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Chief Justice Mogoeng v Africa4Palestine and Others
[2021] JSC/819/20; JSC/825/20; and JSC/ 826/20

*Dunia P. Zongwe*¹

This is a judgment against the first judge among his peers: the Chief Justice. Handed down by the Judicial Conduct Committee (JCC) of South Africa's Judicial Service Commission (JSC), this judgment involves the remarks made in 2020 by Chief Justice Mogoeng Mogoeng at a webinar hosted by a pro-Israel, conservative, Zionist newspaper. During that webinar, Mogoeng criticized the South African government's official policy on the Israel-Palestine conflict. Following Mogoeng's faux pas and a loud public outcry, three non-governmental organizations (NGOs) lodged complaints with the JCC against Mogoeng for his Israel comments.

This appeal judgment largely confirms the JCC's earlier complaint judgment in 2021 that Mogoeng violated its duties under the Code of Judicial Conduct ('the Code') and the JSC Act by embroiling himself in a political controversy or activity and by lending the prestige of the judicial office to advance private interests. In a 2-to-1 split decision, the JCC concluded that Mogoeng's extra-judicial comments on South Africa's foreign policy in the Middle East infringed the law in a manner that breached the separation of powers as he intruded into the sphere of the executive and Parliament. However, the dissenting judge maintained that the JCC should have upheld Mogoeng's appeal because the complaints against him took his Israel's comments out of their biblical context while downplaying Mogoeng's constitutional rights to freedom of expression and religion.

The *Mogoeng* decision enriches the jurisprudence on judicial ethics and judges' freedom of speech as it appears to offer a test for determining when a judge speaking extra-judicially has unlawfully allowed himself or herself into a political controversy or activity. Though not expressly stated as such, the test in the *Mogoeng* decision apparently enquires into whether a judge could reasonably foresee that his or her extra-judicial speech on any issue would lead to a situation where he or she would have to recuse himself or herself should anyone bring a case related to that issue before the court where that judge sits.

Above all, this is a judgment against the transformative constitutionalists who view politics as a virtue. Informed by transformative constitutionalism,² Mogoeng has ventured on a wide range of hot button issues extra-judicially and extra-curially because he felt that this leading theory of South African constitutional law entitles him and judges to speak out publicly on matters they care about. A cautionary tale against extra-judicial speech on touchy subjects, the *Mogoeng* judgment has now created a precedent: Mogoeng has gone down in the history of South Africa and the whole continent as the first Chief Justice to ever be disciplined for something he said outside his judgments outside the courtroom.

Facts: The Chief Justice's Israel comments

The facts that prompted the disciplinary proceedings against Mogoeng Mogoeng occurred on 23 June 2020 during the COVID-19 pandemic. Mr. Mogoeng, the then Chief Justice of South

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² See Drew F Cohen, 'A Constitution at a Crossroads: A Conversation with the Chief Justice of the Constitutional Court of South Africa' (2014) 12 *Northwestern Journal of International Human Rights* 132, 146.

Africa, joined Mr. Warren Goldstein, the Chief Rabbi of South Africa, in a webinar hosted by The Jerusalem Post, a broadsheet and online newspaper based in Israel. Moderated by the newspaper's Editor-in-Chief, Mr. Yaakov Katz, Chief Justice Mogoeng commented on the diplomatic relations between South Africa and Israel as they concern Palestine.

Katz asked Mogoeng:³

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... You know, what do you think about that? ... [Are these diplomatic relations] something that should be improved, in your opinion?

To which Mogoeng replied:⁴

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.

[...] 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 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."

³ *Chief Justice Mogoeng v Africa4Palestine and Others* [2021] JSC/819/20; JSC/825/20; and JSC/ 826/20 [8] (hereinafter referred to as the 'Mogoeng' case or 'the appeal judgment').

⁴ *ibid* [9].

[...] 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.

