

Justice Mogoeng Mogoeng
Chief Justice of the Republic of South Africa
Private Bag x1
Constitutional Hill, Braamfontein
Johannesburg,
2017



**Higher Education
Transformation Network**

Non-Profit Organization (NPO) Reg No: 116-851

6th May 2015

By Email: enquiries@judiciary.org.za; info@concourt.org.za;

**RE: APPEAL: COMPLAINT ON JUDICIAL BIAS & MISCONDUCT BY DEPUTY JUDGE
PRESIDENT OF THE WESTERN CAPE HIGH COURT: JUDGE JEANETTE TRAVERSO**

Dear Mr. Chief Justice:

Further to our notice of appeal dated 3rd May 2015 and in anticipation of receipt of the documents we requested in the said notice of appeal, we would like to place the following before the judges hearing this appeal. We also seek clarification on certain points. Once we receive clarification on the points raised below and receive the documents previously requested, we reserve the right to supplement our papers.

- 1) The decision we received on the 23rd April 2015 penned by Leeuw JP and concurred by Molemela JP (the decision) reads as a decision of the Judicial Conduct Committee (JCC). It is our understanding that as per section 8 of the Judicial Service Commission Act 9 of 1994 as amended (JSC Act), the JCC consists of six judges. Moreover, section 9(2) (a) of the JSC Act provides that “[t]he Committee may determine the procedure to be followed at its meetings, but decisions of the Committee must be supported by a majority of its members”. We seek clarification whether the entire JCC deliberated upon our complaint and whether they all supported the decision of Leeuw JP.
- 2) We wish to place on record our letter dated 29th March 2015 to the Chief Justice and Deputy Chief Justice where we complained about Traverso DJP bragging to certain people, a few weeks before the JCC delivered its opinion, that the JCC was about to dismiss our complaint against her. In our letter, we also indicate that Traverso DJP knew the identity of the lady judge that was to write the decision. This is a matter of grave concern to us. How is it that Traverso DJP knew of these matters? It would be a grave affront and a compromise to independence of the judiciary if the JCC or JSC as an institution, unwittingly or otherwise creates an impression that it is operating as an agency to protect the interests of judges. We trust that this sharing of information with one party is not passed off as the work of staff or other subordinates, which stance we encounter with aberrant government officials. We expect better from our judiciary. The integrity of the JCC, JSC and ultimately the judiciary is on the line. We would like this matter to be considered on appeal in terms of the fairness of the process.

- 3) The decision alludes to the affidavits received from the legal representatives of Shrien Dewani who supposedly refute the allegations made against Judge Traverso. With due respect, we cannot see the probative value of affidavits from the legal representatives of Shrien Dewani, in whose favour we assert Judge Traverso showed bias.
- 4) The decision also alludes to a letter received from the Director of Public Prosecutions Mr. RJ de Kock who allegedly claims he found nothing untoward in the conduct of Judge Traverso. The decision further alludes to the lack of any complaint lodged by the State Advocate Mr. Mopp. One of the problems in South Africa is a problematic culture of deference, which the prosecution has towards the judiciary. There's a prevailing political correctness, which intimidates and renders powerless any critique of judicial misconduct. In this regard, we draw the attention of the JCC to the outrageous judicial conduct of Judge Anton Veldhuisen in the Arthur Brown fraud trial. Judge Veldhuisen, who is a protégé of Judge Traverso, treated the prosecution with disdain and contempt, and failed to accord the state a fair trial, which was patently apparent. Despite this travesty, there was a fecklessness on the part of the office of Mr. de Kock who failed to ask for the recusal of Judge Veldhuisen. Despite the egregious judicial conduct of Judge Veldhuisen, Mr. de Kock nor his office failed to report Judge Veldhuisen to the JSC for investigation.
- 5) This constituted an abject dereliction on the part of Mr. de Kock. It was only the enlightened intervention by the Supreme Court of Appeal, which resulted in a complaint against Judge Veldhuisen being forwarded to the JSC. So despite the fact that there was a clear record of improper conduct on the part of a judge in other cases as well, contrary to the findings in the decision in paragraph 27, the prosecution service under Mr. de Kock in this and other cases has displayed timidity and fecklessness, even in the face of clear judicial misconduct in failing to ask for the recusal of the judge or reporting the judge to the JSC.
- 6) Fair procedure would dictate that we should have been afforded an opportunity to consider and respond to all affidavits and submissions before the decision was rendered. The fact that this was not afforded to us renders the process flawed. We await a copy of all affidavits, documents, records and minutes pertaining to this matter.
- 7) The decision erroneously concludes that the reporting in the media of the complaint against Judge Traverso before they were lodged with the JCC undermined s 165(3) of the Constitution. If it is the contention of Judge Leeuw that the complaint should only be reported by the media after it has been received and disposed of by the JCC, that is with due respect incorrect from a constitutional perspective. Whilst some jurisdictions conduct preliminary investigations behind closed doors, no democracy adopts the position that media reporting on complaints against judges undermines the functioning of the courts. On the contrary, democratic international practice informs us that the public has an interest in knowing and hearing about complaints lodged against judges.

