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29 August 2011

The Judicial Services Commission

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Attention : Sello Chiloane

Dear Sirs /Mesdames

Re : Consultation Process of the JSC on the suitability of Justice Mogoeng Mogoeng for Appointment as Chief Justice

The resolution of the JSC dated 20 August 2011 in relation to the above process refers. We address yourselves at the instance of several women's organisations, listed in Annexure 1 hereto. Thank you for the opportunity provided to institutions with an interest in the work of the JSC to make submissions on the suitability of the nominee of the President for appointment as the Chief Justice.

At the outset, we apologise that these submissions were not sent on 26 August 2011. While the WLC was made aware of the above-mentioned resolution, we have not had sight of the invitation for submissions and were thus not aware of the deadline until the 27 August 2011. We request that, in light of the short timeframe for the submission of comments and the extreme importance of the appointment that you condone the late submission. In considering our application for condonation we ask also that you take into account that the organisations listed in this submission all work directly and on a day-to-day basis with women experiencing gender based violence.

One of the objectives of the Women's Legal Centre (WLC) is the transformation of the judiciary, in both form and substance. The WLC has in the past made submissions to the JSC in relation to candidates for

appointments to the Constitutional Court, High court and Labour Court in line with this objective and in order to promote the constitutional vision of an egalitarian society. These submissions have set out the value in appointing strong women candidates, as well as commented on the judgments of both male and female candidates in relation to their views on gender equality.

These submissions seek to draw the attention of the JSC to four judgments, which we believe raise serious questions that the nominee should be given the opportunity to respond to in relation to issues of gender equality and gender-based violence.

S v Mathebe (Case no 8/2001 Bophuthatswana Provincial Division)

This matter is a review of the sentence of Mathebe, who was convicted of assault with the intention to do grievous bodily harm. He ''tied the complainant, his girlfriend, with a wire to the rear bumper of a vehicle. He then drove that vehicle on a gravel road at a fairly high speed over a distance of about 50 metres. The objective of this exercise was to drag the complainant and cause her grievous bodily harm. The complainant did sustain several abrasions on her stomach, right thigh and both knees. She was in pain but the accused refused to let her have medical treatment on the day of the incident. He took her to the Doctor the next day.''[1]

Justice Mogoeng, the reviewing judge, made an order setting aside the sentence of 2 years imprisonment and replaced it with a fine of ''R4000 or 2 years imprisonment suspended for 5 years on condition that the accused is not convicted of an offence involving violence, committed during the period of suspension and in respect of which the accused is sentenced to undergo imprisonment without the option of a fine.'' [2]

The reasons given by the sentencing court included the fact that the offence is prevalent in the district of the accused and that it is an offence that is mainly committed against women. Mogoeng ,J accepted that these are legitimate factors and that a heavy sentence was justified. However he was of the view that the sentence was too severe. He states:

> ''in my view, the imposition of an effective term of two years imprisonment in circumstances where the accused is a first offender, who pleaded guilty and thereby showed remorse, who

[1] Para 1 and 2
[2] Para 7

> was provoked by the complainant and the complainant did not sustain serious injuries, cannot be in accordance with justice. It is too harsh by any standards.''

In S v Baloyi[3], decided before Mathebe, the Constitutional Court considered the scourge of domestic violence in our society. The court pointed out that domestic violence is systemic, pervasive and overwhelmingly gender specific.[4] Domestic violence is a manifestation of gender inequality that reinforces patriarchal domination and thus undermines the constitutional value of equality and the non-sexist society envisaged by the Constitution.. The right to equality is further undermined when 'spouse-batterers enjoy impunity.'[5] The Constitutional Court further held that:

> 'The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of the individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic sexist behaviour are normalised rather than combatted. Yet it is precisely the function of constitutional protection to convert misfortune to be endured into injustice to be remedied.'[6]

The WLC has attempted to obtain the court file in the S v Mathebe but has been advised that it has been archived. In any event, it is difficult to imagine any form of 'provocation' that would have justified a reduction of sentence to one of a fine in an assault such as this, specifically in the context of domestic violence, where the trial court had found that these crimes were not only prevalent, but mainly committed against women in the area.

