JUDICIAL CONDUCT COMMITTEE

Ref: JSC/819/20; JSC/825/20; and JSC/ 826/20

In the appeal between:

CHIEF JUSTICE MOGOENG **Appellant**

and

AFRICA4PALESTINE **First Respondent**

and

SA BDS COALITION **Second Respondent**

and

WOMEN'S CULTURAL GROUP **Third Respondent**

APPEAL DECISION IN TERMS OF S 17 OF THE JUDICIAL SERVICE COMMISSION ACT 9 of 1994 (the JSC Act)

Zondi JA:

Introduction

[1] This is an appeal against the decision of Mojapelo DJP, a member of the Judicial Conduct Committee (the JCC), in terms of which he found the appellant, the Chief Justice of the Republic of South Africa (the Chief Justice) to have breached certain provisions of the Code of Judicial Conduct (the Code)[1] adopted in terms of s 12 of the Judicial Service Commission Act 9 of 1994 (the JSC Act) by making certain utterances at a webinar. Mojapelo DJP directed the Chief Justice to issue an apology and retraction. The appeal must be considered against the following background.

[2] On 23 June 2020 the Chief Justice participated in a webinar with the Chief Rabbi of South Africa, Rabbi Warren Goldstein, hosted by an Israeli newspaper, The Jerusalem Post and moderated by its editor-in-chief, Mr Yaakov Katz. The webinar was titled 'Two Chiefs, One Mission: Confronting Apartheid of the Heart'. It is not clear when the Chief Justice was invited to participate in the webinar.

[3] During the webinar, the Chief Justice made certain utterances concerning diplomatic relations between South Africa and Israel in relation to Palestine. Aggrieved by the utterances, the first respondent, Africa4Palestine lodged a complaint of judicial misconduct with the JCC against the Chief Justice. The second respondent, SA BDS Coalition and the third respondent, the Women's Cultural Group joined forces with Africa4Palestine and lodged further complaints about the Chief Justice arising from the utterances he made at the same webinar.

[4] The Acting Chairperson of the JCC, Deputy Chief Justice Zondo, referred the complaints to Mojapelo DJP, a retired Deputy Judge President of the Gauteng Division of the High Court, Johannesburg, in his capacity as a member of the JCC, for consideration in terms of s 17 of the JSC Act. Mojapelo DJP held that the Chief Justice had become involved in political controversy or activity in breach of Article 12(1)*(b)* of the Code at the webinar on 23 June 2020. In addition, he found that further complaints had been established. These further complaints were based on Article 12(1)*(d)* – the

[1] 'Code of Judicial Conduct GN R865, *GG* 35802, 18 October 2012.'

use or lending of the prestige of judicial office to advance the private interest; Articles 14(1) read with Note 14(i), 14(2)*(a)* and 14(3)*(a)* of the Code. For the purpose of remedial action in terms of s 17(8) of the JSC Act, Mojapelo DJP took all of the contraventions together. He dismissed a complaint based on Article 13*(b)* of the Code (failure to recuse himself in a matter between *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku*, which was pending before the Constitutional Court). There is no cross-appeal against that dismissal. Nothing further needs be said about this complaint.

[5] Mojapelo DJP ordered the Chief Justice to issue an apology and retraction. In para 243.2 of the decision, he formulated the wording of an apology to be issued 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 complaints of alleged judicial misconduct against me and all Judges in the Republic of South Africa.'

[6] Mojapelo DJP ordered the Chief Justice to, within ten (10) days of the 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 Office of the Chief Justice (OCJ) and to the media in the normal manner in which the Constitutional Court and the OCJ issue media releases. The appeal is directed at the findings and orders made by Mojapelo DJP.

The issues

[7] Three main issues arise for determination in this appeal. The first one, which involves the interpretation of Article 12(1)*(b)* of the Code, is whether the Chief Justice became involved in political controversy or activity. The second, is whether the further complaints arising from the same utterances were established and the third one is the appropriateness of the remedial action imposed. The background against which these issues must be considered is briefly the following.

[8] As already stated, the complaints about the Chief Justice were lodged following his utterances at the webinar. His utterances were in response to the following questions posed to him by the moderator:

'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?'

[9] In response thereto the Chief Justice stated:

'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 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 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 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.'

[10] The moderator also asked the Chief Justice to express his opinion on calls by SA BDS Coalition for sanctions to be imposed against Israel as a way to promote peace and conciliation with the Palestinians. The Chief Justice declined to comment on it stating that it was rather too sensitive for him as a Chief Justice to deal with it.

[11] The first complaint against the Chief Justice was lodged by the first respondent. Its main complaint alleged that the Chief Justice had violated the provisions of Articles 12(1)*(b)* and 12(1)*(d)* as well as Articles 14(2)*(a)* and 14(3)*(a)* of the Code. In the alternative it was alleged that he had contravened s 14(4)*(e)* of the JSC Act. Article 12 deals with association and it provides the following:

'1. 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) . . .

(d) use or lend the prestige of the judicial office to advance the private interests of the Judge or others.'

[12] Article 14 deals with extra-judicial activities of Judges on active service. Articles 14(1) and (2)*(a)* read:

'(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 the independence of the Judge.'

[13] Article 14(3)*(a)* provides the following:

'A Judge must not…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 . . . .'

[14] Section 14(4)*(e)* of the JSC Act, which forms basis of the alternative complaint, sets out additional grounds upon which a complaint against a Judge may be lodged. It provides as follows:

‘Any other wilful or grossly negligent conduct, other than conduct contemplated in paragraphs *(a)* to *(d)*, that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.’

Africa4Palestine Complaint (The First Complaint)

[15] Africa4Palestine, a human rights organisation, based in Parkhurst, Johannesburg, lodged a complaint with the JCC against the Chief Justice contending, first, that the Chief Justice became involved in political controversy or activity in breach of Article 12(1)*(b)* and/or in extra-judicial activities which are incompatible with the confidence in and the impartiality of Judges in breach of Article 14(2)*(a)* of the Code. It asserted that the impugned utterances of the Chief Justice constituted comments on political controversy, which is a conduct proscribed by Article 12(1)*(b)* of the Code. It argued that the issue of whether it is right for the State of Israel to be subjected to boycott, disinvestment and sanctions, is a political controversy and is one of the greatest political controversies in South Africa and the world. It alleged that the Chief Justice expressed, or at least unambiguously implied, that the political posture adopted by the South African Government in relation to the State of Israel is not right and ‘can only attract unprecedented curses upon our nation’. It alleged further the Chief Justice also expressed that a ‘disinvestment campaign against the State of Israel is not right’.

[16] In the alternative, Africa4Palestine contended that the Chief Justice, by making the impugned comments, contravened s 14(4)*(e)* of the JCS Act – his utterances constituted wilful or grossly negligent conduct that is incompatible with or unbecoming [with] the holding of judicial office.

[17] The Chief Justice responded to the complaint of Africa4Palestine and sought its dismissal. He contended that Africa4Palestine had taken his remarks completely out of their context in order ‘to achieve its goal of making an example of [him] to any, who would ever dare to knowingly or unknowingly differ with them’. The context which the Chief Justice contended was ignored by Africa4Palestine is the following: He is a Christian, who believes in the Bible in its totality and that embracing, professing and ordering one’s affairs in line with the Holy Bible is a fundamental human right entrenched in the Constitution. And so is the free expression of one’s opinion, belief or

thought'. He referred to various Biblical texts, as providing the context in which his comments had to be understood.

[18] He denied that he involved himself in a political controversy. He rejected the contention that an opinion, a belief or thought grounded on the Holy Bible amounts to 'expression of support for and solidarity with Zionism and Zionists' and an anti-Palestine disposition. He argued that the employment of Bible-based Christianity ought not to be available subject to the approval or at the mercy of anyone, neither should other constitutional rights.

[19] The Chief Justice lamented the fact that critical parts of his statement that best contextualised his views on the webinar were tactfully or strategically left out by Africa4Palestine. The first of these was on love and advance-forgiveness, based on Matthews 5:44 that says:

'But I say unto you, love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you and persecute you.'

[20] The other remarks which the Chief Justice said were left out by Africa4Palestine, were the following:

'I love the Jews. **I love Palestine. I love the Palestinians. I love everybody.** One, because it is a commandment from the God in whom I believe, but also because when you love, **when you pursue peace with all human beings**, you allow yourself the opportunity to be [a] critical role player whenever there is a dispute.'

[21] The Chief Justice asserted that it was in this context and after referring to Psalm 122:6 and Genesis 12:1-3 in the Holy Bible that he said:

'I am 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 can only attract unprecedented curses upon our nation. So what do I think should happen?

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 SA 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.'

[22] The Chief Justice maintained that Judges as citizens with fundamental rights and freedom, are not to be needlessly censored, gagged or muzzled. He contended that they ought to be free to continue to write articles or books, deliver public lectures, or participate in radio or television programmes to share reflections on human rights, constitutionalism, policies or any other subject of public interest. They are not to be confined to judgment-writing responsibilities as some, either out of sheer ignorance, mischief-making or stone-age conservatism, have consistently advocated for.

[23] The Chief Justice argued that the reference in Article 12 to political controversy or activity must be read as limited to membership of political parties on home ground. He stated that it is the involvement on home-soil political controversy that could bring the independence or impartiality of a Judge into question. He argued that the Israel/Palestine conflict is not 'political controversy or activity' that could lend itself in South African courts for adjudication. Article 12, proceeded his argument, is about ensuring neutrality on justiciable issues – not a blind and purposeless banning order on Judges from ever reflecting on political controversies. Whether Palestine, he argued, should be free and how best to achieve peace in the Middle-East was a matter so unrelated to the operations of South African courts that commentary on it could not justly and reasonably serve as the basis for hauling a Judge before the JCC.

[24] The Chief Justice acknowledged that the South African Government, as empowered by s 85(2)*(b)* of the Constitution, has developed a policy, which governs its relations with Israel and that such policy is binding on him. He contended, however, that as a citizen and even as a Judge, he is entitled to criticise the Constitution, the laws and even policies of the country. He stated that during the webinar conversation, he lamented the country's policy stance towards Israel, which in his opinion, does not seem to be aligned to the possibility of South Africa contributing towards the attainment of peace in that region. He said, he was pleading or arguing for this country's rich history and experience-based capacity to be peace makers to be tapped into as a resource, rather than excluding 'ourselves from that possibility'.

[25] The Chief Justice expressed the view that strong positions the Judicial Officers take on any human rights, constitutional issues, or any issue, must be made known to the public as that would enable the public to assess their judgments with reference to their known views or dispositions, be it on religion, sexual orientation, gender-based issues, femicide, landlessness, homelessness, poverty, peace, forgiveness or other issues. He argued that the approach of Africa4Palestine would inadvertently, but certainly, entrench hypocrisy and enable partiality and attendant possibility to quietly push own or sectional agendas without detection.

The South African Boycott, Divestment and Sanctions Coalition (SA BDS Coalition) Complaint (The Second Complaint)

[26] On 26 July 2020, Roshan Dadoo, a member of the Interim Executive Committee of the South African Boycott, Divestment and Sanctions Coalition (SA BDS Coalition) deposed to an affidavit in support of a complaint lodged against the Chief Justice by the SA BDS Coalition on 21 July 2020. The complainant, formed in February 2020, is an umbrella body that brings together 11 Palestine solidarity organisations.

[27] The SA BDS Coalition alleged that the Chief Justice, by making utterances at the webinar, contravened Article 12(1)*(b)* of the Code, which prohibits a Judge from becoming involved in any political controversy or activity, unless it is necessary for the discharge of judicial office. It contended, firstly, that his statements were completely unrelated to discharging his judicial office nor were they related to any legal argument or the administration of justice; and secondly, 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 Palestinian territory. It argued that by expressing explicit support for Israel at this time in a manner that was contrary to a number of United Nations Resolutions, international law, South African foreign policy and the spirit of the South African Constitution his statements were highly controversial.

[28] A further point made by the SA BDS Coalition was that the fact that the Chief Justice made the statement in a webinar ‘hosted by a right-wing Israeli Zionist English Language newspaper, the Jerusalem Post, amplified the pro-Israeli bias of his

utterances'. It argued that the Chief Justice must have known that his remarks would result in 'political controversy' which was precisely why the Jerusalem Post and the pro-Israeli Chief Rabbi involved him. The SA BDS Coalition thus submitted that the Chief Justice demonstrated his inability to uphold the premise of the South African human-rights based Constitution. It expressed concern that through his impugned statements, the Chief Justice had created a situation where he would be required to recuse himself should any matter related to it come before the Constitutional Court.

[29] The SA BDS Coalition alleged further that the Chief Justice had aggravated his 'politically controversial statement' by reacting to criticism of his comments in the manner that he did by publicly stating in the Prayer Meeting that he would not retract, nor apologise '[e]ven if 50 million people can march every day for the next 10 years' for him to do so.

