JUDICIAL CONDUCT COMMITTEE

Ref: JSC/819/20

In the matter between

AFRICA 4 PALESTINE Complainant

and

CHIEF JUSTICE MOGOENG MOGOENG Respondent

Ref: JSC/825/20

In the matter between

SA BDS COALITION Complainant

and

MOGOENG MOGOENG CJ Respondent

Ref: JSC/827/20

In the matter between

WOMENS CUTLTURAL GROUP Complainant

and

MOGOENG MOGOENG CJ Respondent

DECISION

MOJAPELO J

1. The question at the centre of enquiry is whether the Chief Justice of South Africa (the respondent CJ) contravened the applicable judicial ethical rules. The answer turns on whether, through his utterances during an online seminar (webinar) in which he participated in June 2020 and at a subsequent prayer meeting, he became involved in political controversy in contravention of the Code of Judicial Conduct. There are other forms of judicial misconduct which are alleged to have been committed.

2. On 23 June 2020 the Chief Justice, Mogoeng Mogoeng CJ, participated in a webinar with the Chief Rabbi of South Africa, Rabbi Warren Goldstein hosted by an Israeli newspaper, The Jerusalem Post. The moderator was the editor-in-chief of the newspaper, Mr Yakoov Katz, and the webinar was entitled "Two Chiefs, One Mission: Confronting Apartheid of the Heart".

3. In the course of the webinar, the moderator (Mr Yakoov Katz) asked Mogoeng CJ a question as follows:

> *'So, Chief Justice, I want to get back to you, you mentioned something before about your love for the Jewish people, for Israel, for the state of Israel uh, I want to kind of walk through very delicately some of the boundaries here.*
> *You are a member of the judiciary. But it's no secret that there's some tense diplomatic relations between our two countries, between Israel and South Africa. It's not a secret, it's all over the press and we had a bit of tense diplomatic flare up just about a year ago. You know, what do you think about that?*

Right, this is a … the state of Israel is a country, we used to have very close relations with South Africa, they've gone up and down over the years. Um, is that something that should be improved, in your opinion?'

4. Mogoeng CJ responded as follows:

'I think so. Uh, let me begin by saying I acknowledge without any equivocation that the policy direction taken by my country, South Africa, is binding on me, it is binding on me as any other law would bind 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. But just as a citizen, any citizen is entitled to criticize the laws and the policies of South Africa or even suggest that changes are necessary, and that's where I come from.

Let me give the base. The first base I give is in Psalm 122, verse 6, which says "Pray for the peace of Jerusalem. They shall prosper that love thee". And see, also Genesis 12, verse 1 to 3 that says to me as a Christian that, if I curse Abraham and Israel, God, the Almighty God, will curse me too. So, I'm under an obligation as a Christian to love Israel, to pray for the peace of Jerusalem which actually means the peace of Israel. And I cannot as a Christian do anything other than love and pray for Israel because I know hatred for Israel by me and for my nation will, can only attract unprecedented curses upon our nation.

So, what do you think should happen? I think, I think as a citizen of this great country, that we are denying ourselves a wonderful opportunity of being a game changer in the Israeli-Palestinian situation. We know what it means to be at loggerheads, to be a nation at war with itself, and therefore the forgiveness that was demonstrated, the understanding, the big heart that was displayed by President Nelson Mandela and we, the people of South Africa, following his leadership, is an asset that we must use around the world to bring about peace where there is no peace, to mediate effectively based on our rich experience.

Let me cite another example, for instance in regards to the Israeli-South African situation. Remember the overwhelming majority of South Africans of African descent are landless, they don't have land. Why? Because the colonialists came and took away the land that belongs to them. The colonialists came and took the wealth that belongs to them and that has never stopped. To date, in South Africa and in Africa, people are landless and some are wallowing in poverty and yet, South Africa and the whole of the continent is rich in fertile soil, rich with water, rich with mineral resources.

Have we cut diplomatic ties with our previous colonisers? Have we embarked on a disinvestment campaign against those that are responsible for untold suffering in South Africa and the continent of Africa? Did Israel take away our land? Did Israel take away the land of Africa? Did Israel take the mineral wealth of South Africa and of Africa?

So, we've got to move from a position of principle here, we've got to have the broader perspective and say: we know what it means to suffer and to be made to suffer. But we've always had this spirit of generosity, this spirit of forgiveness, this spirit of building bridges and together with those that did us harm, coming together and saying, "Well, we can't forget what happened but we're stuck together. Our history forces us to come together and look for how best to coexist in a mutually beneficial way."

Reflect on all those colonial powers in South Africa. Now in Africa there is neo-colonialism, it is open secret, we know why South Africans and Africans are suffering. What about diplomatic ties, what about disinvestment, what about strong campaigns against those that have ensured that we are where we are, those that supported apartheid, vocally.

So, I believe that we will do well to reflect on these things as a nation, and reflect on the objectivity involved in adopting a particular attitude towards a particular country, that did not, that does not seem to have taken as much and unjustly from South Africa and Africa as other nations that we have consider to be an honour to be having sound diplomatic relations with. People that we are not even, nations that we are not even criticising right now and yet, the harm they have caused South Africa and Africa and the rest of the developing world is unimaginable. So, we we've got to reflect, take a deep breath and adopt a principled stance here, that we will go somewhere.'

The Complaints

5. On 04 July 2020, a nongovernmental organisation with the name Africa 4 Palestine, with offices at Suite 3, Park Centre, 75 Twelfth Street, Parkhurst, Johannesburg lodged a complaint (the first complainant) about the respondent CJ with the Judicial Conduct Committee (JCC) of the Judicial Service Commission (JSC). The complaint was received on the same date and given the reference number JSC/819/20. It was lodged in terms of section 14 of the Judicial Service Commission Act 9 of 1994 (the JSC Act or the Act).

6. The writer was designated on 09 July 2020 by the Deputy Chief Justice (DCJ), in his capacity as the Acting Chairperson of the JCC, to investigate the complaint in terms of section 17 of the JSC Act.

7. The second complaint was lodged by the South African Boycott Disinvestments and Sanctions Coalition (SA BDS Coalition) on 21 July 2020 and was allocated reference number JSC/825/20. It was later supported by an affidavit attested to on 26 July 2020. The writer was designated on 27 August 2020 by the DCJ, in his capacity as the Acting Chairperson of the JCC, to investigate and determine the merits of the second complaint in terms of section 17 of the JSC Act.

8. The third complaint was lodged by the Durban based Women's Cultural Group (WCG) and is contained in an affidavit attested to on 27 July 2020. It was lodged with the JCC and received by the secretariat under reference number JSC/827/20. The writer was similarly designated for this complaint on 27 August 2020 to determine the merits in terms of section 17 of the JSC Act.

9. The respondent CJ first delivered a response in terms of section 17 (3) (a) to the first complaint of Africa 4 Palestine on 27 July 2020 (the first Response), which in turn delivered its sec 17 (3) (c) Comment on 11 August 2020. When the time came for him to respond to the second and third complaints of SA BDS Coalition and WCG respectively he sought and was granted leave to respond at the same time to all the three complaints. He therefore delivered a second response (Response 2) to the three complaints on 18 September 2020. The second and third complainants each filed their respective statutory Comments. In view of the indulgence given to the respondent CJ, the first complainant was given a further opportunity to comment on Response 2 but elected not to do so.

10. It is convenient to start with an outline of the first complaint of Africa 4 Palestine, which is supported by all the complainants.

11. The first complainant believes and submits that the respondent has committed wilful or gross negligent breaches of the Code of Judicial Conduct, 2012 (the Code) in that he has:
    - 11.1 become involved in political controversy or activity (in breach of article 12(1)(b) of the Code);
    - 11.2 failed to recuse himself from a pending case where there has arisen a reasonable suspicion of bias against one of the parties (in breach of article 13(b) of the Code); and
    - 11.3 involved himself in extrajudicial activities which are incompatible with the confidence in and the impartiality of judges (in contravention of article 14(2)(a) of the Code).

12. The charges in paragraphs 11.1 – 11.3 above are specific offences under the Code. For brevity these are: (a) involvement in political controversy or activity, (b) failure to recuse himself and (c) incompatible judicial activities.

13. As an alternative to these specific charges, the first complainant alleges that the respondent has committed 'other wilful or grossly negligent conduct that is incompatible with or

unbecoming the holding of judicial office, including conduct that is prejudicial to the impartiality of the courts.'

14. The common element in all the charges raised is the element of either wilfulness or gross negligence in the conduct. The specific charges in paragraph 11.1 – 11.3 are based on section 14(4)(b) of the JSC Act which makes wilful or gross negligent breaches of the Code a judicial misconduct offence.

15. The alternative charge in paragraph 13 above is based on section 14(4)(e) of the same Act. It is similar to but not identical to the misconduct offence in para 11.3 above. It is a broad or wide judicial misconduct offence and is not limited to the breach of a specific provision of the Code. It is a statutory misconduct offence while others are what one may call ethical Code misconduct offences. The operative or key words in the Code offence is 'incompatible with the *confidence in the impartiality*' of judges; whilst the key distinguishing words in the statutory misconduct are 'incompatible with or *unbecoming* the holding of judicial office, including conduct that is *prejudicial to the impartiality of the courts*'. The alternative statutory charge is not only broader; but it can also relate to conduct which is more serious than the main charge as it tarnishes the judicial office and is prejudicial to the courts' impartiality in general.

16. As will appear further hereunder, the second and third complaints support the first complaint but also bring forward new allegations of their own. The legal framework within which the complaints are considered is anchored in the Constitution, the JSC Act and the Code of Judicial Conduct.

SA legal and ethical framework

Constitution

17. The Constitution of the Republic of South Africa (Constitution) is the supreme law of the land and the obligations imposed by it must be fulfilled.[1] In terms of section 1 of the Constitution, the Republic is founded on values of human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism, non-sexism, the rule of law and the universal adult suffrage, a national common voter roll, accountability, responsiveness and openness. The Constitution includes as its cornerstone, a Bill of Rights in chapter 2 which embodies fundamental non-derogatable human rights.[2]

18. Its design includes a separation of powers between the three spheres of government in chapters 4 to 8. It vests the legislative authority in relevant legislatures (Parliament, the Provincial Legislature and the Municipal Councils) at the respective levels of government;[3]

[1] Section 2 of the Constitution.

[2] Sections 7 – 39 of the Constitution.

[3] Section 43 of the Constitution.

and the executive authority, at national level, in the President who exercises same with other members of the cabinet,[4] and at provincial level, in the premier who exercises same with other members of the executive council.[5] The judicial authority of the State vests in the courts.[6]

19. The courts are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.[7] Organs of state are obliged, through legislative and other measures, to assist the courts and protect them to ensure their independence, impartiality, dignity, accessibility and effectiveness.[8] Consistent with the foregoing, before every judicial officer starts to perform their judicial functions, they take an oath or affirm in terms of section 174(8) that they will 'be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitutions and the law'.[9] Therefore, every judge in the Republic has taken this oath or affirmation of office and is bound by it.

20. The President and his cabinet have the exclusive constitutional authority to develop and implement national policy,[10] just as they also have the exclusive authority to implement national legislation, coordinate the functions of state departments, prepare and initiate legislation and to perform other executive functions. At provincial level this authority vests in the premier and his executive council.

21. It is in the exercise of this function that the national executive sets up departments such as the departments of education, health, finance, social welfare and so forth. The departments include the Department of International Relations and Cooperation (DIRCO) with international missions in several counties to execute and implement policies.

22. The Minister of International Relations and Cooperation (the Minister) through DIRCO handles the relationship between South Africa and other countries such as Israel, Palestine, Zimbabwe, USA etc. The Minister is the political head for South Africa's relationship with other countries, just as education and finance and other departments have their own Ministers who are political leaders in their respective areas. The Ministers account to the Cabinet which is led by the President. The President appoints the Deputy President and

[4] Section 85 of the Constitution

[5] Section 125 of the Constitution.

[6] Section 165 of the Constitution. See also *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) at p 298 per Langa CJ, *South African Association of Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (CC) p 86 par 22 per Chaskalson P.

[7] Section 165 (2) of the Constitution.

[8] Section 165 (4) of the Constitution.

[9] Schedule 2 item 6(1) of the Constitution.

[10] Section 83(2)(b) of the Constitution.

other Ministers who, together with him form the Cabinet.[11] He also assigns to them powers and functions and may dismiss them.[12] Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.[13] There is therefore overall accountability of the entire national executive to Parliament, which comprise all political parties in the country with representation therein according to the numbers they polled in national elections.

23. The Judicial Service Commission (JSC) is established in terms of section 178 of the Constitution, which provides that the Chief Justice presides at its meetings. It also provides for other members who include the President of the Supreme Court of Appeal (SCA). If the Chief Justice or the President of the Supreme Court of Appeal is temporarily unable to serve on the Commission, the Deputy Chief Justice or the Deputy President of the SCA, as the case may be, acts as his or her alternate on the Commission.[14]

24. The Constitution provides for the powers and functions of the JSC[15] to be assigned to it by the Constitution and by national legislation. The powers provided for in the Constitution is for the Commission to advise the national government on any matter relating to the judiciary or the administration of justice.[16] The Constitution also 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.[17]

The JSC Act

25. The national legislation contemplated in that part of the Constitution is the Judicial Service Commission Act (JSC Act).[18] The JSC Act regulates matters incidental to the establishment of the JSC by the Constitution. It establishes this Judicial Conduct Committee (JCC) to receive and deal with complaints about judges. It also provides for the compilation of a Code of Judicial Conduct, to be tabled in Parliament for approval.[19] The Code, which was approved accordingly and promulgated, serves as the prevailing standard of judicial conduct which judges must adhere to. The JSC Act also provides for procedures for dealing with complaints about judges and for incidental matters[20].

[11] Section 91(1) of the Constitution.

[12] Section 91(2) of the Constitution.

[13] Section 92(2) of the Constitution

[14] Section 178(7) of the Constitution.

[15] In section 178(4) of the Constitution.

[16] Section 178(5) of the Constitution.

[17] Section 180(b) of the Constitution.

[18] Act 9 of 1994.

[19] Section 12 of the JSC Act.

[20] Part 111 (Sections 14 to 18) of the JSC Act

26. The JSC Act seeks to maintain and promote the independence of the office of judge and the judiciary as a whole. It does so while acknowledging the necessity to create an appropriate and effective balance between protecting the independence and dignity of the judiciary when considering complaints about judges.

27. The JSC Act provides for oversight over judicial conduct by providing, in section 8, for the establishment of the JCC comprising the Chief Justice, who is its Chairperson, the Deputy Chief Justice and four judges, at least two of whom must be women. The four judges are designated by the Minister of Justice in consultation with the Chief Justice for a period not exceeding two years at a time. Oversight is given effect to through the lodging and consideration of complaints about judges.

28. Important provisions of the JSC Act, having regard to the present complaints, are sections 8(3) and (4), which provide as follows:

> *'(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 person.'*

29. By reason of the foregoing, the Deputy Chief Justice acts as the Chairperson and the JCC sits in all matters relating to this complaint without the Chief Justice.

30. The justiciable complaints over which the JCC presides are specified in section 14(4) of the Act. The category of complaints commonly lodged are:

    (a) impeachable complaints, namely, incapacity to perform judicial functions, gross incompetence, gross misconduct (section 14(4)(a)); and
    (b) wilful or grossly negligent breaches of the *Code of Judicial Conduct* SA (the Code) (section 14(4)(b)).

