SUBMISSION ON THE SUITABILITY OF JUSTICE MOGOENG MOGOENG FOR APPOINTMENT AS CHIEF JUSTICE OF SOUTH AFRICA

INTRODUCTION

1. 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". Paragraph 4 of the resolution provides as follows:

> The JSC will issue an invitation to the law bodies, namely the General Council of the Bar of South Africa, the Law Society of South Africa, the Department of Justice and Constitutional Development, the Magistrates Association of South Africa, the National Association of Democratic Lawyers, the Society of Teachers of Law, the Association of Regional Magistrates of South Africa *and other institutions with an interest in the work of the JSC*, to make written submissions to it, on the suitability of the nominee by the President for appointment as the Chief Justice.[1]

2. SECTION27 is a public interest law centre and registered law clinic that seeks to develop and use the law to protect, promote and advance human rights. As its name suggests, it has a particular focus on the right to have access to health care services and the obligations it imposes on the state and those who exercise private power. SECTION27 also focuses on the right to basic education.[2]

3. 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. Central to this vision of the judiciary is the appointment as judicial officers of appropriately qualified men and women who are fit and proper persons.

4. SECTION27 is an institution with an interest in the work of the JSC. Most recently, this interest was reflected in a parliamentary submission made together

[1] Emphasis added

[2] SECTION27 builds on and expands the work of the AIDS Law Project, which was established in 1993 at the University of the Witwatersrand's Centre for Applied Legal Studies. For more information on SECTION27, see www.section27.org.za

with the Legal Resources Centre on the Constitution Seventeenth Amendment Bill [B 6—2011]. Amongst other things, the submission considered proposed amendments to section 178(1) of the Constitution dealing with the composition of the JSC.[3]

5. SECTION27 makes this submission in its own name and on behalf of Sonke Gender Justice Network ("Sonke"), the Lesbian and Gay Equality Project ("the Equality Project") and the Treatment Action Campaign (TAC); all of them also have an interest in the work of the JSC. In particular, this submission is made in light of our shared concerns about the suitability of Justice Mogoeng for appointment as Chief Justice.

6. Our firm view is that Justice Mogoeng is not suitable for the position of Chief Justice. We reach this conclusion largely based on an analysis of the positions he adopted in the following superior court decisions:

    6.1. *Le Roux and Others v Dey* (8 March 2011);[4]
    6.2. *S v Mathibe* (1 March 2001);[5]
    6.3. *S v Moipolai* (20 August 2004);[6]
    6.4. *S v Modise* (9 November 2007);[7] and
    6.5. *S v Madukanele* (28 March 2002).[8]

STRUCTURE OF THIS SUBMISSION

7. We begin this submission by setting out why the organisations represented by SECTION27 have an interest in making submissions on the suitability of Justice Mogoeng for appointment as Chief Justice. Thereafter we consider the positions adopted by Justice Mogoeng in the superior court decisions referred to in paragraph 6 above under the following two headings: Justice Mogoeng's

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[3] The submission is available at http://www.section27.org.za/2011/07/28/joint-submission-on-the-constitution-seventeenth-amendment-bill/
[4] [2011] ZACC 4; 2011 (3) SA 274 (CC)
[5] [2001] ZANWHC 12, available at http://www.saflii.org/za/cases/ZANWHC/2001/index.html. Leeuw J concurred in Mogoeng J's opinion in this case.
[6] [2004] ZANWHC 19, available at http://www.saflii.org/za/cases/ZANWHC/2004/index.html. Gura AJ concurred in Mogoeng JP's opinion in this case.
[7] [2007] ZANWHC 73, available at http://www.saflii.org/za/cases/ZANWHC/2007/index.html. Mogoeng JP concurred in Gura J's opinion in this case.
[8] [2002] ZANWHC 8, available at http://www.saflii.org/za/cases/ZANWHC/2002/index.html. Pistor AJ concurred in Mogoeng J's opinion in this case.

approach to sexual orientation and Justice Mogoeng's approach to gender-based violence.

