

Complaint to the Judicial Service Commission against the Chief Justice Mogoeng

Mogoeng by Paul Hoffman SC (complainant)

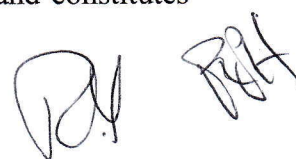
Common cause or undisputed facts

1. On 6 July 2013, in Cape Town, Chief Justice Mogoeng delivered a speech to an open meeting of Advocates for Transformation on the topic "The Duty to Transform". It is annexed marked "A". The speech was disseminated by the Office of the Chief Justice and was widely reported in the media. It is available on the *Politicsweb* website.
2. On 8 July 2013, in The Hague, the Chief Justice told the complainant that: "you can continue to challenge me, but you will continue to be frustrated."
3. On 18 July 2013, the complainant wrote a letter to the Chief Justice to which he attached a draft media article written by him entitled "The Chief Justice descends into the arena". A copy of the letter is annexed marked "B" and the draft article is annexed marked "C".
4. On 25 July 2013 the Office of the Chief Justice replied to the letter annexed marked "B". A copy of the letter in which the Chief Justice, via an official, invites the complainant to "forge ahead" is annexed marked "D".
5. On 27 July 2013 the complainant caused a revised version of the draft article to be published in the Sunday Times newspaper. A copy of the revised article is attached marked "E".

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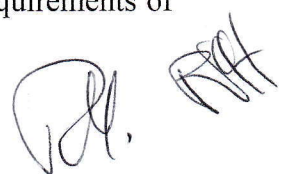
The complaints

1. Prior to the delivery of the address of the Chief Justice recorded in the speech annexed marked "A", and in June 2013, the Helen Suzman Foundation ("HSF") launched an application in the High Court challenging the approach of the Judicial Service Commission defended by the Chief Justice in his speech.
2. By publicly making and disseminating the speech annexed marked "A", the Chief Justice brought the judiciary of South Africa and the high office which he holds into disrepute in that he descended into the arena of contestation and controversy in respect of issues which are pending in the High Court and which, in the light of their constitutional nature, are likely to require final determination in the Constitutional Court. Such conduct is in conflict with the provisions of clause 10(1) of the Code of Judicial Conduct for Judges.
3. In the speech the Chief Justice involved himself in the politics and policy aspects of affirmative action measures in a manner unbecoming of a sitting judge in that he adopted a position on various political questions and matters of policy in a manner which undermined the proper function, the standing and the integrity of the judiciary. Such conduct is in conflict with the provisions of clause 10(7) of the Code of Judicial Conduct for Judges. Having regard to the obligation of the state to respect, protect, promote and fulfil human rights guaranteed in the Bill of Rights, in particular the rights to dignity, equality, psychological integrity and the freedom to choose a profession, the stance adopted by the Chief Justice in the speech is a legally untenable interpretation of the provisions of section 174(2) of the Constitution and constitutes

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proscribed unfair discrimination against “white” male lawyers including, but not limited to, those who are or may become candidates for the judiciary. Non-racialism and non-sexism are foundational to the constitutional order as appears from section 1 of the Constitution.

4. Section 165(2) of the Constitution provides that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Section 165(3) of the Constitution provides that no person or organ of state may interfere with the functioning of the courts. The speech of the Chief Justice is in conflict with these provisions of the Constitution, and strikes at the heart of the independence and impartiality of the courts. It also impacts negatively on their dignity and effectiveness in breach of the requirements of section 165(4) of the Constitution.
5. The content of the speech is a clear breach of the constitutional duty of the Chief Justice to act without fear, favour or prejudice in that it favours the current practices of the JSC, over which the Chief Justice is meant to preside in even handed fashion as chairman. The speech is prejudiced against the stance of the HSF and its arguments against the *modus operandi* of the JSC and is fearful of the “key operators” (whoever they may be) to whom reference is made in the speech.
6. The content of the speech is evidence of a contemptuous and carefully orchestrated attempt to defeat the ends of justice by placing untoward and improper pressure on the judges and courts that will hear the pending case brought by the HSF regarding the functioning and role of the JSC. The speech is in clear breach of the requirements of



section 165(3) of the Constitution in that it constitutes interference with the functioning of the courts in the HSF matter in which the Chief Justice cannot sit as he is chairman of the JSC and accordingly has a conflict of interest.