    There are other complaints specified in section 14(4)(c), including the holding of office of profit; and section 14(4)(d), which includes the failure to comply with remedial actions. Paragraph (e) makes provision for an overarching or broad complaint of 'any other wilful or grossly negligent conduct … that is incompatible with or unbecoming the holding of judicial office'. In practice, the overarching paragraph (e) contravention, is relied upon as an alternative to any number of specified charges. Grounds upon which complaints against a judge may be lodged, other than those set out in section 14(4)(a) and (c), require wilfulness or gross negligence as an element.

31. This is the broad constitutional and legal framework within which the present complaints have to be dealt with.

32. In order to complete the national legal framework for dealing with the present complaints one has to bear in mind the specific provisions of the following provisions of the JSC Act. Section 14, which deals with the lodging of complaints and section 17, which deals with inquiry into serious non-impeachable complaints.[21]

---

[21] Section 17 of the JSC Act provides as follows:

> '***Inquiry into serious, non-impeachable complaints by Chairperson or member of Committee***
>
> *(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*
>
> *(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.*
>
> *(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—*
>
> *(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.*
>
> *(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)—*
>
> *(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*
>
> *(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 …*
>
> *(b) …*
>
> *(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*

Code of Judicial Conduct

33. The specific articles of the *Code of Judicial Conduct* SA (the Code) relied on are the following and provide as follows:

    a. Article 12(1)(b) states:

    'A judge must not –

    unless it is necessary for the discharge of judicial office, become involved in any political controversy'.

    b. Article13(b) provides:*'*

    'A judge must recuse him- or herself from a case if there is a-

    reasonable suspicion of bias based upon objective facts.'

    c. Article 14(2)(a) states:

    'A judge may be involved in extra-judicial activities, including those embodied in their rights as citizens, if such activities-

    are not incompatible with the confidence in, or the impartiality or the independence of the judge'.

34. Section 15 of the JSC Act deals with lesser complaints that are to be summarily dismissed while section 16 of the Act deals with complaints which the JCC may recommend to be dealt with by a Tribunal. These sections are not applicable as the current complaint is to be dealt with in terms of section 17. The rider to this is that in a section 17 investigation, the investigator may recommend to the JCC that a complaint should be investigated by a Tribunal.[22]

(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) ....

(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) .... t'.

[22] Section 17(4)(c) or Section 17(5)(c)(iii).

35. The complaints that the writer was designated to determine are those referred to in paragraphs 11 and 13 above, lodged initially by the Africa4Palestine but supported by both SA BDS Coalition and WCG and those raised for the first time by the last mentioned two complainants. It is convenient to start with the complaints in paragraphs 11 and 13 before turning to the additional ones.

36. The question to be considered having regard to the above framework and the facts is whether the respondent CJ committed a conduct which amounts to judicial misconduct. Put otherwise, did the impugned statement: (a) amount to prohibited involvement in political controversy or activity – political involvement; (b) reveal a disposition which obliged the respondent CJ to recuse himself – recusal; or (c) amount to conduct that was incompatible with the confidence in, or impartiality or the independence of the judge – incompatible conduct.

37. If the respondent CJ is found not to have committed any of the acts of misconduct specified in the preceding paragraph, then we are required to consider (in the alternative), whether he has committed any misconduct broadly incompatible with or unbecoming judicial office within the meaning of section 14(4)(e).

38. The two topics which immediately call for consideration are the following:
    - Recusal, and
    - Political controversy or activity.

Recusal

39. The complaint is that the respondent CJ failed to recuse himself from the case of *Masuku*[23] where there had arisen a reasonable suspicion of bias against one of the parties. The case was heard in the Constitutional Court in August 2019 before a bench that included the respondent CJ.[24] The case, concerns a complaint of hate speech against Mr Masuku, a senior official of COSATU, in respect of the Israeli-Palestinian conflict, specifically his call for action against 'Zionists'.

40. His statements, says the complaint, were made *inter alia* in the context of a speech calling for 'boycott, disinvestment and sanctions against Israel'. The case is said to turn on whether calling for such action against Zionists constitutes advocacy for harm against members of the Jewish community. Judgment was reserved and, at the time of the complaints, is still

[23] *South African Human Rights Commission obo South African Jewish Board of Deputies v Bongani Masuku and Another* (CCT 19/2019).

[24] The case was an appeal from against the decision of the SCA decision of 2018 reported as *Masuku and Another v South African Human Rights Commission obo SAJBOD* 2019 (2) SA 192 (SCA).

pending. The complaint is in effect that the impugned statement indicates support for the position of one of the parties in that case.[25]

41. The CJ's response is that his Biblical obligation to love and pray for the peace of Jerusalem and Israel is not an expression of a view on Zionism (which is an issue in the case). He refers to the fact that in the same webinar he also declared that he loves Palestine and the Palestinians and asserts that the complaint had deliberately left that portion of his statement out.[26]

42. Judicial recusal from proceedings takes place when a judge removes himself or herself from a case either out of own initiative (*mero motu*) or upon application of an interested party. It may take place at any stage before the proceedings are concluded. The matter of *Masuku* was still pending at the time of the webinar and at the time when the complaint was lodged. The respondent CJ, with all the facts at his disposal, including this complaint, has not found it necessary to recuse himself. He in fact maintained in his first Response in terms of section 17(3)(a), that it is not necessary for him to recuse himself. Recusal at his own instance therefore appeared to be out of question.

43. The webinar and these complaints have been publicised. It may therefore be assumed that the parties in the *Masuku* case and any interested parties are aware of the publicised statement of the respondent CJ as stated in the webinar. They, too, have knowingly not brought an application for his recusal.

44. An application for recusal has its own legal requirements that must be met in order to be sustained. A recusal on own initiative must satisfy those requirements. A reasoned decision on recusal takes the form of a judgment of the court. It is an exercise and expression of the judicial authority of the judge/court.

45. It is undesirable for the JCC to exercise, through the guise of a determination of the merits of a complaint, to usurp the judicial authority of the judge and pronounce on what should rightly be the decision of the respondent judge. That decision falls within the protected judicial independence and should be respected by the JCC. The writer does note a changed position in Response 2,[27] where the respondent CJ intimates the possibility of him withdrawing from the *Masuku* case in the interest of justice. That decision remains his to make.

---

[25] Paragraph 23 – 24 of the first complaint.

[26] Paragraph 36 of the CJ's first Response.

[27] The respondent CJ states in the last sentence of Response 2: 'And <u>even if I were to withdraw</u> from *Masuku*, <u>which I may or may not do</u>, it would be purely because I consider it to be in the interests of justice to do so, and not because of what in my opinion is the complainants' campaign based on a misinformed sense of justice.' (Emphasis added)

46. I shall therefore refrain from considering the question whether the respondent CJ should or should not recuse himself. That decision is pre-eminently his and should be engaged through proper legal proceedings to give a reasoned decision. It is not the place of the JCC.

47. I would therefore dismiss that part of the complaint (or complaints) that is based on a breach of Article 13(b) of the Code – failure to recuse oneself.

Political controversy or activity

48. The complaint of alleged involvement in political controversy or activity in contravention of article 12(1)(b) appear to be the main charge here. The focus is on 'political controversy' and not so much on 'political activity'. I will therefore deal with political controversy in some detail.

49. In sum, the complaint here is that the respondent CJ has become involved in political controversy or activity in breach of the ethical rule that a judge must not become involved in any political controversy or activity, unless such involvement is necessary for the discharge of judicial office. The respondent CJ denies that this complaint has any merits and seeks its dismissal. He does not allege that his participation in the webinar was 'necessary for' the discharge of his judicial office, either as a judge or as chief justice. The qualifier in article 12 (1) (b) therefore need not be considered here.

50. The focus will therefore be on 'political controversy' and on determining whether in his utterance at the webinar the respondent CJ became involved therein.

51. There is no common ground as to how the concept 'political controversy' has to be understood. That dispute permeates all the complaints. It is therefore proposed to deal with the matter further under the following topics:
    - What is political controversy? (Interpretation);
    - Comparative and international perspective;
    - Texts of Complaint(s) and Response;
    - Objectivity of extract from the webinar;
    - The element of wilful or gross negligence and
    - Overall Conclusion.

What is political controversy (Interpretation)

52. In determining the meaning of 'political controversy', we take guidance from *Endumeni*, where the SCA held that:

> *'[I]nterpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration*

must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context, it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[28]

Dictionary Meanings

53. *The Concise Oxford Dictionary*[29], gives meanings of the key words as follows: **'political**': 'of or affecting the State or its government; of public affairs; of politics; belonging to or, or taking, a side in politics; relating to person's or organisation's status of influence (*political decision*)'. **'Politics'**: 'science and art of government; political affairs or life (*politics is a dirty business*)'. **'Controversy**: disputation; (prolonged) debate, esp. conducted in writing'.

54. *Longman Dictionary*[30] gives three meanings of the word **'political'** of which only two are relevant. '**Politica**l', according to it, means: 'relating to the government, politics, and public affairs of a country; relating to the ways that different people have power within a group, organization etc'. The same dictionary,[31] defines and explains '**controversy'** in the following terms: 'a serious argument about something that involves many people and continues for a long time'. It then gives the following examples: 'the **controversy surrounding** Skinner's theories **cause/provoke/arouse controversy**'; or '[t]he judges' decision provoked controversy'.

55. The English – Afrikaans dictionary, *Tweetalige Woordeboek*[32], gives the following Afrikaans equivalents for controversy and political: '**controversy'**: '*stryd(vraag), twispunt,*

[28] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18. See also *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[29] 7th ed. (1982)

[30] https://www.ldoceonline.com/dictionary/political (accessed 15/08/2020)

[31] https://www.ldoceonline.com/dictionary/controversy (accessed 15/08/2020)

[32] Prof.dr D. B. Bosman, Prof I. W. van der Merwe, Dr L. W. Hiemstra Sewende, Verbeterde Uitgawe,

geskil; twisgeskryf, polemiek;' and '**political'**: 'staatkundig; politiek; polities, staats.' To unpack these Afrikaans meanings of the concepts, reference was made to the explanatory dictionary in that language which gives the following meanings to those and related concepts as set hereafter. The *Verklarende Handwoordeboek van die Afrikaanse Taal*[33] explains the words further: '**politiek'**: 's.nw. Beginsels waarvolgens 'n staat geregeer word; kuns, wetenskap van regering, van die bestuur van 'n staat en die praktiese toepassing daarvan; staatkunde: Gedragslyn, beleid van 'n regering met betrekking tot 'n bepaalde saak: Optrede, organisasie van 'n groep wat op een of ander vlak wil regeer: Taktiek, manier van optee'. Then **'kontroverse'** 's.nw. Pennestryd, twispunt onder geleerdes; *controversia; vertere* draai.' '**Kontroversieel**': 'b.nw en bw Wat aanleiding gee of kan gee tot 'n kontroverse.' **'Strydvraag':** 's.nw Probleem, vraag waarby (ernstige) verskil van opinie bestaan; twispunt, strydpunt.' **'Twispunt'** 's.nw Punt, kwessie waaroor getwis word, waaroor verskil van mening bestaan.' '**Polemiek' '**s.nw Twis, stryd tussen voor- en teenstanders van 'n meestal aktuele saak.'

56. The dictionaries show that there are fairly wide meanings for both 'political' and 'controversy'. Political controversy may be defined as a prolonged debate or disputation on matters of or affecting the state or its government; of public affairs or politics. Such debates may and often entail the views of people belonging to or taking different sides in politics. It may but does not necessarily involve party politics.[34] It may and often relates to the status of influence of a person or organisation. In international relations, it relates to the status or ability of state parties to influence events in those relations.

Guide to interpretation within the Code

57. The Code itself gives the following principles to guide its interpretation. The Code must be applied consistent with the Constitution, and the law as embodied in the common law, statute, and precedent, having regard to the relevant circumstances.[35]

58. While on the subject of interpretation, it is necessary to touch on the 'Notes' at the end of some of the articles of the Code. Notes to the articles are for the purpose of elucidation, explanation and guidance with respect to the purpose and meaning of articles[36]. The notes to each Article have been put at the end of the Articles to which they relate and in fact bear

[33] Vyfde Uitgawe, F. F. Odendaal & R. H. Gouws:

[34] The dictionaries consulted in addition to those specified in the text are *The Thumb Index Edition of the Concise Oxford English Dictionaryi (*Thumb Index Edition, 11th Edition), *Meriam Webster Dictionary (*Available at www.meriam-webster.com (accessed:11 August 2020*)), Collins Dictionary* (https://www.collinsdictionary.com/dictionary/english/political (accessed 15 August 2020)), the *Thesaurus (www.thesaurus.com* – (accessed on 11 August 2020)) and the *Cambridge Dictionary(* https://dictionary.cambridge.org/dictionary/english/controversy (accessed 15/08/2020). Only one out of many meanings of 'political' links the word to party politics, that is Meriam Webster. That is certainly not a dominant meaning.

[35] Article 3(2)(a) of the Code

[36] Article 3(4) of the Code.

the number of the relevant Articles for convenience. For instance, notes to Article 4 are numbered 4(i) to 4(v) and those to Article 5 are numbered 5(i) to 5(iv) to make their purpose absolutely clear. They are notes to their particular Articles and are not intended to be separate rules or Articles.

59. The very first Article of the Code, Article 1 is definitions, Article 2 is Application of the Code while Article 3 explains the Objects of the Code and its Interpretation as a whole. The first rule in the Code is in Article 4 and understandably deals with judicial independence. The first part is the institutional independence which a judge owes to the judiciary as an institution and the courts generally: 'A judge must uphold the independence and integrity of the judiciary and the authority of the courts'.[37] The second part deals with individual independence and directs itself to the mind of the judge personally in relation to performance of judicial duties: 'A judge must maintain an independence of mind in the performance of judicial duties'.[38] The elucidation and explanation of these two sub rules of judicial independence are, *inter alia*, found in Note 4(i) which enforces the independence, and records that 'a judge acts fearlessly and according to his conscience because a judge is only accountable to the law.' In order to be truly independent, 'a judge does not pay any heed to political parties or pressure groups' (e.g., demonstrations, protests, prayer groups, night vigils, placards etc. during the hearing) and performs all professional duties free from such outside influences.[39] The notes to Article 4 further elucidate by providing that judicial independence denotes freedom of conscience for judges and non-interference in the performance of their decision making.[40] This describes a state of mind which a judge has to maintain to ensure that the decision he or she makes is made truly independently by the judge herself or himself, ensuring that external influences are kept out of reckoning in their judicial work (including judgments).

60. Each set of notes quite clearly relate to the Articles under which they are placed. The Notes are also numbered to correspond with the numbering of the Articles to which they relate. Dragging a note made under one Article in order to explain the meaning of another Article, is inconsistent with and strains the clear intention which is apparent from the text. We shall return to this later when we deal with the texts of the complaint(s) and the response.

Comparative and international perspective

61. International standards and those that apply in comparable foreign jurisdictions, provide a useful source of reference for interpreting, understanding and applying our Code, even though they are not directly applicable.[41]

[37] Article 4(a) of the Code.

[38] Article 4(b) of the Code.

[39] Note 4(ii) of the Code

[40] Note 4(iv) of the Code.

[41] Article 3(3) of the Code.

