse to

comply with a binding court decision for this would be contrary to section 165(5) of the Constitution and the rule of law.

[63] I conclude this aspect by stating categorically, that **there is no criticism of any existing official policy of the South African Government towards Israel.** As stated, there is no conflict between anything that I actually said and what the UN Secretary General and Deputy Minister Botes said. It is difficult to understand where the learned Judge found the conflict and which policy he read and found to have been criticised and undermined. He seems to have readily accepted the ill-conceived allegations or suspicions of some of the complainants. He should have analysed the law, the issues and the facts. Sadly, there was no meaningful analyses. Again, his decision is based on a non-existent official policy of the South African Government towards Israel, that supposedly says the opposite of what I said. That is where these assertions about the disrespect for the Executive come from – from nothing.

Lending the prestige of the office to advance the interests of the Judge or others

[64] His Lordship said at para 194:

> "The sustainability of this charge of judicial misconduct depends on **whether the private interests** of the newspaper, The Jerusalem Post, or the respondent CJ or of any other person or entity, **were advanced by the projection of the judicial office in the advert. A possible interest would be a desire to attract as many people as possible to watch the webinar. There is also the interest of the Israeli propaganda**, which WCG alleges. . . . **The conclusion is ineluctable that the private interest advanced was that of the respondent CJ or others**".

Again, His Lordship just mentions and accepts serious allegations made by WCG against me as facts without any reflection. And he went on to conclude at para 228:

> "It is common cause that the position of the respondent as the Chief Justice and at the Constitutional Court were used in the advertisement for the webinar and at the webinar itself. This he was clearly aware of and acceded to. The webinar did not advance the interests of his judicial office. **The respondent CJ therefore used or lent the prestige of judicial office to advance the private interests of the judge or others in contravention of Article 12(2)(d) of the Code**".

Such sweeping conclusions by a Judge are most concerning.

[65] As stated already, Judges, particularly senior ones, are routinely interviewed and reported on, by television stations, radio stations, magazines and, like Mojapelo J, newspapers. Mojapelo J's decision poses a serious threat or danger to the Judges and Magistrates' normal judicial life and fundamental rights to freedom of expression, association, religion, belief, thought and opinion. These kind of engagements or interviews will on the authority of His Lordship's decision "inevitably" fall foul of, among others, Article 14(3)(a) of the Code.

[66] What is proscribed is a Judge decidedly going out of his or her way to advantage himself or herself or to profiteer out of a particular activity or association or doing so to benefit others. Other activities like conferences, public lectures or serving in institutions should, in terms of Mojapelo J's decision, be construed as prohibited conduct. This is a consequence of a misconstrued meaning of the Article.

[67] The same misdirection or misconstruction applies with equal force to the fourth and fifth complaints that I was found guilty of – involvement in extra-judicial activities that are incompatible with judicial office or impartiality. Is it the activity as such – mere participation – or what a Judge says or does that is proscribed? The learned Judge was very superficial in his reflections and does not therefore assist in the current and future determination of what the proscription entails. A media engagement is not without more a proscribed activity. And it is not necessarily incompatible with judicial office.

[68] My appeal and comments made in support of the above, extend to a fifth finding of contravention of Article 14(1) read with Note 14(i). This article is about ensuring that Judges do not allow extra-judicial activities to take more of their time thus rendering them unduly unavailable for judicial functions. And it also seeks to ensure that our extra-judicial activities are conducted in a way "which minimises the risk of conflict with judicial obligations". His Lordship seems to have understood this to mean that any actual or potential conflict must automatically be visited with conviction and punishment. The conviction relating to Article 14(1) is not even reasoned at all. It is simply announced. One can only assume that it has to do with BDS' disinvestment, boycott and sanctions campaign and its assertion that their matters cannot be impartially considered by me. There is no basis for this conviction.

Connivance/Timing

[69] Mojapelo J appears to have accepted the following statement by the Women Cultural Group at para 38.2 of its first affidavit:

> "To willingly participate in this propaganda exercise at the opportune moment of illegal annexation and to declare unconditional, undiluted love for modern day Israel . . . is an affront to our Constitution . . . and human decency".

At para 180 of his decision, he then said:

> "The Independent Foreign Group editor stated in the aftermath of the webinar that the respondent CJ (of South Africa) **chose to criticise the foreign policy of his own country towards Israel** 'at a critical juncture when Israel is about to annex massive swathes of Palestinian land, continues to violate international law and numerous UN resolutions . . .' **Was the respondent CJ aware of the planned annexation**? **Or was it from his perspective just a coincidence**? The WCG charges that in announcing its intentions, Israel did so 'in defiance of international law, including the United Nations charter and the

Geneva Conventions'. **Was he aware that international law was being defied when he declared his position towards Israel in opposition to the official position of his country**?"

