Published on *Treatment Action Campaign* (http://tac.org.za/community)

JSC interview raises concerns about judicial appointment process

By *moderator*
Created *2011/09/13 - 12:15pm*
13 September, 2011 - 12:15 ? moderator

6 September 2011

PRESS STATEMENT FROM SECTION27, SONKE GENDER JUSTICE NETWORK, LESBIAN AND GAY EQUALITY PROJECT AND THE TREATMENT ACTION CAMPAIGN

JSC INTERVIEW RAISES CONCERNS ABOUT JUDICIAL APPOINTMENT PROCESS

- **Civil society organisations unfairly attacked for participation in process**
- **Substantive concerns about Justice Mogoeng remain**
- **JSC fails to discharge its constitutional mandate**

On 20 August 2011, the Judicial Service Commission (JSC) passed a resolution ?on the procedure it would follow for the purpose of being consulted by the President of South Africa on the suitability of Justice Mogoeng Mogoeng for appointment as Chief Justice of South Africa?. In particular, the resolution noted that the JSC would ?issue an invitation to the law bodies ? and other institutions with an interest in the work of the JSC, to make written submissions?.

SECTION27, Sonke Gender Justice Network (?Sonke?), the Lesbian and Gay Equality Project (?the Equality Project?) and the Treatment Action Campaign (TAC) heeded this call and made a joint submission in light of our shared concerns about Justice Mogoeng?s suitability. That submission, which was largely based on an analysis of the positions he adopted in five superior court decisions, came to the conclusion that he is not suitable for the position. That other judgments exist that were not referred to in no way addresses the issues that arise from those we brought to the attention of the JSC. We stand by our submission.

A majority of the JSC has apparently decided differently. After a lengthy interview, which was broadcast live on the eNews Channel over two days, the JSC deliberated on Justice Mogoeng?s suitability behind closed doors. Press reports indicate that a significant majority of JSC members voted ? by way of a secret ballot ? to advise the President that Justice Mogoeng is suitable for appointment as Chief Justice. The President has yet to make his final decision.

Why are we speaking out again?

SECTION27, Sonke, the Equality Project and TAC feel compelled to make public our views on how those who participated in the process were unfairly attacked, how Justice Mogoeng?s responses did little to address our concerns and how the JSC failed to discharge its constitutional mandate. We do so primarily because of our commitment to ensuring that future interviews for judicial appointment ? to all superior courts ? are conducted in an open and accountable process. While important, live broadcasting alone cannot guarantee that this happens.

Unfair attacks on civil society

Our submission, whilst robust, was entirely based on a detailed analysis of Justice Mogoeng?s public record as a judge.

Yet it was characterised by a number of senior JSC members ? and the judge himself ? as part of a ?vicious campaign?. In his closing remarks, Justice Mogoeng referred to us as ?well-resourced pressure groups?, implying that we were merely doing the political work of other more sinister organisations with a hidden agenda.

Yet our submission simply considered a number of judgments in the limited time available to us; the conclusions reached were almost exclusively based on an analysis of Justice Mogoeng?s own writing and that with which he associated himself. We had no other writing to consider, whether publications or speeches. Instead of allowing proper consideration of the submissions, including ours, they were treated with contempt by many commissioners.

Our submission was not vicious and they were also not part of any concerted campaign with hidden forces against the person of Justice Mogoeng. Our submission was motivated by real and genuine concerns about the suitability of Justice Mogoeng for the position of Chief Justice. These concerns remain unaddressed.

Our submission also made our interests in the process clear. For example, we expressly noted that ?SECTION27 recognises that the realisation of all rights depends upon ensuring access to an effective, functional and independent judicial system based on the rule of law and the supremacy of the Constitution?, and that ?[c]entral to this vision of the judiciary is the appointment as judicial officers of appropriately qualified men and women who are fit and proper persons.? The interests of Sonke, the Equality Project and TAC were also raised.

Yet despite our proven tracks records of fighting inequality and using the Constitution, the rights and values it entrenches and the Constitutional Court to advance social justice, we were unfairly branded as the enemy. It would seem as if members of the JSC and Justice Mogoeng would like to chill the prospects of future forthright submissions from civil society. But this will not happen. Indeed, this hearing has made us more alert to the need to monitor the JSC carefully.

We also point out that it is inevitable that where there is only one nominee, robust debate will arise. Indeed, it was unfair to Justice Mogoeng for the JSC to put the spotlight on him alone by not allowing for further nominations or considering additional nominees of its own.