Women's Cultural Group Complaint (The Third complaint)

[30] The third complaint supporting that of Africa4Palestine, was lodged by the Women's Cultural Group (WCG). It is a Durban-based cultural group, comprising almost exclusively of mothers and grandmothers. The ambit of its complaint is much wider than that lodged by Africa4Palestine. In addition, it alleged that the Chief Justice's statements violated the following:

(a) Section 177(1) of the Constitution;[2]

(b) Violation of separation of State and church;

(c) Improper involvement in extra-judicial activities in violation of Article 14(2)*(a)* of the Code;

[2] 'A Judge may be removed from office only if—
(a) the Judicial Service Commission finds that the Judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
(b) the National Assembly calls for that Judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.'

(d) Breach of Articles 4*(a)*,[3] 7*(a)*,[4] 11*(f)*[5] and 12(1)*(d)*[6] of the Code; and

(e) Violation of Bangalore principles.

[31] As already stated s 14 of the JSC Act sets out the grounds upon which a complaint against a Judge may be lodged. Section 12(5) read with s 14(4)*(b)* of the JSC Act specifically declares in clear terms that the Code shall serve as the prevailing standard judicial conduct, to which Judges must adhere and any wilful or grossly negligent breach of the Code may amount to misconduct. Violating either the doctrine of separation between the State and the church or the Bangalore Principles is not one of the listed grounds on which a complaint against a Judge may be lodged. There is a reference in clause 7 of the Preamble to the Code to the Bangalore Principles of Judicial Code. But this clause only states 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 . . . .' Mojapelo DJP's treatment of SA BDS Coalition's complaint founded on the breach of the doctrine of separation between the State and the church and the Bangalore Principles, was correct. The SA BDS Coalition's submission that Mojapelo DJP did not adequately address the breach of the Bangalore Principles in his analysis, is therefore rejected.

[32] The SA BDS Coalition alleged further that the Chief Justice at the webinar, which it contended, was a propaganda exercise, sought to stifle any criticism of the illegal and discriminatory policies of Israel and denial of the breach of fundamental human rights by declaring such criticism as cursing Israel and against the Bible. It argued, that, by publicly criticising government policy and appearing to call upon it to

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[3] 'A Judge must-
(a) uphold the independence and integrity of the judiciary and the authority of the courts.'
[4] 'A Judge must at all times-
(a) personally avoid and dissociate him- or herself from comments or conduct by persons subject to his or her control that are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution.'
[5] 'A Judge must-
(f) unless it is germane to judicial proceedings before the Judge concerned, or to scholarly presentation that is made for the purpose of advancing the study of law, refrain from public criticism of another Judge or branch of the judiciary.'
[6] 'A Judge must not-
(d) use or lend the prestige of the judicial office to advance the private interests of the Judge or others.'

disregard its international law obligations, the Chief Justice eroded the separation of powers principle by intruding into the sphere of the executive and parliament; and that his comments not only dragged the judiciary into heated dispute, but had also served to fan the flames of divisiveness within South African society.

[33] The Chief Justice addressed the allegations in the second and third complaints in his second response. He asserted that his persecution was grounded firmly on his exercise or enjoyment of the constitutional right to freedom of religion, belief, opinion and thought, as well as the right to freedom of expression. He claimed that the views he expressed during the Jerusalem Post webinar, were all founded on the Holy Bible.

[34] He argued that the issue of disinvestment or related campaigns and this country's diplomatic relations with Israel, is not necessarily political and does not constitute 'politics' in the language of Article 12, which he argued, makes reference to membership of political parties and participation in political activities.

[35] The Chief Justice rejected the suggestion that the separation of powers doctrine arose in this matter. He asked rhetorically, which arm of the State had, in the execution of its constitutional authority, impermissibly exercised the power that belonged to another arm of the State and how?

[36] He was adamant that he would not apologise for:

'27.1 loving Israel and the Jews and for loving Palestine and the Palestinians;

27.2 praying for the peace of Jerusalem, which will obviously redound to the peace of the region;

27.3 not being hateful and my advance-forgiveness of all those who have, are and might in years to come decide alone or plotting with others to disgrace or even kill me;

27.4 not cursing Israel, the Jews or anybody for that matter;

27.5 the opinion I hold that South Africa has a crucial peace-making role to play in the Israeli-Palestinian situation and that our policy seems to deny us that possibility;

27.6 stating that consistency is key ─ Israel must at least be treated the same way we treat the top ten alleged human rights violating countries and those objectively responsible for the landlessness, homelessness, injustice and abject poverty of South Africans and Africans in general;

27.7 disagreeing with our policy on Israel just as I do with parts of our supreme law. But, as I said the policy, not politics, was determined in terms of the Constitution and is therefore binding on me.'

[37] In the reply, Africa4Palestine rejected the Chief Justice's suggestion that the complaint was about religion. In this regard it contended that the purpose of its complaint was to challenge two statements of the Chief Justice that did not come from anywhere in the Bible itself – that South Africa's diplomatic posture towards Israel was wrong and that divestment from Israel, was wrong. It argued that the Bible's injunction to 'pray for the peace of Jerusalem' does not prescribe that any specific strategy for bringing peace to Jerusalem is more holy or morally right than any other. To say, proceeded its argument, that it was wrong to divest from Israel or to confront Israel diplomatically, was therefore not the expression of a religious view, but a political view.

[38] As regards the merits of the complaint, Africa4Palestine rejected the contention that Article 12(1)*(b)* prohibition is confined to 'home-soil political controversy', which could come before South African courts. It argued that the Chief Justice was not commenting on 'how best to achieve peace in the Middle-East'. It asserted that he was commenting on how the South African Government should work to achieve peace in the Middle-East, which is not a "foreign" political controversy, but a 'home-soil political controversy'.

[39] In support of its contention, Africa4Palestine referred to the *Masuku* dispute,[7] which it contended, demonstrated that the question of how best South Africa should work 'to achieve peace in the Middle-East' is a home-soil political controversy, which 'could lend itself in our courts for adjudication'.

[40] Mojapelo DJP rejected the Chief Justice's contention that the provisions of Article 12(1)*(b)* should be interpreted restrictively, that is to say, they must be interpreted to prohibit no more than a Judge becoming so involved in the politics of his or her country so much so that his or her independence from political structures and players and the possibility to be impartial is reasonably questionable. He held that such

[7] *Masuku and Another v South African Human Rights Commission* [2018] ZASCA 180; 2019 (2) SA 194 (SCA).

a construction of Article 12(1) was neither textually, nor constitutionally justifiable. He opined that Article 12 has a wider meaning. It prohibits Judges from belonging to political parties or from getting involved in political controversies or political activities, whether linked to political parties or not. He also found that the political controversy in which the Chief Justice was involved was of concern to the South Africans as it related to the policy of the South African Government. He held that Judges must be seen to respect the separation of powers where it was necessary for the maintenance of the rule of law.

[41] He accordingly concluded that the Chief Justice was involved in political controversy and that his involvement was not necessary for the discharge of judicial office and thus a complaint based on Article 12(1)*(b)* of the Code, had been established.

[42] Additionally, Mojapelo DJP found the following complaints to have been established:

'239.4.1 Contravention of Article [12(1)*(d)*] 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.'

Grounds of Appeal

[43] The Chief Justice lodged an appeal against the findings made, and the remedial action, imposed by Mojapelo DJP. He advanced various grounds on which he attacked the decision.

(i) ***Whether involvement in political controversy or activity was established***

[44] It was submitted by the Chief Justice that Article 12(1) of the Code ought not to be interpreted as narrowly as Mojapelo DJP did. He argued that Mojapelo DJP adopted

a wrong approach to the interpretation of Article 12. He stated that Mojapelo DJP should have had regard, not only to individual words or expressions in the text, but also to the entire provision. He maintained that Mojapelo DJP should have interpreted Article 12 in a way that promoted the spirit, purport and objects of the right to freedom of expression and freedom of religion, belief, thought and opinion and which recognised the supremacy of the Constitution over the Code. This assertion is with reference to ss 15 and 16 of the Constitution. He contended that Mojapelo DJP should have adopted an approach which was alive to the mischief sought to be addressed by Article 12 which, he argued, was a Judge becoming so involved in the politics of his or her country so much so that his or her independence from political structures and players and the possibility to be impartial becomes questionable.

[45] The Chief Justice explained in paras 37 and 38 of his grounds of appeal what the Article is all about. He stated that:

'This Article is all about preserving judicial independence and impartiality. It is not about the mere possibility of justiciability and prohibition of anything that smacks of political controversy. After all, constitutional, legal, economic, religious and other controversies are just as justiciability and involvement in them would, on [Mojapelo DJP's] reasoning, also have been proscribed. But because they stand very little chance of compromising or undermining judicial independence or impartiality by reason of their marked distance from raw State or political power, the Code does not prohibit them. As set out in my response, talking about the politics of China, the USA or Russia cannot affect these judicial attributes, without more. This issue of involvement in political controversy is therefore not about a question of whether Judges would in any event want to be involved in the politics of other countries, as posed by Mojapelo J. And that is how to "properly contextualise" and determine a purpose-informed meaning of political controversy. That is also why even something as strong as "political activity" shares the same space with "membership" and "controversy". The involvement in any of these two, "controversy" and "activity", have to be so sufficiently close to membership as to raise a concern. For emphasis, it is necessary to repeat that this is about ensuring that a South African Judge is not entangled in the politics of his or her country.

It has always been open to South African Judges to exercise their constitutional right to freedom of expression to criticise the Constitution or the exercise of powers thereof by any constitutional office-bearer, and to criticise laws including policy. Policy is not sacred. It is therefore not taboo to comment on it or criticise it. Just as the Constitution and legislation are made by functionaries in the political Arms of the State, so is policy. Policy does not occupy

any peculiar status above legislation and the Constitution. It is not untouchable. It cannot be open to Judges to comment on, and criticise or propose a change to the Constitution or a statutory provision and the exercise thereof extra-judicially but be forbidden to comment on policy. That proposition is not only illogical but also unconstitutional.'

[46] The Chief Justice submitted that the approach adopted by Mojapelo DJP to the interpretation of the Code, was at odds with the binding principles of interpretation laid down in the Constitutional Court decisions in *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC) (Cool Ideas) and affirmed in *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20; 2020 (6) SA 14 (CC).

[47] In *Cool Ideas,* the Constitutional Court, with regard to the correct approach to statutory interpretation, stated as follows at para 28:

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in *(a)*.' (Footnotes omitted.)

This passage was quoted with approval in *Chisuse* at para 47.

[48] It is correct that Mojapelo DJP, in interpreting the provision of Article 12(1) of the Code, did not refer to s 39(2) of the Constitution. This was because in his view, the complaints were not about penalising Judges for their religious beliefs or freedom of expression. The matter, he reasoned, was about breach of Articles of the Code and whether the Chief Justice had been involved in political controversy or activity.[8] The constitutionality of the Articles of the Code, he proceeded, was not impugned.[9]

[8] Para125.
[9] Para 64.

[49] Section 39(2) provides that, when interpreting any legislation, every court, tribunal or forum must promote the spirit, purport and the objects of the Bill of Rights. This is because the Constitution is supreme and the Bill of Rights applies to all laws. The injunctions are triggered by the interpretation of the Bill of Rights and do not depend on whether the parties to a particular litigation have asked for them. This means that we may not make an order that is inconsistent with the provisions of the Bill of Rights, unless we are satisfied that the inconsistency meets the requirements of s 36(1) of the Constitution.

[50] In *Batho Star Fishing*[10] Ngcobo J reaffirmed the supremacy of the Constitution: 'The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court "must promote the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation . . ."

It is now well-established that the language of the Bill of Rights must be given a purposive and generous meaning so as to give individuals full protection of their fundamental rights and freedoms. However, it is apparent from what Ngcobo J stated in *Batho Star*, para 72 that the generous construction must not extend to a meaning beyond what the language of the provision may reasonably carry.'

[51] Mojapelo DJP rejected the construction of the Code contended for by the Chief Justice, namely, that 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)* and that the Article prohibits the Judges from getting involved in controversies or activities involving political parties but, on home ground. He stated that the Chief Justice's construction of the Article unduly limits the meaning of the concepts of 'political controversy or activity' as used in the context. He went on to say the following at para 104:

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[10] *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 72.

'The respondent CJ suggests that political controversy or activity, which article 12(1)(b) prescribes, 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.'