The court ignores the compounding of the offence by refusing the complainant access to medical treatment until the next day, an aggravating circumstance. The judgement also does not appear to recognise, or consider as serious, the psychological harm and injury resulting from such an assault.

[3] 2000 (2) SA 425 (CC)
[4] Paragraph 12.
[5] Paragraph 12.
[6] Paragraph 12.

E Modise v The State (CA 113/06 Bophuthatswana Provincial Division)

In this matter the judgment was handed down by Gura J with Mogoeng concurring. It is the appeal of the conviction and sentencing of the accused for attempted rape of his wife. He was sentenced to five years imprisonment.

The couple had been separated for a period of almost one year. Modise was staying in his parental home. One the night in question, he came 'unexpectedly to the matrimonial home and proceeded straight to the matrimonial bedroom. His wife, the complainant, joined him in bed later. They shared the same blankets on the same bed. She was clad in a pair of panties and a nightdress only.'[7]

'In the middle of the night, the appellant asked her if they could make love. This request was turned down. He grabbed her and completely undressed her of her panties. He throttled her and pinned her down to the bed. Initially, the complainant was lying on her side, but the appellant then turned her body in such a way that she eventually lay on her back. He then tried to lie on top of her. They engaged in a tussle with each other. She broke loose and jumped out of the bed. In an attempt to prevent her from fleeing, he grabbed her nightdress which got torn.'[8]

The appellant challenged the conviction, but the Appeal Court accepted the above version and held that 'the guilt of the appellant was proved beyond reasonable doubt.'[9]

The trial court took into account a number of factors: the seriousness and prevalence of the offence, the defencelessness of the victim and the injury on her knee, the judgment of S v Mvamvu [10] (where a husband who had raped his wife more than once had his sentence increased by the SCA to 10 years direct imprisonment), the previous conviction of assault and the poor health of the appellant.

The sentence in Modise was reduced from 5 years direct imprisonment to a wholly suspended sentence of five years imprisonment on certain conditions.[11]

[7] Para 3-4
[8] Para 5-6
[9] Para 16
[10] 2005 (1) SACR 54 (SCA)
[11] Para 23

The reasoning of the court was :

> 'This is a man whose wife joined him in bed, clad in panties and in 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.'[12]

The SCA judgment dealing with marital rape and relied upon by the trial court (where the sentence was 10 years direct imprisonment per rape charge) was held to be 'clearly distinguishable from the present case' because:

> 'apart from **Mvamvu's** case being that of at least eight incidents of rape , and this matter being a singular incident of attempted rape, the appellant in this matter did not beat up the complainant, not even to half the degree to which **Mvamvu** had done to his wife. There are, therefore, more mitigating factors in the present case as opposed to the strong aggravating features in the **Mvamvu** case which was incorrectly relied on by the Court *a quo.* Each case has to be decided primarily on its own facts. ' [13]

The court in Mvamvu increased the trial court's sentence of three and five years per rape charge respectively to ten years on each. Even if one distinguished this case from Mvamvu, it would require convincing substantial and compelling reasons to result in a sentence that involved no direct imprisonment at all.

One of the mitigating factors relied upon is that the appellant did not beat up the complainant. The court draws an arguably tenuous distinction in finding that the appellant did not 'smack, punch or kick' the complainant after confirming that he 'throttled' her, 'pinned her down to the bed', tried to lie on 'top of her' and 'engaged in a tussle' with her from which she broke free and fled, with him tearing her night dress to stop her. The reliance on the finding that the accused 'did not beat up' his wife does not hold up after the court had described his behaviour as 'somewhat violent'.

[12] Para 19
[13] Para 20

A further mitigating factor relied on by the court on appeal was the relationship between the complainant and the appellant. The trial court was criticised for not taking this relationship into account. 'This relationship, of husband and wife, should never be overlooked by any judicial officer. See **S v Moipolai** 2005 (1) SACR 580 (BD).'[14]

The judgment in Moipolai is one penned by Mogoeng, JP and is discussed below.