Later, Katz invited Mogoeng to comment on campaigns by the South African Boycott, Divestment and Sanctions Coalition (the BDS Coalition) for sanctions to be imposed on Israel as a means to promote peace in the Middle East. But Mogoeng refused, explaining that he deemed the matter too sensitive for him as a Chief Justice to deal with it.⁵

Reactions by government, the public and civil society

The South African government, an opposition political party, several NGOs and other civil society organizations reacted to the Chief Justice's comments. On July 1st, 2020, South Africa's International Relations and Cooperation Minister Naledi Pandor said that she viewed the Chief Justice's 'rather astounding' comments 'with great dismay'.⁶ In similar vein, several NGOs protested against Mogoeng's comments.

A major political party from the opposition, the Economic Freedom Fighters (EFF), called on Mogoeng to 'repent', to retract his position, and 'subdue himself to the collective wisdom and call by the oppressed people of Palestine.'⁷ Alluding to Mogoeng's webinar comments on anti-Israel boycott and disinvestment campaigns, the EFF observed that:

There would have never been a Chief Justice Mogoeng Mogoeng presiding over a democratic judiciary in South Africa if it were not for boycotts, disinvestment and sanctions against apartheid South Africa.

In the face of the media storm, Mogoeng doubled down on his polarizing comments. At a prayer meeting, he declared that he would not retract, nor apologize for his comments, '[e]ven if 50 million people can march every day for the next 10 years' for him to do so.⁸

Procedural history and the parties' arguments

One of the protesting NGOs, Africa4Palestine, filed a complaint against Mogoeng. Two other NGOs, the South African Boycott, Divestment and Sanctions Coalition (the BDS Coalition) and the Women's Cultural Group (WCG), joined Africa4Palestine in lodging complaints with the Judicial Conduct Committee (JCC) against Mogoeng.

The Acting Chair 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, so

⁵ See *ibid* [10].

⁶ Jeanette Chabalala, 'Naledi Pandor Views Chief Justice's Comments on Israel With "Great Dismay"' *News24* (1 July 2020) <<https://www.news24.com/news24/southafrica/news/naledi-pandor-views-chief-justices-comments-on-israel-with-great-dismay-20200701>> accessed 18 November 2022.

⁷ Zintle Mahlati, 'EFF Calls on Mogoeng Mogoeng to "Repent" and Retract Israel Comments' *IOL* (23 June 2020) <<https://www.iol.co.za/news/politics/eff-calls-on-mogoeng-mogoeng-to-repent-and-retract-israel-comments-49977935>> accessed 22 November 2022.

⁸ See *Mogoeng* (n 3) [29] and [36].

that Mojapelo DJP could, in his capacity as a JCC member, adjudicate on the matter on the JCC's behalf.

Africa4Palestine alleged that Mogoeng violated his duties to refrain from becoming involved in political controversy or activity, and from using or lending the prestige of judicial office to advance private interests. Specifically, Africa4Palestine alleged that the Chief Justice infringed Articles 12(1) and 14 of the Code and section 14 of the Judicial Service Commission Act 9 of 1994 ('the JSC Act').⁹ In the alternative, Africa4Palestine maintained that Mogoeng engaged in willful or grossly negligent conduct prohibited by section 14(4)(e) of the JSC Act.¹⁰

Africa4Palestine contended that Mogoeng's 'propaganda exercise' aimed to stifle any criticisms of Israel's discriminatory policies and human rights violations by declaring such criticisms as cursing Israel and thereby offending the Bible.¹¹ It also charged that, by calling upon South Africa to disregard its international law obligations, Mogoeng eroded the separation of powers doctrine as he intruded into the sphere of the executive and Parliament.¹² Africa4Palestine accused Mogoeng of dragging the judiciary into a heated dispute and fanning the flames of divisiveness within South African society.¹³

The second complainant, the BDS Coalition, backed up Africa4Palestine's main submissions. Apart from echoing Africa4Palestine, the BDS Coalition pointed out that Mogoeng publicly lambasted the government's Palestine policy on the eve of South Africa's raising a debate in the Security Council of the United Nations (UN) to support the human rights of the Palestinian people and condemn Israel as it planned to illegally annex Palestinian territory.¹⁴