62. The preamble to the Code makes international judicial conduct relevant to the interpretation of the Code. It provides that:

> '*It is necessary* for public acceptance of its authority and integrity in order to fulfil its constitutional obligations *that the judiciary should conform to ethical standards that are internationally generally accepted, more particularly as set out in the Bangalore Principles of Judicial Conduct* (2001) as revised at the Hague (2002).'[42] (Emphasis added)

63. Having regard to the level at which the parties have pitched their submissions, including reference to international and foreign jurisdictions, it is necessary to have regard to some comparative foreign and international sources to enrich the determination the complaint that the writer is called upon to determine under the Code.[43]

64. It must however be made clear from the outset that the current complaint is not about penalising judges for their religious beliefs,[44] as the respondent suggests. This matter is about whether the respondent CJ became involved in political controversy or activity. It is to be determined in circumstances where Article 12(1)(b) of the Code, in this country, makes specific provisions that judges must not become involved unless it is necessary for the discharge of judicial office. The occasion at the webinar clearly did not involve any duties of judicial office. The factual question is therefore simply whether the respondent CJ 'became involved in political controversy'.

United States of America

65. The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973.[45] The version consulted was amended up to March 2019. It is divided into five (5) main parts called Canons. Each Canon is elaborated by details and comments. We refer hereunder only to those Canons which proximate our present investigation and cite applicable details.

66. Canon 4 provides that: 'US Judges may engage in extrajudicial activities that are consistent with the obligations of judicial office.' The detail reads: 'A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. *However, a judge should not*

[42] Para 7 of Preamble to the Code

[43] Part of the motivation for this comparative exercise is a statement in paragraph 30 of the first Response, which reads: 'Mature democracies don't penalise judges … for holding strong views on Christianity or any religion. They insist on transparency. That should apply to South Africa as well'.

[44] In SA under the Bill of Rights, everyone (including judges) has the right to freedom of conscience, religion, thought, belief and opinion, see section 15(1) of the Constitution.

[45] It was first known as the "Code of Judicial Conduct for United States Judges". Since then, the US Judicial Conference has made several amendments to the Code. The latest version used here was last amended in March 2019.

*participate in extrajudicial activities that **detrac**t from the dignity of the judge's office, **interfere** with the performance of the judge's official duties, **reflect adversely** on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.'* [Emphasis added]

67. The limitation in sub-paragraph A (1), deals with Speaking, Writing, and Teaching in Law-related Activities. It states:

> 'A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.'

68. Canon 5 provides: 'A Judge should refrain from political activity.' The detail in the relevant part, which is paragraph A, states:

> 'General Prohibitions.
>
> A judge should not:
>
> (1) act as a leader or hold any office in a political organization;
>
> (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office.'

69. The Commentary to Canon 5 provides some indication of what is a political organisation and is therefore worth quoting.

> 'Commentary:
>
> The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.'

What is envisaged here is political organisation within a state. Relationships between states themselves, which stand even above national relations, are unquestionably political. International politics to be specific.

70. A final provision in the US Code which may be of some interest appear under the heading: 'Compliance with the Code of Conduct'. The provision states:

> 'Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.'

The exceptions are: Retired Judges, Part-time Judges or Pro Tempore Judges, each with qualifications. Having regard to the quoted parts, the Code of Conduct for US Judges prohibits political activity of judges. It will accordingly also prohibit involvement in political controversy.

European Union member states

71. The comparative assessment of European member states of the European Union (EU) on the question under consideration is done on the basis of an article by OLG Köln titled *Political Activity of Judges in the light of Judicial Ethics*.[46] Reliance has also been placed on the Venice Commission Report on the Freedom of Expression of Judges, 19 -20 June 2015.[47]

72. In his article, OLG Köln records that there is a divergence of positions in individual member states of the European Union. The spirit of the article is captured by the following questions which are postulated upfront in relation to judges in the EU:

> 'Is a judge supposed to be a judge and a judge only? Or should he or she be allowed to be politically active and if so, to what extend? Can a judge hold a mandate in a city council? Can he or she distribute flyers for a political party? Political activity might change the public´s perception of judges. It can influence the level of trust of individuals in their judicial system. Is political neutrality in this context not only an ideal but a necessity for peoples´ confidence in a fair trial? How are the common values of judges' independence and impartiality interpreted in European countries?'

In the paper, OLG Köln tries to find answers to these questions. As the author states, 'The relationship between the judiciary and politics varies in the jurisdictions of the European Countries where the specific influences by the particular circumstances of each legal system needs to be taken into consideration.'

73. As a point of departure, OLG Köln writes that: 'It is important for judges to be perceived as being independent and impartial adjudicators free from undue influence, especially from

---

[46] OLG Köln (Team Germany: THEMIS Semi-final D 2015, Kroměřiž): ***Political Activity of Judges in the light of Judicial Ethics***

(Website:https://www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_Germany4.pdf)
(accessed 19 February 2021)

The writer is indebted to the author for the comprehensive article.

[47] The Report for the European Commission for Democracy Through Law (Venice Commission) was Adopted by the Venice Commission, at its 103rd Plenary Session (Venice, 19-20 June 2015) on the basis of comments by: Mr Johan HIRSCHFELDT (Substitute Member, Sweden) Mr Milenko KRECA (Member, Serbia) Mr Christoph GRABENWARTER (Member, Austria).

(***Venice Commission Report***:
https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)018-e)
(accessed 19 February 2021)

political influence. This results from the citizen´s right to fair trial guaranteed in Article 6 of the ECHR which provides:

> 'Independence is the right of every citizen in a democratic society to benefit from a judiciary which is, (and is seen to be), independent of the legislative and executive branches of government, and which is established to safeguard the freedom and the rights of the citizen under the rule of law.'
>
> 'The impartiality of the judge represents the absence of any prejudice or preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment.'
>
> 'A judge ensures that his private life does not affect the public image of the impartiality of his judicial work. He is entitled to complete freedom of opinion but must be measured in expressing his opinions, even in countries in which a judge is allowed to be a member of a political organisation.'

74. This broad statement of the position of the ECHR provides a perspective through which the positions of individual members states are to be seen. Judicial independence is the right of every citizen in a democratic society. It is not the right of individual judge who may in accordance with personal inclinations determine how far it stretches and how far it does not. It is part of the guarantee for individual citizens for a judiciary that will safeguard the freedom and rights of citizens under the rule of law. Prejudice and preconceived idea in exercising judgment, or in the process that leads to it, are inimical to impartiality. Some may find it difficult to accept that rigid adherence to religious beliefs as fundamental to one's thinking and approach to matters may threaten the requirement of 'the absence of any prejudice or preconceived idea. A secular state, such as South Africa, may require the discarding of religious dogma in the approach to judicial work in order to live and function above and free of 'preconceived idea when exercising judgment, as well as in the procedures adopted prior to the delivery of the judgment', that is, in all judicial conduct, intra and extra- judicial activities.

75. This requirement appears to require a judicial attitude which is clear of any pre-conception and which is subject in the first and last place to the Constitution and the law. It is an ideal standard which requires that those who might be holding in their private capacities, some positions which may be regarded as preconceptions, should reign in and keep those private views outside judicial consideration. South Africa as a secular state, as opposed to a religious one, is established by 'the supremacy of the Constitution, the rule of law and the rights enshrined in the Bill of Rights as the foundation of the democracy established by the Constitution'.[48]

[48] Taken from Principle 1 in the Preamble to the SA Code of Judicial Conduct and provisions of Article 14(2)(a) read with Article 14(1) of the Code.

76. With the above perspective and the peculiarities of our South African situation in mind, the writer looks at the position of a few individual countries within the EU, including Gernany, Sweden, Italy and Switzerland.

Germany

77. Section 4(1) of the German Judiciary Act ('Deutsches Richtergesetz – DRiG') provides for the separation of powers. In order to abide by that rule, judges should not simultaneously perform duties of adjudication, legislation or executive. Section 3(4) of the Federal Constitutional Court Act ('Bundesverfassungsgerichtsgesetz–BVerfGG'), states explicitly the incompatibility of being a judge at the Constitutional Court and being a member in a constitutional body at the same time, to guarantee the independence and neutrality from political influences. Section 25 states the basic principle as follows**:** **'**A judge shall be independent and subject only to the law.'

78. In the applicable part of the Fifth Chapter, which deals with 'Special duties of judges', the German Judiciary Act provides under section 39 as follows:

> 'In and outside office a judge shall conduct himself, in relation also to political activity, in such a manner that confidence in his independence will not be endangered.'[49]

Under section 36(2) of the German Judiciary Act, it is allowed for judges to run a political mandate at a federal level or at a state level under the condition that the judge ceases to hold his judicial office when being elected to parliament or appointed as part of the executive. In accordance with the existing rules in Germany, holding a political mandate is incompatible with the judges' profession as long as the judge is in office. To the contrary, section 36(2) determines the legitimacy to run a political mandate after ending the career of a judge in particular. This is a material distinction from our South African situation.

79. Public political statements by judges are not prohibited in Germany. A judge should however not mention his or her office when he or she expresses political opinions in public, except with respect to a legal question (lecture and law review article for instance).[50] Another major difference with the South African position.

80. The 2015 Venice Report on Freedom of Expression for Judges states in relation to Germany that:

[49] The quotation was uplifted from **The German Judiciary Act,** in the version published on 19 April 1972 (Bundesgesetzblatt, Part I p. 713) and as last amended by Article 1 of the Law of 11 July 2002 (Bundesgesetzblatt, Part I p. 2592).

[50] See also OLG Köln op cit. at p5 referring to the Decision of the German Constitutional Court 06.06.1988 – NJW 1989,93.

> ‘Judges may be members of associations, including trade unions, and belong to a political party. They can stand as a candidate for Parliament. If he or she is elected, the right and the duty to hold judicial office are suspended (terminated).’

Even though this is the legal framework, cases similar to those of Judges Schill and Müller show that the public heavily criticised judges becoming politicians and vice versa. Ronald Schill was a judge who later started his political activities as a new career, after he had ended his career as a judge. On the other hand, Peter Muller was a former politician, who had held several cabinet positions, including that of Prime Minister and Minister of Justice (1999 – 2011). He was however elected as Judge of the Federal Constitutional Court (‘Bundesverfassungsrichter’), the highest German Court, in December 2011. Both these moves were publicly criticised, for straddling the line of separation of powers.[51]

81. The position of judges in that country appears to be quite different from ours. Their law contemplates that German judges may, outside judicial office, be involved in political activities subject to the proviso that such involvement should not endanger judicial independence. Political activities as such do not appear to be prohibited. It is the endangering of independence of the judge which needs to be guarded. Those who may seek to rely on the German system need to be warned about the fundamental difference with the SA provisions.

Other EU states

82. In principle, countries like **Sweden**[52], **Italy**[53] and **Switzerland**[54] consider judicial and political functions as being not compatible. They however seem to be willing to risk the appearance of judicial independence, in their respective provisions, possibly because they do not consider the exercise of certain political functions and activities as potentially undermining the independence of judges. It should suffice to say their rules are very different from ours.

83. It is reported that the answers of a questionnaire of the Consultative Council of European Judges (CCJE) in 2002 on the principles and rules governing judges’ professional conduct (in particular incompatible behaviour and impartiality) made clear, that the general idea of separation of powers is a well-known concept in European countries. The concept is

[51] See OLG Köln: op. cit. para-B.1 on p3 under subtitle ‘Recent cases ‘and at p4

[52] In Sweden there are no restraints to political activities that judges are able to undertake.

[53] The Italian royal decree of 30 January 1941 states that judges may not have a ‘job or public or private office except as member of parliament...’ A number of magistrates run political campaigns and sit in the Italian Parliament.

[54] In Switzerland judges are generally elected for a certain period by the cantonal parliament. Due to periodical re-election, judges in Switzerland might be under political control, also because judges usually stay in their parties during their term as judges.

handled strictly in **Eastern European countries**. Regarding incompatibilities, **Slovenia**, **Slovakia and Czech Republic** answered that judges may not have a political post. **Moldovia´**s judges may not belong to political parties. No political mandate or activity is allowed in **Estonia, Romania or Hungary**. The Hungarian constitution in this regard states in Article 26(1) that: 'Judges shall not be affiliated to any political party or engage in any political activity.'[55]

84. The association of **Austrian** judges initiated a discussion process in Wels in 2003. Every judge in the state could participate. The further development of the principles of the 'Salzburger Beschlüsse' from 1982 resulted in a decision in principle known as the 'Welser Erklärung' (2007). It provides:

> 'This declaration advises judges in order to safeguard their appearance of impartiality not to be a member of a political party or be active in a party-political context during their services'.

The recommendation is based on § 63 RDG, which similar to § 4 DRiG prohibits the judge to perceive tasks of the executive or legislative.

United Kingdom

85. In the United Kingdom judges are not permitted to participate in political activities. Even after they have left office, they are subject to substantial restrictions. The 2006 Guide to Judicial Conduct states that impartiality is essential to the proper exercise of the judicial office. Therefore, a judge should make sure that his behaviour in court and in his private life maintains and enhances the public´s confidence in the impartiality of the judge and the judiciary. The judge's primary task is to fulfil the duties of his office. Extra judicial activities should therefore be avoided if they can cause the judge to not sit on a case because of his decision seeming biased due to his extra-judicial activities.

86. In the UK a judge must forego any kind of political activity and on appointment sever all ties with political parties. An appearance of continuing ties has to be avoided. Their Code of Conduct even goes as far as to state that 'where a close member of a judge's family is politically active, the judge needs to bear in mind the possibility that, in some proceedings, that political activity might raise concerns about the judge's own impartiality and detachment from the political process.' The United Kingdom has quite extensive provisions in its Code to create a distance between the judiciary and any political activity or controversy.

[55] See OLG Köln: op. cit at p 7

87. Political party membership, political activism or political partiality of judges is expressly prohibited in Romania,[56] Croatia[57] and Malta,[58] naturally with differences in details, all in order to protect judicial independence.

88. To sum up, the position in foreign jurisdictions with regard to the leeway allowed to judges to be involved in political activities is quite varied. There are differences which need to be kept in mind when one seeks to make a comparison. The provisions in some states are totally incomparable with ours, while others are much closer to ours. The position of South Africa on the topic, having regards to its Constitution, the JSC Act and its Code, is much more comparable with the position in the USA, the UK, Croatia and to a lesser extent Austria. It also finds much consonance with the provisions in the East European states such as Slovenia, Slovakia and Czech Republic, Moldova, Estonia, Romania and Hungary**.** In East European countries, just as in South Africa, judges may not belong to political parties and if they did belong to one prior to appointment they are required to sever relations with such political parties. In the final analysis, one must interpret the provisions in our Code of Judicial Conduct having regard to the legal framework set out above, which is provided by the Constitution as the supreme law and our statutes.

The Bangalore Principles

89. At an international level, the most popular source for guidance for the ethical conduct of Judges is, without doubt, The Bangalore Principles.[59] As already stated, those Principles are expressly echoed and accepted in the Preamble to our own Code of Conduct. The UN Commentary on The Bangalore Principles states, amongst others, that 'these principles give expression to the highest traditions relating to the judicial function as visualised in all cultures and legal systems.' Reaffirming the cardinal role played by the judiciary in a democratic society, the Commentary proclaims that: 'A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law. Even when all protections fail, it provides a bulwark to the public against any encroachments on rights and freedoms under the law'.

90. The preamble to the Bangalore Principles reaffirms the following three principles that need to be restated: (1) public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society; (2) it

---

[56] . In **Romania**, according to the Law on the Status of Judges (no. 303/2004), judges may not be members of political parties or undertake political activities. They are obliged to refrain from expressing or manifesting their political beliefs (Article 8). (As cited by OLG Köln op. cit.).

[57] In **Croatia**, obligations of judges are regulated under Articles 92 to 98 of the Law on Courts (as amended in 2010). According to Article 94, a judge must not be a member of a political party, nor be involved in political activity. (As cited by OLG Köln op. cit.).

[58] The Code of Ethics for Members of the Judiciary of **Malta (Article 25 of the Code of Ethics for Members of the Judiciary of Malta).** (As cited by OLG Köln op. cit.).