INTERESTS OF ORGANISATIONS REPRESENTED BY SECTION27

Sonke

8. Sonke was established in 2006 and has 50 full-time staff working across all of South Africa's nine provinces and in ten other African countries. It seeks to build the capacity of government, civil society and individuals to take action to promote gender equality, prevent domestic and sexual violence and reduce the spread and impact of HIV.[9]

9. In particular, Sonke's work includes mobilising men to play an active role in achieving gender equality. As an organisation that works to encourage men to take a stand against men's violence against women, Sonke's interests in making this submission are threefold:

    9.1. First, Sonke has an interest in ensuring women's confidence in a criminal justice system that does not grant perpetrators of gender-based violence a sense of impunity. In a country with some of the highest levels of domestic and sexual violence of any in the world, Sonke is of the view that our courts need to send a clear message that perpetrators of gender-based violence will be held to account: violence against women will not be tolerated and those who commit egregious acts of violence against women will not receive leniency from the courts.

    9.2. Second, Sonke has an interest in ensuring that judicial officers remain faithful to their oaths of office, upholding and protecting the Constitution and the human rights entrenched in it. In particular, Sonke's interest focuses on the right to equality before the law and equal protection and benefit of the law, the right to be free from unfair discrimination and the right to freedom and security of the person, including the right to be free from all forms of violence from public and private sources.

[9] For more information on Sonke, see www.genderjustice.org.za

9.3. Third, Sonke has an interest in ensuring that the judiciary is led by a fit and proper person who instils women's confidence in the criminal justice system and, in relation to upholding constitutional rights and values, leads by example.

The Equality Project

10. The Equality Project is a registered non-profit organisation with a range of objectives, including – for the purposes of this submission – the following:

    10.1. To promote equality before the law for all persons irrespective of their sexual orientation;
    10.2. To challenge by means of litigation, lobbying, public education and political mobilisation, all forms of discrimination on the basis of sexual orientation; and
    10.3. To defend and promote constitutional rights and values as an integral aspect of social and economic development.

11. Like SECTION27, the Equality Project recognises the direct link between the realisation of constitutionally protected rights and the appointment as judicial officers of appropriately qualified men and women who are fit and proper persons. In its view, the Chief Justice – as the head of the judiciary – must exemplify constitutional values.

12. Like Sonke, the Equality Project has an interest in ensuring that the criminal justice system holds perpetrators of gender-based violence to account, including perpetrators of violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. In addition, it shares an interest in ensuring that judicial officers remain faithful to their oaths of office.

TAC

13. TAC is a registered not-for-profit company that was founded on 10 December 1998. Since then, TAC has held government accountable for health care service delivery; campaigned against official AIDS denialism; challenged the world's leading pharmaceutical companies to make treatment more affordable; and cultivated community leadership on HIV. TAC has received worldwide acclaim

and numerous international accolades, including a nomination for a Nobel Peace Prize in 2004.[10]

14. Since 2003, TAC has been active in addressing gender-based violence in its district work, particularly in Lusikisiki, Cape Town (Khayelitsha), uMgungundlovu and Ekurhuleni. TAC aims to reduce gender-based violence and expand access to health services and justice for rape survivors. It seeks to achieve this by increasing awareness of abuse and rape and by providing education on human rights. This is done through workshops, engaging with communities, disseminating material and door-to-door campaigns.

15. TAC's interest in this submission stems from the support it provides to rape survivors who attempt to obtain access to justice. Its experience has been one of police insensitivity, poor investigations, missing dockets and an inevitable failure of the criminal justice system (including the courts) to protect the rights of abused women. Like Sonke, TAC has an interest in ensuring that the judiciary is led by a fit and proper person who instils women's confidence in the criminal justice system and, in relation to the values of equality and dignity, leads by example.