The umbrella body representing 11 Palestine solidary organizations argued that Mogoeng's comments stirred political controversy because they explicitly sided with Israel in a fashion that contradicts UN resolutions, international law, South African policy, and the spirit of the South African Constitution.¹⁵ For the BDS Coalition, the fact that Mogoeng uttered those comments in a webinar hosted by 'a right-wing Israeli Zionist English Language newspaper' amplified the pro-Israeli bias of his comments.¹⁶ The South African NGO stressed that Mogoeng must have known that his remarks would cause "political controversy", which explains why the Jerusalem Post and the pro-Israel Chief Rabbi invited him to the webinar.¹⁷ The BDS Coalition worried that his impugned comments had created a situation where Mogoeng would have to recuse himself if anyone brought a matter related to it before the Constitutional Court.¹⁸

Women's Cultural Group (WCG), a Durban-based cultural group almost entirely comprising of mothers and grandmothers, formulated grievances broader than the ones levelled by Africa4Palestine against Mogoeng. Notably, it submitted that Mogoeng's Israel comments violated both the Bangalore Principles of Judicial Conduct and the separation between state and church.¹⁹ Here, however, Zondi JA agreed with Mojapelo DJP in rejecting these broader

⁹ See *ibid* [15].

¹⁰ *ibid* [16].

¹¹ *ibid* [32].

¹² *ibid*.

¹³ *ibid*.

¹⁴ *ibid* [27].

¹⁵ *ibid*.

¹⁶ *ibid* [28].

¹⁷ *ibid*.

¹⁸ *ibid*.

¹⁹ *ibid* [30]-[31].

claims because they do not figure among the grounds listed in section 14 of the JSC Act – grounds on which a person may validly file a complaint against a judge.²⁰

Mogoeng prayed the JCC to dismiss the three complainants' allegations. In essence, Mogoeng's defense consisted in insisting that the complainants strategically took his Israel's comments entirely out of their biblical context. Mogoeng placed his comments in their proper context as follows: He is a Christian, who embraces and who has faith in the whole Bible, and who believes that professing and ordering one's affairs in line with the Bible is a fundamental human right entrenched in the Constitution just like freedom of expression.²¹

To demonstrate the proper context of his comments, Mogoeng cited several texts of the Bible that he claims the complainants left out of the proceedings against him. Among other omitted passages, he mentioned Matthews 5:44 which deals with love and advance-forgiveness, Psalm 122:6 and Genesis 12:1-3.²² He also claimed that the complainants left out the passage where he expressed love for Palestine and Palestinians.²³

Mogoeng submitted that the JCC should interpret Article 12(1) of the Code narrowly, and not in an 'overly-liberal and uncontextualised' manner.²⁴ He pleaded that the JCC must construe Article 12(1) in a way that promotes the spirit and objects of the rights to freedom of expression (section 16 of the Constitution) and religion (section 15), and that reflects the supremacy of the Constitution.²⁵

On March 4th, 2021, Mojabelo DJP found that Chief Justice Mogoeng had indeed violated his duties under the Code and the JSC Act.²⁶ The learned judge accordingly ordered the Chief Justice to publicly apologize, within 10 days of the JCC's decision, for his Israel comments and to retract them unreservedly.²⁷ Dissatisfied with the JCC's decision and order, Mogoeng appealed against them.

The rulings of the Judicial Conduct Committee

On appeal, two judges of the Supreme Court of Appeal (Zondi JA and Dumbuzza JA) and one judge of the Competition Appeal Court (Victor J) sat on the JCC. The three judges issued three separate judgments: Zondi JA wrote for the majority,²⁸ Dambuzza JA concurred,²⁹ and Victor J dissented from the majority.³⁰

In the majority opinion, Zondi JA determined that the JCC had to settle three questions:³¹

1. whether the Chief Justice became involved in a political controversy or activity, thereby contravening Article 12(1) of the Code of Judicial Conduct ('the Code');³²

²⁰ *ibid* [31].

²¹ Paragraph 3 of the affidavit by Mogoeng Mogoeng to respond to the submissions made by the complainants [hereinafter 'Mogoeng's Response']. Mogoeng's affidavit is available on the official website of the South African Judiciary <https://www.judiciary.org.za/images/news/2020/Chief_Justice_Mogoeng_Mogoengs_Response_-_Africa_for_Palestine.pdf> accessed 20 November 2022. See also *Mogoeng* (n 3) [17].