[52] He opined that the prohibition was necessary to secure the Judges' independence which would be jeopardised if the Judges were allowed to become involved in political controversy or activity. It is apparent from Mojapelo DJP's analysis that he considered the construction contended for by the Chief Justice and concluded that the Article was not capable of being interpreted in the manner suggested by the Chief Justice. I cannot find fault with his approach. The restriction placed by Article 12(1)*(b)* of the Code on section 15 and section 16 rights of the Constitution, is reasonable and justifiable and serves to achieve a legitimate objective. By preventing the judges from getting involved in political controversy or activity Article 12(1)*(b)* seeks to protect and preserve the integrity and independence of the Judiciary, which would otherwise be compromised if the judges were allowed to get involved in such controversies. The construction of Article 12(1)*(b)* contended for by the Chief Justice cannot be achieved without straining the text of the Article. The purposive interpretation of legislation must still remain faithful to the literal wording of the Statute. The finding that the Chief Justice contravened Article 12(1)*(b)* by getting involved in political controversy or activity, was therefore correct.

[53] In any event the constitutionality of Articles 12(1)*(b)* and 14 of the Code, on which the complaints were based, was never raised as an alternative defence. The defence advanced by the Chief Justice, was that the Code could not be interpreted to preclude anything he said provided that he could claim that it was said in the exercise of constitutional rights. He argued that the views he expressed during the webinar were

all founded on the Holy Bible. He contended further that the Israel/Palestine conflict was not a 'political controversy or activity' that could lend itself in South African courts for adjudication and that, as a citizen of this country, he was entitled to criticise the Constitution, the laws and its policies. This was a high water mark of his case.

[54] It was not his case that Articles 12 and 14 of the Code, to the extent that they purported to apply to his statements, violated his right to freedom of religion, belief, opinion and thoughts, as well as the right to freedom of expression, and were thus unconstitutional. It was for the Chief Justice to argue that the provisions of Articles 12(1)*(b)* and 14(2) are unconstitutional or accept that they are not unconstitutional and argue that they do not apply to the views he expressed during the webinar. Mojapelo DJP accepted the constitutionality of these Articles and found that the Chief Justice had violated them by making the impugned utterances. In the absence of a direct attack on the constitutionality of the relevant Articles of the Code I cannot find fault with the manner in which Mojapelo DJP interpreted them. This ground of appeal must therefore fail.

(ii) ***Whether the complaints infringed the Chief Justice's constitutional rights of religion***

[55] The second ground of appeal was that Mojapelo DJP materially misdirected himself, by finding that the complaints were not about the constitutional rights to freedom of religion, belief, thought, opinion and freedom of expression. The Chief Justice submitted that members of the Judiciary including himself, as citizens, are entitled to the full enjoyment of their rights to freedom of expression, association, religion, belief, thought and opinion. He referred to various passages in the three complaints, in which he alleged the complaints were directed at his Christian belief or reliance on the Bible.

[56] Mojapelo DJP rejected the Chief Justice's contention that prohibiting the South African Judges from being involved in political controversy or activity as the Code does, was tantamount to needlessly censoring, gagging or muzzling them. In his view some measure of restraint was necessary to secure the independence, not for the Judges, but for the litigants.

[57] He held at paras 122-123:

'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.

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".'

[58] The conclusion by Mojapelo DJP that the complaints were not about freedom of religion, belief and opinion or freedom of expression under ss 15 and 16 of the Constitution, cannot be faulted. The complaints were about the breaches of Articles of the Code, and their constitutionality was not challenged. It was not contended by the Chief Justice that the provisions of Article 12(1)*(b)* of the Code prohibiting Judges from getting involved in any political controversy or activity, violated the relevant rights, which he asserted. Rather his contention was that on a proper construction of Article 12, whose intention is to prevent Judges from getting involved in political parties, his statements at the webinar were not covered by the prohibition. He submitted that this was because when he made them, he was not involved in controversies or activities, involving political parties, which he said is what the Article prescribes. His argument was that his remarks were 'on all fours with our Constitutional values, our Bill of Rights, the Code and my Oath of Office'.[11] In other words, the dispute was about the

[11] See para 31 of the Second Response.

interpretation of Article 12(1)*(b)* and whether his impugned statements were covered by its prohibition.

[59] The second ground of appeal must fail for two reasons. First, the purpose of the complaints particularly the third one, was to challenge the two statements of the Chief Justice which did not come from the Bible, namely that South Africa's diplomatic position towards Israel and that disinvestment from Israel was wrong. The Chief Justice was not expressing a religious view when he made these two statements. Secondly, there was no challenge to the constitutionality of the Code. Had the constitutionality of Article 12 of the Code been raised, the complainants would have been afforded the opportunity to deal with it and Mojapelo DJP may well have found in favour of the Chief Justice, which would have resulted in the dismissal of the complaints grounded on Article 12.

(iii) ***Existence of South African Government policy towards Israel***

[60] The third ground of the attack on the decision, was that Mojapelo DJP misdirected himself by finding that the Chief Justice, through his criticism of the official policy of the South African Government towards Israel, became involved in political controversy. In this regard, the Chief Justice contended, that the South African Government does not have an official policy towards Israel that is at variance with any of the statements he made on the webinar.

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

[62] The Chief Justice went on to contend that after a diligent and thorough search, he vouched for the fact that there is no official policy of the South African Government

towards Israel that contradicts any part of what he actually said, as opposed to what had been and was being put in his mouth.

[63] The Chief Justice's contention that he was convicted on the basis of a non-existent policy, is surprising, as it now seeks to contradict the defence he advanced in his responses to the complaints. In his defence he acknowledged that he was aware that the government has a policy towards Israel but stated that he was entitled to criticise it or even suggest a change to it. The issue before Mojapelo DJP was not about the existence of the policy. Rather, it was whether the Chief Justice in his statement was critical of the government policy towards Israel. Mojapelo DJP, after referring to various passages in the Chief Justice's response to questions put to him by the moderator, concluded that lack of awareness was out of question. The express intention in the response, he found, was to criticise South African policy and to suggest that it should be changed and how it should be guided in contrast to how it actually is as positioned by the constitutionally mandated arm of the State. The Chief Justice's contention that he was convicted on the basis of a non-existent policy must therefore fail.

(iv) ***Did the Chief Justice criticise the government policy?***

[64] The next issue to determine is whether Mojapelo DJP's finding that the Chief Justice criticised the government policy, was correct. He reasoned that the Chief Justice as the Head of the Judiciary was subject to the restraints of his office and that he could not publicly criticise the government policy without raising controversy.

[65] A closer examination of what the Chief Justice said or did not say, is necessary to determine whether his statement violated the provisions of Articles 14(2)*(a)* and 14(3)*(a)* the Code.[12] As already stated the moderator asked him to comment on whether there was something that could be done to improve the tense diplomatic relations between Israel and South Africa. In his response, the Chief Justice started 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 acknowledged

[12] The provisions of these Articles are quoted in full in paras 11 to 13 of this judgment.

that its formulation was a matter outside his terrain and that it was the constitutional responsibility of other arms of the state.

[66] He went on to say:

'So, whatever I have to say, should not be misunderstood, as an attempt to say, the policy direction taken by country in terms of their constitutional responsibilities, is not binding on me. But, just as a citizen, any citizen is entitled to criticise . . . the laws and policies of South Africa, or even suggest that changes are necessary and that is where I come from.'

[67] He prefaced his answer by referring to Psalm 122 verse 6 and Genesis 12 verse 1 to 3, which, he stated, warned him as a Christian '[t]hat if I curse Abraham and Israel, . . . Almighty God will curse me too'. He thereafter declared:

'So, I am under an obligation as a Christian. So 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 prayer for Israel, because I know hatred for Israel by me and for my nation will ─ can only attract unprecedented curses upon our nation.'[13]

[68] The Chief Justice concluded his remarks as follows:

'Let me cite another example, for instance in regard to the Israeli/South African situation. Remember, the overall majority of South Africans, of African descent are landless. They do not have land. Why? Because the colonialist came and took away the land that belongs to them. The colonialist 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 farm are wallowing in poverty and here in South Africa and the whole of the continent of Africa is rich in fertile soil, rich with water, rich with mineral resources.

Have we cut diplomatic ties with our previous colonises? Have we embarked on a disinvestment campaign against those that are responsible for uncalled 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 have got to move from a position of principle here. We have got to have a broader perspective and say, we know what it means to suffer and to be made to suffer. But we 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 say, well we cannot forget what happened,

[13] The full text of the Chief Justice's response appears in para 9 of the judgment.

but we stuck together. Our history forces us to come together and to look for how best to coexist in a mutually beneficial way.'

[69] The moderator's question required the Chief Justice to comment on the Israeli-South African diplomatic relations which is a matter falling outside the domain of the Judiciary. In terms of the separation of powers doctrine, it is an issue that falls within the domain of the executive and parliament. Section 85(2)*(b)* locates development and implementation of the national policy in the Executive authority of the Republic. I accept that the Chief Justice was bona fide in his response and was merely expressing his Biblically-inspired view on the issue. But it was a question which he should have declined to answer in view of the fact that his personal views on how the issue should be handled differed from those of the people in charge of the diplomatic relations between South Africa and Israel. The finding by Mojapelo DJP that the Chief Justice intruded into the territory of the Executive by criticising its policy, cannot be faulted and this ground of appeal must be rejected.

(v) ***Did the Chief Justice accept an appointment as envisaged in Article 14(3)(a)?***

[70] The next ground of appeal advanced by the Chief Justice and which is related to the previous one, is that Mojapelo DJP misconstrued the meaning and application of the doctrine of separation of powers, particularly within the context of Article 14(3)*(a)* of the Code, and as a result, proceeded the argument, he misdirected himself in a material respect by finding that it was breached. Article 14 deals with extra-judicial activities of Judges on active service. Article 14(3)*(a)* provides:

'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 . . . .'

[71] Mojapelo DJP found that a breach of Article 14(3)*(a)* had been established. His reasoning was that 'if the impugned utterance by the [Chief Justice] 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'.

[72] Mojapelo DJP went on to state:[14]

'The [Chief Justice] 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.'

[73] Mojapelo DJP correctly observed that, what Article 14(3)*(a)* contemplates, is a Judge who is approached to perform a non-judicial function. But I am not satisfied that a contravention of Article 14(3)*(a)* was established. The Chief Justice was not offered appointment, nor did he accept appointment to perform an extra-judicial function. The fact that the Chief Justice was invited, and accepted an invitation to participate at the webinar, does not mean that he accepted appointment as envisaged by Article 14(3)*(a)* of the Code. A violation of Article 12(1)*(b)* does not necessarily lead to a violation of Article 14(3)*(a).* These are two different Articles dealing with totally different subject matters. Article 12(1)*(b)* prohibits Judges from becoming involved in a political controversy or activity, whereas Article 14(3)*(a)* prohibits Judges from accepting any appointment that is inconsistent with an independent judiciary or that could undermine the separation of powers or the status of the judiciary. The conviction on a charge based on Article 14(3)*(a)* must be set aside.

(vi) ***Whether violation of Article 12(1)(d) was established***

[74] The next question is whether the conclusion by Mojapelo DJP that the Chief Justice had, in breach of Article 12(1)*(d)*, lent the prestige of his Office to advance his interests and those of the Jerusalem Post, was correct. These interests, he said, were advanced 'by the projection of the judicial office in the advert'. He reasoned that the possible interest for the Jerusalem Post would have been a desire to attract as many people as possible to watch the webinar to advance the Israeli propaganda. The Chief Justice's own interest, he found, was advanced because no evidence was tendered to show that the interest of the South African judicial office was advanced. In reaching

[14] Para 206.

this conclusion, Mojapelo DJP had regard to the layout of the advert for the webinar, which in his view, demonstrated that the Chief Justice was billed to speak as the Chief Justice of South Africa, not in his personal capacity. He also found support for this finding from the timing of the webinar. He stated that it was significant to note that the webinar coincided with the planned Israeli annexation, the imminent statement by the South African Government to the UN Secretary Council and the impending statement of the UN Secretary on the same issue.

[75] In my view, the evidence proffered was not sufficient to sustain a charge of the contravention of Article 12(1)*(d)*. Other than that the Chief Justice participated at the webinar, there is no evidence that there was an association between him and the Jerusalem Post, which organised the webinar and its editor-in-chief, who moderated it. Article 12(1)*(d)*, which he was found to have contravened, is located in Article 12, which deals with 'Association' and for the Chief Justice to be found to have lent the prestige of his Office to advance his interests and those of the Jerusalem Post newspaper, evidence of association between him and the people or entities, whose interests he advanced, had to be established. In this case, such evidence was lacking.

[76] The Chief Justice was also found to have contravened Article 14(1) read with Note 14(i) and Article 14(2)*(a)* of the Code. The provisions of these Articles are set out in para 12 of the judgment. Article 14 deals with extra-judicial activities of Judges in active service. Article 14(1) declares that a Judge's judicial duties must take precedence over all other duties.