[59] Which were the result of the work of a global group of high level judges ("Judicial Integrity Group"), initiated by the UN and published in 2001.

is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system; (3) the primary responsibility for the promotion and maintenance of high standards.

91. Whilst South African judges are largely aware of the Bangalore Principles, I will restate a few which deserve being recalled for present purposes. These are Principles 2.2, 2.3, 2.4 and 4.6, which provide as follows:

> Principle 2.2
>
> 'A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary'.
>
> Principle 2.3
>
> 'A judge shall, as far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.'
>
> Principle 2.4
>
> 'A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process, nor shall the judge make any comment in public or otherwise, that might affect the fair trial of any person or issue'.
>
> Principle 4.6
>
> 'A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary'.

92. The official commentary to the Principles specifies this general and abstract principle by saying that 'a judge's duties are incompatible with certain political activities.' Principle 4.9 provides: 'A judge shall not *use the prestige of the judicial office to advance the private interests* of the judge, a member of the judge's family or anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties' (Emphasis added). The last-mentioned Principle from the Bangalore Principles is echoed in Article 14 of the SA Code, while the other principles mentioned above are in consonance with other provisions of our Code.

93. In 2002, the CCJE (Consultative Council of European Judges) published an Opinion to the attention of the Council of Ministers at the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and

impartiality. Of particular relevance for present purpose is a rule that the CCJE stated with regard to a judge and political activities. In its conclusions on the standards of conduct, the CCJE phrased the rule no. xii as follows: '[Judges] should refrain from any political activity which could compromise their independence and cause detriment to their image of impartiality.

94. Finally, the following statements made by the Venice Commission in paragraphs 83 and 84 of its Report (already referred to above) are worth noting:

> '83. In its assessment of the proportionality of an interference with the freedom of expression of a judge with regard to his/her specific duties and responsibilities, the ECHR considers the impugned statement in the light of all the concrete circumstances of the case, including the office held by the applicant, the content of the impugned statement, the context in which the statement was made and the nature and severity of the penalties imposed. In this context, the position held by a particular judge and matters over which he/she has jurisdiction or the venue or capacity in which a judge expresses his/her opinions are taken into account and appear as important factors. …'
>
> 84. In the context of a political debate in which a judge participates, the domestic political background of this debate is also an important factor to be taken into consideration when assessing the permissible scope of the freedom of judges.'

95. The following factors, inter alia, provide context to the complaints and the impugned statement: the impugned statement was made by the respondent who is a serving Chief Justice of South Africa; the statement is on SA foreign policy towards Israel and diplomatic relations between the two countries; it was made at an international platform and on the eve of the South African executive arm of the state making its statement at the UN Security Council on the Israeli-Palestinian question.

Allegations and Responses

96. I now turn to look in a little more detail at the text of the various Complaints and the Responses thereto against the backdrop of the above framework.

First complaint by Africa4Palestine

97. 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'. He expressed also that a disinvestment

campaign against the State of Israel is not right.[60] They contend that in making these comments the respondent involved himself in political controversy 'and potentially even political activity'.[61]

98. As pointed out earlier, the respondent CJ filed two affidavits in response to the complaint of Africa 4 Palestine. In the first Response, he differs with the interpretation placed by the first and other complainants on Article 12(1)(b) of the Code, on which interpretation, they base the complaint of political controversy.

99. It is necessary to quote Article 12(1) of the Code in full in order to unpack the contentions of the parties. It reads as follows:

> 'A judge must not –
>
> (a) belong to any political party or secret organization;
> (b) unless it is necessary for the discharge of judicial office, become involved in any political controversy or activity;
> (c) take part in any activities that practice discrimination inconsistent with the Constitution; and
> (d) use or lend the prestige of judicial office to advance the private interests of the judge or others.'

100. The respondent CJ contends that the context within which the 'reference to political controversy or activity' in Article 12(1)(b) must be understood, is the explicit reference in Article 12(1)(a) 'to membership of political parties'.[62] In his contention the proscribed 'political controversy or activity' in Article 12(1)(b) must be interpreted and understood with reference to proscribed membership of political parties in Article 12(1)(a). In amplification he states: 'Judges may not get involved in controversies or activities involving political parties but, on home ground'.[63]

101. This contention seems to suggest that judges are free to be involved in political controversies (and possibly activities) as long as it is away from South Africa. What is not clear from this contention is whether, in the view of the respondent CJ, it would still be permissible for judges to be involved even if South African political parties were active in the political controversy that plays itself outside South Africa.[64]

---

[60] First Complaint para 12 and 16.

[61] First Complaint para 17.

[62] First Response para 15.

[63] First Response para 15.

[64] The example given by the respondent CJ in the next paragraph (First Response para 16) relates to international politics in which the main protagonists would be foreign political parties. However, there is nothing wrong with South African political parties taking an interest in those politics and even being outspoken. Given modern cross-national interests, influence and flow of information, this is both possible and probable. And what about political controversies in a neighbouring state, where SA political parties may be keenly interested and even involved at

102. The further point made by the respondent CJ is that 'policy must not be conflated with politics, even if it touches on political issues'.[65] The first Response states further that: 'Section 85(2)(b) of our Constitution empowers the Executive to develop and implement national policy. And this is how SA – Israeli policy came into being'. Indeed, in the webinar the respondent CJ stated that he regards the policy as binding on him. He contends nevertheless that 'as a citizen and even as a Judge' he is entitled to criticise those policies.[66]

103. That in a nutshell appears to be the nub of the dispute between the parties in addition to arguments and illustrations and points which are clear from the text of the webinar itself, to which I shall turn later.

104. The respondent CJ suggests that political controversy or activity, which article 12(1)(b) proscribes, only relates to political parties. That, I suggest, unduly limits the meaning of those concepts as used in the context. Membership of political parties is dealt with in article 12(1)(a) while 12(1)(b) deals with involvement in political controversy or activity. If what the respondent CJ suggests is all that the Code sought to achieve, there would have been no need for a separate paragraph (b). That meaning would have been achieved by adding at the end of paragraph (a) the phrase 'or be involved in their controversy or activity'. That is the paragraph which deals with political parties. That would have achieved the restriction of prohibition to political parties and their activities or their debates. Another alternative would have been to insert at the end of the present paragraph (b) the words 'of political parties.' To read in such an addition, which does not exist, violates the actual text of the paragraph and brings in an unintended meaning.

105. However, article 12(1)(b) as it stands has something else in mind over and above membership of political parties and organisations dealt with in 12(1)(a), just as 12(c) and 12(d) are not restricted to political parties and secret organisations. The clear objective of 12(1)(b) is to remove judges from the arena of political debates, disputations etc. (political controversies) and political activities except ('unless') their involvement is necessary for the discharge of judicial office. It takes South African judges not only out of activities and controversies of political parties and secret organisations; it seeks to keep judges out of political controversies and activities completely except to the extent that their involvement is necessary for judicial office. The two paragraphs of article 12(1), (that is, paragraphs (a) and (b)), when read together, almost take judges completely out of politics. Paragraph (a) takes them out of membership – without qualification - while paragraph (b) prohibits their involvement in all political activities and controversies. The framers of the prohibition (that

---

the level of debate, because of the potential flow over; or in another state which though geographically removed, but is close by reason of economic, social and cultural connections to SA?

[65] It is not clear to me as to where one draws the line where, in the words of the first Response, policy 'touches on political issues.'

[66] First Response para 22.

is the text itself) in paragraph (b), however, realised that activities of judicial office may make the involvement of judges in the controversies or activities necessary, and thus provided for that as the only limitation to the prohibition. The qualifier is therefore explicit – 'unless it is necessary for the discharge of political office.' (underlining added for emphasis). The qualifier comes first in the paragraph to emphasise the exclusivity. In the paragraph, judicial office is taken out of all political debates (controversies), which include debates about the formation and implementation of national or provincial policies of the state.

106. The inherent difficulty with the restriction that the respondent CJ seeks to place, in an attempt to give judges some room for political manoeuvrability, is demonstrated by the following. National policy of the country including international policy is developed, formulated and implemented by the national executive. That formulation and implementation is openly debated in parliament (and in the media) where different political parties take different positions. Those who formulate and implement policy are constitutionally accountable to parliament where different political parties are represented. The political activities and controversies in the process is their business. Even though a particular policy of the SA government may seem removed from the local environment, it remains subject to the Constitution and may be challenged in South African courts e.g., for its constitutionality. It remains a terrain of debate and disputation of local political parties for as long as it is the policy of the government of South Africa. The restricted interpretation is therefore neither textually nor constitutionally justifiable. The rule is clear: South African judges are prohibited from belonging to political parties; and they are not to be involved in political controversies (debates/disputations) or political activities, whether linked to political parties or not.

107. Judges are to stay out of politics, and are only permitted to pronounce on the legal and constitutional boundaries that may apply to those politics. When called upon to pronounce, they do so on the basis of the Constitution and the law and not on the basis of any preconceived notions – not even religion - however committed to those notions. That is what the Constitution and their oaths or affirmation binds them to.

108. I cannot think of a policy of the South African government which is so removed from the South African scene that it is either of no concern for local South Africans or nonjusticiable in our courts. For as long as it is a policy of the South African government, South Africans have an interest in it and can engage the courts about it, for example, to test whether their government policy abroad is consistent with its constitutional obligations. South Africans have a right to take an interest in the policy direction of their government because it runs its affairs with their taxes. Therefore, in my respectful view, nothing of the South African government is too remote for South Africans. SA citizens in turn are entitled to take them to the national courts, which will adjudicate thereon as long as by law they have jurisdiction.

109. There are numerous examples where South Africa's international relations were a subject before national courts. A few examples are: In *Tsebe*[67] the relationship between South Africa and Botswana was in focus both in the High Court and the Constitutional Court, having regard to the fact that Botswana legal system recognises death penalty which is unconstitutional in South Africa. The question there was whether South Africa may extradite a person to a country where such person faces death penalty. The question was answered in the negative.

110. Again *Mohamed & Another v President of South Africa*[68] concerned the collaboration between South Africa and the United States of America (USA), which led to the removal of the applicant to the USA to face capital charges relating to the bombing of the USA embassy in Dar es Salaam, Tanzania in August 1998. When the incident took place, one might have considered it to be a matter between the US and Tanzania and remote from the South African courts. The case disproves that perception. The South African government was found to have acted contrary to the underlying values of the Constitution and its obligation to protect the human right to life of everyone in South Africa.

111. In *Kaunda*[69] the Constitutional Court had to consider the executive's power to make diplomatic representations under international law to other states on behalf of its citizens. The matter, it may be recalled, concerned 69 South African citizens, who had been arrested in Zimbabwe when their plane landed there and who were being held in custody there. It was alleged that the 69 were mercenaries en route to Equatorial Guinea to overthrow the government of that country. The matter concerned international and diplomatic relations between South Africa, Zimbabwe and Equatorial Guinea. The South African courts rightly exercised jurisdiction.

112. Another incident of international relations that served before our courts concerned a series of court cases in what is referred to as the Al Bashir debacle, when SA came under obligation to execute a warrant of the International Criminal Court (ICC) based on its membership of the ICC under the Rome Statute. Those cases served before our courts. In *Democratic Alliance v Department of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)*[70], a political party brought an application in 2016 before a South African court following that debacle. The case, which focused on SA's attempt to withdraw from the ICC, was decided in 2017. The Court recognised, *inter alia*, that 'while … *the conduct of international relations and treaty-making [is] an executive act, it still remained an exercise*

[67] *Minister of Home Affairs and Another v Tsebe and Others* 2012 SA 467 (CC).

[68] *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC).

[69] *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC).

[70] 2017 (3) SA 212 (GP).

in public power, which must comply with the principle of legality and is subject to constitutional control.'[71]

113. It happened again in *Engels*[72] that a South African political party brought proceedings before court to question and challenge the way in which the South African government sought to exercise its executive power in foreign relations when it attempted to confer diplomatic immunity against criminal prosecution of Grace Mugabe, the wife of Zimbabwe's then president. On the facts, the Court declared the conferral of such immunity unconstitutional. It found that in terms of section 6(a) of the Foreign States Immunities Act, President Mugabe himself did not enjoy immunity from the jurisdiction of South African courts for the injury of a person in South Africa.

114. More significantly as *Ngcobo J explained in Kaunda:*

> *'[172] The conduct of foreign relations is a matter which is within the domain of the executive. The exercise of diplomatic protection has an impact on foreign relations. Comity compels states to respect the sovereignty of one another; no state wants to interfere in the domestic affairs of another. The exercise of diplomatic protection is therefore a sensitive area where both the timing and the manner in which the intervention is made are crucial. The state must be left to assess foreign policy considerations and it is a better judge of whether, when and how to intervene. It is therefore generally accepted that this is a province of the executive, the state should generally be afforded a wide discretion in deciding whether and in what manner to grant protection in each case and the judiciary must generally keep away from this area. That is not to say the judiciary has no role in the matter.' (*Emphasis added*)*

115. Without getting into the merits of the pending Constitutional Court case, as I understand the facts, the *Masuku* case is an example of an issue concerning foreign policy which comes before our courts. Mr Masuku made statements about relationship with Israel and the issue was brought before our courts[73] on behalf of a local interest group.

116. The distinction which the respondent CJ seeks to draw between policy and politics in order to demonstrate what is and what is not of local concern is, with respect, one which I find to be without merit.

---

[71] At [44].

[72] *Democratic Alliance v Minister of International Relations and Cooperation and Others; Engels and Another v Minister of International Relations and Cooperation and Others* 2018 (6) SA 109 (GP).

[73] As *SAHRC obo SAJBD v Masuku and Another* 2018 (3) SA 291 (GJ); and on appeal to the SCA reported at 2019 (2) SA 194 (SCA).

117. In paragraph [15] of his first Response the respondent CJ explains the meaning he attaches to Article 12(1)(b) with reference to Note 4(ii), which is a note to an all altogether different Article 4 of the Code. That approach is not in accordance with intention which is evident from the way in which each set of notes are attached to and were made with reference to particular Articles of the Code. The text of the Code indicates that Notes 4(i) to 4(v) relate to Article 4 while the Notes for Article 12 are Notes 12(i) and (ii).

118. While Article 4(b) – not in issue here – gives guidance to the judge in performing judicial duties, Article 12, particularly 12(1) – which is the focus of the complaint - as a whole deal with the situations a judge could find herself or himself in, while not performing judicial duties. Article 12 applies as long as one remains a judge, while Article 4(b) addresses itself to the process of executing judicial office. These are complimentary but distinct rules. Appreciation of that difference is necessary for a proper interpretation; as these are notes to the various articles of the Codes. It is plainly not in accordance with the structure of the Code to adopt and invoke notes to Article 4 to interpret Article 12. Article 12 (1) is applicable to association and activities away from the bench (extra-judicial) while Article 4 (and its notes) is about the position on the bench or while executing judicial office (intra-judicial).

119. In paragraph 17 of the first Response, the respondent CJ refers to what he calls 'home-soil political controversy' which he rightly acknowledges is distinct from 'foreign political controversies' to which he refers in paragraph 18, in which judges should be freely involved. In paragraph 26, the respondent CJ identifies what he refers to as 'the real mischief' sought to be addressed. This is impartiality and independence which stems from 'staying away from all local political parties and their controversies and activities'. The events in other countries may feature in local politics and South Africa may even send envoy or take other diplomatic positions in relation to those events. That is ostensibly of local concern, whether one would nevertheless call it policy or politics.