²² *Mogoeng* (n 3) [19]-[21].

²³ *Mogoeng's Response* [10]; and *Mogoeng* (n 3) [20].

²⁴ *Mogoeng's Response* [18]; and *Mogoeng* (n 3) [44].

²⁵ *Mogoeng* (n 3) [44].

²⁶ See *Africa4Palestine and Others v Chief Justice Mogoeng Mogoeng* [2020] [2021] JSC/819/20; JSC/825/20; and JSC/ 826/20 [239] (hereinafter the '*Africa4Palestine*' case or 'the complaint judgment').

²⁷ *Mogoeng* (n 3) [242]-[243].

²⁸ *ibid* [1]-[95].

²⁹ *ibid* [96]-[104].

³⁰ *ibid* [105]-[189].

³¹ *ibid* [7].

³² Adopted in terms of section 12 of the JSC Act and promulgated on 18 October 2012.

2. whether the further complaints against Mogoeng's comments had been established; and
3. whether the remedial action (i.e., the order to publicly apologize for and to retract the Israel comments) imposed on the Chief Justice was appropriate.

With respect to the political controversy question, the JCC recalled that Article 12(1) of the Code forbids judges to

- (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[s] or others.

Moreover, Article 14 of the Code, which focuses on extra-judicial activities, lays down that:

- (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.
 - ...
- (3) 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...

Because Africa4Palestine had submitted in the alternative that Mogoeng's faux pas constituted willful and grossly negligent behavior incompatible or unbecoming with the holding of judicial office, Zondi JA quoted section 14(4)(e) of the JSC Act on which Africa4Palestine's submission rested:

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.

Crucially, Zondi JA concluded that Mogoeng flouted Article 12(1)(b) of the Code.³³ In reaching this conclusion, Zondi JA expressly agreed with Mojapelo DJP's ruling that the restriction in Article 12(1)(b) on the rights in sections 15 and 16 is reasonable and justifiable, and that it serves a legitimate objective.³⁴ Forbidding judges to meddle in political controversy or activity preserves the integrity and independence of the judiciary, which a judge would undermine if he or she allowed herself to get involved in such controversies.³⁵

The dissent

³³ Mogoeng (n 3) [52].

³⁴ See *ibid* [52].

³⁵ *ibid*. Bam says that this sort of restrictions aim to preserve both the reality and appearance of the integrity, independence, and impartiality of judges. See Dmitry Bam, 'Seen and Heard: A Defense of Judicial Speech' (2017) 11 Liberty University Law Review 765.

Victor J dissented from the majority judgment. She firmly believed that the JCC should have upheld Mogoeng’s appeal. The marrow of her dissent deplores that both the complaint judgment by Mojapelo DJP and the majority judgment in this case failed to frame Mogoeng’s constitutional rights³⁶ and the context of his disputed remarks, resulting in distorted findings in the complaint judgment and the majority opinion on appeal.³⁷

For Victor J, ‘context is everything’.³⁸ And her colleagues have, according to her, misconstrued the evidence and the facts that formed the context of Mogoeng’s opinionated remarks.³⁹ She insisted that one cannot “pluck sentences out of an interview consisting of some 50 pages in length”, extract them out of their context, analyse them in isolation, and then purport to have arrived at a definitive interpretation of their words.⁴⁰

Victor J nonetheless agreed with the majority in two respects. First, she accepted the majority’s decision to cast aside Mojapelo DJP’s finding that Mogoeng breached Article 14(1) of the Code, which affirms that a judge’s judicial duties must take precedence over all other duties and activities.⁴¹ She noted that the evidence does not countenance the finding that Mogoeng’s participation in the webinar affected his availability to perform his obligations as a judge.⁴²

Victor J also stood behind the majority in dismissing Mojapelo DJP’s ruling that Mogoeng breached Article 14(3)(a) of the Code by accepting an appointment that actually or potentially clashed with an independent judiciary or its status, or with the separation of powers.⁴³ She could not see any logic in regarding Mogoeng’s participation in the webinar as constituting an “acceptance of appointment” as envisaged in the Code.⁴⁴