[77] Note 14(i) to Article 14 provides the following:

'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 Judges' availability to perform any judicial obligations.'

[78] In my view, the appeal against the conviction of contravening Article 14(1) of the Code, must succeed. There was no evidence that the Chief Justice's judicial duties were affected as a result of his participation and what he said at the webinar. This was a once-off event. It did not impinge on his availability to perform his judicial functions. The argument by the Women's Cultural Group that the Chief Justice's statements at

the webinar, expressing support for Israel, created a conflict of interest for him to sit on a matter, in which the South African Jewish Board of Deputies, the supporter of Israel, was a litigant, was rejected by Mojapelo DJP when he considered the complaint that the Chief Justice had failed to recuse himself in the Masuku matter in breach of Article 13*(b)*. He dismissed the complaint. There is no appeal against the dismissal of that complaint, though in para 11 of its written submissions, the Women's Cultural Group contended that its complaint based on Article 13, should not have been dismissed.

[79] A similar assertion was made by SA BDS Coalition, albeit in the context of supporting a complaint based on the provisions of Article 14. It asserted that the Chief Justice had 'created a situation where he would be required to recuse himself should any matter related to [it] come before the Constitutional Court', that is to say, matters relating to the calls for boycott, divestment and sanctions against Israel come to the Constitutional Court. This assertion seems to suggest that by reason of his comments the Chief Justice created a potential conflict of interest and for this reason he must be convicted and punished. This assertion must be rejected simply on the basis that the recusal application is fact-specific. Whether or not the Chief Justice in a given situation will be expected to recuse himself will depend on the facts of each case that will come before him.

(vii) ***Whether the contravention of Article 14(2)(a) was established***

[80] The next question is whether the conviction for the contravention of Article 14(2)*(a)* was correct. This sub-article prohibits Judges from being involved in extra-judicial activities that undermine the integrity of the judiciary. The first question is whether the Chief Justice was involved in extra-judicial activities and secondly, whether such activities are the activities that are envisaged by the sub-article. There is no doubt in my mind that the Chief Justice was involved in extra-judicial activity when he participated at the webinar. The primary function of a Judge is to decide cases that are brought in courts of law. A secondary function is to perform work that is assigned to him or her by statute or otherwise. The Chief Justice was not performing any of these

functions when he participated in the webinar. He was performing a non-judicial function.[15]

[81] The crucial question, however, is whether the activities in which the Chief Justice was involved, are proscribed by the sub-article. A reading of Article 14(2) makes it clear that a Judge is not prohibited from getting involved in extra-judicial activities. A Judge, like any other citizen, is entitled to exercise the rights conferred by the Constitution. The involvement of a Judge in extra-judicial activities is not, however, unconstrained. The Article imposes a limit. He or she may not be involved in extra-judicial activities that are (a) incompatible with the confidence in or the partiality or the independence of the Judge; or (b) affect or are perceived to affect the Judge's availability to deal attentively and within a reasonable time with his or her judicial obligations. This enquiry is, however, concerned with Article 14(2)*(a)*, not 14(2)*(b)* of the Code.

[82] The incompatible condition may arise in a number of different ways. It was held in *Grollo v Palmer*[16] that 'incompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a Judge that the further performance of substantial judicial functions by that Judge is not practicable'. The Court went on to state that:

'It might consist in the performance of non-judicial functions of such a nature that the capacity of the Judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual Judge to perform his or her judicial functions with integrity is diminished.'

[83] In short, the ultimate inquiry is whether a Judge's involvement in extra-judicial activities, is an issue falling within the limit of Article 14(2) and second, whether a particular activity undermines the integrity of the judiciary[17] or will materially breach the line that has to be kept between the judiciary and the other branches of government,

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[15] *City of Cape Town v Premier, Western Cape and Others* 2008 (6) SA 345 (C) para 191; Mr Justice C T Howie 'Judicial Independence' (2003) 118 *SALJ* 679 at 680.
[16] *Grollo v Palmer* [1995] HCA 26 para 17.
[17] *Mistretta v United States* 488 US 361 (1989).

in order for it to remain independent.[18] The provisions of Article 14(2)*(a)* seem to overlap with those of Article 14(3)*(a)* although the latter provisions prohibit acceptance of 'any appointment' by a Judge 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'.

[84] Articles 14(2)*(a)* and 14(3)*(a)* of the Code, although they address different subjects ─ the one prohibiting involvement in extra-judicial activities and the other prohibiting acceptance of any appointment ─ serve an important function. Their intention is to ensure that the line that separates the judiciary from other branches of government is maintained which in turn provides a theoretical basis for judicial independence. As the Constitutional Court stated in *South African Association of Personal Injury Lawyer*:[19]

'The separation of the Judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution and is essential to the role of the courts under the Constitution. Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. Although Parliament has a wide power to delegate legislative authority to the Executive, there are limits to that power. Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.

The separation required by the Constitution between the Legislature and Executive, on the one hand, and the courts, on the other, must be upheld, otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of State or other person may interfere with the functioning of the courts and all organs of State, through legislative and

[18] C Hoexter and M Olivier *The Judiciary in South Africa* (2014) at 297.
[19] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) paras 25 and 26.

other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.' (Footnotes omitted.)

[85] The statements made by the Chief Justice at the webinar were of such a nature that they could diminish the public confidence in the integrity of the judiciary. By publicly stating that he could not 'as a Christian do anything other than love and pray for Israel' because of the fear that to hate Israel would 'only attract unprecedented curses upon our nation' and articulating a policy position that was different from that of the government the Chief Justice missed the opportunity of invoking our human rights-inspired Constitution as an instrument that could be employed to effect changes in Israel-Palestine conflict. Instead he intruded into the executive domain which the Code seeks to avoid in order to preserve the independence of the Judiciary. The fact that the Constitution and the Code do not absolutely prohibit a Judge from performing non-judicial function does not mean that in the execution of such function, a Judge may make pronouncements, which may threaten his or her ability to perform his or her judicial function or undermine the doctrine of separation of powers. The finding that the Chief Justice was involved in extra-judicial activities which are incompatible with the confidence in and the impartiality of Judges, was correct.

[86] It is significant to note that in recent years, speeches and lectures by sitting Judges in which they have been critical of the conduct of certain public institutions, have been tolerated. In this regard, Hoexter & Olivier provides the following examples:
'[A] lecture given by Judge Deon van Zyl in 2008, in which he regretted the emphasis given to political considerations in the appointment of Judges. Another is an address given by Judge Kees van Dijkhorst the following year in which he drew attention to a number of warning signs of a failing legal system, such as the decision of the National Prosecuting Authority to drop the prosecution against 'a political figure' and the decision of the Judicial Service Commission not to pursue its investigation against a certain Judge President.
Even more noteworthy are some vigorous responses to unwarranted criticism of the courts and the Constitution. In an address at the University of Cape Town in January 2012, former Chief Justice Arthur Chaskalson decisively refuted the mischievous propositions "that the constitution is a bar to transformation, and that essential change is being hampered by an untransformed judiciary". In an opening address in March of that year, Justice Zak Yacoob responded to a sadly uninformed presidential lament about split decisions and dissenting judgments, pointing out firmly that judicial dissent is "not something to bemoan". A few months

later the current Deputy Chief Justice, Dikgang Moseneke, addressed similar themes in a lecture given at a prestigious law school in the USA. Members of the executive were reported to be infuriated by the tone of his lecture, in which Justice Moseneke criticised the government's failure to carry out court orders and described the tendency as "a constant threat to our constitutionalism".

Today it is commonplace for sitting Judges to write for newspapers and law journals on a wide range of legal topics, and "[f]ar from attracting criticism, they are generally regarded as making a welcome contribution to the law".' (Footnotes omitted.)

[87] But the fact that such speeches and lectures have been tolerated, does not mean that they should be encouraged. Where a doctrine of separation of powers has been breached, necessary corrective action should be taken against those Judges, who have acted in a manner that is inconsistent with the Code.

(viii) ***Whether the Prayer Meeting statement aggravated the misconduct***

[88] Mojapelo DJP upheld the complaint that the statement made by the Chief Justice at the Prayer Meeting in response to the public criticism of his impugned statement aggravated his misconduct. This finding formed the basis of para 2 of the remedial order imposed by Mojapelo DJP. If the finding on aggravation was incorrect it follows therefore that the remedial order relating thereto cannot be supported and must be set aside.

[89] In my view the finding that the Chief Justice's Prayer Meeting statement aggravated the impugned statement made at the webinar, is incorrect. It is correct that at the Prayer Meeting, the Chief Justice, reacting to the criticism of his webinar statements, declared that he would never apologise. Following the complaints by the Women's Cultural Group and the SA BDS Coalition, the Chief Justice filed a second response in which he qualified his Prayer Meeting statement. Para 28 of the second response reads:

'I would never refuse to apologise for or retract what I believe to be wrong, however correct I might have initially believed it to be. Even if it is a 10 years old child who would have helped me to so understand. I would apologise to him or her for the wrong I would then be convinced I have done to him or others. But, I will never apologise for or retract what I believe to be correct. It would never matter how many millions, how many. Presumably or actually, influential people say so. I would never, unless forced by the law, align myself with principles or values

repugnant to my sense of what is just, right or wrong. I would be happy to stand alone no matter the consequences. There is a tendency to follow the drowning voices that often dictate the narrative either without reflection, or for fear of massive reputational or positional or other conceivable damage. I would rather suffer the worst imaginable consequences than hypocritically apologise for what I don't believe to be wrong ─ just to please those who think they have the right to demand and secure an apology or to avoid being labelled arrogant! I stand by my refusal to retract or apologise for any part of what I said during the Webinar. Even if 50 million people were to march every day for 10 years for me to do so, I would not apologise. If I perish, I perish.'

[90] Mojapelo DJP stated that what aggravated the misconduct was that the Chief Justice repeated the words at a time when he was aware that the JCC had been investigating the three complaints of the alleged judicial misconduct for a period of three months. He stated that this was an opportunity for the Chief Justice to publicly declare his confidence in the statutory process of the JCC but his statement did the opposite. He should not have, proceeded Mojapelo DJP, shown his disregard for the process 'by flaunting the fact that he would never apologise for his conduct even if 50 million people marched for 10 years'.

[91] I agree with the Chief Justice's submission that Mojapelo DJP erred in not taking into account exonerating aspects of para 28 of his second response, in which in recognition of the authority of the JCC and the law, he qualified his pronouncements at the Prayer Meeting. In determining the intention of the Chief Justice, as expressed in para 28 of his second response, Mojapelo DJP should have considered the entire statement of para 28, not only its portions. Mojapelo DJP therefore materially misdirected himself on the facts by finding the statement made by the Chief Justice at the Prayer Meeting aggravated his webinar statement. I am therefore entitled to interfere with the remedial steps he imposed.

(ix) ***Remedial action***

[92] The next issue to consider, is the appropriateness of the remedial action imposed on the Chief Justice. The remedial steps that may be imposed on a Judge found to have violated the Code, are set out in s 17(8) of the JSC Act. These are:

(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, attendance of a specific training course, any other appropriate corrective measure.

Any one or a combination of these remedial steps may be imposed.

[93] The Chief Justice submitted that the remedial action imposed on him was inappropriate by reason of its harshness and that it was imposed in order to humiliate him. When Mojapelo DJP imposed a remedial action he was exercising a true discretion. In deciding on what would be the appropriate remedial action to impose, he had to consider a wide range of options set out in s 17(8) of the JSC Act, each of which was equally permissible. As the Constitutional Court stated in *Mwelase*[20] his 'pick can be said to be wrong only if [he] has failed to exercise that power judicially or has been influenced by wrong principles or a misdirection on the facts, or reached a decision that could not reasonably have been made by a [Judge] properly directing [himself or herself] to all the relevant facts and principles'.

[94] The first paragraph of the remedial order (para 243.2) requires the Chief Justice to issue an apology. I have no problem with the first paragraph of the apology. However, it must be amended in view of the fact that the Chief Justice is no longer in active service since his retirement on 11 October 2021 though in the judgment, for convenience, we continued to refer to him as the Chief Justice. The second paragraph of the apology directs him to retract and withdraw the comments he made at the Prayer Meeting. This paragraph should be removed in light of the conclusion I have reached on the aggravation finding made by Mojapelo DJP. Paragraph 3 of the draft apology requires the Chief Justice to reaffirm his recognition for the statutory authority of the Judicial Conduct Committee. This paragraph must also be deleted in light of my conclusion on the aggravation finding.

[20] *Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (6) SA 597 (CC) para 68.