JUSTICE MOGOENG'S APPROACH TO SEXUAL ORIENTATION

16. In *Dey*,[11] the Constitutional Court held that "[a]ll members … endorse the exposition in the judgment of Froneman J and Cameron J about apology (paras 195 to 203) and, save for Mogoeng J, regarding expression about constitutionally protected groups (paras 181 to 189)." In dissenting, Justice Mogoeng offered no reasons. In contrast, however, the nature of and the extent to which other members of the Court dissented are set out in the judgments of Froneman J and Cameron J, Yacoob J and Skweyiya J.

17. In essence, paragraphs 181 to 189 hold that "[i]t is not, and should not be considered to be, an actionably injurious slight to offend someone's feelings by merely classing them in a condition the Constitution protects – be it religious, racial, age, birth or sexual." The judgment expands: "To simply call someone Muslim, Christian, gay, black, white, lesbian, male, an old-age pensioner, atheist,

[10] For more information on TAC, see http://www.tac.org.za
[11] See above note 6.1

Venda, or Afrikaans-speaker is not actionably injurious. Something more is needed."[12]

18. In relation to the facts of the case, the judgment makes it clear that it "cannot be actionable simply to call or to depict someone as gay even though he chooses not to be gay and dislikes being depicted as gay – and even though stigma may still surround being gay."[13] In other words, there is no actionable claim if one if simply called gay or said to be in a gay relationship; there has to be something more, like an inference that one is "a hypocrite, or untruthful … or unworthy of trust".[14]

Withholding reasons for decisions is unlawful

19. Writing on behalf of a unanimous Court in *Mphahlele v First National Bank of South Africa Ltd*, Goldstone J explained why judges are ordinarily required to give reasons for their decisions:[15]

> There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.[16]

20. In addition, paragraph 8(1)(c) of the Code of Judicial Conduct for Judges – in respect of which Parliament invited stakeholders and interested persons to submit written submissions in early January 2011 – makes it plain that a judge is required to "give adequate reasons for any decision."[17] Note 8B to the Code explains:

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[12] Paragraph 182
[13] Paragraph 185
[14] Paragraph 186
[15] [1999] ZACC 1; 1999 (2) SA 667 at paragraph 12
[16] Footnote omitted. In addition (but not relevant for our purposes), Goldstone J considered the appeal process and how it relied upon the furnishing of reasons for decisions taken. This judgment was cited with approval in *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd and Others* [2010] ZACC 14, a unanimous decision of a nine-judge bench of the Constitutional Court (of which Justice Mogoeng was a member).
[17] Section 12(1) of the Judicial Service Commission Act 9 of 1994 provides that "the Chief Justice, acting in consultation with the Minister [of Justice and Constitutional Development], must compile a

> Reasons for decisions must be clear, cogent, complete and succinct. A number of decisions do not necessarily require reasons, e.g. unopposed cases and interlocutory rulings, because the reasons are usually self evident. If reasons in such cases are later reasonably required, they must be given with[in] a reasonable time.

21. In addition to this rule of law consideration, Justice Mogoeng's failure in *Dey* to explain his dissent raises further concerns; in particular, it raises concerns relating to a possible conflict between his personal (religious) views on the one hand and the oath he would have taken upon his initial elevation to the bench on the other. The oath or solemn affirmation of judicial officers, which is set out in Item 6 to Schedule 2 of the Constitution, provides as follows:

> I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/ E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.

22. Such concerns arise because we do not know the basis of Justice Mogoeng's dissent and whether he dissented from the general proposition set out in paragraphs 181 to 189 or just those parts dealing with sexual orientation. The issue is not whether Justice Mogoeng was right or wrong to dissent, but rather that we are entitled to know the extent of his dissent, why he dissented and whether he is in fact able to discharge his oath of office.

23. This is particularly so given his alleged membership of Winners Chapel South Africa, the local branch of David Oyedepo Ministries International that preaches that homosexuality is a perversion that can be cured.[18]

Seeking explanations from Justice Mogoeng

24. In our view, the JSC – in its interview with Justice Mogoeng – should seek answers to the following questions:

Code of Judicial Conduct, which must be tabled by the Minister in parliament for approval." It appears as if the Code has not yet come into force.