120. 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, which is clearly of interest to South Africans and is not insulated from the South African Constitution and South African law. Whether certain South African judges wish to become involved in foreign political controversies and activities having no connection to their country is an issue into which this investigation needs not be drawn. That is not before us. The political controversy in the present case relates to the policy of the South African government and is therefore of concern to South Africans.

121. In paragraph 13 of his Response, the respondent CJ makes the point that judges have fundamental rights and freedoms and are not to be needlessly censored, gagged, or muzzled. A question that arises is whether denying or restricting the freedom of South African judges from being 'involved in political controversy or activity', as the Code does, is tantamount to 'needlessly censoring, gagging or muzzling' them. It seems to me that

some measure of restraint is necessary to secure their independence, not for themselves, but for the litigants, just as it may be necessary for them to defer to the executive in a terrain which is properly theirs.

122. 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 imperilled 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.

123. 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'.

124. 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.

125. 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.

Response 2

126. The respondent CJ delivered Response 2, as an additional response to Africa 4 Palestine, more than two months after the first Response. Response 2 is also his sole response to the other two complaints (by SABDS Coalition and WCG).

127. There is, with respect, nothing new of substance which alters the views stated above with regard to the understanding of proscribed involvement in political controversy or activity by judges. On the contrary, on that aspect, Response 2 appears to have created tension between it and what the writer understood to be the respondent's position in the first Response affidavit dated 27 July 2020.

128. The writer's understanding from the reading of the first Response was that the respondent CJ contended that judges were only prohibited from being involved in political controversy or activity of political parties. Not any political controversy or activity. The rationale advanced was that disputes involving political parties often come before our courts. This was in contrast to foreign policy or controversies on foreign soil. In the words of the respondent CJ, 'Judges may not be involved in controversies or activities involving political parties … because pressure often comes from political arena and party-politics is a high litigious space and could easily give rise to disputes that are justiciable before our courts where our Judicial Officers serve'.[74]

129. However, in Response 2, the respondent CJ does seem to acknowledge that issues at foreign policy level, which play themselves out on foreign soil (not 'home ground' to use his expression) do in fact have their own politics, which deserve the attention of South Africa (and therefore South Africans) and that the comments of South Africans thereon may result in litigation before our courts. The following are selected passages from paragraphs 12 and 13 of Response 2: 'The Israeli-Palestine politics or issues are not an integral part of South African politics. … They are peripheral and not inherently South African in character although they deserve the attention of South Africa';[75] 'Individuals, groups and formations of political or other nature, who stand on opposing sides about issues that might have reached boiling point in those other foreign territories, may use words or act, in relation to those tensions, in a way that could result in litigation'.[76] Litigation here refers to litigation in South African courts. It simply means politics in foreign relations, therefore involving our foreign policy, may reach a point where it forms the subject of dispute between South African 'individuals, groups of a political or other nature' in South African courts where our judges serve and preside. Far from clarifying the point made by the respondent CJ in the first Response, Response 2 in relation to proscribed political controversy or activity waters down that point or even contradicts it. Therefore Response

[74] First Response para 15.

[75] Response 2 para 12.

[76] Response 2 para 13.

2 did not provide greater clarity in relation to the position of the respondent CJ regarding prohibited 'political controversy or activity' in terms of article 12(1)(b).

Second complaint by SA BDS Coalition

The SA BDS Coalition, formed in February 2020, is an umbrella body of 11 Palestinian solidarity organisations. It is affiliated to the international Palestinian BDS National Committee and is its sole South African affiliate. The international body is a civil society body organising internationally for boycott, disinvestment and sanctions against Israel.

130. The SA BDS Coalition complaint (second complaint) affidavit was attested to on 26 July 2020 by Roshan Dadoo, a member of the interim executive committee of the SA BDS Coalition and is supported by an annexure. The annexure, which sets out the complaint, was issued on behalf of the SA BDS Coalition by Ronnie Kasrils, Roshan Dadoo and Judy Favish.

131. This complaint (which shall be referred to as the second complaint), like the first complaint of Africa4Palestine, arises from the same statements made by the respondent CJ at the webinar on 23 June 2020. As the complaint appears to have been lodged by lay people, we shall, where the language suggests, link its statements to particular articles of the Code to facilitate its consideration.

132. This complaint makes the point that the advertisement of the webinar made it clear that the respondent participated in the event as the Chief Justice of South Africa. It alleges that 'a number of statements' made by the respondent CJ at the webinar violated the Code, in particular Article 12(1)(b) – involvement in 'political controversy or activity' - when it was not necessary for the discharge of judicial office. The statements, says the complaint, were also not related to any legal argument or the administration of justice.[77] This point touches the spirit if not the direct provisions of Article 11(2). The two fresh points made here are: the advertisement[78] and the fact that the statements were unrelated to any legal argument or the administration of justice

[77] This point implicates or touches the spirit of article 11(2) of the Code which provides that:

> 'A judge may participate in public debate on matters pertaining to legal subjects, the judiciary, or the administration of justice, but does not express views in a manner which may undermine the standing and integrity of the judiciary'.

[78] The allegations made about the advertisement may implicate article 12(1)(d) of the Code which provide:

> 'A judge must not use or lend the prestige of the judicial office to advance the private interests of the judge or others.'

This will depend on whether the private interests of any person or entity were advanced by the projection of his judicial officer in the advert. It could be the interest of the newspaper, The Jerusalem Post or that of the respondent CJ, or that of any person or entity that were advanced, e.g., in having many people watch the webinar were advanced; or any other private interests. Private interests could be any interest other than that of judicial office. No interests of the judiciary were advanced there. The article prohibits the use or lending of the prestige of judicial office to advance 'the private interest of the judge or others' which is wide enough to safeguard judicial office against abuse.

133. The third point is one about timing. It is alleged that 'he denounced government policy on Palestine *on the eve of* South Africa raising a debate in the United Nations Security Council in support of the human rights of the Palestinian people and condemning the planned illegal Israeli annexation of Palestine territory' (Emphasis added).

134. The fourth point is that he expressed explicit support for Israel 'at this time in a manner that runs counter to a number of the United Nations Resolutions, international law, South African policy and the spirit of the South African constitution'. This, it is said, makes his statements 'highly controversial'. The question of running counter to South African foreign policy was also made by Africa4Palestine in its complaints (the first complaint).

135. That his statements resulted in 'political controversy', it is said, is evident from statements made about his conduct 'not only by our Coalition', but also by the following:

135.1 the South African Council of Churches (SACC);
135.2 the Muslim Judicial Council (MJC);
135.3 the South African Jews for a Free Palestine (SAJFP);
135.4 the National Association of Democratic Lawyers (Nadel);
135.5 the Council for the Advancement of the South African Constitution (CASAC);
135.6 trade union federations SAFTU;
135.7 trade union federation COSATU;
135.8 the African National Congress (ANC); and
135.9 two legal academics (Professor Pierre de Vos of UCT and Professor Z Motala of Howard – US).

136. This second complainant submits that: 'The Chief Justice has thus demonstrated his inability to uphold the premise of our human rights-based Constitution as required by his office'.[79] This is a serious charge or accusation as it is directed at ability to uphold duties of judicial office.

137. The SA BDS Coalition also repeats the recusal point made by Africa4Palestine (first complainant). It further adds that 'he has created a situation where he would be required to recuse himself should any matter related to BDS come before the Constitutional Court'. This clearly implicates Article 14 of the Code[80] as it appears more clearly from the notes

[79] The last but one paragraph Complaint of SA BDS Coalition.

[80] Article 14(1), (2) and (3)(a) of the Code, which may be relevant here provide:

'

(1) A judge's judicial duties take precedence over all other duties and activities, statutory or otherwise.
(2) A judge may be involved in extra-judicial activities, including those embodied in their rights as citizens, if such activities-
    (a) are not incompatible with the confidence in, or the impartiality or independence of the judge; or

thereto.[81] Their allegation is in effect that the respondent CJ, when he involved himself in these extra-judicial activities and having regard to his utterances there, acted in a manner inconsistent with judicial independence, and undermined the separation of power. He did not minimise the risk of conflict with judicial obligations as he has created a situation where he would be required to recuse himself when matters related to BDS, i.e., the calls for boycott, disinvestment and sanctions against Israel, come before his Court.

138. Finally, the second complainant alleges that the respondent CJ has aggravated his 'politically controversial statements' by reacting to criticism of his comments as he did by publicly stating that he would not retract nor apologise 'even if 50 million people can march every day for the next 10 years' for him to do so.

139. Although the complaint does not label the conduct as gross misconduct, it does so in essence in the last sentence of the complaint (annexure) as it calls upon the JSC to investigate the matter 'by establishing a tribunal with the mandate of recommending sanctioning in accordance with the Constitution'. Within the framework of JCC complaint, a Tribunal is established to consider gross misconduct and only the Tribunal may recommend sanctions in terms of the Constitution. It therefore appears that in addition to violations of the Code, in the complaint of SA BDS Coalition, I am called upon to investigate gross misconduct in terms of section 14(4)(a) of the JSC Act and section 177 of the Constitution.

140. The respondent CJ chose to file one response affidavit to second complaint of SA BDS Coalition and third complaint of the WCG. In the same affidavit, he also responded for the second time to the first complaint of Africa4Palestine. The composite response affidavit (Response 2) is therefore considered in the determination of each of the three complaints. Some overlap is inevitable.

141. In his response to the second complaint (in Response 2), the respondent CJ does not confirm or deny the allegation that:

(b) do not affect or are not perceived to affect the judge's availability to deal attentively and within a reasonable time with his or her obligations.

(3) A judge must not-

(a) Accept any appointment that is inconsistent with or which is likely to be seen to be inconsistent with an independent judiciary, or that could undermine the separation of powers or the status of the judiciary'.

[81] Notes 14 (i) and (ii) read as follow:

(i) A judge conducts extra-judicial activities in a manner which minimises the risk of conflict with judicial obligations. These activities may not impinge on the judge's availability to perform any judicial obligations.

(ii) While judges should be available to use their judicial skills and impartiality to further the public interest, they must respect the separation of powers and the independence of the judiciary when considering a request to perform non-judicial functions for or on behalf of the state or when performing such functions'.

141.1 he 'has demonstrated his inability to uphold the premise of our human rights-based Constitution as required by his office';

141.2 that his support for Israel runs counter to a number of the United Nations Resolutions and international law,

141.3 that the advert for the webinar projected him as the Chief Justice of South Africa;

141.4 that his statements, were not related to any legal argument or the administration of justice;[82]

141.5 he also does not comment on the timing issue where it is alleged that that 'he denounced government policy on Palestine *on the eve of* South Africa raising a debate in the United Nations Security Council in support of the human rights of the Palestinian people and condemning the planned illegal Israeli annexation of Palestine territory; and

141.6 he also makes no comment regarding the fact that the SA BDS Coalition specifically calls upon the JSC to investigate the matter 'by establishing a tribunal with the mandate of recommending sanctioning in accordance with the Constitution,' which appears to contemplate a complaint of gross misconduct.

142. The omission, ostensibly, strengthens allegations in the complaint. There is no reason to suggest an oversight given the fact that the complaint of SA BDS Coalition comprises only two pages. The respondent CJ did however state in paragraph 26 of Response 2 that '[t]here is no constitutional value I have undermined'. He therefore denied breach of the Constitution but not of UN resolutions and international law. He also stated his view that 'the majority of the people and formations on whose remarks the complaints seek to rely are traditional allies of BDS and Africa 4 Palestine'.[83] The statement is open to a reasonable interpretation that it refers to the complaints of both SA BDS Coalition and Africa4Palestine and those annexures that the two bodies refer to and which support their complaint. Even allowing for a generous interpretation as referring to all complaints, including the third complaint of WCG, there is still no suggestion that there are any traditional supporters or allies of WGC in any annexures referred to or relied upon in their complaint.

143. On all constructions of Response 2, the WGC has no 'traditional allies' that it or any of the other complainants rely upon. There is no allegiance alleged between it and any sources, on whose remarks, reliance is placed by anybody. Its allegiance, if any, is untainted on either construction. If it has any, those are evidently not questioned.

144. In Response 2 the respondent CJ avers that the complaints of SA BDS Coalition and the WCG are the same as, and an attempt to reinforce the complaint of Africa4Palestine, in

[82] This point implicates or touches the spirit of article 11(2) of the Code.

[83] Para 25 of Response 2.

an act of desperation 'clutching at straws' after realising that the first case was weak, and as an attempt 'to build up something out of nothing'.[84] The respondent CJ repeats this theme when he states that '[t]he unnecessary and belated complaints by BDS and the Group are … meant to beef up the weak complaint by 4 Palestine'.[85] The insinuation that the three complainants are acting in consort is strongly denied by both the SA BDS Coalition and the WCG. SA BDS Coalition states categorically that they had never heard of the WCG prior to being furnished with copy of Response 2 on 25 September 2020 and that 'at no stage had the Coalition communicated, consulted and/or cooperated with any other complainants' or acted in a manner that the respondent ascribes to them.[86] Similarly, WCG also denies the allegation of collaboration amongst complainants and asserts that theirs is a 'separate and distinct complaint to be dealt with on its own merits'. Theirs is not an attempt at reinforcement and they describe the respondent's allegation in this regard as 'misleading'.[87]

145. The respondent CJ lays no factual basis for the alleged collaboration. It is his belief. The second and third complainants were, like many other South Africans, aware of the first complaint and independently decided to lodge their own which support the first. The three complaints are dealt with together in this Decision for convenience only as they are against the same respondent and arise from his utterances in the same webinar. They therefore overlap in some respects. Each complainant stands by its own allegations and submissions, except where it specifically incorporates the allegations made by another. The respondent CJ has not established the link and collusion which he alleges or the basis of his belief.

146. The respondent CJ deprecates as irrelevant to the determination of the complaints the reference by the rd complainants to the writings and commentaries of third parties. He however on his turn also refers to the writings and commentaries of other third parties, which he prefers as 'contrary and unemotional':

- Advocate Guy Hoffman;
- Advocate Jonathan Silke;
- Advocate Mark Oppenheimer; and
- Dr Ralph Mathekga.[88]

147. The divergent views and commentaries underscore the heat of controversy in which the respondent CJ have become involved.

[84] Para 4, 5 and 11 of Response 2.

[85] Para 30 of Response 2.

[86] Para 9 of Comments / Replying Affidavit of SA BDS Coalition dared 19 October 2020.

[87] Para 4.2.2 of WCG Comments / Replying Affidavit dated 12 October 2020.

[88] Paragraph 25 of Response 2

148. In its Comments / Replying Affidavit, SA BDS Coalition, deprecates the fact that the respondent CJ has not provided a specific and separate response to their complaints and that he has accordingly compromised his own defence.[89] It also reiterates its request for a tribunal to properly investigate the complaint and determine an appropriate sanction in accordance with the Constitution.[90]

149. As I read the complaint of SA BDS Coalition, I am required in this complaint to investigate:

149.1 Contravention of any article[91] of the Code, and in particular contravention of Article 12(1)(b); and

149.2 Gross misconduct – which may arise from the conduct complained of including the alleged aggravation.

Third complaint by Women's Cultural Group (WCG)

150. The WCG is a Durban based cultural group with offices at First Floor, Mariam Bee Sultan Building, 222 Kenilworth Road, Sydenham, Durban. It lodged a complaint through an affidavit dated 27 July 2020.

151. It emerges from its latest Comments/Reply to the respondent CJ's Response 2 that the WCG has been in existence for 66 years to date.[92] It has had members of virtually every faith and bears no animosity towards the respondent CJ and his religious beliefs.[93] The WCG, it is said, 'comprises almost exclusively of mothers and grandmothers'.[94]

152. The complaint of WCG, the third complaint, supports and adds to the complaint of Africa4Palestine. The additional complaints are:

(a) Gross misconduct as contemplated in section 177(1)(a) of the Constitution;
(b) Violation of separation of state and church;[95]
(c) Violating or eroding of separation of powers of executive and parliament;[96]

[89] Para 11 of the Comments / Replying Affidavit of SA BDS Coalition dated 19 October 2020.

