



***Institute for Accountability in Southern Africa***

P O Box 33, Noordhoek, Cape Town, 7979

Phone: +27 (0)21 7890303 (Operations Manager only)

Fax: +27 (0)21 7890313

[www.ifaisa.org](http://www.ifaisa.org)

NPO NO: 70681

## **Open letter to Justice Mogoeng Mogoeng:**

Dear Justice Mogoeng,

Your dissatisfaction with the process to which you have been subjected by the President and the Judicial Service Commission after you accepted the former's nomination as his "preferred candidate" for the currently vacant position of Chief Justice refers.

As you have stated, your oath of office obliges you to uphold our Constitution. In it, the founding values of our system of multi-party democracy under the rule of law require: openness, accountability and responsiveness, as set out in section 1.

You will also have noted the opinion published on politicsweb by JJ Gauntlett SC and Max du Plessis, in which they analyse the meaning and import of section 174(3) of the Constitution which requires that the President appoint the Chief Justice after consulting (obviously in a meaningful and bona fide way) with the JSC and the leaders of parties represented in the National Assembly.

It is easy to deduce that, had your nomination as "preferred candidate" been made **after** consultation with these parties, instead of before the consultation process began, you would have been spared a lot of the pressure, public criticisms and personal anguish you have suffered as a consequence of the unpopularity of your candidature and the opposition to it which has emerged

from a variety of sections of society. You will also appreciate that it is a salutary practice of the JSC to make public the representations made in respect of candidates for judicial office.

Similarly, had you not been the only candidate in the field (surely out of kilter with the section 1 values) the public debate would probably not have brought so severe a firestorm down on your head. In multi-party democracies the public are accustomed to a choice of candidates in any process of selection or election or appointment which takes place when high offices of great importance to them are filled. The normal workings of the JSC in which some candidates for the Bench succeed in being appointed and others do not are now established in the public imagination and so, unless the designated Chief Justice-to-be is universally popular, the situation in which you find yourself must follow if the interpretation of section 174(3) adopted by the Presidency and JSC is used in the necessary and meaningful democratic consultation process that is constitutionally required.

Having experienced the pain and suffering of being the sole “preferred candidate” you may be well advised to pause to consider the consistency with the Constitution of the process to which you have been subjected having regard to your own constitutionally guaranteed dignity, privacy and freedom of religion. You are still at liberty to withdraw from the process, If you come to the conclusion that it does not pass constitutional muster. This is what Ngcobo CJ did, after he chose not to act on an open appeal Ifaisa made to him –also published on politicsweb, when the extension of his term was questioned. This was obliquely alluded to by Commissioner Ntsebeza on Sunday last during your JSC interview. It seems he voted for you out of loyalty to the President and not out of conviction that you are the best man for the job of CJ. How many of the other commissioners found themselves in the same boat as him is something for you to ponder.

The fact that you did not know before your JSC interview that you were not the President’s first choice may, on moral and ethical grounds, also dissuade you from proceeding with your candidacy in order to give those approached ahead of you a fair opportunity of considering their positions afresh now that the DCJ has made it known that he has no aspirations of career advancement. We leave this aspect to your Christian conscience.

Ifaisa must agree with you that the process was less than fair to you. The writer warned that this would transpire in his first television interview on the topic. In particular, the lengthy, sometimes pointless and often convoluted questioning to which you have been subjected has evoked critical responses from parties as disparate as Professor Adam Habib of UJ and Patrick Craven of COSATU.

In the interests of restoring some semblance of cogency to the seriously flawed process that has so hurt you, Ifaisa would very much appreciate it were you publicly to respond in writing to the questions set out below. This will be in the interests of openness, accountability and responsiveness. It may also serve to helpfully clarify your position on some critical issues.

We appreciate that you may be justified in feeling that you have answered enough questions already during the JSC interview, but there are various aspects that still leave room for doubt, ambiguity and inferential reasoning that may not serve your best interests. Clear and considered answers to the questions set out below will serve the interests of the public, especially those who litigate in the Constitutional Court.

We will deal with matters in the same order in which you responded to the public's concerns in your written response which you read into the record at the commencement of the JSC interview.

### **Gender sensitivity.**

1. Why is there no reference to the leading case of S v A in your response?
2. Why exactly was this case not referred to at the time that you prepared and gave judgment in S v Moipolai?
3. How could you have overlooked the sea change brought about by the guarantee of freedom from violence in the Bill of Rights, the new minimum sentence legislation applicable, and the finding in S v A?
4. How could you rely in Moipolai on the values of the apartheid era set out in S v N when you were bound to uphold those of the Constitution?
5. Is your reliance on S v N based on your personal mindset, religious philosophy and overall value system?

6. If so, is the criticism of your gender insensitivity not well founded?
7. If not, how else do you explain your findings in *S v Moipolai* and your spirited defence of them before the JSC?