[18] See http://www.davidoyedepoministries.org and http://www.winnerssouthafrica.org/

24.1. What is the extent of your dissent in *Dey*? Does it extend to the finding that "[i]t is not, and should not be considered to be, an actionably injurious slight to offend someone's feelings by merely classing them in a condition the Constitution protects", or is it limited to the finding that there is no actionable claim if one is simply called gay or said to be in a gay relationship?

24.2. What is the legal basis for your dissent and why did you not give reasons for your dissent?

24.3. Are you a member of Winners Chapel South Africa? If so, how do you reconcile your religious views with the oath that you took to "uphold and protect the Constitution and the human rights entrenched in it"?

Seeking commitments from Justice Mogoeng

25. Irrespective of the finding the JSC makes in relation to his suitability to be appointed as Chief Justice, it should – in addition to asking these difficult questions – seek the following public commitments from Justice Mogoeng:

25.1. Consistent with paragraph 11(2) of the Code of Judicial Conduct, a public commitment that he will "not take part in the activities of any organization that practices discrimination inconsistent with the Constitution"; and

25.2. Consistent with his oath of office, a public commitment he will "uphold and protect the Constitution and the human rights entrenched in it", including the rights of LGBTI persons to equality before the law, equal protection and benefit of the law and freedom from unfair discrimination – whether public and private – on the basis of sexual orientation.

JUSTICE MOGOENG'S APPROACH TO GENDER-BASED VIOLENCE

26. Of particular concern to the parties to this submission is what appears to be a trend of patriarchy in a line of judgments of Justice Mogoeng relating to cases of gender-based violence. The judgments we refer to below suggest that Justice Mogoeng does not appreciate fully the values of equality and dignity that are foundational to our Constitution.

S v Mathibe[19]

27. The facts of the case are appalling. It was undisputed that the accused tied the complainant to the bumper of his car and "drove that vehicle at a fairly high speed over a distance of about 50 metres", with the objective "to drag the complainant and cause her grievous bodily harm." The complainant was injured and in pain. The accused refused to allow her to obtain medical attention until the next day.

28. The accused pleaded guilty to the charge of assault with intent to do grievous bodily harm and was convicted. He was sentenced to two years' imprisonment. In response to a query raised by Justice Mogoeng, the magistrate defended the two-year sentence on the grounds that "the offence is prevalent in the Odi district; this type of offence is mainly committed against women; dragging a woman in the manner the accused did is ancient and barbarous; [and] the sentence is intended to deter potential offenders."

29. While recognising that these are "valid and legitimate factors", Justice Mogoeng felt that the two-year sentence was "too harsh by any standards". Mitigating factors in his view were that –

    29.1. The appellant was a first offender;
    29.2. By the sole fact of pleading guilty, the appellant showed remorse;
    29.3. The appellant "provoked" the accused; and
    29.4. The complainant did not sustain serious injuries. (She had sustained abrasions on her stomach, right thigh and both knees).

30. The indignity and psychological harm that the complainant suffered were not considered as factors in the injury that she sustained.

S v Moipolai[20]

31. The appellant in this case was convicted of the rape of his "common law" wife. He was convicted and sentenced to 10 years' imprisonment. Justice Mogoeng upheld the conviction. However, in considering the merits of the case, Justice Mogoeng was comfortable in articulating the argument of the defence as being

[19] See above note 6.2
[20] See above note 6.3

that "the nature of their [the complainant and appellant] relationship is such that it renders their intercourse incapable of being legally categorised as rape." It appears that Justice Mogoeng may have been unaware that marital rape was no longer protected from criminal sanction in South Africa.