The court in Modise continues to criticise the trial court for over-emphasising the accused's previous conviction of assault (not on the complainant). 'Clearly, such a record is not an indication that a person did not learn any lesson. 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 interest of justice to send the appellant to prison.

The 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, inappropriate in this case.'[15]

The Centre for the Study of Violence and Reconciliation, in considering why South Africa has one of the highest rape statistics in the world, suggests that one of the causes is social acceptance of 'Rape myths'. [16] The paper explains that 'rape myths are false ideas about what rape is and include such beliefs as: men rape because they cannot control their sexual lust, women encourage rape, rapists are strangers and women enjoy being raped. These myths serve to label women as in some way responsible for the rape and to view men's actions as excusable, thereby giving silent consent to their actions'. [17]

The effects of these stereotypes are manifold: they contribute to under-reporting[18], they lead victims to internalise popular misconceptions and subsequently blame themselves[19] they contribute to the stigma attached to being raped and hamper recovery;[20]they are implicated in the poor treatment meted out by

[14] Para 21
[15] Para 22
[16] 'an Overview of Rape in South Africa' Mary Robertson, in the Continuing Medical Education Journal, No. 16, pp 139-142, February 1998.
[17] Ibid
[18] Department of Health, 1999; Wood and Jewkes, 2001).

[19] Ward, 1995; Lebowitz and Roth, 1994; Lira, Koss and Russo, 1999; Wood and Rennie, 1994; Wyatt and Notgrass, 1990
[20] Sinclair and Bourne, 1998

service providers to victims of sexual assault[21] and they are a factor contributing to low conviction rates for rape, as well as inappropriate sentencing of rapists.[22]

The judgment in this matter relies on several 'rape myths' as mitigating circumstances. The perceived encouragement of the complainant, who went to her bed in a nightdress and panties is viewed as 'overwhelming' the accused with lust. He then cannot control his sexual desire and uses 'minimum force' to subdue her resistance. Her seemingly 'provocative' sleep attire combined with the accused's inability to control his sexual urges, suggests that the complainant was the provocateur of rape by her ex-husband. The physical violence of the attempted rape is then minimised by saying that no injuries resulted from the 'throttling' and 'he never chased her'. Finally, the rape is not as bad as if the complainant had come upon a 'stranger who tried to rape her'. [23]

Once again, the psychological and emotional impact of rape and attempted rape on women was also not considered in relation to sentence.

***S v Moipolai*[24]**

This is the matter relied upon as authority in the Modise matter above, where the court states that the marital relationship should be seen as a mitigating circumstance in the attempted rape.

Moipolai is a 2005 judgment of Mogoeng JP in the Bophuthatswana High Court, also dealing with the appeal of a conviction and sentence in relation to rape. The appellant was convicted of rape and sentenced to 10 years imprisonment by the Regional Court.

The complainant alleged that she was at her long term boyfriend's parental home where she was sleeping. She was eight months pregnant with his third child, when he entered the room with another woman called Matron (his lover of some months) and he made the complainant aware that they would all three share the same bed. She refused and on leaving the bed he punched her on her cheek and chin. She fell and sustained a laceration on the right arm. The accused then ordered her to stay, which she did. He undressed her, and had intercourse with her. The next morning she laid a charge of rape.

[21] Christofides et al, 2006 Suffla et al, 2001

[22] See Bonthuys, E & Albertyn, C (eds) *Gender, Law and Justice* (2007) Juta Albertyn, C, Artz, L, Combrinck, H, Mills, S, & Wolhuter, L Chapter 9 Women's Freedom & Security of the Person. 'Rape law and societal perceptions of rape are informed by myths and stereotypes about rape, that 'serve to deny, minimize, or misrepresent what we know [about sexual assault] from research and accounts of victims and perpetrators' (p310).