- 8) Comparative practice also demonstrates that a judge must be expected to be subject to public scrutiny. The concern about media reporting, coupled with the leaking of information to Judge Traverso and the other concerns we raise below, lead us to conclude that there was more a concern to protect Judge Traverso rather than uncover the truth. The position of Justice Black in *Bridges v California* 314 U.S. 252 (1941), stands in contra-distinction to the incorrect position of Judge Leeuw where the learned judge held that protecting the judiciary from criticism would engender suspicion and contempt instead of respect for the judiciary. In *Landmark Communication Inc. v Virginia* 435 U.S. 829 (1978), the Supreme Court of the United States held that the public has an interest in the truthful reporting of the full record of the investigation of the conduct of a judge whilst the investigation was pending. The court held the matter was of high value and pertained to conduct of government officials, which was of public interest. There is an unfortunate old school mindset with which Judge Leeuw approached this complaint, which arguably does not comport with the ethos of our Constitution. The lens through which she approached this complaint shows a great bias in favour of protecting the judiciary – in this case Judge Traverso.
- 9) We also appeal the secret manner in which the JCC conducted its proceedings. Our courts have correctly embraced an expansive concept of openness and transparency when it comes to actions of government officials as reflected in a myriad Constitutional Court and High Court decisions. Unfortunately, this has not been the case with respect to investigations of judicial misconduct. No matter how much some would deny it, the judiciary constitutes the third branch of government. There are jurisdictions, which conduct investigations of judges in private. There are others which recognize that a judge must be expected to be subject to public scrutiny. For example, the residents of the State of California voted in a referendum to have judicial misconduct proceedings open to the public. According to the then Attorney General, secret hearings raise "a disturbing appearance of impropriety: the specter of judges throughout this state" using their power in sealed proceedings to protect their judicial colleagues. http://articles.latimes.com/1994-06-09/news/mn-2188_1_disciplinary-hearings. In keeping with our constitutional ethos and its expansive embrace of openness and transparency, we question and appeal the secret manner in which hearings of the JCC were conducted. We also question the constitutionality of section 9 (3) of the JSC Act, which allows meetings of the JCC to be held behind closed doors, to be determined according to the discretion of the JCC. This discretion has to be circumscribed, as it would be for any other government actor.
- 10) In our complaint, we cited to over eighteen authorities. The decision alludes to only one citation namely the Village of Arlington Heights case. Most troublingly, it does not engage nor interrogate any of the authorities we alluded to including the Village of Arlington Heights case except to repeat our allegations.