### **Your perceived approach to sexual orientation**

1. In *Dey*, the photo-shopped cell-phone picture case, you dissented without giving reasons. If you had formulated reasons at the time of judgment, what would they have been?
2. In your response you said: "*Perhaps, and on reflection, I should have given some reasons, no matter how superficial or brief they were. But to put the record straight, I am not against the exercise of any constitutional right, including the right (sic) of the gay and lesbian people.*" This led to the questioning which caused you to snap. Did you snap because you were unable to provide the reasons you had for dissenting without exposing a less than constitutionally compliant approach on your part to sexual orientation?
3. If not, please explain why the mild and measured intervention of the Chair of the JSC provoked you to give the disproportionate response you gave and then to apologise for uttering it, only after a Commissioner chided you?
4. Are you aware that the gay and lesbian community still feel justified in their apprehension that you allowed your anti-gay religious convictions to trump your oath of office in your dissent in the *Dey* matter?
5. Do you draw a distinction between homophobia and principled religious beliefs that homosexuality is a sin, an affliction or a curable disease? If so, what is the distinction and why did you allow the debate in the JSC to focus solely on homophobia? Do you fear homosexuals or do you relate to them lovingly as sick people, according to the tenets of your religion?
6. Are you able to formulate reasons for your dissent in *Dey* (a dissent you appear to have abandoned during the JSC interview) that will be able to assuage the apprehensions of the gay and lesbian community?
7. If not, on what basis do you contend that you are a suitable person to be the Chief Justice of the constitutionally protected gay and lesbian community in South Africa?

8. If so, please set out the constitutionally compliant reasons you advance for dissenting in Dey.

### **Commitment to judicial ethics.**

1. Is it your contention that children appearing before their mothers or fathers is on par with wives appearing before husbands?
2. If so, please explain your reasons for so contending.
3. If not, what is the relevance of your response relating to sons and daughters appearing before parents?
4. Are you aware that there are judges who do not allow their offspring to appear before them at all and that Justice O'Regan did not ever allow her husband, an advocate, to appear before her?
5. Can you point to any example in any court in SA in which a spouse is on the Bench and a spouse is prosecuting matters before that Bench other than in your own personal experience?
6. Do you appreciate that it would be reasonable for an accused in such a case to apprehend bias?
7. If so, why did you do it?
8. If not, do you now understand why your ethics are questioned?

### **Lack of experience**

1. Can you please explain why it took you seven months to deliver your four page summary judgment reasons in the reported BMW Finance case?
2. What is your response to this judgment not being followed in another division?
3. How do you reconcile your admitted lack of passion for legal writing with your primary duty to write judgments?
4. Are there any features of your track record that justify your claim to have the necessary intellect to be Chief Justice that you would like to make known? If so, what are they?
5. Are you a counter-revolutionary judge (in the sense that you uphold the Constitution in preference to upholding the aims of the National Democratic Revolution of the ANC)?

6. If so, why did you avoid answering this question when it was posed by Commissioner Koos van der Merwe during the interview?
7. If not, how will you square your oath of office with the hegemonic and unconstitutional tenets of the NDR?
8. Please disclose the precise nature, contents and topics of the discussions you held with Jacob Zuma when you first met him and conversed with him for three and a half hours.
9. What possible relevance to the issues in the case do the opening words of your dissent in McBride's case have and why did you include them in your judgment?
10. Having regard to the impartiality and independence of the judiciary as well as the doctrine of the separation of powers, can you think of any constitutionally sound basis upon which prosecutors, who normally fulfil a completely different function independently, could become acting judges in SA? In your reply please deal with the reasoning of Schutz JA in the Lesotho case on this topic.
11. Does the type and amount of civil and commercial law experience which you apparently have stand you in good stead to lead an apex court that deals with all matters?
12. When the DCJ retires or resigns, who would you like to have as your new deputy, if you are made CJ?
13. What is your response to the criticism of X Mangcu that you seem to represent power while the DCJ represents authority?
14. What is your response to the view of J Malala that with you as CJ "we enter Zimbabwe, where everything Robert Mugabe does is above the law, where every judge is in the president's pocket"?
15. What is your response to the feeling of E McKaiser that "I will be more sad on behalf of fellow South Africans if the JSC and the President did the wrong thing and allowed Justice Mogoeng's dream to come true" ?
16. What is your response to the statement by A Sparks that your "preferred candidacy" is the biggest mistake the President has made?

Please let us have your response to this letter as soon as is humanly possible. Should we not hear from you by noon on Saturday this week, we reserve our right to make this letter public. Until then we will keep it under embargo, in the hope that it can be

published together with your reply to it, rather than in advance of receipt of your reply.

On a more personal note, when you shook the hand of the writer during the afternoon comfort break on Saturday and told him that you love him, despite his reservations about the propriety of the processes of the President and JSC in which you are caught up and his interrogation of your suitability for the post to which you aspire (to which you jocularly referred as “public lambasting”) it was much appreciated. At a human and personal level the feeling you expressed is reciprocated; at the level of exacting accountability and promoting responsiveness to the needs of all people, you obviously appreciate that Ifaisa has a mission and responsibilities of its own to fulfil.

Your right to take your own concerns about the situation in which you find yourself to God in prayer is utterly respected by Ifaisa. Whether or not you elect to answer fully the questions we have raised in this letter, either publicly or privately, we appeal to you to consider the important issues and concerns that underpin them in prayer.

Yours truly,

Paul Hoffman SC  
Director,  
Institute for Accountability in Southern Africa  
[www.ifaisa.org](http://www.ifaisa.org).  
7<sup>th</sup> September, 2011