[95] To sum up, the appeal against the decision upholding the complainants' complaints based on Articles 12(1)*(b)* and 14(2)*(a)* of the Code, is dismissed. The Chief Justice was correctly found to have breached these Articles. The appeal against the finding that the Chief Justice had breached Articles 12(1)*(d)*, 14(1) and 14(3)*(a)* of the Code is upheld. The remedial action imposed on the Chief Justice in terms of s 17(8) of the JSC Act is set aside and is substituted with the following:

1 The Chief Justice shall issue an apology worded as follows:

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

2 The former Chief Justice must, within ten (10) days of this Decision, release a copy thereof under his signature to the Office of the Chief Justice (OCJ) and to the media in the prescribed manner in which the OCJ issues media releases.

Zondi JA
Member of the Judicial Conduct Committee

Dambuza JA

[96] I agree with the conclusions reached my colleague Zondi JA and the remedy he proposes. In addition I do wish to make a few additional remarks of my own.

[97] There can be no doubt that the CJ's utterances fall within the realm of 'political controversy or activity' as envisaged in Article 12(1)*(b)* of the Code of Judicial Conduct. The comparison between the diplomatic relations which this country has with Israel on one hand and the 'previous colonisers' on the other, puts the matter beyond doubt. Our country decided that it wants judges who do not step into political disputes to advance their individual political views. Until that ordained ethical framework is duly changed our Judges are bound by it.

[98] As my colleague Zondi JA points out, there can be no dispute that under our Constitutional democracy, Judges, as citizens of this country, enjoy the rights and

freedoms available to other citizens under the Constitution. However there certainly are limitations to judges' enjoyment of those freedoms. Such limitations are necessary because of the role judges perform in our society. Judges are trustees of the rule of law. They bear the responsibility of protecting and promoting all the freedoms of the citizens of this country, equally. Where this responsibility detracts from the Judges' individual freedoms they may not place their freedoms ahead of those of the rest of the citizens whose freedoms under the Constitution they have undertaken to protect and promote.

[99] When Judges ascend to judicial office they are well aware of the intrusions that their calling entails on some of their freedoms. They accept that the judicial office comes with certain restrictions which would not be acceptable to ordinary citizens. They accede to limitations to their own freedoms in order to promote the rights of other citizens for the public good.

[100] Public confidence, which is fundamental to judicial authority and respect, would be undermined if the public believed that Judges put their own interests and/or freedoms before those of the public. Courts would have no authority and society would descend into chaos. It is for that reason, for example, that conduct which would ordinarily be unobjectionable from an ordinary person, when engaged in by a Judge, whether in public or privately, and would be perceived by informed members of the community as likely to detract from respect for the judge or the judiciary, is impermissible.[21] A Judge may not rely on his or her right to privacy where such conduct is established.

[101] Of crucial importance to the issues that arise in this appeal (and the complaint) is the distinction between the right of Judges to manifest their religious beliefs in practice, worship and observance on the one hand, and the right to engage in partisan political discussions on the other. Generally, there are no restrictions on the former[22] - it is in relation to the latter that Judges are restricted. The commonly held principle is that Judges participate in scholarly presentations and debates, with the political views

[21] See Note 5(i) to (iv) to Article 5 of the Judicial Code of Conduct.
[22] Except in relation to extreme religious practices.

expressed in such discussions undergirded by international laws and human rights principles.[23]

[102] The ethical restriction on judicial politicking is in conformity with the separate, independent powers and responsibilities of the three arms of the State.[24] The one arm of the State that carries the mandate to directly prescribe or influence State policy is the Executive. It is in this context that the limitations on Judges' freedoms and their participation in political controversies or activities under Article 12(1)*(a)* of the Code must be interpreted.

[103] The response by the Chief Justice, in highlighting his individual freedoms to justify the conduct complained of, and his criticism of the restrictions as tantamount to needless censoring, gagging or muzzling, regrettably, ignores these considerations. It also makes naught of the undertakings given by Judges to observe these constraints. The debate on whether restrictions on Judges' freedom of speech, expression and religion are beneficial to the public is not new.[25] It is not the mandate of this committee to determine the merits of that debate. Through the Code of Judicial Conduct our Judiciary has undertaken to observe the limitations to the Judges' enjoyment of their freedoms under the Constitution. In addition, the Code is not 'absolute, precise or exhaustive' in relation to unethical conduct of Judges. Even conduct that may appear to be permitted on a literal reading of the Code, may be unethical.[26]

[104] The remarks that in the past other Judges have made comments comparable to the Chief Justice's do not assist in these proceedings. It does not appear that any complaint was made against those judges so that their utterances could be tested for ethical compliance. This committee is constrained to determine this appeal (and the complaint) on its own merits. For these reasons I concur in the decision by Zondi JA.

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[23] See for example Article 11(1)(*f*) of the Judicial Code of Conduct.
[24] The Executive, the Judiciary and the Legislature.
[25] See for example, Alan Morrison: What to Do and Not to Do About some Inevitable Problems; The Justice System Journal Vol. 28 No 3 Judicial Conduct and Ethics 2007; also Jonathan R Nash, Judges must politically impartial, period; The Hill at the hill.com.
[26] Article 3(2)*(c)* of the Code of Judicial Conduct.

Dambuza JA
Member of the Judicial Conduct Committee

Victor J

Introduction

'The mention of any relationship between law and religion attracts controversy. . . How do the courts go about reconciling these rights? . . . The issues are multifaceted and complex; there are no absolute answers. However, one specific issue that has not been sufficiently debated is the relationship between a Judge's personal right to freedom of religion, freedom of speech and his/her role as a judicial officer.'[27]

[105] This relationship, in particular as it relates to former Chief Justice Mogoeng ('Mogoeng CJ' in this matter), has indeed, of recent, gripped the nation and the Judiciary. Creating a media storm in its wake, this matter has raised important questions concerning where exactly in the sand, the lines are to be drawn around a Judge, at once both an Officer of the Court and a citizen of the Republic. This matter is a stark reminder that in adjudicating the complaint that comes to us on appeal, the eye of this storm is, in fact, not the pages of the press but a calm centre in which sits an adjudicator who must remain at all times objective and who must be guided by fact, evidence and context alone.

[106] I have had the benefit of reading the judgment by former Deputy Judge President Mojapelo (Mojapelo DJP) on the complaint (complaint judgment) and the concurring judgment of my Colleagues, Zondi JA and Dambuza JA, on the appeal. Regrettably, I cannot agree with their ruling. I do not see the matter entirely as they do. I should say that it is not on all aspects that I disagree – on certain of their findings, which I come to presently, I agree wholeheartedly. However, several problems spring to mind immediately, which is why I feel compelled to put pen to paper.

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[27] M Tsele 'Rights and religion; bias and beliefs: Can a judge speak God?' (2018) 43(1) *Journal for Juridical Science* 1-25 at page 1.

[107] There is a manifest failure by both the complaint judgment and now the appeal judgment to address fully the context of the debate in the webinar. I am not of the view that Mogoeng CJ's answers have been construed against the context within which they were made, which as I see it, has led to somewhat distorted findings being made against him. In evaluating the appeal, it is necessary to address the context in which Mogoeng CJ's remarks were made and the nature of the complaints. There has also been a manifest failure to critically analyse Mogoeng CJ's constitutional rights in any depth when measuring the complaints against the Code.

[108] I am of the view that this matter must be seen, first and foremost, through the prism of the Constitution. Of course, this matter comes to us as an appeal in terms of the findings made by Mojapelo DJP that Mogoeng CJ breached various provisions of the Code. Therefore, this matter fundamentally calls for an interpretation of the Code. However, this interpretative exercise must be governed by the Constitution. After all, s 39(2) of the Constitution provides a binding injunction in the following terms:

'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[109] This judgment, therefore, differs from those that come before it, to the extent that it lauds the Constitution as the Supreme law of the Republic and interprets the relevant provisions of the Code within the constitutional context. Likewise, any interpretation of the Code, the Bangalore principles and the various International Conventions that are applicable, is exercised through the prism of the Constitution.

[110] Furthermore, context is everything. And because I am of the view that Mojapelo DJP and the majority judgment on appeal, misconstrued the evidence and facts when concluding that Mogoeng CJ breached portions of the Code, I will begin by setting out, in some detail, the comments made by Mogoeng CJ, *within their context*, before turning to interpret the specific provisions of the Code and making determinations thereto.

[111] The background and history of this matter, including details of the complaints launched against Mogoeng CJ in respect of his comments, the findings of Mojapelo DJP, and Mogoeng CJ's subsequent grounds of appeal have already been

eloquently set out in detail. Thus, save for where necessary, I do not repeat the submissions made by the parties, nor will I traverse the history of this matter.

[112] According to Mojapelo DJP, Mogoeng CJ breached the following Articles of the Code: Article 12(1)*(b)*; Article 12(1)*(d)*; Article 14(1); Article 14(2)*(a)*; and Article 14(3)*(a)*. All findings are on appeal before us. Before turning to the areas of divergence between this and the majority appeal judgment, I will first dispose of those findings made by the majority with which I agree.

Agreement with the findings of the majority in respect of:

Article 12(1)(d)

[113] Concluding that Mogoeng CJ had lent the prestige of his Office to advance his interests and those of the Jerusalem Post, Mojapelo DJP found that Mogoeng CJ had breached Article 12(1)*(d)* of the Code.[28] The majority in this appeal set aside that finding, holding that 'the evidence proffered was not sufficient to sustain a charge of the contravention of Article 12(1)(d)'. I agree. The finding that Mogoeng CJ 'used or lent the prestige of Judicial Office to advance the private interests of the Judge or others', in contravention of Article 12(1)*(d)* of the Code, is not borne out by the objective facts. The question to be asked is what is meant by the 'private interest of a Judge'?

[114] As I see it, this must involve some benefit being reaped by a Judge or others he holds in his circumference, which benefit would not accrue but for the status or office he or she holds as a Judge. Whilst it cannot be denied that the webinar in question advertised Mogoeng CJ as a participant in his capacity as 'Chief Justice', I cannot see that he, or anyone else connected to him, stood to gain from his participation in the webinar. There is no tangible association between Mogoeng CJ, in his official capacity, and the Jerusalem Post and, as the majority correctly finds, 'for the Chief Justice to be found to have lent the prestige of his Office to advance his interests and those of the Jerusalem Post newspaper, evidence of association between him and the people or entities, whose interests he advanced, had to be established. In this case, such evidence was lacking.' I agree that this portion of the appeal must therefore, succeed.

[28] See judgment of Mojapelo DJP at para 239.4.1.

Article 14(1)

[115] Mojapelo DJP found that Mogoeng CJ had breached Article 14(1), which provides that 'a Judge's judicial duties take precedence over all other duties and activities, statutory or otherwise', read with Note 14(i), as he 'failed to minimise the risk of conflict with judicial obligations, and involved himself in extra-judicial activities that impinge on a Judge's availability to perform judicial obligations'.[29] According to the majority, Mogoeng CJ's appeal against this finding succeeds. I agree. The evidence simply does not demonstrate that Mogoeng CJ's judicial duties were, or could ever be, affected as a result of his participation in the webinar. His participation does not amount to involvement in extra-judicial activity as prescribed by Article 14(1). That portion of the appeal must also be upheld.

Article 14(3)(a)

[116] I also agree with the majority that Mojapelo DJP was incorrect in finding that Mogoeng CJ had breached Article 14(3)*(a)* by accepting an 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. There is simply no logical way to conclude that agreeing to participate in a webinar constitutes 'acceptance of an appointment' as envisaged by the Code. The mischief that particular provision seeks to address is quite clearly situations where Judges accept positions in which they are required to perform extra-judicial functions. Participation in a webinar simply cannot be characterised as such mischief. As above, this finding should be set aside.

Article 13(b)

[117] On the question whether Mogoeng CJ beached Article 13*(b)* of the Code, in respect of failing to recuse himself from, in particular, the *Masuku* matter pending before the Constitutional Court, Mojapelo DJP found as follows:

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[29] Id at para 239.4.2.

'I shall 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.'[30]

[118] The majority judgment in this appeal notes that because there is no cross-appeal against that dismissal, 'nothing further needs be said about this complaint'. This is correct. This is not an issue that would be appropriate for us to determine, and in any event, this issue is not the subject of the appeal before us.

[119] Having set out where I concur with the majority, I must turn my attention to the findings with which I disagree, namely the findings in respect of Articles 12(1)*(b)* and 14(2)*(a)*. However, because the source of my divergence on these issues lies in the difference between my, and my Colleagues', interpretation of the words spoken by Mogoeng CJ *within their context*, it would be at odds with my fidelity to the importance of context if I were to measure Mogoeng CJ's comments against Articles 12(1)*(b)* and 14(2)*(a)*, without first providing the *context* in which the impugned words must be understood.

The importance of a "contextual" interpretation of Mogoeng CJ's comments

[120] Language exists in a dynamic relationship with those around us and helps us to make sense of the world. It is essential that language and words be understood within their context. What this means is that in a matter such as this, we simply cannot resort to plucking sentences out of an interview consisting of some 50 pages in length, to place a meaning to words or sentences selected to stand alone. To do so would lead one to import a meaning or intention behind words which, when read within their proper context, are understood entirely differently.