[90] Para 12 of the Comments / Replying Affidavit of SA BDS Coalition dated 19 October 2020.

[91] Some articles have been mentioned in the footnotes above. Breaches of other Articles of the Code are implicated by the language used.

[92] Para 15. of the Comments / Replying Affidavit of WCG12 October 2020.

[93] Para 7.1 of the Comments / Replying Affidavit of WCG dated 12 October 2020.

[94] Ibid para 15.

[95] Complaint para 4.2 of WCG Complaint Affidavit

[96] Complaint para 34 of WCG Complaint Affidavit.

(d) Improper involvement in extra-judicial activities in breach of Article 14(2)(a) of the Code;[97]
(e) Breach of several other Articles of the Code – of which the following are specifically mentioned: Articles 4(a), 7(a), 11(f) and 12(1)(d);[98] and
(f) Violation of the Bangalore Principles.[99]

153. It is not clear whether the WCG in fact intends each of the charges enumerated above to be a separate charge or only as aggravation or demonstration of the seriousness of its other complaints. I have however enumerated each separately so that this investigation can comment on each of them as raised:

153.1 Breaches of the Bangalore Principles

The Bangalore Principles are acknowledged in South Africa as part of the acceptable international ethical standards with which South African judges must strive to comply. These Principles are specifically acknowledged in the preamble to our Code and are referred to in this Decision as part of international ethical rules. They are relevant to the interpretation of our own rules but 'are not directly applicable'. However, breaches of the Bangalore Principles are not justiciable before the JCC as separate grounds or charges of judicial misconduct. This is because the JCC, as a statutory body, can only deal with complaints which are recognised under its founding statute, that is, 'based on one or more of the grounds referred to in subsection (4) of section 14 of the JSC Act. However, conduct which is in breach of the Bangalore Principles may at the same time breach one or more of the grounds under which the JCC may consider complaints. Particularly, but not limited to, the broadly formulated grounds under Article 14(2) or section 14(4)(e) of the JSC Act which refers to incompatible or unbecoming conduct.[100] That is the basis on which the relevant allegations will be considered.

153.2 Violation of separation of state and church:

Similarly, a violation of the separation between the state and the church is not a chargeable misconduct under the enabling JSC Act. The conduct has to be brought under one of the specified grounds in section 14(4). Allegations in that regard will be considered only to the extent that they are alleged to breach a

[97] Complaint para 31of WCG Complaint Affidavit.

[98] Complaint para 32.1of WCG Complaint Affidavit.

[99] Complaint para 33.1 – 33.4 and para 32.2 of WCG Complaint Affidavit

[100] Such breach might for instance also support a misconduct amounting to gross misconduct under sec 14(4)(a) of the JSC Act.

recognised ground of judicial misconduct.

153.3 Violating separation of powers with the executive and parliament

Article 14(3)(a) of the Code provides that 'A judge must not accept any appointment … that could undermine the separation of power or the status of the judiciary'. Note 14(ii) elucidates and explains: 'While judges should be available to use their judicial skill and impartiality to further the public interest, they must respect the separation of powers and the independence of the judiciary when considering a request to perform non judicial functions' for the state or when performing such function.

The rule contemplates a judge being requested by the state to perform a non-judicial function and requires that such a judge must, when considering the request or while performing the function, respect the separation of powers and the independence of the judiciary. Whilst the rule has been framed to address the situation where the state has requested the judge to perform non-judicial function, it is assumed that the duty to respect those values must apply even when the state is not the party that made such a request. It is an obligation which rests on the judge at all times.

The WCG articulates its complaint in this regard[101] by stating that 'by publicly criticising government policy and … to call upon it to disregard its international law obligations, the respondent CJ has eroded the separation of powers by intruding into the sphere of the executive and parliament'. It asserts further that '[i]t is not competent for a judge to second guess the executive' and that 'the respondent siding with a foreign power against his own government represents the most egregious violation of separation of powers that any judge has committed in our nascent democracy'. It is on this basis that the complainant asserts that 'the gravity of the conduct rises to the level of gross misconduct'.

The respondent CJ responds that because he was not exercising judicial authority, he did not impermissibly encroach on the sphere of another authority, hence there is no separation of power issue.[102] A constitutional breach of separation would normally take place where one bearer of authority encroaches on the sphere of another bearer of authority. A crude example would be where parliament seeks to circumvent the authority of the court by establishing its own special court as the apartheid parliament did in the mid 1950's; or where the executive issues its own interpretation of its rules to avoid or circumvent an interpretation of the courts; or where the High Court sets aside the election of

[101] In para 34 of Complaint Affidavit of WCG dated 27 July 2020.

[102] Paragraph 19 of Response 2.

one president or appointment of a Minister and by order of court appoints another. There could be many other examples. Those type of actions would fall into what one would call crude breaches of separation and would cause a constitutional hiatus or crisis.

However, what the Code contemplates is a judge who is approached to perform a non-judicial function. It directs that judges should not accept appointments that are inconsistent with, or likely to be seen to be inconsistent with, or have the potential to undermine the separation of power or the status of the judiciary. The Code contemplates a judge doing non-judicial work which could undermine the separation of power. The note (Note 14(ii))) is more explicit: Judges are encouraged to make their judicial skills available to further public interests. However, they are enjoined to respect the separation of power and independence of the judiciary (a) when considering whether to perform a non-judicial function or (b) when performing such function. The Code, read with the applicable note, contemplates a judge accepting an appointment to perform a non-judicial function that could potentially encroach on the separation of powers. The Code applies specifically when judges step out of the judicial arena.

It is the Code that the respondent is alleged to have contravened. He was performing a non-judicial function and is alleged to have showed a lack of respect for the executive. The writer's understanding of the complaint relative to the erosion of separation powers, is that one should consider whether, in the circumstances, it breached article 14(3)(a). There is also the broad complaint in terms of Article 14(2)(a) – incompatible with the confidence in, or the impartiality or the independence of the judge, charged specifically by Africa4Palestine in paragraph 6.1.3 and reiterated by the WCG in paragraph 31.1 of its own complaint. The other broad one that has to be considered is the alternative statutory section 14(4)(e) of the JSC Act contravention – conduct that is incompatible with or unbecoming judicial office, pleaded in paragraph 6.2 of the complaint of Africa4 Palestine.

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. If I am wrong in this conclusion, then the alternative charges of misconduct in contravention of Article 14(2)(a) or section 14(4)(e) of the JSC Act are to be considered.

154. The WCG complaint arises from the same facts as the complaint of Africa4Palestine (first complaint) and it specifically accepts the correctness of the facts stated in the specified

paragraphs of the first complaint,[103] which are incorporated in the complaint affidavit of the WCG (third complainant).[104]

166 However, altogether new allegations are statements allegedly made by the respondent CJ at a virtual Africa Prayer Meeting. Although a date was not given for the Prayer Meeting, the statements are said to have been made 'since the affidavit (Complaint Affidavit of the first complainant) was deposed to and following strong criticism and condemnation by various commentators.'[105]

167 The WCG has in addition furnished the JCC with supporting documents namely: SM2 – Open letter by Professor Z Motala;[106] SM3 – Extracts from the Holy Bible;[107] and SM4 – Article by Dr W Goldstein - the Chief Rabbi of South Africa – 'in defence of the Respondent's rights'[108]. It also attached to its complaint affidavit annexures SM5 to SM8[109] tendered 'to demonstrate the seriousness of the misconduct' and SM 9 to SM 12 [110] tendered 'in demonstration of the division and consternation created amongst the public by the conduct of the Respondent'.

Aggravation (Gross Misconduct)

168 The WCG relies on the new evidence it tenders, in particular, the statements allegedly made at the Prayer Meeting, to support the contention that the respondent CJ aggravated his wilful, alternatively grossly negligent misconduct.[111] It is alleged that the respondent CJ's conduct was 'brazenly defiant';[112] and now amounts to the more serious charge of gross misconduct[113].

169 The statements that the respondent CJ is said to have uttered at the Prayer Meeting are the following:[114]

---

[103] These are paragraphs 7 to 10, 14, 15 and 22 of the Complaint of Africa 4 Palestine

[104] See para 5 of the Complaint Affidavit of the WCG.

[105] WCG Complaint Affidavit paragraph 6.1. This investigation established that the Prayer Meeting was held on 03 July 2020, a day before the first complaint was lodged. It may therefore have been made in response to strong public criticisms, or even an intimation of the complaint. But it was certainly before the lodging or signing of the first complaint.

[106] WCG Complaint para 10.5 and para 10.6.

[107] Complaint para 26.

[108] Complaint para 30.4.

[109] Complaint para 40.

[110] Complaint para 41.

[111] WCG Complaint para6 and 7.

[112] WCG Complaint para 9.

[113] WCG Complaint para 4.2 (i).

[114] WCG Complaint para 6.1 (a) – (c).

169.2 '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

169.3 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

169.4 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".'

170 The utterance of these statements has not been placed in dispute. Nor has the JCC been advised as to what provoked their utterance. These are sharp and strong words.[115] I will not apologise; I will not retract; if I perish, I perish. What was the context, beyond the occasion having been a Prayer Meeting? It has since been established that the virtual Prayer Meeting took place on or about 03 July 2020 whereas the first complaint was lodged on 04 July 2020. The utterances at the Prayer Meeting were therefore made before the first of the three complaints were lodged with the JCC. It can only have been in response to wide ranging public utterances criticising his statement at the webinar and calling upon him to retract or apologise. 'Even if 50 million people can march every day for the next 10 years for me to retract or apologise for what I said', he said, 'I will not do it'. Fifty million people approximates the entire population of South Africa. There is no qualification or explanation as to under what circumstances, he might reconsider or accept criticism of his stand. A firm definitive and strong statement of defiance that will stand unaltered for a long time, ten years if you have energy to protest every day for that long.

171 WCG contends that these subsequent aggravating statements prove beyond doubt that the respondent CJ is 'guilty of nothing less than wilful gross misconduct'.[116] It describes the earlier statements of the respondent CJ, on which Africa4Palestine based its complaint, as 'statements of a highly sensitive nature'.[117]

172 In the view of WCG, the issue of separation of power is 'fundamental', and has 'the potential and real danger of undermining the very foundations of the independence,

[115] However, in the formal Response 2 to the JCC the sharpness has been slightly reduced as I shall demonstrate.

[116] WCG Complaint para 7.

[117] WCG Complaint para 8.

integrity, dignity, efficacy, and accessibility of the entire judicial system'.[118] Its complaint seeks to demonstrate the gravity of the misconduct. They describe the misconduct as 'the single greatest … threat to our judiciary in our democratic era'.[119] They see the misconduct as having the potential to open the floodgates where every judge outside the court room may behave in undisciplined manner which WCG stipulates in paragraphs 10.2.1(a) – (d) of its complaint. These include siding with a foreign power against the policies of our own government. WCG reminds us that of the three separate arms of state into which democratic government is divided, the judiciary alone is regarded by most as the only arm left to protect the Constitution and the rights and obligations enshrined therein.[120]

173 They accuse the respondent CJ for publicly rebuking the foreign policy of his own government and siding with a foreign power. They quote, with approval, from an open letter of Professor Motala of Howard University to the respondent CJ to the effect that the author (and therefore WCG too) 'have never seen or heard of any Chief Justice, nor any judge, that publicly rebukes their government's foreign policy and sides with a foreign power against their own government'.[121]

174 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'.[122]

175 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.[123] I am unable to find fault with the principles asserted here.

176 In paragraphs 14.1 to 14.6 of its complaint, WCG sketches a context within which it asserts that the complaint of gross misconduct on the part of the respondent should be determined. These include the lobby allegedly conducted by the Israeli government to deflect criticisms of its actions. It targets public officials and influential persons who are invited on fully paid propaganda tours of Israel. That government allegedly set aside US $72 million in 2017 to fight the boycott disinvestment and sanctions campaign mounted

[118] Complaint para 9.

[119] Complaint para 10.2.1.

[120] Complaint para 10.3 and 10.4.

[121] Complaint para 10.6.1.

[122] Complaint para 10.7.

[123] Complaint para 10.8.

internationally by the BDS movement. The impugned webinar is said to have been well timed for the benefit of Israel; the image and prestige of the office of the respondent CJ was used to promote it. Two issues come out, namely, timing and use or lending of prestige of office in the advert.

177 The question of timing is also made by the SA BDS Coalition. It is raised not so much as an accusation that the respondent CJ timed his remarks but rather to reflect on the coincidence between the position of the State of Israel and the remarks that the respondent CJ was invited to, and did make, about the policy of South Africa towards Israel.

178 It is important to bear in mind that the webinar took place on 23 June 2020. Israel is said to have announced sometime prior thereto that from 01 July 2020 it would start a process of annexing occupied territory of the West Bank settlements and the Jordan Valley.[124] The move is said to have been in defiance of the UN charter, the Geneva Convention and international law. Several UN resolutions are also said to have been breached. This was also covered in the Statement issued on 25 June 2020 by the Office of the South African Council of Churches General Secretary, Bishop Malusi Mpumlwana, titled 'Statement on Imminent Annexation of Palestinian West Bank by Israel', (annexure SM 10 to the Complaint of WCG). The statement of the South African Council of Churches, an ecumenical association of Christian Churches, incidentally the same faith as that of the respondent CJ, was issued without any reference to the webinar. It enriches the timing theory and sketches the build-up reflected in statements and developments in May 2020. It deserves a full reading and states, *inter alia*, the following:

> 'The South African Council of Churches (SACC) is appalled at the latest developments in Israel, with the coalition government set to take decisive steps to kill off any prospect for a just peace with the Palestine. While the nations of the world are self-absorbed, battling COVID19, the final chapter on the nightmare tale of Palestinian existence is being written in Israel with a new unity government with not so new but bolder policy of annexation of parts of the West Bank, already illegally occupied by Israel. This will make the already illegal Israeli settlements on West Bank, to become official Israeli state territory. Such annexation would unquestionably be in gross violation of international law.
>
> The new reality facing the people of Palestine condemns to the scrap heap any prospect of a Palestine State solution under UN Resolutions, and all humanitarian protocols and humane considerations for justice and peace. In anticipation of this act of effectively abrogating of international law, the illegal Israeli settlers on the West Bank are already expecting acts of violence against Palestinian citizens and destroying

[124] WCG Complaint para 14.3.

> their olives and livestock. This goes against the best prophetic tradition and teachings of both Judaism and Christianity.
>
> All United Nations Resolutions on Israel / Palestine referred to … from UN 181 to SC 2334 affirm the necessary commitment to the two-state solution to the conflict. The latest resolution SC2334 of 2016, condemned "all measures aimed at altering the demographic composition, character and status of Palestinian Territory occupied since 1967, including East Jerusalem, including inter alia, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions."
>
> The international community, and all reasonable people in the world recognise that the only path to justice and peace is for a Palestinian State, side by side with the State of Israel with security for all. The proposed annexation of the West Bank will render Palestinians as noncitizens in an Israeli State that govern them with apartheid principles – no civil rights, no democratic choice, and legal protection – a dispensation long declared a crime against humanity.
> … The State of Israel should not be allowed to continue as an exception in terms of international law. The international community be required to treat Israel like all other members of the international community and compel it to respect international law and the rights of all humanity.'[125]

179 In the statement, a major body of Christian Churches, is aware of and condemns the planned annexation. The statement is quoted not so much for the truth of its contents but to sketch the position which Israel faced in the international world. The position taken by the South African Council of Churches and its call for the international community and the World Council of Churches to respond is a fact. 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.