That said, she stated that, not only did it fail to contextualize Mogoeng’s remarks, the majority judgment did not interpret the Code in light of its broader scheme and the Constitution.⁴⁵ She preferred a ‘holistic’, ‘flexible’ and ‘supple’ construction of the Code.⁴⁶ Applying this interpretation to the case, Victor J concluded that the word ‘involved’ in the Code’s phrase ‘involved in political controversy or activity’ should mean ‘actively engaging in, associating with, taking part in’ – none of which accurately describes what Mogoeng did during the webinar.⁴⁷

Significance of the case

Although this decision implicated the highest-ranking judge in South Africa, the significance of this case resonates across the continent and the globe. With this appeal judgment, Mogoeng has gone down in African history as the first Chief Justice in a democratic country to be disciplined for speaking on matters outside the courtroom. On the rare occasions where a Chief Justice gets ‘disciplined’ on the continent, it would arise when the President of the Republic or the competent authority retires or removes him or her from office. *Mogoeng* stands out as it featured a judicial service authority rapping the Chief Justice’s knuckles (without firing him) through a published decision of that authority.

³⁶ Mogoeng (n 3) [165]-[183].

³⁷ See *ibid* [107].

³⁸ *ibid* [110], [120]-[126], and [128]-[132].

³⁹ *ibid*.

⁴⁰ *ibid* [120] and [128].

⁴¹ *ibid* [115].

⁴² *ibid*.

⁴³ *ibid* [116].

⁴⁴ *ibid*.

⁴⁵ *ibid* [133]-[147].

⁴⁶ *ibid* [136]-[138], and [141].

⁴⁷ *ibid* [141].

Moreover, the *Mogoeng* decision enriches the jurisprudence and scholarship on judicial ethics as it appears to offer a test for determining when a judge speaking extra-curially has unlawfully allowed himself or herself into a political controversy or activity. As Virelli observed in 2018, the literature on ethics and constitutions has largely overlooked the topic of judicial speech.⁴⁸ Though not expressly stated as such, the test in the *Mogoeng* decision enquires into whether a judge could reasonably foresee that his or her extra-judicial speech on any issue would create a situation where he or she would have to recuse himself or herself should anyone bring a case related to that issue before the court where that judge sits.

Mogoeng was certainly right to scathe those who, ‘either out of sheer ignorance, mischief-making or stone-age conservatism,’ have campaigned to confine the responsibilities of judges to writing judgments.⁴⁹ Right was he also to stress that judges ought to retain their freedom to write articles or books, deliver public lectures, or participate in radio or television programs to share reflections on human rights, constitutionalism, policies, or other subjects of public interest.⁵⁰

In addition, the *Mogoeng* decision tackled the question of how to properly interpret Article 12(1)(b) of the Code and statutory provisions in light of the Constitution. Mogoeng cited two important cases, *Cool Ideas*⁵¹ and *Chisuse*,⁵² that spelt out how courts should construe statutes correctly.⁵³

Both Mojapelo DJP in the initial complaint and Zondi JA on appeal noted that Mogoeng did not directly challenge the constitutionality of Articles 12 and 14 of the Code,⁵⁴ though Zondi JA and Victor J did nonetheless address the constitutionality of Article 12(1)(b) explicitly while Mojapelo DJP assumed it.⁵⁵

In the end, however, Zondi JA rejected the angle advocated for by Mogoeng because it would strain the text of Article 12(1)(b).⁵⁶ For the judge, the purposive interpretation of a statute must still remain faithful to the statute’s literal wording.⁵⁷

The ‘political’ question

In this appeal judgment, Mogoeng contended that the law should confine the ‘the political controversy or activity’ contemplated in Article 12 to home-soil politics. In his view, the Code prohibits political controversy or activity only where a judge belongs to a political party on home ground or where a judge gets enmeshed in a home-soil political controversy that could undermine the independence or impartiality of a judge.⁵⁸ He contended that the Israel/Palestine situation does not qualify as a ‘political controversy or activity’ that could lend itself in South African courts for adjudication. He considers the Middle East a matter so detached from what is justiciable in South Africa that commentary on it could not justly and reasonably serve to

⁴⁸ Louis J Virelli III, ‘(A Bit More) on Judicial Speech and the First Amendment’ (2018) 79 Ohio State Law Journal Furthermore 83.