[121] Firstly, the webinar itself must be understood against the moderator's introduction in which he set out the purpose of the interview. The entire webinar was predicated upon the religious approach of the two interviewees – the Chief Rabbi of South Africa and the Chief Justice of South Africa – on the vexed problem of racism and relations between nations. The moderator introduced the programme by

[30] Id at para 46.

suggesting that there should be a re-evaluation of the relations between different races and types of people. He went on to say that the two speakers were well suited to comment on this, especially because they came from a country – South Africa – where the issues of race and relations between people of different colours and backgrounds are issues that lie at the core of identity and nationality. This context of the webinar ought to be borne in mind.

[122] It needs no repetition that the impugned comments, which have brought us to this point, are those made by Mogoeng CJ when he stated: 'I love Jews, I love Israel'. However, Mogoeng CJ submitted that the above words must be understood within the context of the entire webinar and placed within the whole phrase in which they were made. In full, he stated that:

'Some possibly then expect of me to be very hateful of Israel and the Jews, I do not. I love Jews, I love Israel. I love Palestine. I love the Palestinians. I love everybody.'

And he went on to state that this was because doing so was—

'a commandment from the God in whom I believe, but also when you love, when you pursue peace with all human beings, you allow yourself the opportunity to be a critical role player whenever there is a dispute.'

[123] Mogoeng CJ submitted that his philosophy of love, peace and mediation are principles supported by texts from the Bible, in particular, the Book of Psalms and Genesis. Mogoeng CJ explained that in expressing his love for Israel and to pray for the peace of Jerusalem, he was doing no more than following the example of former President Mandela, whose life's work was to advocate for peace. His view is that this mission of achieving peace should be used in the Israeli-Palestinian conflict, which is clear from his comments, read within their context. He gave biblical references as to why he holds the views that he does, which must be iterated in full:

'**Mogoeng CJ:** Let me give the basis. 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 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.

Moderator: So, what do you think should happen?

Mogoeng CJ: 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 an 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 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 the rest of the developing world is unimaginable. So, we've got to reflect, take a deep breath and adopt a principled stance here, that we will go somewhere.'

[124] Thereafter the moderator acknowledged that Mogoeng CJ came from humble beginnings and went on to reach the apex court and the apex of the Judiciary. He probed whether he has been able to forgive the wrongs of the apartheid era. Mogoeng CJ spoke about his path and his background, and commented on painful personal experiences of discrimination, after which he went on to state that he does not foster hatred, for 'hatred is toxic' and can damage States and empower oppression. He said that—

'people will realise sooner rather than later, that if one were to mediate, if this one were to be allowed the opportunity to continue towards binding a peaceful and lasting solution to our challenges, he is not going to take sides, he hates nobody. You can impact (indistinct) you can try and marginalise him all you want, it is a principle of integrity that he pursues. That has helped me in my nation. . . That is why I have to play my role globally, because hatred is not in my heart. I forgive in advance. That is my principle.'

He stated that it is important to be deliberate and intentional in the way one changes one's mind-set, and one must love and forgive.

[125] The moderator noted that there used to be strong diplomatic relations between South Africa and Israel, and asked whether, in the current climate, 'that is something that should be improved', to which Mogoeng CJ responded:

'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.' (Emphasis added).

[126] The moderator also asked Mogoeng CJ to express his opinion on calls by the SA BDS Coalition for sanctions to be imposed against Israel as a way to promote peace and conciliation with the Palestinians. In response, Mogoeng CJ stated that he would not, as Chief Justice, deal with that point, stating that he was more comfortable dealing with issues of principle. He stated that the broader principle is challenging all people of different religions, different nationalities, and different groups to reflect on the injustices that were perpetrated in the past and those injustices that continue to be perpetrated today, and assess how South Africans and the community of the world can address the challenges so as to ensure justice and peace everywhere.

Divergence with the findings of the majority in respect of:

Article 12(1)(b)

[127] Having endeavoured above to set out the relevant context and provide some flesh to the bones of the comments made in the webinar, I can now say that in respect of perhaps the most significant findings of Mojapelo DJP, Zondi JA and Dambuza JA, I disagree. In short, I am not satisfied that the evidence demonstrates that Mogoeng CJ embroiled himself in political controversy in breach of Article 12(1)*(b)*.

[128] I reiterate what I said above: in order to ensure justice, one cannot pluck portions of the discussion out of their context, analyse them in isolation and then purport to have arrived at a definitive interpretation of the words. Everything, and every interpretation of language, depends on the specific context in which a thing is said or done.[31] As Ngcobo J stated, as with so much in law, everything will depend on, and is sensitive to, context.[32] He referred with approval to Lord Steyn, who when dealing with a review, stated that 'the intensity of . . . review in a public law case will depend on the subject-matter in hand" and "in law, context is everything'.[33]

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[31] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) para 159.

[32] *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 12; 2007 (1) BCLR 47 (CC) para 37

[33] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) para 63, Ackermann J referred with approval to this passage for support that 'context is all-important.'

[129] In my view, context is, indeed, everything, and Mogoeng CJ's plea for peace and love among nations, in a broad and general sense, must be the context against which the impugned statements must be measured. Mogoeng CJ's words were not calculated to support an anti-BDS campaign, nor were the words consistent with a Zionist notion of unequivocal support for Israel at the expense of Palestine and the struggle of Palestinians. On the contrary, on a careful scrutiny of the entire transcript of the webinar and the specific context within which the impugned statements were made, one garners merely a lesson in peace for both Israel and Palestine as well as all nations. Not more.

[130] The views of Mogoeng CJ are acceptable coming from anyone, including a Chief Justice, who is advocating for peace. His comments are no different from saying that the internal wars in Ethiopia and Afghanistan should come to an end by mediated peace solutions. A plea for peace, which may relate to a global issue of international relations that may generally speaking form the substance of wide political controversy, is not itself political, and he who prays for such peace does not inherently involve himself in political controversy.

[131] In my view it is clear that the context is consistent with a plea for peace. There is no political interference that is intended, whether direct or indirect. Article 12(1)*(b)* of the Code proscribes a Judge from becoming *involved in any political controversy or activity* unless it is necessary for the discharge of his or her judicial office. The word *involved* connotes activity which would be akin to joining sides in an active way such as signing petitions or participating in a sit-in or protest action. A plea for peace does not translate into becoming involved in a political controversy. The profile depicted in Article 12(1)*(b)* is a far cry from pleading for peace and mediation. Mogoeng CJ contends that his mediatory approach to the Israeli-Palestinian conflict has been completely ignored. And I agree. I am of the firm view that Mogoeng CJ has not breached Article 12(1)*(b)* of the Code and that Mojapelo DJP as well as Zondi JA and Dambuza JA have not afforded sufficient weight to the context within which his statements were made. Had sufficient weight been given, it would have emerged by now that Mogoeng CJ's comments did not have the effect of dragging him into

inappropriate political dialogue but rather, constituted not more than a wish for peace, love and harmony.

[132] This is why I say that context is everything. Viewed in this light, context is everything.

[133] Furthermore, on a proper interpretation of the Code with regard to the broader 'scheme' of the Code, I do not believe the finding of my Colleagues insofar as Article 12(1)*(b)* is concerned, is sustainable.

[134] The Preamble of the Judicial Service Commission Act stated that the Act, and Code, 'seek to maintain and promote the independence of the office of Judge and Judiciary as a whole, while at the same time acknowledging that it is necessary to create an appropriate and effective balance between protecting the independence and the dignity of the Judiciary when considering complaints'.[34]

[135] Article 3 of the Code deals with the objects and interpretation of the Code. Article 3(2) provides that the Code must be applied consistently with the Constitution and the law (sub-article (a)), must not to be interpreted as impinging on the Constitutionally guaranteed independence of the Judiciary or any Judge or on the separation of powers (sub-article (b)); and must not to be interpreted as absolute, precise or exhaustive (sub-article (c)). Conduct may therefore be unethical which, on a strict reading of this Code, may be permissible.

[136] Embedded in the Preamble and Article 3 is a degree of flexibility which derives from a caution not to impinge on a Judge's guaranteed independence. The Code expressly provides that it is not to be interpreted as absolute, precise and exhaustive. This brings to the fore the proper approach to statutory interpretation. The previous primary, or golden, rule of statutory interpretation is no longer applicable, as was pointed out by Wallis JA in *Natal Joint Municipal Pension Fund*, for that rule.[35]

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[34] See paragraph 6 of the Preamble.

[35] The proper starting point is the current approach to statutory interpretation is set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA), where Wallis JA said the following at para 18:

[137] Wallis JA stated that golden rule led to a "studied literalism" as it "denied resort to matters beyond the ordinary grammatical meaning of the words used." In discussing this, Wallis JA stated:

'At one extreme, as has been the case historically, it leads to a *studied literalism* and denies resort to matters beyond the "ordinary grammatical meaning" of the words. At the other Judges use it to justify first seeking to divine the "intention" of the Legislature and then adapting the language of the provision to justify that conclusion. It has been correctly said that:

"It is all too easy for the identification of purpose to be driven by what the Judge regards as the desirable result in a specific case." When that occurs, it involves a disregard for the proper limits of the judicial role.'[36]

[138] In *Cool Ideas*, the Constitutional Court held that—

'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'[37]

Thus, it is indeed important to have regard to the scheme of the Code, holistically, before applying certain of it is provisions.

'Interpretation 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 . . . Where more than one meaning is possible each possibility must be weighed in the light of all 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.'

In *Panamo Properties (Pty) Ltd v Nel and Others N.N.O*. [2015] ZASCA 76; 2015 (5) SA 63 (SCA) at para 27, Wallis JA held that in attempting to arrive at a 'sensible' interpretation the court should aim towards giving a meaning to every word used and will not lightly construe a provision under scrutiny such that it will have no practical effect.

[36] Id at para 22.

[37] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28.

[139] Cameron JA in *Olitzki* stated that:

'Where the legal duty the plaintiff invokes derives from breach of a statutory provision, the jurisprudence of this Court has developed a *supple* test. . . The process . . . requires a consideration of the statute as a whole, its objects and provisions, the circumstances in which it was enacted, and the kind of mischief it was designed to prevent.'[38]

[140] In the present case, the Code and its Preamble clearly call for a more flexible or *supple* approach to the application of the Code. It is with this in mind then, that Article 12(1)(b) must be interpreted and applied.

[141] In applying a flexible and supple approach to Article 12(1)*(b)*, the word *involved* should be considered not in isolation but in the context of the provision. In my view the word *involved* means actively participating in the controversy. The Article also includes the word *activity* which manifestly also connotes active participation. The words 'become involved in any political controversy' mean more active than just a call for peace at a webinar. The words 'involved', and 'activity' clearly connote active engagement, association and full participation. Mogoeng CJ neither became engrossed nor immersed in the political discourse between Israel and Palestine. His comments, to the extent that they are allegedly politically controversial, were but several sentences in a once-off webinar which, when understood in their context, are the product of nothing more than a foundational thesis being advocated for peace and mediation over conflict.

[142] Note 65 to the Bangalore principles describes that by definition, partisan actions and statements involve a Judge publicly choosing one side of a debate over another. Similarly, the commentary on the Bangalore principles advises that partisan political activity or out-of-court statements concerning issues of a partisan public controversy by a Judge may undermine impartiality and lead to public confusion about the nature of the relationship between the Judiciary, on the one hand, and the Executive and

[38] *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA) para 12.

Legislative branches, on the other.[39] Mogoeng CJ did not choose sides in the Palestine-Israel debate. Instead, he expressly refused to comment on the issue. He opined that it should be approached by way of a broader principle and that the community of the world should be addressing the challenges so as to ensure justice and peace everywhere in the world.

[143] In a further interpretation of Article 12(1)*(b)* in context, Mogoeng CJ correctly submits that it is the involvement in domestic controversy that could bring the independence or impartiality of a Judge into question.

[144] In particular, the actual words used, in relevant part, are:

'**Mogoeng CJ:** 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.'

[145] The words, which encourage the building of bridges and make the comparison with how South Africans were forced to come together and forge a way forward on how best to coexist in a mutually beneficial way, cannot in my view amount to getting involved in a political controversy.

[146] Whilst a Judge must be careful to avoid, as far as possible, entanglements in controversies that may reasonably be seen as politically partisan, a careful analysis of the transcript does not reveal that Mogoeng CJ used his privileged platform of Judicial Office to enter the partisan political arena. The Commentary also emphasises that 'the Judge serves all people, regardless of politics or social viewpoints'.[40] The very purpose of Mogoeng CJ's discussion was to call for peace where there is conflict. His caution about criticising one side at the expense of the other was not, understood *objectively*, aimed at taking sides.