32. In relation to the sentence, Justice Mogoeng found that there were substantial and compelling circumstances to justify a reduction in the minimum sentence of 10 years. While recognising that raping and assaulting an eight-month pregnant woman in the presence of another person are aggravating factors, Justice Mogoeng nevertheless felt that they were "overemphasised at the expense of equally strong mitigating factors". These were the mitigating factors:[21]

    32.1. The appellant was a first offender;
    32.2. The appellant and complainant were no strangers to each other (they were lovers);
    32.3. "[B]ut for the presence of [the other person] the appellant and complainant would probably have had consensual intercourse";
    32.4. "[I]n all likelihood the reason why the Appellant had asked the Complainant to come over to his parental home that night, was so that they could have intercourse together";
    32.5. "Similarly, the Complainant must have come knowing that this was either likely to happen or was going to happen for sure": and
    32.6. "This rape should, therefore, be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable".

33. Justice Mogoeng went on to hold that there were substantial and compelling circumstances to justify imposing a lesser sentence. These were:

> a) the relationship of the Appellant and the Complainant was virtually the same as that of husband and wife; b) theirs was not an abusive relationship; c) they had been lovers for about 7 years and had children together; d) the assault upon the Complainant was not serious; e) the Appellant is a first offender.[22]

34. Justice Mogoeng reduced the sentence to ten years, half of which was suspended for five years.

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[21] At paragraphs 23 and 24
[22] At paragraph 26

S v Modise[23]

35. This is a judgment of Gura J in which Justice Mogoeng concurred. It concerned an appeal against a conviction and sentence (of five years' imprisonment) for attempted rape.

36. The facts as described in the judgment are as follows. The appellant and complainant were married but undergoing divorce proceedings. For almost a year they had not "enjoyed conjugal rights" or shared the same bed. On the night of the incident the appellant returned from his parental home and went to the marital bedroom. The complainant later entered the (her) bed. The judgment notes that she was "clad in a pair of panties and a nightdress only". When the appellant attempted sexual intercourse the complainant refused. He then grabbed her, "undressed her of her panties", "throttled her and pinned her down". They tussled. She was able to break loose and fled to the neighbours where she spent the night.

37. Despite the abolition of the application of the cautionary rule in cases of sexual assault, the judgment notes acceptingly that the trial court had applied the cautionary rule and the evidence of the complainant remained credible.[24]

38. In considering the appropriateness of the five-year sentence, the judges noted that a court of appeal could only substitute the sentence of the trial court where the difference between the sentence imposed by the trial court and that which the court of appeal would have imposed is "so marked that it can properly be described as shocking, startling or disturbingly inappropriate".

39. In order to justify reducing the sentence the judges stated the following:

> This is a man whose wife joined him in bed clad in panties and a nightdress. When life was still normal between them, they would ordinarily have made love. The appellant must, therefore, have been sexually aroused when his wife entered the blankets. The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behaviour. He, however, neither smacked, punched nor kicked her. Minimum force, so to speak, was resorted to in order to subdue the complainant's resistance.[25]

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[23] See above note 6.4
[24] Paragraph 8. See *S v Jackson* 1998 (1) SACR 470 (SCA) and *S v M* 1999 (2) SACR 548 (SCA)
[25] At paragraph 19

40. The judges found that the magistrate erred in not taking into account the relationship between the appellant and complainant. According to Gura J and Justice Mogoeng, "[the] relationship of husband and wife should never be overlooked by a judicial officer."[26]

41. They went on to hold that the trial court had over-emphasised the appellant's previous conviction for assault. They stated:

> It is true that the complainant was injured, outside the house when she fell, but the appellant himself did not inflict any injury on her directly. He never chased after her. No real harm or injuries resulted from the throttling. It is not in the interests of justice to send the appellant to prison. This case is not comparable to a case where a lady comes across a stranger on the street who suddenly attempts to rape her. An effective term of imprisonment is, therefore, not appropriate in this case.[27]

42. The sentence of five years was wholly suspended.

Consideration of gender-based violence cases

43. Given the number of criminal matters that came before Justice Mogoeng, including many dealing with gender-based violence, one would have expected – at the very least – that he would be familiar with the law in relation to such matters. One would also have expected that there would be an appreciation that all forms of violence against women are serious crimes, with devastating physical and psychological consequences.