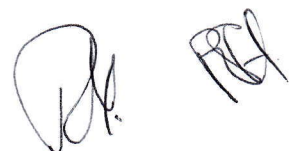
7. The content of the speech, coming as it does from the Chief Justice, amounts to contempt of the said courts in that it seeks to dictate the outcome of the HSF matter or at least to influence the nature of the outcome by adopting a position that is controversial, contains a particular interpretation of the Constitution that is unfavourable to the applicant in the said matter, and which puts pressure on the courts to interpret the Constitution in such a manner.
8. It is in conflict with the role and function of the Chief Justice (or any other sitting judge) to descend into the political arena in the way in which the Chief Justice has done in the speech. By doing so he has breached the Code of Judicial Conduct for Judges and has brought the judiciary into disrepute.
9. The remark made by the Chief Justice to the complainant in The Hague evidences bias and malice toward the complainant and is prejudicial to his professional career insofar as he specialises in constitutional work and frequently appears in or instructs in matters which are heard in the Constitutional Court over which the Chief Justice presides. The remark raises a reasonable apprehension of bias against the complainant on the part of the Chief Justice, an apprehension that is fortified by the nature and content of the discourteous response of the Chief Justice, via a functionary in his office, to the personal letter written to him by the complainant and annexed marked "B". In these circumstances there are *prima facie* grounds to apply for the

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recusal of the Chief Justice in all matters in which the complainant is involved, whether as counsel, *amicus*, applicant or respondent or as a representative of the Institute for Accountability in Southern Africa, of which the complainant is a director. This deleteriously affects the right of access to courts which is guaranteed to all in terms of section 34 of the Bill of Rights as regards the complainant's clients, the Institute for Accountability and the complainant himself.

10. The remark further evidences a failure to respect, protect, promote and fulfil the rights of the complainant that are guaranteed to him in terms of sections 9, 10, 12 (2), 15(1), 16, 22 and 23 of the Bill of Rights. The Chief Justice is bound by his oath of office to uphold these rights of the complainant as a part of his duty to uphold the Constitution itself. The dignity, the right not to be unfairly discriminated against, the rights to psychological integrity, freedom of opinion, freedom of speech, freedom to choose a profession and the right to fair labour practices of the complainant are all infringed by the remark made.

11. The Chief Justice's curt and dismissive relayed response to the olive branch proffered by the complainant in the letter annexed marked "B" exacerbates and compounds the infringement of the said rights and confirms the malice harboured by the Chief Justice toward the complainant, malice which has been festering since the complainant was critical of the readiness of the Chief Justice for the high office he holds and corresponded with him in regard to points of clarification of his values, position on important constitutional issues, and track record, all of which were not fully dealt with during the interview process in respect of the Chief Justice. This correspondence is on the website page titled "Chief Justice" at www.ifaisa.org – the Chief Justice declined



to answer pertinent questions raised by the complainant in the said correspondence and did not respond positively to entreaties to reconsider his position.

12. The response by the Chief Justice of 25 July 2013, taken together with the speech, portrays elements of wilfulness and misconduct on the part of the Chief Justice that do not behove him and his high office. It is improper conduct in any judge, let alone a Chief Justice. It negates *ubuntu*, unity in diversity and the non-racial and non-sexist ethos of the Constitution. The line of argument pursued in the speech is inconsistent and indeed in conflict with the values and obligations of the Constitution. The speech and the remark taken together require the impeachment of the Chief Justice or alternative corrective disciplinary action against him.

13. In summary, the Chief Justice has, by his conduct, made himself guilty of:

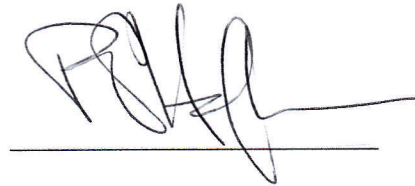
- 13.1 Contempt of court;
- 13.2 Attempting to defeat the ends of justice;
- 13.3 Bringing the judiciary into disrepute;
- 13.4 Breaches of the Code of Judicial Conduct for Judges;
- 13.5 Infringing the constitutional rights of the complainant.

14. The criminal aspects concerning contempt of court and attempting to defeat the ends of justice and the breaches of the Constitution set out above, whether taken separately or cumulatively, constitute gross misconduct as contemplated in section 177(1)(a) of the Constitution, and justify the impeachment of the Chief Justice. In the event, however, that the JSC forms the view that the Chief Justice had no understanding of the nature, gravity and consequences of his action in making the speech, it is submitted in the alternative that his conduct displayed gross incompetence as

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contemplated in section 177(1)(a) of the Constitution. Such a finding too would justify his removal from office.

15. Given the high rank of the Chief Justice and the serious nature of his wilful gross misconduct or gross incompetence, the JSC is respectfully requested to entertain this complaint as a matter of urgency [as contemplated in section 14(4) (a) or (e) read with 27 of the Judicial Service Commission Act No 9 of 1994].

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PAUL HOFFMAN SC

Complainant

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