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[39] See Weeramantry 'Commentary on the Bangalore Principles of Judicial Conduct', available at: https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf.

[40] Id at page 48.

[147] And that is what we must be when assessing the words of Mogoeng CJ: objective. The balance between judicial impartiality on an issue must be based on fact, a critical analysis of what has been said, which also requires impartiality in the perception of the observer. This requires an objective approach by a fair minded person. Indeed, the Bangalore Draft refers to a 'reasonable, fair-minded and informed person' who 'might believe' that the Judge is impartial, or in this case, partial. The meaning of 'a reasonable observer' was agreed upon at The Hague meeting in November 2002, as one who would be both fair-minded and informed.

[148] Clearly a Judge should not involve himself or herself inappropriately in public controversies. The reason is obvious: if a Judge enters the political arena and participates in public debates – by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the Government – he or she will not be seen to be acting judicially when presiding as a Judge in court. The engagement in the webinar does not touch on a dispute that would come before a court and about which Mogoeng CJ has expressed a view. I say this with confidence because the 'raison d'être' of the webinar was a call to peace: peace is not a justiciable issue that can ever seize a court.

[149] At this juncture, I wish to address the concurrence of my Colleague Dambuza JA. Dambuza JA finds that a comparison between the diplomatic relations South Africa has with Israel and the previous colonisers puts his political involvement beyond doubt. With respect, I cannot see how this is so. When understood within the broader context, the comparison that Mogoeng CJ draws between the current Israeli-Palestinian conflict and South Africa's painful apartheid history serves to achieve no more than emphasise the need for peace and forgiveness and a possible approach to mediation of conflict. Although I would agree that of course no democratic country wants a Judiciary comprised of Judges who readily step into 'political disputes to advance their individual politics', I remain unpersuaded that this is what Mogoeng CJ did. As I have already expounded at length above, it is important to note the context and the actual words spoken.

[150] To suggest that Mogoeng CJ entered a 'political dispute' grossly mischaracterises his conduct and is an unduly harsh criticism of his actions. As I read his comments *against the context within which they were made*, I am unable to conclude that they are the stuff of an effort on his part to advance his individual political agenda. There is no individual advantage to be gained by him by stating the role that previous colonisers played in South Africa. His references constitute historical facts and not political in nature.

[151] Dambuza JA also states that: 'of crucial importance to the issues that arise in this appeal . . . is the distinction between the right of Judges to manifest their religious beliefs in practice, worship and observance, and the right to engage in partisan political discussion'. And it is alleged that Mogoeng CJ engaged himself in the latter. Firstly, I struggle to understand where in context his religious beliefs in practice, worship, and observance amount to his expressing his own political views. His is a call for reconciliation and peace and it is unclear based on the evidence how this is consistent with partisan politics? Secondly, I struggle to follow the allegation that he engaged in partisan political discussions because the evidence does not support it and this argument has not been substantiated with persuasive evidence. To allege that a Judge is guilty of 'judicial politicking' is not an allegation that can be taken lightly. Instead, unambiguous evidence would surely be required to prove such an allegation.

[152] Furthermore, these words not only denigrate Mogoeng CJ's purpose of reconciliation but mischaracterises the context of Mogoeng CJ's presentation. It also trivialises his deeply held belief which formed the foundational premise of peace and reconciliation in the entire webinar. Mogoeng CJ is – unapologetically – a man guided by a religious worldview, and to suggest that his comments constituted 'judicial politicking' is not only unsustainable on the evidence but constitutes an unduly harsh characterisation of his behaviour. It is, indeed, tremendously unfortunate that my Colleague Dambuza JA is willing to find that a Judge calling for peace among nations, and in particular between Israel and Palestine, has entered the realm of 'judicial politicking'. It leaves one wondering whether Judges can comment at all or ever on peaceful solutions to global conflict where they do so being openly guided from a

foundational premise emanating from their civic and religious belief. And if they cannot, the ancillary question arises: what sort of oath of office must a Judge be made to hold?

[153] Judges in South Africa have over time expressed extra-judicial thoughts and input and these leave behind a legacy of rich thought and wisdom. It has illustrated the precious contribution and valuable role Judges can play in appropriate circumstances and our democracy should encourage this, not merely *tolerate* it, particularly from some Judges whilst not from others.

[154] The question whether Mogoeng CJ breached Article 12(1)*(b)* must also be approached bearing in mind the legal framework, which takes into account the proper interpretation of the Code, and with a thorough and objective understanding of the transcript, the impugned words and their context. This results in the appeal in terms of Article 12(1)(b), being upheld.

Article 14(2)(a)

[155] According to the majority on appeal, 'there is no doubt . . . that the Chief Justice was involved in extra-judicial activity when he participated at the webinar.' With respect, I disagree with the finding of the complaint judgment and the majority in the appeal judgment that Mogoeng CJ's conduct was incompatible with Article 14(2)*(a)*. Article 14(2)*(a)* provides that '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'.

[156] The appeal judgment referred to the moderator's question which 'required the Chief Justice to comment on the Israeli-South African diplomatic relations which is a matter falling outside the domain of the Judiciary. In terms of the separation of powers doctrine, it is an issue that falls within the domain of the executive and parliament.'

[157] Of importance is the fact that both the complaint judgment and the appeal judgment overlook the answer and the context of Mogoeng CJ's response. He immediately stated that his answer is one of broad principle. His response is one of

peace in the Middle East. As Mogoeng CJ points out, a call for a peaceful settlement is not a pro-Israel or anti-Palestine stance. Both the complaint judgment and the appeal judgment accept the facts asserted by the complainants that Mogoeng CJ holds a policy stance different from those in charge of the policy. The finding was that Mogoeng CJ expressly intended to criticise South African policy and to suggest how it should be changed. He pointed out that there is no conflict between what he said and what the UN secretary General and Deputy Minister Botes said. This does not bear out the finding that Mogoeng CJ's stance is contrary to South African policy.

[158] Justice Weeramantry, in his Commentary of the Bangalore principles, discusses that a Judge 'may engage in appropriate extra-judicial activities so as not to become isolated from the community'.[41] He goes on to conclude that a Judge may write, lecture, teach and speak on non-legal subjects and engage in the arts, sports and other social and recreational activities if such activities do not detract from the dignity of the Judge's office or interfere with the performance of the Judge's judicial duties. He also adds that working in a 'different field offers a Judge the opportunity to broaden his or her horizons and gives the Judge an awareness of problems in society which supplements the knowledge acquired from the exercise of duties in the legal profession'.[42] However, 'a reasonable balance needs to be struck between the degree to which Judges may be involved in society and the need for them to be, and to be seen to be, independent and impartial in the discharge of their duties. In the final analysis, the question must always be asked whether, in the particular social context and in the *eyes of a reasonable observer*, the Judge has engaged in an activity that could objectively compromise his or her independence or impartiality or that might appear to do so.'[43]

[159] The first note (Note 14(i)) to Article 14 explains that a Judge must conduct extra-judicial activities in a manner which minimises the risk of conflict with judicial obligations. The note also provides that they must respect the separation of powers,

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[41] Weeramantry 'Commentary on the Bangalore Principles of Judicial Conduct', available at: https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf, at page 90.
[42] Id.
[43] Id.

meaning different spheres of government must respect each other's independent functions, and this too ensures an independent Judiciary when considering a request to perform judicial functions.

[160] There was a time in our jurisprudence when Judges had to remain silent and were not permitted to participate in any extra-judicial activity. The principle of preserving judicial independence through silence was the order of the day. With the arrival of the constitutional era, this changed. Even prior to the dawn of the Constitutional era, Judges have spoken out against immoral laws such as apartheid. Chief Justice Corbett and others did so.

[161] In 1993, Justice Edwin Cameron said that if Judicial Officers do not speak out in the face of gross inequities such as took place under apartheid, 'the dignity and prestige of the judicial office [is] ill-served. . . [Judicial officers] enjoy considerable status in the community at large. Their pronouncements . . . off the bench, carry weight. Silence in the face of injustice is, it is suggested, incompatible with the judicial office.'[44]

[162] The principle that emerges from these writers is that Judicial Officers, as guardians of civil liberties and freedom, are not barred from engaging in extra-judicial activities in which they speak out. Indeed, they have a duty to speak out when these rights are violated because, in doing so, they preserve the integrity of the bench.[45]

[163] Judges frequently speak out on topics such as gender based violence, sexual orientation, poverty and homelessness and other socio-economic issues. The latter within the domain of the Executive and the Legislature. They do so through their judgments and often in public addresses. If this is to be construed as political interference, political controversy or a transgression of the separation of powers, then the limitations placed on a Judge would be extreme and draconian indeed.

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[44] Edwin Cameron 'Judges' Extra-Judicial Pronouncements' (1993) *Annual Survey of SA Law* 794 at 795.
[45] Id.

[164] Mogoeng CJ has always dealt with highly controversial issues extra-judicially on broad principle, as he did when he was interviewed by the JSC years ago for the Chief Justice position. He did the same when questioned about BDS. He dealt with the matter on broad principle. His extra-judicial participation in the webinar is in no way 'incompatible with the confidence in, or the impartiality or the independence of the Judge' such that one can conclude that he breached Article 14(2)*(a)*. Not only do I fail to follow the reasoning of my Colleagues on this score, but I fear the effects that such conclusion might have on the ability of Judges to lead full and enriched lives, which experiences unequivocally enable them to develop into the sorts of Judicial Officers that our ever-developing constitutional jurisprudence requires.

Important considerations: a Judge's right to freedom of expression and to freedom of religion and belief

[165] As stated above, once a proper interpretation is given to Article 12(1)*(b)* and it is applied to the facts of this particular matter with specific regard to the context in which Mogoeng CJ made the impugned comments, one reaches the conclusion that he did not involve himself in political controversy such that he breached Article 12(1)*(b)*. However, this is not, as I see it, the end of the matter. That is because there is something else that lends credence to this conclusion: the Constitution and the constitutional rights of Mogoeng CJ. It is imperative that I address the question of what weight should be placed on constitutional rights in this matter for two reasons.

[166] First, the essence of Mogoeng CJ's appeal is his assertion – and firmly held conviction – that Judges, like all citizens, are entitled to freedom of expression and belief. He asserts that Judges are citizens with fundamental rights and freedoms, and they should not be "needlessly censored, gagged or muzzled". And he has submitted with force that the judgment of Mojapelo DJP was flawed to the extent that it found that his rights to freedom of religion, belief or opinion as well as to freedom of expression, were not implicated, and therefore, Mojapelo DJP failed to interpret his conduct in light of his constitutional rights. On this basis, he submits that the way in which the complaint judgment approached the interpretation of the Code, is at odds with the founding principles of interpretation laid down in the Constitutional Court in multiple cases. This, he avers, is because the Code was not interpreted in a way which

promotes the spirit, purport and objects of the Bill of Rights, as required by s 39(2) of the Constitution. Ultimately, so the argument goes, that interpretation essentially failed to recognise the supremacy of the Constitution over the Code.

[167] Second, and despite that Mogoeng CJ had made the above assertions known in his initial responses to the complaints before Mojapelo DJP, Mojapelo DJP saw fit to ignore the relevance of his constitutional rights to this matter altogether. I must add that having read the appeal judgments of Zondi JA and Dambuza JA, I find it hard to ignore that they, too, have failed to properly engage with this question.

[168] So it is that I find myself compelled to address this issue of constitutional rights and the positionality of those rights in this matter, in some detail. This is because Article 3(2)*(a)* of the Code expressly states that: 'this Code must be applied consistently with the Constitution', and I do not believe that it has been so applied.

[169] Section 15(1) of our Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. In *Prince,* Ngcobo J reminded us of the importance of the right to freedom of religion, explaining that:

'[t]he right to freedom of religion is probably one of the most important of all human rights. Religious issues are matters of the heart and faith.'[46]

[170] For many, including Judges, 'religion is not something that can be separated from their beings'[47] and it is not always possible for a person to disassociate themselves from religious doctrines. As stated by Sachs J in *Minister of Home Affairs v Fourie*:

'For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity that form the cornerstone of human rights. Such belief affects the believer's view of society and founds

[46] *Prince v President of the Law Society of the Cape of Good Hope* [2002] ZACC 1; 2002 (2) 794 (CC); 2002 (3) BCLR 231 (CC) para 48.
[47] See Tsele above n 1 at page 14.

a distinction between right and wrong. . . For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.'[48]

[171] Section 16 of the Constitution provides that everyone has the right to freedom of expression. As was stated in *Democratic Alliance v African National Congress*:
'For freedom of expression is the cornerstone of democracy. . . Being able to speak freely recognises and protects "the moral agency of individuals in our society". We are entitled to speak out not just to be good citizens, but to fulfil our capacity to be individually human.'[49]

[172] It bears emphasis that the Constitution does not explicitly set a different standard for Judges.