180 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

[125] The full Statement is attached to this Decision as Schedule 1.

resolutions…'.[126] 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?

181 On the question of timing, the SA BDS Coalition states that the respondent CJ 'denounced government policy on Palestine *on the eve of South Africa raising a debate in the United Nations Security Council* in support of the human rights of the Palestinian people and condemning the planned illegal Israeli annexation of Palestine territory'. As it emerged, South Africa was indeed scheduled to and did make a statement in the UN Security Council the next day that condemned the planned Israeli annexation. is it unfair to presume that the Jerusalem Post would have been aware? Whose timing was this?

182 South Africa was scheduled to, and did indeed, address the UN Security Council on 24 June 2020 (the day after the webinar). The statement on that day was made by the Deputy Minister of International Relations and Cooperation and referred to the imminent annexation of the West Bank and Jordan Valley by Israel from 01 July 2020. In that move the Palestinians, it was said, are facing another catastrophe. The annexation, it was said, was in 'stark violation of international law, disregarded international humanitarian law, UN Security Council, including Resolutions 446 (1978) and 2334 (2016)'. It referred to 'the daily suffering of Palestinians as they are being subjected to the continued construction and expansion of illegal Israeli settlements on their rightful land'. It called for 'Israel, as the occupying power (to) be held accountable for its illegal actions and consistent violations of international law and resolutions of this Council'. The statement of the Deputy Minister is attached to this Decision as (Schedule 2 to this Decision). On the same day, 24 June 2020, the Secretary General of the United Nations made a statement in a virtual briefing to the Security Council in which he called the Israeli government to abandon its 'annexation plan'. He referred to the fact that 'Israel's threat to annex parts of the occupied West Bank has alarmed Palestinians, many Israelis and the broader international community'. The Secretary General of the United Nations further stated that 'If implemented, annexation would constitute a most serious violation of international law, grievously harm the prospect of a two-State solution and undercut the possibilities of a renewal of negotiations.' The statement of the Secretary General is attached to this Decision as (Schedule 3 to this Decision). It appears that the Security Council meets monthly to reflect 'on the situation in the Middle East, including the question of Palestine'. The next similar Security Council meeting was held on 21 July 2020, on which occasion South Africa's statement

[126] Annexure SM11 to the Complaint Affidavit of WCG.

on the issue was made by Ambassador Jerry Matjila, the Permanent Representative of South Africa to the United Nations.[127]

183 It is one thing for a member of the judiciary to criticise the foreign policy of his own state and thus become involved in proscribed political controversy. But it is quite another thing, and it elevates the seriousness of the transgression, if this is done on an international platform and at a time when the executive, which has the constitutional mandate and prerogative to formulate and implement foreign policy, is raising the same issue at another international platform, the UN. In the latter event the activities of the respondent CJ not only contradicted the legitimate program of the government, but it also had the potential of undermining and embarrassing the executive in its constitutional function, whether intended or not. This is the precise reason why the judiciary should not meddle unduly into what is the constitutional preserve of others. Even if the word 'rebuke' might be too strong to describe what the respondent CJ stated at the webinar about South African foreign policy towards Israel, the fact is that while declaring himself bound by the policy, the respondent CJ suggested that he had a better alternative for South African policy towards Israel.

184 One should heed the warning aptly issued by the Constitutional Court in *Bato Star* and *Kaunda*, 'to bear in mind that foreign relations is a sphere of government reserved by our Constitution for the Executive' and to 'be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government'. Thus, even a Court is required 'to give due weight to … policy decisions made by those with special experience and expertise in the field'.[128] If that is the obligation on a court of law exercising judicial authority, the duty must apply, with even heavier force, towards individual members of the judiciary.

185 This matter also assumes international proportions with the head of the South African judiciary contradicting or being contradicted by the United Nations in an area which is not the business of judicial office.

186 One of the issues on which the respondent CJ did not respond or comment is whether or not he was aware of the critical timing when he openly criticised South African foreign policy towards Israel. If it transpires that he was, then the situation is much more serious.

187 The critical elements around timing which emerge with force are: (a) the planned Israeli annexation, (b) the imminent statement by SA government to the UN Security Council

[127] The statements of SA to the UN Security Council and that of the Secretary General were obtained in terms of section 17(3)(b) of JSC Act and furnished to the parties in terms of in terms of sec 17(3)(c) of the JSC Act for such comment as they wish to make, but no one commented thereon.

[128] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [48]; *Kaunda and Another v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at [245].

and (c) the impending statement of the UN Secretary General on the same issue - when the respondent CJ made the impugned utterances at the webinar on 23 June 2020

188 The statement of the respondent CJ at the Prayer Meeting, says WCG, 'indicates open defiance and contempt of the Code and the Bangalore Principles'.[129] It is in this context that WCG says 'the timing of the webinar is crucial' to understand the context and the gravity of the political and judicial implications arising from the misconduct of the respondent CJ.[130]

The use of or lending of the prestige of judicial office to advance private interest (the advert)

189 Both the SA BDS Coalition and the WGC complaints raise the question of the advert for the webinar. SA BDS Coalition states in the second paragraph of its complaint that: 'The advertisement of the webinar, makes it crystal clear that he [the respondent] participated in this event as the Chief Justice in spite of his attempt to distance himself from this role'.

190 Linking timing to the use of judicial office, the WGC states the following in paragraph 14.4 of its complaint: 'The Respondent was specifically chosen at a specific point in time for a specific purpose. He was widely billed to speak as the Chief Justice of South Africa'.

191 The facts about the advert or its description are the following. It states:

'The Jerusalem Post brings you Two Chiefs, One Mission.'

The last four words appear in bold capital letters between the unmistakable pictures of the respondent Chief Justice and the Chief Rabbi, with their respective names,
'Chief Justice Mogoeng Mogoeng' and 'Chief Rabbi Warren Goldstein'

'The Jerusalem Post is hosting an exclusive webinar with Chief Rabbi Warren Goldstein and Chief Justice Mogoeng Mogoeng on Tuesday, 23 June.

Join them in this open and informal conversation, moderated by The Jerusalem Post editor-in-chief Yakoov Katz, where these two iconic leaders *will be "**Confronting apartheid of the heart – Lessons from South Africa**" (*the last eight words are in bold*) and drawing on their*

[129] WCG Complaint para 3.3.

[130] WCG Complaint para 14.3.

extensive experience through their religious and constitutional leadership roles working towards a non-racial society.'

Then the date is stated again followed by the time in three different world time zones as follows*:*

'Tuesday, 23 June
20:30 IST/19:30 SAST/13:30 EST'

192 The positions of the two participants in society are emphasised. The one is the Chief Justice and the other is the Chief Rabbi, respectively of South Africa and both are billed to draw and rely on their extensive experience. At the beginning of the webinar, as the transcript shows, they were both introduced with reference to their full titles, the one as the current Chief Rabbi of South Africa and the other (the respondent CJ) as 'the Chief Justice of South Africa, of the Constitutional Court'.

193 A complaint is that the respondent CJ contravened Article 12(1)(d) of the Code which provides:

'A judge must not use or lend the prestige of the judicial office to advance the private interests of the judge or others.'

The 'use or lending' of judicial office to advance private interests is put forward both as a breach of the Code and as an aggravation.

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 watch the webinar. There is also the interest of the Israeli propaganda, which WCG alleges. That too could be private interest in the webinar because it is not the South African judicial interests, which the prestige of our judicial be lent or used to advance. The Article 12(1)(d) targets the use or lending of the prestige of judicial office to advance 'the private interest of the judge or others.' It is unnecessary to identify the private interests which were advanced. It was certainly not the interest of SA judicial office. None was put forward as having been advanced. The conclusion is ineluctable that the private interest advanced was that of the respondent CJ or others.

195 In his formal response[131] to the complaint of both SA BDS Coalition and WCG that his statement at the Prayer Meeting aggravated the earlier complaint, the respondent CJ repeats the essence of his quoted statement made at the Prayer Meeting, although for the

[131] Response 2.

first time he now appears to accept (albeit grudgingly) that he may be proved to be wrong, which, if he accepts, he might apologise for. This somewhat ambiguous stance is stated as follows:

> '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 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 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 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.'

196 SA BDS Coalition and of the WCG argue that the subsequent statement at the Prayer Meeting aggravates the earlier statement of the respondent CJ in that:

196.2 The position he took on the SA foreign policy towards Israel or on the Israeli-Palestinian relations comes down to support for the position of Israel in its

196.2.1 Violation of the UN charter;

196.2.2 Violation of several UN resolutions; and

196.2.3 Violation of the human rights of the people of Palestine.

196.3 He failed to pronounce in favour of the protection of the human rights of the people of Palestine;

196.4 He publicly rebuked and criticised the foreign policy of his own country towards Israel, which is consistent with the SA constitution, on the eve of SA introducing a discussion or rebuke of Israel at the UN Security Council. The timing issue means that his position was used or could reasonable be used to embarrass SA in the position it takes and the role it plays in calling for the protection of the human rights of others;

196.5 He allowed the prestige of his judicial office to be used to advance his private interests or those of others. Others here could be the Jerusalem Post or of the Israeli propaganda. But it is not limited to them. It would

serve the Israeli and or Jerusalem Post interest and embarrass SA to have a South African leader of the stature of the respondent counter its position on an international platform around the same time when SA articulates its official position;

196.6 Making a defiant statement against the people of SA: Even if 50 million of them marched every day for 10 years: I will not retract; I will not apologise; if I perish, I perish.

197 These new statements made in both of the complaints of the SA BDS Coalition and the WCG, other than those already made in the initial complaint by Africa4Palestine, have not been directly denied by the respondent CJ. The furthest the respondent CJ gets to a denial is a broad and bare denial made in paragraph 29 of Response 2 simply that: 'I have not violated any provisions of the Constitution or the Code including the Bangalore Principles'. There is no engagement with specific allegations and assertions by the two complainants. Nor is there an enunciation or expatiation of this curt denial. WCG points out the obvious when it states that 'it is customary for the Respondent to have answered each paragraph of the complaint in a structured manner'.[132] This is normally done by referring to each specific allegation, identifying the paragraph responded to with a sub-heading 'Ad paragraph'. The same complainant points out further that '[t]he respondent has failed to answer various specified breaches'.[133] Given his position, it has to be accepted that the respondent CJ is aware of the practice and benefit of responding point by point to the allegations in the document that one responds to in order to ensure comprehensive response to all statements in the document being responded to. It is assumed that he elected not to respond specifically to certain allegations, assertions and submissions in the complaints of both SA BDS Coalition and the Women's Cultural Group. These therefore stand unchallenged.[134] It is necessary to briefly address the requisite element of wilfulness or gross negligence. But before that it is necessary to look at the objectivity of the extract from the webinar.

Objectivity of extract from the webinar

198 The respondent CJ questions the accuracy or objectivity of the extract from the webinar on which the complaints arise maintaining that his utterances were taken out of context.

---

[132] WCG Comments / Replying Affidavit para 8.

[133] Ibid para 9.2.

[134] WCG makes the same point when it states paragraph 17.1 of the same affidavit thus:

> 'Other than Articles 12 and 13 of the Code, the Respondent has not dealt with any of the other articles and notes thereto of the Code set out in paragraph 22 of the founding affidavit.'

And concludes in paragraph 17.3 of the same document that:

> 'By ignoring and failing to deny the contention that he breached each of these values and articles, the contentions stand unchallenged'.

The writer therefore first accessed and listened to the webinar on 01 August 2020,[135] on https://youtu.be/M7grAU4tmsY as attentively as one could. The writer watched and listened more than once, from the beginning to the end, stopping and replaying where there was a need. The investigator also caused the proceedings of the webinar to be transcribed.

199 The cover page to the webinar bears the title 'Two Chiefs One Mission: Confronting Apartheid of the Heart' with the black and white pictures of both Chief Justice Mogoeng and Chief Rabbi Goldstein. It confirms that it is hosted by The Jerusalem Post. The moderator/facilitator is the editor in chief, Mr Yaakov Kats.

200 After some preliminaries that confirm that it was broadcast live, amongst others, on the website of The Jerusalem Post and on Facebook, the webinar starts with an introduction of both the Chief Justice (CJ) and the Chief Rabbi (CR). In the course of the webinar the moderator puts questions to each of the two participants who responded. Questions were put interchangeably to the one and then to the other, giving the participants an even opportunity to respond fully and make their points. The responses were lengthy, just as the questions were.

201 The theme of the webinar was 'anti-apartheid or countering apartheid of the heart'. The end point of the webinar was a commitment to launch a world movement to engage and possibly change the hearts of people to counter all forms discrimination and its subset, which is racism, using the power of the spoken word. All in all, a joint commitment by the two chiefs to work together for a positive course, promoting love of fellow human beings, and to taking concrete actions in that direction. There was also an intention to use the 18 July 2020, the Mandela Day, to start or launch the movement.

202 In the course of the webinar, the CJ did say, 'I love the Jews. I love Israel.' And followed that immediately with the expression, 'I love Palestine, I love the Palestinians'. Broadly stated, he had been asked to explain how, having grown up under apartheid as a black person, where he was oppressed by white people in the minority government, he had managed to rise to a level where he had love across the racial divides. In the course of his answer, he stated also that having grown up with a negative attitude towards the 'white compatriots' he reached a point where he loves white people. He also loves those who are critical of him and those who may be planning to take some evil action, such as killing him, at some future date. He has forgiven them in advance, just as he has forgiven those who criticised him in the past. It was a broad context, which he sketched in his response, to which even this summary may not do justice. The reason why I do not reproduce the response here is because this is not where the complaint is directed at. And that is where I turn to next, having tried above to capture the context. The reader is

[135] The webinar was still available on 14 and 15 January 2021 at www.jpost.com/israel-news/former-apartheid-state-chief-southafrica-could-bring-peace-to-mideast-632552.

welcomed and encouraged to listen to the full webinar. The reference is given in paragraph 8 of the complaint affidavit of Africa4Palestine, which the JCC secretariat has thankfully sent to me as https://youtu.be/M7grAU4tmsY . The reader may also refer to a transcript of the entire webinar, which the secretariat has subsequently also procured.

203 The question and answers quoted at the beginning of this Decision/Report,[136] and in paragraphs 9 and 10 of the first complaint came, on my count, as the 9th question of the moderator, directed specifically at the CJ and the response thereto. And before we get to that crux of the complaint, one needs to mention that in formulating the 6th question directed at the CR, the moderator stated, 'I do not want to get too much into politics,' the same self-caution that he utters later in formulating the 9th question directed to the CJ and to which he responded.

204 In prefacing the 9th question, he says '*I want to kind of walk through very delicately some of the boundaries here. You are a member of the judiciary but it's no secret …'.* He was here clearly alerting the respondent CJ that it was the area in which he needs to tread with caution or sensitivity given his office. The question related to the diplomatic relations between South Africa and Israel, which is conducted by the executive arms of governments of the two counties. On the side of South Africa, the diplomatic relations fall under the political portfolio of the Minister of International Relations and Cooperation, for which the Minister is accountable to the cabinet which is led by, and is responsible to, the President in terms of the Constitution. The question points out that the relationship between the two countries used to be 'very close' but, as reflected in press reports, that relationship is now tense. There has been 'diplomatic flare up just about a year ago'.