- 11) Investigation of judicial misconduct is new terrain in our nascent democracy. Our Constitution requires us to look at international law and foreign practice for answers to constitutional questions. Our complaint provided comprehensive legal authority, which was juxtaposed against the behavior and conduct of Judge Traverso. That the decision by Leeuw JP took no heed of these authorities, let alone engage them in coming to her conclusions is both disconcerting and unfathomable. The decision merely quoted trite law from Constitutional Court decisions. We are not aware of the contents of the affidavits submitted by the various parties in support of Judge Traverso and were denied an opportunity to challenge it. Regardless, we would have expected the decision to evaluate the various submissions in relation to the specific averments we made and the authorities we tendered. A law trained mind evaluates submissions in relation to an interaction between facts and law before coming to a conclusion. In short, the reasoning in the decision is thin as tissue paper. This is mystifying. It does a disservice to the independence of the judiciary. If someone probes how the JCC is performing its function, the short answer based on this decision is "it is not".
- 12) Our complaint makes a number of distinct averments citing to different canons and sections of the JSC Act and other statutes. We would have expected a thorough canvassing of each of our averments. The lack of canvassing of each of our averments constitutes a grave omission.
- 13) Instead of addressing each of our specific averments, the decision lumps our complaint with the complaint lodged by the group Justice4Anni and concludes in para 33 that both complaints are related to the merits of the judgment. We have not seen the complaint of Justice4Anni and cannot comment on the nature of their complaint. If Judge Leeuw had engaged the authorities we cited in relation to the facts, no reasonable decision maker could come to the conclusion that the HETN complaint was directed at the merits of the judgment. Our complaint is replete with allegations of impropriety and misconduct. As further elucidated in the following paragraphs, and as outlined in our original complaint, the gravamen of this complaint is directed at the judicial conduct of Judge Traverso.
- 14) The decision similarly lumps our complaint with the complaint lodged by the group Justice4Anni and concludes in para 33 that both complaints are "frivolous and lacking of substance." We have not seen the complaint of Justice4Anni and cannot comment on the nature of their complaint. If Judge Leeuw had engaged the authorities we cited in relation to the facts, no reasonable decision maker could come to the conclusion that the HETN complaint was frivolous or lacking of substance. As further elucidated in the following paragraphs, and as outlined in our original complaint, the gravamen of this complaint is directed at the judicial conduct of Judge Traverso.
- 15) The decision in para 37 castigates us for allegedly making "personal attacks on Madam Justice Traverso's family background and of her as a person of Afrikaner descent."

- 16) With due respect, the reference to Justice Traverso's background as a daughter of a notorious National Party and apartheid apparatchik is a fact beyond dispute. This is not personal. It is factual and contextual to our complaint, a matter we canvass in our original complaint and amplify upon in the subsequent paragraphs. An example of a personal and undignified attack is when Judge Traverso refers to the Chief Justice as "die kort mannetjie." This is a gratuitous comment, which arguably is meant to literally and figuratively demean the person, questioning his stature and undermining his dignity. We ask on appeal that the question be posed to Judge Traverso - does she continually refer to the Chief Justice as "die kort mannetjie"? This reflects the mental construct of Judge Traverso, which is absolutely pertinent to our complaint where we ask the JCC to look at the totality of facts in considering invidious discriminatory purpose.
- 17) The decision in para 31 and 32, with strong rhetorical thunder proclaims that our complaint violated the dignity of Judge Traverso by alluding to racial animus. With due respect, this part of the decision reads like a version of George Orwell's Animal Farm. In our original complaint, we raised the issue of not dealing with racism and the effect of past socialization and background experiences on one's perceptions of reality and behavior. The literature in so many parts of the world is replete with studies which focuses on these sorts of questions both at the societal level and in the context of the judiciary. We mentioned in our complaint that this is an area that we in South Africa have not addressed as it pertains to the judiciary. That Judge Leeuw would find this discussion and the reference to Judge Traverso's background as troubling is truly Orwellian. We can cite to studies, which address the concerns we raised in relation to the judiciary in other parts of the world. Instead, we refer you to a recent article in the Mail and Guardian by Leon Wessels, a proud Afrikaner and a former Minister of Police under the apartheid government. The article is entitled "[\[W\]e are not free from racial prejudice and stereotypes](http://m.mg.co.za/article/2015-04-15-we-are-not-free-from-racial-prejudice-and-old-stereotypes)" and is contained in the Mail and Guardian of 15 April 2015. <http://m.mg.co.za/article/2015-04-15-we-are-not-free-from-racial-prejudice-and-old-stereotypes>
- 18) Mr. Wessels writes "[t]he first step towards greater racial reconciliation is to acknowledge that the demon is in our midst. It is not easy to harness this demon. I battle to bury my own racial prejudices. Of this I am not proud. That my earlier bias sometime overpowers me is a great disappointment." With brutal honesty, Mr. Wessels writes "[r]acism raises its ugly head all the time – it happens in spite of the fact that it is impossible to find a self-proclaimed racist in our country. It is also difficult to find anyone that ever voted the National Party, with its roots embedded in statutory racism, into power." Like Mr. Wessels, our original complaint pointed out that today, no one is going to proclaim that they are racist. This racism, although not proclaimed in an overt form is reflected in behavior and consequences. It shows its ugly face be it in the politics of the Western Cape, the behavior of the University of Cape Town towards Blacks or for that matter the behavior of certain judges. Over the past few weeks, we have witnessed a vigorous debate about subtle but no less real and pernicious racism at the University of Cape Town.