[70] How else is a reader supposed to understand questions about timing in paras 181, 182, 183, 186, 187 and 190 except as set out below? I believe that His Lordship is insinuating that I knew what the Israeli Government wanted to achieve, as believed, suspected or known by the complainants, the media house he quoted, and I endorsed it all. The questions posed by the learned Judge are apparently meant to challenge or tease out the reader's thinking along these lines – "surely the CJ aligned himself with all this?" Mojapelo J seems to be insinuating connivance between the Israeli Government and I. Hence these questions. For what it is worth, I did not know about the annexation. I said nothing to condone any violation of law or violations of conventions or resolutions or to support annexation of land or undermining of human rights anywhere in the world. But, I hold the view that His Lordship insinuates, baselessly, that I did. It is a fallacy to hold that I declared a "position" towards Israel in opposition to the official position of [my] country". South Africa, like me, wants peace in Israel and by extension in Palestine and the Middle East. South Africa, like me wants a negotiated settlement. Commonsensically, praying for the peace of Israel means peace in the neighbourhood as well. There cannot be peace in Israel if there is no peace around Israel. South Africa has no official policy of **hatred** towards Israel. And I can't love both Israel and Palestine and be wishing harm to any of them.

[71] The extensive reference to the irrelevant SACC statement at para 178 of the decision points to agreed timing and my believed endorsement of annexation of land, alleged breach of international law, UN resolutions, destruction of Palestinian olive groves and livestock, perpetration of violence to people and breach of human rights. What reinforces the belief that in His Lordship's view I am guilty of what the complainants and their and his preferred commentators said even with regard to timing, appears at para 179:

"In the statement, a major body of Christian Churches, is aware of and condemns the planned annexation. . . . The statement of the respondent CJ appears to be at odds with the position of the national Council of Christian Churches. Having regard to the statement of the South African Council of Churches of 25 June 2020, the impugned statement of the respondent CJ at the webinar, two days earlier, **appears to be not only politically controversial**, it also appears to be controversial within the Christian faith in South Africa".

[72] It bears repetition that the SACC statement is irrelevant for the purpose of determining whether I was involved in political controversy. In any event, there is no conflict between my utterances and their statement. The status of and weight to be attached to the SACC statement is zero. Sadly, this is what characterises the quality and nature of His Lordship's reasoning – little or no reflection on critical issues.

"Brazen defiance"

[73] My statement quoted at para 232 of His Lordship's decision is, just like the unsubstantiated connivance or timing issue, also said to constitute aggravation. The paragraph as a whole reads:

"The statements made by the respondent CJ are regarded as aggravation of the earlier impugned utterance made at the webinar. And let it be clear which statement these are:

'*Even if 50 million people can march every day for the next 10 years for me to retract or apologise for what I said, I will not do it.* I will never say I hate anybody, or any nation. I will never. I love everybody. I love Israel, I love Jews, I love Palestinians …';'and

So, there will, there will therefore be no retraction, there is nothing to retract. *There will be no apology. Not even this political apology that "in case I have offended anybody without meaning to offend them for that reason ... ". I will not apologise for anything. There is nothing to apologise for, there is nothing to retract*; and I can't apologise for loving, I can't apologise for not harbouring hatred, I will not. If I perish,

I perish. Like Esther said, "*If I perish, I perish.* The God of Abraham, Isaac and Jacob will sustain me"."

[74] With respect, the learned Judge cannot quote selectively to demonstrate aggravation and ignore the most telling parts of the quotation, namely "I will never say I hate anybody, or any nation. I will never. I love everybody. I love Israel, I love Jews, I love Palestinians . . ." That gives context to my refusal to apologise or retract. Sadly, not only does the learned Judge ignore these glaring and telling realities, he chose to see them as defiance of the public and of the JCC's authority, when repeated in my response.

[75] He takes this further at paras 234 and 236 in his irrational attempt to project me as irresponsible:

"The respondent CJ repeated these words at a time when he was aware that the JCC had been investigating the three complaints as alleged judicial misconduct for a period of three months. It was an opportunity for him as leader of the judiciary to publicly declare his confidence in the statutory process of the JCC as the body which will adjudicate upon his conduct. **His statement did the opposite exuding a self-righteous view that he would only apologise if he believed himself to be wrong. Members of the judiciary have a duty, individually and collectively, to publicly accept their own peer review process, the JCC, and to strengthen its credibility. Instead, the CJ showed his disregard for the process by flaunting the fact that he would never apologise for his conduct even if 50million people marched for 10 years.**

. . .

It is the utterance of the offending statements at the Prayer Meeting, which are primarily used as a basis by the complainants to submit that his conduct now amounts to gross misconduct deserving of an investigation by a tribunal. He is said to be 'brazenly defiant'. The statement at the Prayer meeting is linked to the webinar. **It is defiant of those who are critical of the utterances at the webinar**. This is what makes it an aggravation because it is defiant. The respondent CJ defied those who publicly criticised his utterance because he believed that his utterance at the webinar were innocent. Today the writer finds differently. His was not defiant of a lawful finding of a statutory investigation and should

not be equated to such. It was not sufficient to amount to gross misconduct. Not every serious breach of the Code will amount to gross misconduct. **The further aggravation is the fact that the respondent CJ's criticism the foreign policy as of the executive authority came on the eve of the executive authority making an official statement at the UN Security Council as set out earlier in this Decision**".