205 The question requires the respondent CJ to comment on matters concerning diplomatic relationship between South Africa and Israel, which is in the domain of the executive and parliament. It is clear political territory; that is why those who serve in parliament and in the executive are referred to as politicians. They formulate policies, including foreign policy. It is very different from question 4 and 5, though it links up to the CJ's declared love for Israel in response to question 5. There the question concerned his personal journey from having been the victim of oppression and now having transcended to a point where he loves his oppressors. Here, in the question to which the impugned statement is a response, the respondent CJ is being asked about international relations between South Africa and Israel which used to be 'good' but which has gone 'a bit tense' or 'up and down over the years'. He is being asked for his opinion, given his love for Israel, '*is that something that should be improved, in your opinion?'*

[136] Paragraphs 3 and 4 above.

206 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.

207 The respondent CJ's response to question 9 is on record. He starts off by acknowledging '*without any equivocation that the policy direction taken by my country, South Africa, is binding on [him] as any other law'* binds him. He acknowledges that its formulation is outside his terrain and that it is the constitutional responsibility of other arms of the state. He says however that like any other citizen he is entitled to criticise '*the policies of South Africa or even suggest that change is necessary.'*

208 Firstly, let me say that whether we like it or not, the respondent CJ is not like any other citizen of South Africa. He is the head of the judiciary and is subject to the restraints of that office, including the ethical rules which govern the conduct of each and every judge. He is the first amongst the judiciary and thus represents the entire South African judiciary in several instances, nationally and internationally. He is subject to those restraints of office in his official and private capacity. In his judicial and extra-judicial activities, in terms of the Code that he himself signed into effect. He cannot cease to be Chief Justice and be like any other citizen for as long as he is in office. That is a comfort he left behind when he accepted the office which he now holds. He may wish to criticise the policies of the executive and legislative arms of the state, but he cannot do so publicly without raising controversy, that is, involving himself and his office in political controversy.

209 The responsibility and sensitivity of the position of the Chief Justice towards the policies and politics of South Africa may be compared to the responsibility of the President of the country towards court judgments, whether they relate to him or other citizens. The deference which he owes towards binding court judgments does not afford him the liberty to criticise those judgments publicly at will and say what he believes a particular judgment should have been. As a first citizen he is expected to lead by example, as he and many of his predecessors did, by accepting the authority of judgments of the court and appealing against them where he has grounds to so. But ever deferring to their authority. However, once the final court has spoken, it behoves him to publicly accept its authority and lead the citizenry in complying for as long as the judgment stands. The President and his predecessors have previously lost in the courts and graciously accepted the outcome. In formulating and articulating policy, the relevant Minister and the rest of the cabinet have the last word, and that constitutional authority should be respected even by the judiciary.

210 I need to refer to the 10th question, which was a follow up to the 9th question, because here the respondent CJ responds differently. In that follow up to the 9th question, the respondent CJ is asked about the efficacy of boycott, divestment and sanctions against the State of Israel 'as a way to promote peace and reconciliation, and peaceful resolution of the conflict with Palestinians'. He is asked 'pointedly' about the BDS, as a movement,

whether that is a way to try and bring about a peaceful resolution. This the respondent CJ believes is 'rather too sensitive' to ask for his comment as Chief Justice. He clearly does see the line and, sensitive to his position, he declines to cross it.

Wilful or gross negligent conduct

211 For a breach of the Code of Judicial Conduct to constitute judicial misconduct, it must be wilful or grossly negligent. The complainants, particularly the first and the third complainants, allege that in relation to all the breaches the respondent CJ acted with the requisite wilfulness or gross negligence.[137] For this requirement to be satisfied the respondent CJ must have intended to commit the conduct complained of fully aware (wilful) or grossly negligent as to whether the conduct breached the Code or not.

212 The first complainant cites an incident in April 2016 during JSC interviews for judges, chaired by the respondent CJ, when a candidate for judicial appointment (Adv. Michel Donen) was asked for his views on the demand for the existence of an independent state of Palestine. It is alleged that the respondent CJ, who chaired the interviews, intervened as follows:

> 'No. That is a political question. Please let it be about law now. Independent state of Palestine? That's a highly sensitive political question.'[138]

213 The intervention tells us that the view of the respondent CJ, expressed four years before the webinar, that the demand by Palestinians for their own state independent of and separate from the State of Israel is political. Not just political, but a sensitive one as well. A 'highly sensitive political question'.

214 At the webinar, four years later, he appears to be fully aware of South Africa's official foreign policy position on that question. Being thus aware, he felt obliged and entitled to criticise that policy and 'even suggest that change is necessary'. In his words, 'we are denying ourselves a wonderful opportunity of being a game changer in the Israeli-Palestinian situation'. He recognised it as a political/policy question on which he not only held a different position from the country, but on which he wanted to place his own position publicly on an international platform. He knew the policy of South Africa and wanted to controvert it publicly, as he did.

215 In relation to the disinvestment issue the respondent CJ sates:

[137] First Complaint inter alia at para 6.1, 19, 29, 30, 35 and 36. Second Complaint states that 'he must have known that his remarks will result in political controversy'; that 'he has knowingly created a situation where he would be required to recuse himself. Third Complaint para 6.1,7,9 et seq. The third complaint states *inter alia* that he is 'wilful and brazenly defiant'.

[138] Complaint para 14.

> 'I alluded to the inadvisability of the apparent inconsistent application of the disinvestment policy and expressed a preference for a policy, …, that would enable us to facilitate a peaceful resolution of the conflict.'[139]

That policy preference, says the respondent CJ, is 'not politics.'

216 In relation to the position, he took in April 2016 in relation to the Israeli-Palestinian question, in particular the demand for an independent state of Palestine being a political issue, the respondent CJ states:

> 'I stand by what I said in the April 2016 JSC interview of Advocate Michel Donen SC'.[140]

217 When formulating the 9th question that led to the impugned statement at the webinar, the editor in chief was alive to the fact that the question could bring a member of the judiciary into an area in which he (and the judiciary) should perhaps not be involved. He introduced the topic on a cautionary note: '*I want to kind of walk through very delicately some of the boundaries here. You are a member of the judiciary …'*

218 If for one reason or another, the respondent CJ might not have been alert to the possible lines not to be crossed for the judiciary, this would put the respondent CJ on guard immediately. From his response, the respondent CJ appears to have been aware that the terrain he was entering was the exclusive constitutional terrain of the executive. There was a bright light shining on the line for separation of power and he himself pointed to it:

> *'I acknowledge without any equivocation that the policy direction taken by my country, South Africa, is binding on me, it is binding on me as any other law would bind 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.'*

219 There could have been no question of lack of awareness. That is, of lack of wilfulness, or for any accidental statement. 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.

---

[139] First Response para 34.

[140] First Response para 33.

220 Is this not an area for politicians, for political parties? In a country where judges are prohibited by express provisions of their own Code of Conduct from being involved in political controversy, in political debate or disputation, this is straddling a clear line of separation of power. On the factual matrix there is no scope to argue that the conduct of the respondent CJ was not wilful or grossly negligent.

221 In the words of the respondent CJ himself:

> 'And again, it bears emphasis that the only exception to involvement in "any political controversy or activity" is when "it is necessary for the discharge of judicial office." … "Judicial office" has to do only with the execution of the core functions of a judge.'[141]

222 I am aware that the respondent CJ wrote the words in the immediate, preceding paragraph, not in the process of confessing guilt but in the context of alleging that other colleagues have been involved in activities which will be similarly reprehensible if he were to be found to have traversed the line in the current enquiry. That is what I deal with next. The truth of his statements as quoted however stands.

223 I am satisfied that the judicial misconduct established in this case was committed with the requisite wilfulness or gross negligence.

The 'others did it too' defence

224 The respondent CJ has devoted a few paragraphs of his Response affidavit to articulating what I would call the defence of '*others did it too*.' Whether the complaint against the respondent CJ has merits or not has nothing to do with the conduct of other colleagues. The question is whether the current complaint has merit. And that inquiry depends on the facts of this complaint and its scope.

225 The writer's duty was to investigate a particular complaint based on particular conduct and the investigation was restricted to the specific complaint and conduct. The writer has not been called upon to investigate or to express a view on the conduct of other judges in other circumstances. The JCC should only express a view on what it has investigated. The guilt or innocence of others will not assist this enquiry.

226 Nothing which the respondent CJ says in paragraph 35 of the first Response is an issue in the current complaint.

[141] First Response para 26.

Overall conclusion

227 The writer has discussed at some length the proscribed involvement of judges in political controversies. For reasons that have been advanced I am satisfied that the respondent CJ contravened Article 12(2)(b) of the Code in that he became involved in the political controversy on the issue of South Africa's policy towards Israel and the conduct of its diplomatic relations.

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.

229 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). There was no duty of judicial office compelling him to do so. He elected to criticise the official position of the state and put forward his own 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.

230 The respondent CJ has not joined issue with a number of fresh allegations and assertions made in the second complaint of SA BDS Coalition.[142] Those allegations and assertions therefore simply stand unanswered. They include an assertion that by his utterance 'he has created a situation where he would be required to recuse himself should any matter related to BDS come before the Constitutional Court'. This clearly implicates Article 14(1) of the Code.[143] The allegation is in effect that the respondent CJ, when he involved himself in these extra-judicial activities and having regard to his utterances there, acted in a manner inconsistent with judicial independence, did not minimise judicial risk of conflict with judicial obligations as he has created a situation where he would be required

[142] The allegations in relation to the Second Complaint (of SA BDS Coalition) which are set out in paragraphs 133 – 135 and 137, 138 and 140 of this Decision. Some are also summarised in para 142.1 to 142.6. See also in relation to allegations of the Third Complaint (of WCG) Complaint para 4.2 et seq and further the following paragraphs of this Decision: 166, 170 et seq.

[143] Article 14 (1): 'A judge's judicial duties take precedence over all other duties and activities, statutory or otherwise.' And the Notes thereto.

to recuse himself when matters related to BDS, i.e., the calls for boycott, disinvestment and sanctions against Israel, come before his Court.

231 There could be a number of other Articles, subsections and paragraphs of Articles of the Code which one could specify as having been breached, having regard to the conclusions I reach in the discussions above. But it is unnecessary having regard to the fact that I intend to take all of them together for the purpose of remedial action in relation to what may arise from the webinar itself. The utterances made at the virtual Prayer Meeting, which was a separate event, will be treated separately. They were not part of webinar and constitute separate subsequent conduct.

Aggravation

232 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".'*

233 The writer has underlined the offending parts which are regarded as aggravation. His love for Israel and Palestine is not part of the complaint and it is acknowledged that he declared love for both Palestine and Israel and for their people. However, there is no complaint before the JCC nor any call for a retraction or apology in relation thereto. In paragraph 28 of Response 2 which he signed on 18 September 2020 the respondent CJ himself, clearly appreciating the nature of the complaint of aggravation, reiterates the message at the end of the paragraph when he says:

> "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."[144]

234 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

[144] Quoted in paragraph 195 of this Decision.

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.

235 The WCG makes it clear that it is the subsequent aggravating statements, obviously read with the statement at the webinar, that in its view, prove beyond doubt that the respondent CJ is 'guilty of nothing less than wilful gross misconduct'[145]

236 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'.[146] 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.

237 Because the utterances at the Prayer Meeting were directly linked to a belief that his earlier statements at the webinar did not fall into prohibited 'political controversy or activity', it is fair to the respondent CJ and to the entire process, to give him an opportunity to reconsider and reflect in the light of the findings in this Decision. The utterances are incompatible with this Decision and should not be allowed to stand.

238 I am satisfied that there is no reasonable likelihood that a formal hearing on this matter will contribute to determining the merits of the complaints. There is sufficient information before me to make appropriate findings.

Findings

239 In the result, I make the following finding:

[145] WGC Complaint para 7; See also para 171 of this Decision.

[146] See paragraph 168 above.

239.2 The complaint (or complaints) against the respondent Chief Justice (CJ) based on a breach of Article 13(b) of the Code – for failure to recuse himself – is dismissed.

239.3 The complaint that the respondent CJ became involved in political controversy or activity, in breach of Article 12 (1) (b) of the Code, at the online seminar (webinar) held on 23 June 2020, has been established.

239.4 In addition, the following further complaints have been established about the respondent CJ arising from his utterance at the same webinar in:

239.4.1 Contravention of Article 12(2)(b) of the Code – the use or lending of the prestige of judicial office to advance the private interest of the judge or others;

239.4.2 Contravention of Article 14 (1) - judicial duties to take precedence over other duties and activities, statutory or others - read with Note 14(i) of the Code – failure to minimise the risk of conflict with judicial obligations, and involving himself in extra-judicial activities that impinge on a judge's availability to perform judicial obligations;

239.4.3 involvement in extrajudicial activities which are incompatible with the confidence in and the impartiality of judges (in contravention of article 14 (2) (a) of the Code); and

239.4.4 Failure to respect the separation of power in contravention of Article 14 (3)(a) of the Code.

240 The contraventions in paragraphs 239.4 arise from the same utterance as and are closely related to the contravention in paragraph 239.3 and will be will be taken together for the purpose of consideration of remedial steps in terms of section 17 (8).

Remedial steps (sec 17 (8) (a) and (g)

241 In considering appropriate remedial action under section 17(8) of the JSC Act, the following are taken into consideration: the nature of the contravention, the position of the respondent in the judiciary, the circumstances in which the judicial misconduct arose and the public interest within the broad legal framework as defined by the Constitution, the law and the rules of ethics. Within that framework, the South African judiciary is and must remain one which does not unduly involve itself in political controversy. It does not use or lend the prestige of judicial office to advance any private interests, whether of its

individual members or others. It jealously guards its independence, impartiality and public confidence in the courts and respects the separation of power (where appropriate) and justly demands of the other organs of the state to fulfil their constitutional obligations in terms of section 165(4) of the Constitution. The more the members of the judiciary comply with its own constitutional, legal and ethical obligations, the greater the public confidence it attracts. The Judicial Conduct Committee contributes towards this by fearlessly investigating and pronouncing on judicial misconduct and imposing appropriate remedial steps in case of deviation.

242 As the proven judicial misconduct arise from the statements made at one occasion, namely at the webinar on 23 June 2020, they are all taken together for the purpose of remedial steps. The offending utterances made by the respondent CJ at the virtual Prayer Meeting and repeated in his Response 2 are particularly aggravating. They are brazenly defiant. It is important that that those utterances must be unreservedly retracted and withdrawn to return and maintain the public image of the judiciary to its rightful place.

243 Accordingly, in terms of section 17(8) of the Judicial Service Act 9 of 1994 the following remedial steps are imposed:

243.2 The respondent CJ shall issue an apology and retraction worded as follows:

Apology and Retraction

I, Mogoeng Mogoeng, Chief Justice of the Republic of South Africa, hereby apologise unconditionally for becoming involved in political controversy through my utterances in the online seminar (webinar) hosted by The Jerusalem Post on 23 June 2020, in which I participated.

I further hereby unreservedly retract and withdraw the following statement which I uttered subsequent thereto or other words to the same effect: "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."

I reaffirm my recognition for the statutory authority of the Judicial Conduct Committee of the Judicial Service Commission established in terms of Part 11 of the JSC Act 9 of 1994 to decide on any complaint of alleged judicial misconduct against me and all judges in the Republic of South Africa.

243.3 The respondent CJ must, within ten (10) days of this Decision read the above Apology and Retraction at a meeting of serving Justices of the Constitutional Court and release a copy thereof under his signature to the OCJ and to the media in the normal manner in which the Constitutional Court and the OCJ issue media releases.

JUDGE P M MOJAPELO

(MEMBER OF THE JUDICIAL CONDUCT COMMITTEE)

Date of issue: 04 March 2021