⁴⁹ See Mogoeng’s Response [13]; and Mogoeng (n 3) [22].

⁵⁰ See *ibid*.

⁵¹ *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) [28] (hereinafter the ‘*Cool Ideas*’ case).

⁵² *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) [47](quoting, with approval, the statutory-interpretation principles set out in the *Cool Ideas* case).

⁵³ See Mogoeng (n 3) [44], [46]-[47]. See also *ibid* [138] (where dissenting judge Victor J similarly quoted with approval the principles enunciated in *Cool Ideas*).

⁵⁴ *Africa4Palestine* (n 26) [64]; *Mogoeng* (n 3) [49], [53]-[54].

⁵⁵ See Mogoeng (n 3) [54] (finding that Mojapelo DJP “accepted” the constitutionality of Articles 12 and 14 of the Code).

⁵⁶ *Mogoeng* (n 3) [52].

⁵⁷ *ibid*.

⁵⁸ Mogoeng’s Response [15].

haul a judge before the JCC and to censure him or her.⁵⁹ He stressed that Article 12 strives to ensure neutrality on justiciable issues – it is not a blind and purposeless banning order on judges from reflecting on political controversies.⁶⁰

However, the JCC brushed aside Mogoeng’s understanding of the ‘political controversy or activity’ question. As Africa4Palestine discerned, commenting on how the South African government should go about achieving peace in the Middle East is not a “foreign” political controversy, but a ‘home-soil political controversy’.⁶¹

One issue that has beset the separation of powers in South Africa and that eluded the *Mogoeng* judgment is the political question doctrine. On the one hand, the question as to whether speech amounts to political activity is itself political, ultimately. Jurists will struggle to draw the line between permissible and impermissible political commentary. On the other hand, the political question doctrine is likely to enable judges to perceive the line between free and impermissible extra-judicial speech more clearly.

A few years ago, Mogoeng CJ doubted that South African courts would ever adopt the political question doctrine.⁶² He stated that the South African Constitution endows the Constitutional Court with powers that reach so far that ‘there are very few areas that the Court would be forbidden from entering into’.⁶³ Yet not long after he expressed those doubts, the judge who immediately preceded him in his position, Chief Justice Sandile Ngcobo, advocated precisely such doctrine.⁶⁴

Transformative constitutionalism and extra-curial speech

Transformative constitutionalism informed Mogoeng’s Israel comments in two ways: First, it shaped what he said; and it influenced the manner in which he delivered it as he set his hand to testy issues of peace in the Middle East and South Africa’s policy in that region. Tellingly, in the appeal judgment, Mogoeng opined that judges should publicize their stances on human rights, constitutional issues and other matters to enable the public to assess judges’ court decisions in light of those publicized stances.⁶⁵ He premised this opinion on the principle that, for the sake of transparency and accountability, judges should never be forced to pretend not to have strong views on religion, human rights, justice, and peace, and even policies adopted by the government when they actually hold such views.⁶⁶

Former Kenyan Chief Justice Willy Mutunga shares this sentiment. In a piece that he penned in 2021, he celebrated ‘judicial politics’ under ‘transformative Constitutions’ and exclaimed that ‘[j]udiciaries the world over can no longer claim they do not do politics!’⁶⁷

⁵⁹ Mogoeng’s Response [17].

⁶⁰ Mogoeng’s Response [18]; *Mogoeng* (n 3) [23].

⁶¹ Mogoeng (n 3) [38].

⁶² As quoted by Cohen (n 2) 146.

⁶³ *ibid.*

⁶⁴ Sandile Ngcobo, ‘South Africa’s Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers’ (2011) 22 Stellenbosch Law Review 37. See also Mtendeweka Owen Mhango, *Justiciability of Political Questions in South Africa: A Comparative Analysis* (Eleven International 2019) (advocating the political question doctrine as a way for South Africa to tackle the increase in the number of court cases that bring up purely political questions and maintaining that, at the heart of the political question doctrine, lies the principle of separation of powers).

⁶⁵ See Mogoeng’s Response [29]; *Mogoeng* (n 3) [20].