There is no basis for these conclusions. Disturbingly, they are made with no regard to the Constitution, the meaning of the Code, the non-existence of the policy and the facts in general. Mere allegations and strange extrapolations are readily accepted as facts which are then relied on to produce whatever outcome the complainants desire.

[76] It is most concerning that Mojapelo J inexplicably and most unreasonably left exonerating aspects of para 28 of my second response out of consideration, just as he did with the contents of my two affidavits. For example, in recognition of the authority of the JCC and the law, I said: "But, I will never apologise for or retract what I believe to be correct. . . . I would never, **unless forced by the law**, align myself with principles or values repugnant to my sense of what is just, right or wrong". His Lordship was unjustly selective. That para 28 reads:

"I would never refuse to apologise for or retract what I believe to be wrong, however correct I might have initially believed it to be. Even if it is a 10 years old child who would have helped me to so understand. I would apologise to him or her for the wrong I would then be convinced I have done to him or her or others. **But, I will never apologise for or retract what I believe to be correct. It would never matter how many millions, how many, presumably or actually, influential people say so. I would never, unless forced by the law, align myself with principles or values repugnant to my sense of what is just, right or wrong**. I would be happy to stand alone no matter the consequences. There is a tendency to follow the drowning voices that often dictate the narrative either without reflection, or for fear of massive reputational or positional or other conceivable damage. I would rather suffer the worst imaginable consequences than hypocritically apologise for what I don't believe to be wrong – just to please those who think they have the right to

demand and secure an apology or to avoid being labelled arrogant! I stand by my refusal to retract or apologise for any part of what I said during the Webinar. Even if 50 million people were to march every day for 10 years for me to do so, I would not apologise. If I perish, I perish".

The JCC is a creature of statute. Whatever decision it makes is and must be regarded as lawful, whether we agree or disagree with it. When it decides, that decision falls within the broad meaning and scope of "**the law**" alluded to in this para 28 that forms part of my response. Surely His Lordship knows this and thus misdirected himself in a material respect by treating this qualification as if it is not there. **How could he have missed the significance of "unless forced by the law" and concluded that I was being self-righteous**? Hopefully, this is not how he has been dealing with all other cases, over the years.

Remedy

[77] The prescribed script to be read out, particularly the inclusion of my names, as if I don't know them, the terms of the apology and the retraction, is most puzzling to say the least. It is almost as if it was written by a strict disciplinarian similar to **some** of the primary school principals of old. It bears the hallmarks of something intended to bring one down to his knees – to crush, to humiliate, written for a pupil who cannot as yet "read for meaning". What also compounds his remedial action is the stage His Lordship has so creatively set for the rendition of the apology and the retraction – in the presence of Constitutional Court Justices. Thereafter to send a signed copy to the OCJ and to have the OCJ media unit send that copy to the media. This brings His Lordship's objectivity and sense of justice into sharp focus. And it gets compounded by His Lordship's exceedingly flawed, poor and shallow reasoning.

Conclusion

[78] His Lordship cited cases like *Tsebe*, *Mohamed*, *Engels* and *Kaunda* to make a point they don't support. Those matters are not about the mere fact of the involvement of policy that then supports the notion that policy is a justiciable executive instrument that Judges dare not comment on or criticise. They were more about the Extradition Act, the impact of our Bill of Rights on the sentencing regime in jurisdictions requesting extradition. In particular, whether they are compatible with the relevant constitutional provisions here, particularly the right to life.

[79] More importantly, the proscription of political controversy or activity is not simplistically about its justiciability in our courts. As already stated, all controversies are potentially justiciable, yet they are not proscribed. Why? As I said in my response to the complaints against me and earlier in these grounds, the mischief sought to be rooted out is the corruption of judicial independence and impartiality. But that is to be done without needlessly muzzling or gagging Judges and unjustifiably denying them their constitutional rights, as His Lordship did.

[80] What was said by the Constitutional Court in *Mwelase* at para 68 regarding when interference with a court's exercise of a "true discretion would be permissible", however high that test is, has been fully met here because:

> "[His Lordship's] pick can be said to be wrong [because he] has failed to exercise that power judicially or **has been influenced by wrong principles or a misdirection on the facts**, or **reached a decision that could not reasonably have been made by a court [or a Judge] properly directing itself to all the relevant facts and principles."**

[81] I contend that this matter was wrongly decided, without any regard for or proper understanding of, the facts, the Code and its entrenched and practicalised understanding,

our jurisprudence and the Constitution. And all findings of guilt and the remedial action must therefore be set aside.

Dated at MAHIKENG on this the 2nd day of April 2021.

Mogoeng Mogoeng
Appellant