New and ongoing concerns about Justice Mogoeng

Whilst the interview showed that Justice Mogoeng has strengths in case management and the administration of courts, in our view it did not allay our concerns about Justice Mogoeng?s suitability for the office of Chief Justice. In particular, the interview confirmed the following:

On rape

- Justice Mogoeng did not (and apparently still does not) understand the law on ? or the impact of ? rape, especially on those raped by persons in whom they have placed their trust. His judgments, as well as his spirited defence of them, do not exhibit any real understanding of the injuries that extend beyond physical harm.
- A number of pertinent questions were simply not put to him. For example, he was not asked why he thinks that provocation can ever be a mitigating factor in rape cases; or whether pleading guilty is itself evidence of remorse.
- His argument that he was only following legal precedent was shown to be hollow when he admitted that he followed a 1988 case, despite the fact that since then the Constitution was adopted, minimum sentencing legislation was brought into force and a 2001 Supreme Court of Appeal case ? *S v A* ? had overturned the earlier case.
- Further, the principle of a court effectively overturning pre-constitutional precedent of a higher court was clearly established in 1996 in the case of *Ryland v Edros*. That case was already reported before Justice Mogoeng was first appointed to the bench.

On the role of civil society

- Justice Mogoeng does not appear to understand the nature of the democratic space that our Constitution has opened for public debate; instead, he agreed with those JSC members who claimed that he had been ?viciously attacked? over the last few weeks by civil society.
- A range of credible, well-established organisations made submissions in good faith and out of a responsibility to ensure that all necessary information is before the JSC. To suggest that these submissions were part of a vicious campaign is incorrect; it strongly suggests that criticism of judicial nominees, based on facts, is not permissible.
- In his closing remarks, Justice Mogoeng also warned ominously that he would not allow this to happen again, despite asserting ? without much more ? that the media is important and must express itself fully. In our view, this demonstrated his willingness to say what he thought was necessary for public consumption.

On his writing and judgments

- Justice Mogoeng admitted that he has no published articles about law because he has ?no passion? for writing. It is difficult to understand how the leader of the judiciary, which accounts to the public primarily through its written decisions, has no passion for the written word.
- It is through writing that jurists develop a judicial philosophy and intellectual rigour.
    - He also admitted that, despite being a judge for 14 years, he has very few reported judgments.

On his religious beliefs

- Justice Mogoeng is a religious person. That is his constitutional right. So too is it his right to be a member of a church that sees homosexuality as a sin.
- What is of concern to us however, is Justice Mogoeng?s reliance on the passages from Romans in order to explain why he would uphold the law:

Consequently, he who rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves.

- In other words, in Justice Mogoeng?s view, the Bible (God?s word) comes first; then there is the government, which is the expression of God?s word. That Justice Mogoeng sees government authorities as God?s servants and what this means for his interpretation of judicial independence is a cause for serious concern.

On his relationships with his colleagues

- Justice Mogoeng admitted that there are many people in the judiciary who do not support him, including in the Constitutional Court. But he also said that those in the Constitutional Court who do not support him were probably jealous. In our view this is a shallow understanding about what the concerns of his colleagues may be.
- In addition, he was unable to articulate what actions he would take to unify the Constitutional Court, except to say that his colleagues would ?come around?.

On his failure to give reasons in *Dey*

- Although Justice Mogoeng denied being homophobic, as one would have expected, he could not properly explain his dissent in the *Dey* case; his excuse ? that he didn?t have time to think about it ? does not ring true.
- Because he was under pressure in the interview, he finally admitted that ?if he had thought about it? he would have adopted a different position (i.e. he would not have dissented).

JSC?s failure to discharge its constitutional mandate

We made our written submission with the trust that JSC members would approach the interview properly and with open minds. But as we observed the interview it became very clear that this would not happen. Instead of putting our well-reasoned concerns and questions properly to the President?s nominee, in the manner in which they were raised, he was

congratulated for his ?dignified silence? ? a matter which is extraneous to his objective suitability for Chief Justice.

Instead of probing Justice Mogoeng for full answers, several commissioners sought to protect him by invoking procedure and deflecting attention away from difficult questions. Several commissioners behaved as if they were Justice Mogoeng?s defence counsel, not independent guardians of the Constitution and the independence of the judiciary. It is important to point out that JSC members, even if appointed by the President or political parties, are supposed to be independent and impartial in their assessment of candidates for the judiciary.

Despite wide concerns set out in a large number of submissions from bodies representing professionals, civil society and the labour movement, a majority of the JSC clearly demonstrated an intent to push through the President?s nomination. Some sought to limit substantive debate, including through reference to his 2009 interview for a position on the Constitutional Court which in their view had proved his suitability.

But instead of proving his fitness for office, the record of that interview shows that the JSC failed at the time to examine or consider properly his prior judicial record. In addition, a number of commissioners sought to use the public platform of the live broadcast to advance their political agendas. The intention was apparently not to assess fitness for purpose, but rather to smooth the way for Justice Mogoeng?s appointment.

It was obvious to all who witnessed the interview that the decision was a foregone conclusion. We call on the JSC to make public its written reasons for its decision.

For more information, contact ?

Mazibuko Jara

Lesbian and Gay Equality Project

083 651 0271

Sisonke Msimang

Sonke Gender Justice Network

082 610 6705

Source URL (retrieved on *2016/08/29 - 4:48pm*): http://tac.org.za/community/node/3151