44. Instead, Justice Mogoeng reached for arguments akin to "she asked for it", "she wasn't really hurt", "he was understandably sexually aroused" and "it wasn't really that bad because he was not a stranger". In our view, an existing relationship between perpetrator and victim is not a mitigating factor; to the contrary, it aggravates the injury.

45. Justice Mogoeng's arguments are not befitting a judicial officer, let alone one who occupies a seat on the Constitutional Court. One is entitled to expect from all judicial officers, in particular Constitutional Court judges, an understanding and upholding of the values and rights contained in the Constitution necessary for dispensing justice.

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[26] At paragraph 21
[27] At paragraph 22

46. Notably, in contrast to cases of sexual violence committed by men against women (where Justice Mogoeng reduced the sentences imposed by the lower courts), he took a different approach to cases involving sexual violence committed by men against other men. This approach is consistent with a person who holds stereotypical views of gender roles, viewing male rape as that which figuratively turns a man into a woman.

47. *S v Madukanele*, for example, concerned a conviction of sodomy and a sentence of two years' imprisonment. Notwithstanding the fact that the law – at the time – did not recognise that a man could be the victim of rape, Justice Mogoeng observed that male rape (at the time only punishable as indecent assault)[28] and female rape should be punished equally. He explained:

> The sentence imposed on the accused in this matter is, in our view, extremely lenient. It ignores the degradation, the violation of bodily integrity, the injuries sustained by the complainant, the accused's abuse of trust and hospitality of the [complainant and his mother] and all the other considerations that necessitate the imposition of severe penalties for the rape of a female, which should equally have been given expression to.[29]

48. Justice Mogoeng found that a sentence of between eight and 15 years would have been suitable and declined to certify the sentence of two years.

Conclusion on Justice Mogoeng's approach to gender-based violence

49. Unlike our concern with *Dey*, where it is unclear what position Justice Mogoeng holds, in the cases of gender-based violence his attitude is quite clear. None of the concerns raised by these judgments were put to Justice Mogoeng in his interview for appointment to the Constitutional Court.

50. We hold a strong view that the opinions expressed in the judgments to which we have referred cast a shadow over Justice Mogoeng's suitability for judicial office. However, this is not the question that is now before the JSC; instead, what is before the JSC is the suitability of Justice Mogoeng for the highest judicial office

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[28] At the time the crime was committed, the common law offence of sodomy had already been declared unconstitutional. A gender-neutral definition of rape was only introduced into our law some time later with the coming into force of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

[29] See above note 6.5 at paragraph 12

in the country. In addition to his services on the Constitutional Court, Justice Mogoeng would be required to lead the judiciary, including in relation to racial and gender transformation.

51. We have no confidence in his ability either to dispense justice in accordance with the values of the Constitution or in his ability to address the complex gender questions that arise in the judiciary and in the legal profession appropriately. The judgments to which we have referred evidence a patriarchal attitude to women. We have no reason to believe that Justice Mogoeng will not exhibit similar patriarchy in relation to gender transformation in the judiciary, the legal profession and indeed society as a whole.

CONCLUSION

52. We believe that it is necessary, in the interests of accountability, for the Commission to pose the questions set out and the commitments sought in paragraphs 24 and 25 respectively. In relation to Justice Mogoeng's approach to gender-based violence, however, it is our view that the JSC should ask him to explain –

    52.1. His reasoning in the judgments that we have cited in this submission; and
    52.2. How someone with his patriarchal views – as expressed in his judgments – would be appropriately qualified to head the judiciary.

53. It is our firm view that Justice Mogoeng is not suitable for the position of Chief Justice of South Africa.

54. In addition, we call on the JSC to conduct an open and accountable interview and consultation process. In our view, this includes conducting a public interview of Justice Mogoeng that is open to all media (including broadcast media), as well as committing to publishing the advice given to the President on the suitability of his nominee for appointment as Chief Justice of South Africa.

Adila Hassim
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24 August 2011
Johannesburg