⁶⁶ Mogoeng’s Response [28].

⁶⁷ Willy Mutunga, ‘Court in the Crossfire’ (*African Law Matters*, 18 November 2021) <<https://www.africanlawmatters.com/blog/willy-mutunga-court-in-the-crossfire>> accessed 22 November 2022. See also Willy Mutunga, ‘Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence From the Global South?’ (2021) 8 *The Transnational Human Rights Review* 30.

A couple of months before the Nelson Mandela Lecture, Mogoeng CJ already had the opportunity to delve on the politics of transformative constitutionalism. On 30 August 2019, he gave a lecture in the Faculty of Law at the University of the Free State on that topic. He affirmed that⁶⁸

[j]udges are supposed to deal with political issues, as they interpret the Constitution and the law. Some say that judges should only speak through their judgments, but I have always said that our constitution is political in nature.

Though Mogoeng did not mention transformative constitutionalism in the appeal judgment, he had repeatedly relied on transformative constitutionalism – as this appeal judgment shows – to justify his extra-judicial opinions on several dicey issues. American jurist Klare defined ‘transformative constitutionalism’ as

a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.⁶⁹

Effectively, transformative constitutionalism induces judges to embrace the politics of adjudication when deciding cases with a view to transforming society. In fact, in the preview to his Nelson Mandela Lecture on transformative constitutionalism in 2019, Chief Justice Mogoeng reportedly said that ‘[t]here is very little that a judge does, based on the Constitution, that is not political in character.’⁷⁰

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Whatever the position of judges, lawyers, and jurists on this constitutional theory, they will not be able to deny that transformative constitutionalism does provide grounds on which judges and lawyers could climb to utter controversial political statements. After all, transformative constitutionalism embraces politics in adjudication as a virtue. Like Victor JA herself observed in the appeal judgment, Mogoeng has ‘always dealt with highly controversial issues extra-

⁶⁸ See ‘Unite to Build a Better SA’ *Express* (11 September 2019) <<https://www.news24.com/SouthAfrica/Local/Express-News/unite-to-build-a-better-sa-20190910>>.

⁶⁹ Karl E Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 150.

⁷⁰ Nthakoana Ngatane ‘Mogoeng to focus on how to transform the Constitution at Mandela Lecture’ *Eyewitness News* (22 November 2019) <https://www.google.com/search?biw=1280&bih=578&ei=IjJ4Xv_UN-3Ugwf00q-oDg&q=Mogoeng+%22transformative+constitutionalism%22&oq=Mogoeng+%22transformative+constitutionalism%22&gs_l=psy-ab.3...0.0..124484...0.0..0.267.516.2-2.....0.....gws-wiz.iEINV9m71eU&ved=0ahUKEwj_7ZTY2K_oAhVt6uAKHXTpC-U4RhDh1QMICw&uact=5>; ‘Mogoeng to focus on how to transform the Constitution at Mandela Lecture’ *South Africa Mirror* (22 November 2019) <<https://humanafrica.org/latest-news/mogoeng-to-focus-on-how-to-transform-the-constitution-at-mandela-lecture/>> (hereinafter referred to as ‘*South Africa Mirror*’). See also his interview at the Nelson Mandela Foundation, <<https://www.nelsonmandela.org/content/page/annual-lecture-2019>>.

⁷¹ See ‘Unite to Build a Better SA’ *Express* (11 September 2019) <<https://www.news24.com/SouthAfrica/Local/Express-News/unite-to-build-a-better-sa-20190910>>.

judicially’, though she affirmed that he did so ‘on broad principles’,⁷² rather than as a way for him to descend into the arena of politics.

This overt embrace of politics carries far-reaching consequences for the separation of powers.⁷³ It risks colliding with the Code, which restricts the ability of judges in South Africa to engage in political activities. Bam says that this sort of restrictions aim to preserve both the reality and appearance of the integrity, independence, and impartiality of judges.⁷⁴ Besides, the Code states that people should not interpret it as impinging on the constitutionally guaranteed independence of the judiciary and on the separation of powers.⁷⁵

Parting thoughts

One question should have hung on the tip of the judges’ tongues: Did it make any difference that Mogoeng sat on the crowning seat at the country’s highest court? Bam suggests that perhaps ethics rules for judges should differ depending on the court in question,⁷⁶ although he generally advocates for greater room for judicial speech. Maybe those rules should also vary depending on the position that a judge occupies.