- 19) Over the past decade, there has been a simmering debate, which from time to time has boiled over about racism among judges in the Western Cape. Our judges, like every other person human. To summarily dismiss any or all invitations to engage in this inquiry constitutes an abject dereliction on the part of the JCC. Our complaint against Judge Traverso is directed at deconstructing this racism from the totality of circumstances – what in the literature is considered as invidious discriminatory purpose. Judge Leeuw failed to engage this constitutional concept. In truth, we are unsure whether she understood our argument, given that she utterly failed to engage the idea.
- 20) Wessels goes on to write that “[d]uring a visit to Eastern Europe I discovered that it is not possible to bump into a communist to talk about the old days. Nobody in Eastern Europe or South Africa wants to be associated with a failed state. This means nobody wants to take ownership for the past and then no one knows how to cure the past.” In contradistinction to the irrational response of Judge Leeuw, Mr. Wessels renders an important cautionary advice namely that “[y]ou can’t build the future if you don’t understand the past.” This required a careful and thorough review of the record in relation to appropriate judicial behavior, as exemplified in comparative best practices as contained in the cases we cited. Our complaint stated in categorical terms it was not directed at the merits of the judgment. It was directed at the judicial conduct of Judge Traverso.
- 21) With complete candor Wessels further writes “I am not brave enough to claim that I am not a racist because I grapple with my prejudices every day. At dusk I watch the pedestrians closely. I relax when I see people that look like me – people who are of the same colour.” This is the crux of our complaint against Judge Traverso and the extent to which her past has influenced her conduct and perceptions of reality. Judge Leeuw finds our approach as a violation of Judge Traverso’s dignity. This part of the decision is monumentally Orwellian. Our complaint is directed towards the enhancement of human dignity and the eradication of prejudice, due to historical factors, towards the realization of access to justice for all.
- 22) It seems that commenting on Judge Traverso’s past socialization earned the ire of Judge Leeuw, which is truly astonishing. Leon Wessels in his article further states “[t]here is greater colour and race awareness than before. This is true in South Africa but certainly also in the world.”
- 23) Wessels quotes business consultant Alida de Wet who says that she “found during the research for her doctoral thesis that racial prejudice is a deep emotional phenomenon. It cannot be resolved with superficial chit-chats.” It seems that Judge Leeuw found it offensive when these questions are addressed in the context of our judiciary. That is both a shirking of responsibility on the part of the JSC and JCC. Moreover, it is profoundly intellectually dishonest. Unless the JCC and JSC is prepared to deal with hard questions and address and deconstruct comprehensively improper behavior among their own, the legitimacy of our courts and judicial system is compromised.

24) Wessels correctly writes that “the end of constitutional negotiations did not herald the end of constitutional dialogues or dialogues about matters of national importance to ensure the realising of the constitutional ideals.” In the context of our judiciary, the appropriate forum for this discussion, particularly in the light of a questionable judicial conduct is within the JSC and the JCC. It appears that Judge Leeuw finds this conversation distasteful and an inconvenient truth warranting the dismissal of this complaint as frivolous and lacking in substance.

25) Judge Leeuw apart from displaying a lack of understanding or ignoring the nature of our complaint, nor canvassing each of our averments, nor canvassing the authorities cited, adopted a very atomistic and mechanical approach to interpretation, which ignored the connections between human actors, historical phenomena, the interactions between individuals and groups in society and how this could have played itself out in the Dewani and Solomon trial, in terms of Judge Traverso’s conduct. We urge the judges that hear this matter on appeal to thoroughly consider our complaint. We ask that they evaluate all the authorities we referenced in relation to the facts and behavior of Judge Traverso. When considering the presence or absence of racism using invidious discriminatory purpose, facts cannot be interpreted in an atomistic or mechanical way, disconnected from the context in which they are embedded. We urge the judges hearing this matter on appeal to consider this matter in a holistic and systemic manner. We request that they look at our original complaint, looking at facts and events in terms of the interaction between individuals, groups and their social, political and historical environment. Moreover, we ask that each and every averment in our original complaint be addressed.

26) We request that the full JCC reverse the decision of Judge Leeuw. We request that the JCC urge the JSC to appoint a Tribunal to investigate this complaint against Judge Traverso.

We look forward to your response.

Yours faithfully



Lucky Lempiditse Thekisho
Board Chairperson
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