[173] These rights are of course, not immune from limitation. As with most rights in our Bill of Rights, sections 15 and 16 guarantee rights that can be limited where such limitations are reasonable and justifiable in terms of section 36 of the Constitution.[50] In this particular context of rights as they relate to Judicial Officers, as we well know, additional limitations are placed on these rights by the Code of Judicial Conduct and the Bangalore principles. I do not wish to be misunderstood: de facto, and by virtue of the nature of their office, Judges and Judicial Officers are subject to a particular degree of restraint on their liberty to express themselves or make manifest their religious views. However, importantly, that does not mean that these rights do not apply to them.

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[48] *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) para 89.
[49] *Democratic Alliance v African National Congress* [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) paras 122-3.
[50] Section 36 of the Constitution provides that:
'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[174] The ICJ has stated that global experience with States and judiciaries from around the world over some six decades, has enabled it to conclude unequivocally that 'Judges and prosecutors are like other citizens entitled to freedom of expression, belief, association and assembly'.[51] Judges are also entitled to hold religious views and beliefs, and nothing in section 15 of the Bill of Rights suggests the Judges are not permitted to enjoy that right and speak openly about what their religion or belief means to them or how their religious beliefs influence their worldview – as all religious beliefs invariably do.[52]

[175] In some countries, Judges can even stand as a candidate for a political party. For example, in Germany, codes of conduct have been adopted which state that Judges as well as civil servants enjoy the same freedom of expression as all other citizens. In some countries this includes the right to be a member of a political party. In Sweden, there is a constitutional guarantee to ensure the effective protection of freedom of expression and this includes a consideration whether to set aside constitutional guarantees of freedom of expression if there is a connection between the expressed views and tasks of the Judge in the administration of his office. Whilst there are some limitations, it is clear that in some jurisdictions, the freedom of expression of Judges is given prominence. And of course, all of this can take place within the context of the Judicial oath of office.

[176] The ICJ report, which explored the Bangalore principles and the right of Judges to freedom of expression, recognises that Judges enjoy rights as citizens and may have a moral duty to express their views in certain circumstances:

'Occasions may arise when a Judge - as a human being with a conscience, morals, feelings and values - considers it a moral duty to speak out. For example, in the exercise of the freedom of expression, a Judge might join a vigil, hold a sign or sign a petition to express opposition to

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[51] International Commission of Jurists 'Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly' (2019) available at: https://www.icj.org/wp-content/uploads/2019/02/Global-JudgesExpression-Advocacy-SRIJL-2019-Eng.pdf, (ICJ report) at page 18.

[52] For an in depth exposition of the relationship and apparent tension between a Judge's duty to apply the law in a fair and impartial manner and his or her own personal right to freedom of religion, and the extent to which those religious views might influence a Judge in the adjudication of disputes, see Tsele above n 1.

war, support for energy conservation or independence, or funding for an anti-poverty agency. These are expressions of concern for the local and global community.'[53]

[177] The basic UN principles on the Independence of the Judiciary also acknowledges that Judges are entitled to enjoy **freedom of expression and association:**

'In accordance with the Universal Declaration of Human Rights, members of the Judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

Judges shall be free to form and join associations of Judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.'[54]

[178] In its Opinion Number 3, the Consultative Council of European Judges (CCJE), comments on 'the principles and rules governing Judges' professional conduct, in particular ethics, incompatible behaviour and impartiality'. In this Opinion, the CCJE echoed many elements of the Bangalore Principles and stated, inter alia, that:

'…as citizens, Judges enjoy the fundamental rights and freedoms protected, in particular, by the European Convention on Human Rights (freedom of opinion, religious freedom, etc). They should therefore remain generally free to engage in the extra-professional activities of their choice. . . However, such activities may jeopardise their impartiality or sometimes even their independence. A reasonable balance therefore needs to be struck between the degree to which Judges may be involved in society and the need for them to be and to be seen as independent and impartial in the discharge of their duties. In the last analysis, the question must always be asked whether, in the particular social context and in the eyes of a reasonable, informed observer, the Judge has engaged in an activity which could objectively compromise his or her independence or impartiality.'[55]

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[53] ICJ report at page 6.

[54] Articles 8 and 9 of the UN Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 and 40/146 (1985). The Universal Declaration of Human Rights (UDHR) recognises, on the one hand, the freedoms of expression, association and peaceful assembly (Articles 19 and 20), and on the other the need for courts and other tribunals to be independent and impartial (Article 10). Similarly, the International Covenant on Civil and Political Rights (ICCPR) provides for the right to fair trial in Article 14, as well as the right to freedom of expression (Article 19), peaceful assembly (Article 21) and freedom of association (Article 22).

[55] ICJ report at page 11.

[179] Of course, unlike ordinary citizens, they are subject to the particular emphasis on the need to preserve the dignity of their office and the impartiality and independence of the judiciary. A court must be free of bias and that must be so to a reasonable observer.[56] After all, section 34 of the Constitution entitles everyone to the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before an independent and impartial court or tribunal or forum. This certainly 'implies potential for certain special restrictions on Judges' exercise of expression, association or assembly for the purpose and to the extent necessary to guarantee these qualities'.[57] However, any such restrictions would need to be consistent with the particular limitations clauses and any disciplinary consequences, including potential removal from office, would need to satisfy the requirements of necessity and proportionality.[58] And, ultimately, 'any interference with the freedom of expression of a Judge calls for close scrutiny.'[59]

[180] The ICJ report, which emanated from research compiled over a number of years, concluded that although involvement in or comment on matters of party politics carry particularly high risks of giving rise to perceptions of lack of independence or absence of impartiality, and whilst Judges ought to exercise caution and restraint in making public comments, this—

'do[es] not mean that a Judge or prosecutor can never engage in expression, association or assemblies that touch on issues or parties that could speculatively come before the courts at some future point. Total isolation from the community and society is neither realistic nor required of Judges and prosecutors, nor would it be desirable in any event since the administration of justice, while based on the law and the evidence before a judicial decision-maker, should nevertheless be informed by awareness and engagement with the community and society.'[60]

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[56] Id at page 2.
[57] Id.
[58] Id. The question whether a Judge's comments contribute to a debate of public interest is also an important factor when assessing the proportionality of the interference with a Judges right to freedom of expression.
[59] *Baka v Hungary* Application no. 20261/12 (23 June 2016). Globally, a number of jurisdictions have commented on the interference with a Judges right to free expression. In a paper dated 23 June 2015 on the freedom of expression of Judges adopted by the Vienna Commission at its 103rd Plenary Session Venice 19-20 June 2015, the essential point was made that if there is to be interference with the freedom of expression of a Judge it calls for close scrutiny.
[60] ICJ report at page 19.

[181] Ultimately, as stated in *National Director of Public Prosecutions v Zuma*:

'[J]udges as members of civil society are entitled to hold views about issues of the day and may express their views provided they do not compromise their judicial office. But they are not entitled to inject their personal views into judgments or express their political preferences.'[61]

[182] According to Tsele, 'this dictum illustrates that the limitation to Judges expressing their social views is narrowly interpreted and will, in most instances, be limited to situations that involve the adjudication of cases'.[62] Indeed, what should be clear on a conspectus of all of the above is that a Judge is a citizen, entitled to hold religious views and entitled to freely express him or herself so long as it does not compromise the discharge of his or her judicial duties. Accordingly, where a Judge holds views, religious or otherwise, this does not, without more, constitute partiality, inherently compromising their ability to adjudicate disputes or their ability to discharge their judicial functions. As I read the comments made by Mogoeng CJ, *in the context in which they must be read*, I cannot see that the plea for peace and love for Jews and Israel and the love for Palestinians and Palestine, and any other utterances made in that context, can be construed in such a way as to undermine the dignity of his judicial office. Clearly Mogoeng CJ was expressing concerns for love and peace globally, locally and in relation to the Israeli-Palestinian conflict. And that, he was entitled to do. It is plain to all and sundry that for former Chief Justice Mogoeng, the concept of humanity has biblical roots and his outlook on life is imbued with religious resonance.

[183] In *Baka v Hungary*, the Grand Chamber of the European Court of Human Rights found that Hungarian Supreme Court President András Baka's premature termination as President of the Supreme Court (though remaining a Judge), following his public criticism of Hungarian legal reforms that he believed undermined judicial independence, violated the European Convention on Human Rights (ECHR), namely the right to freedom of expression as enshrined in Article 10. The Court found that in evaluating whether a Judge's freedom of expression has been violated, it is important to look beyond the formal grounds presented for any disciplinary sanctions or other

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[61] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 16.
[62] Tsele above n 1 at page 9.

measures adopted, to examine the actual motivation behind the Judge's comments. It held that:

'In the context of Article 10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made . . . It must look at the impugned interference in the light of the case as a whole . . ., attaching particular importance to the office held by the applicant, his statements and the context in which they were made.'[63]

Conclusion

[184] South Africa is a vibrant democracy and is still growing. Mogoeng CJ asserts that Judges, as citizens with fundamental rights and freedoms, should not be 'censored, gagged or muzzled'. In my view, this is correct, for if we muzzle and gag a Judge, Justice or Chief Justice, in this instance, one who has lived through the most bitter and painful apartheid era, from speaking out about world peace and stating on a public platform that nations should not hate each other, then we are dispiriting democracy instead of deepening it.

[185] There must be careful scrutiny when a Judge's constitutional rights are called into question, and any alleged misconduct must be interpreted and analysed, first and foremost, in a constitutional manner. A Judge's constitutional right to speak must only be limited in the clearest of cases where for example, the impugned unequivocally drags the Judicial Officer into inappropriate terrain at odds with their Judicial duties and office. Viewed objectively and without emotion the facts in this case do not amount to misconduct. Judges may take a moral stance on issues such as world peace. Caution must be exercised when muzzling Judges, as this goes to the heart of his or her constitutional rights.

[186] The second opinion of the appeal panel, penned by Dambuza JA, finds that Judges must, when accepting Judicial Office, accept restrictions on their constitutional right to freedom of expression. In doing so, they accede to limitations in order to promote the rights of other citizens for the public good. The second opinion also finds that public confidence will be undermined if Judges put their own interests above those

[63] See *Baka v Hungary* Application no. 20261/12 (23 June 2016).

of the public. Firstly, a proper analysis of the actual words spoken by Mogoeng CJ cannot, on a fair reading, amount to him promoting his own political interests to the detriment of the South African public. Furthermore, I cannot see that public confidence in our Judiciary will go unscathed if Judges are silenced and censored and made to abandon the rights that our Constitution endows upon them as citizens of this Republic. After all, muzzling Judges is a slippery path that leads away from, not towards, democracy, and it leads in a direction from which there may be no road back.

[187] South African democracy has been hard-won, and Mogoeng CJ's emulation of the model adopted by President Nelson Mandela to be a mediator and game-changer is no random choice when Mogoeng CJ made suggestions based on broad principle in discussing the Israeli-Palestinian conflict. The lifeblood of his comments was the successful Mandelian model of peace-making coupled with his deeply held convictions based on his Christian faith. This combination is not sufficient to demonstrate that Mogoeng CJ became involved in a political controversy.

[188] Democracy is a fragile thing which does not happen by accident. It must be renewed and given meaning and substance at every turn. Underpinning every lively democracy are rights and freedoms that extend to all, and Judiciaries that are able to operate according to the social and moral universe in which they exist. Ultimately, ours is a nation that believes in the public exchange of ideas and open debate. Ours is also a society which protects and provides for religious belief to be held without fear of persecution. Ours is a diverse, multiracial, multicultural and pluralist society. And, as a product of our society, our Judiciary is likewise multiracial, multicultural and pluralist. Whilst I agree that Judges and Officers of the Judiciary, by virtue of the sacrosanct positions that they occupy, are called upon to exercise caution and restraint in expressing their constitutional rights, these are still rights that are extended to them. I fear that the potential consequence of the reasoning and findings of Mojapelo DJP, and Zondi JA and Dambuza JA, is that religious Judges may be forced to refrain or shy away from openly declaring their religious beliefs, in fear of being criticised or having their competency as Judicial Officers raked over the coals.

[189] Had I commanded the majority, I would have upheld the appeal in its entirety, setting aside the findings of Mojapelo DJP and, importantly, setting aside the remedial action that flowed therefrom. The remedy imposed by Mojapelo DJP was calculated to humiliate and crush Mogoeng CJ. It was inappropriate and I am pleased that, though my Colleagues and I differ in our approach to this matter on appeal, we are in agreement that the remedial action as set out by Mojapelo DJP is warranting of interference and censure.

Judge M. Victor
Member of the Judicial Conduct Committee