A Chief Justice stands in that capacity as the highest-ranking representative, the face of the judiciary. In that sense, people may understandably expect the Chief Justice to show more restraint than his or her colleagues on the apex court when he or she addresses the public, especially when he or she takes up matters that they may perceive as either delicate or infringing on the territory of other government branches. And, if he genuinely could not foresee that his comments would touch off a political controversy, at the very least he should have expected that expressing one’s views in an area where one is patently out of his own depth would land him in hot water.

Mogoeng’s viewpoints, by virtue of his position at the helm of the judiciary, always had the real potential to generate or heighten tensions both within other branches of government and inside the judiciary itself. To be sure, his Israel remarks divided public opinion just like it split the Judicial Conduct Committee. Incidentally, one can hardly miss the irony in the *Mogoeng* judgment as the JCC, the body chaired by the Chief Justice *ex officio*,⁷⁷ has put its own Chair on trial.

At any rate, the *Mogoeng* judgment reminds the government and the judiciary that they can ill-afford to ignore what extra-curial speech implies, nor the rights and interests that it entails, as judges become ever more active public figures.⁷⁸ Some South Africans have even started to expect their judges to comment extra-curially on issues affecting their society.⁷⁹ In a globalized world awash with communication technologies, social media and increasingly smarter phones, judges can engage in extra-curial speech far more easily. Accordingly, the dilemma consists in drawing the line between judicial speech that the Constitution protects and judicial speech that overreaches itself.

⁷² See Mogoeng (n) [164].

⁷³ See also Dunia Prince Zongwe, ‘The Dangers of Transplanting Transformative Constitutionalism Into Namibia’ in Artwell Nhemachena, Howard Tafara Chitimira, and Tapiwa Victor Warikandwa (eds), *Global Jurisprudential Apartheid in the Twenty-First Century: Universalism and Particularism in International Law* (Lexington 2021) 110-112 (reflecting on what transformative politics may imply in practice for the independence of the judiciary).

⁷⁴ Dmitry Bam, ‘Seen and Heard: A Defense of Judicial Speech’ (2017) 11 *Liberty University Law Review* 765.

⁷⁵ Code of Judicial Conduct art 3(2)(b).

⁷⁶ Bam (n 74) 794-795.

⁷⁷ Judicial Service Commission Act 9 of 1994 s 12(4).

⁷⁸ See also Virelli (n 48) 88.

⁷⁹ See Cora Hoexter, ‘Non-Judicial Functions and Activities’ in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 315.

In closing her dissent and in agreeing with her colleagues in setting aside the remedy ordered by Mojapelo DJP, Victor J lamented that the remedy imposed on Mogoeng was actually ‘calculated to humiliate and crush Mogoeng CJ’.⁸⁰ On May 1st, 2021, Mogoeng took a long leave, five months before his term as Chief Justice expired.

Despite the amended remedial order on January 23rd, 2022,⁸¹ the JCC left Mogoeng with no choice but to publicly apologize. Mogoeng became aware of the JCC’s order ‘[j]ust before the dawn of day number 666 of the lockdown in [South Africa].’⁸² An ordained pastor, the former Chief Justice bowed to the order on February 3rd, 2022, albeit reluctantly:⁸³

I am now forced by the law – the order of the lawfully constituted Appeal Panel of the Judicial Conduct Committee – to apologise unconditionally in terms of the prescribed apology. And because I am not above the law, I hereby apologise as ordered:

‘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’.

⁸⁰ *Mogoeng* (n) [189].

⁸¹ The JCC slightly amended Mojapelo DJP’s remedial order since Mogoeng retired before the JCC could issue its judgment. See *Mogoeng* (n) [94].

⁸² Mogoeng’s apology letter is available on the official website of the South African judiciary: <https://www.judiciary.org.za/images/news/2022/Media_Statement_by_former_Chief_Justice_Mogoeng_Mogoeng.pdf> accessed 22 November 22.

⁸³ *ibid.*