[23] Para 22

[24] 2005 (1) SACR 580 (BD)

The court upheld the conviction on this version. There is some comment on the misapplication of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) and the court notes that the correct minimum sentence would be ten years direct imprisonment and that the Regional Court found no substantial and compelling circumstances to deviate from the minimum sentence. The magistrate actually imposed a sentence of ten years imprisonment.

However, Mogoeng CJ reduced this sentence to ten years imprisonment, half of which he suspended on condition that the Appellant is not convicted of rape, indecent assault of an attempt to commit these offences, committed during the period of suspension and which does not attract a sentence of imprisonment without the option of a fine.

The court considered that the complainant was 8 months pregnant, that she was raped in the presence of another woman, and that she was assaulted. The court noted that it was 'highly insensitive'[25] to punch a pregnant woman so hard that she was caused to fall and because her 'sense of decency and privacy did not allow her to share the same bed with the father of her children and another woman.'[26] The court also opined that 'it also heightens his moral blameworthiness for him to have intercourse with her in the presence of another woman shortly after having beaten her up. It must have been humiliating.'[27]

The Court then proceeds to conclude that 'these factors though admittedly aggravating were, however, over-emphasised at the expense of strong mitigating factors.'[28]

The substantial and compelling circumstances that the court finds to deviate from the minimum sentence are:

- Appellant was a first offender,[29]
- The relationship of the Appellant and the complainant was virtually the same as that of husband and wife,[30]
- The Appellant and Complainant were no strangers to one another. They were lovers (virtually husband and wife) for 7 years,[31]
- They had 2 children together and she was pregnant with the third,[32]

[25] Para 22
[26] Para 22
[27] Para 22
[28] Para 22
[29] Para 23
[30] Para 26
[31] Para 23

- 'But for the presence of Matron, the Appellant and the Complainant would probably, just as they did many times before, have had consensual intercourse. In all likelihood the reason why the Appellant had asked the Complainant to come over to his parental home that night, was so they could have intercourse together'[33]
- She must have come knowing that intercourse would take place and willing to take part in intercourse[34]
- 'This rape should, therefore, be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable'[35]
- The relationship was not an abusive relationship. The Appellant has never before beaten the complainant up. The only noteworthy problem they ever had related to Appellant's failure to pay maintenance for the children.
- The assault was not serious[36]

Mogoeng CJ then states that 'I say this alive, to the rationale behind the provisions of the Act in so far as they relate to rape and to the reality that we live in a society where physical abuse and sexual abuse of women by boyfriends, husbands and other male persons is rife. It has indeed become so much of a concern that there are strong women bodies formed primarily for the purpose of combating this escalating abuse.'[37]

The Supreme Court of Appeal, as early as 2001, dealing with the rape of a daughter by her father in S v A[38], rejected the notion that rape where the complainant and the accused are in the same family is a mitigating factor. The court found:

> 'The suggestion that rape within a family is less reprehensible than rape outside it is of course untenable.....First and obviously, a family member is also a member of the wider public and equally obviously as deserving as the rest of the public of protection against rapists, including

[32] Para 23
[33] Para 23. Interestingly, the accused when asked this question responded that that was not the only reason.
[34] Para 23
[35] Para 24
[36] Para 26
[37] Para 25
[38] **[2001] ZASCA 126**

those within the home. Indeed, where a rapist's victim is within his family, she constitutes the part of the public closest to, and therefore most evidently at risk of, the rapist.'[39]

Rather than referring to this judgment by the SCA, Mogoeng, JP relied on the case of S v N 1988 (3) SA 450 (a) to justify that if parties are known to each other and the complainant is a woman of experience from the sexual point of view it is a mitigating factor. It is unclear why reliance was not placed on the constitutional values and rights such as that of equality and the right to be free from all forms of violence, both public and private. In Carmichele v Minister of Safety and Security and Another[40], the Constitutional Court explicitly acknowledged that sexual violence and the threat of sexual violence infringe women's right to equality in a most fundamental way. The Court held that: '*sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women*'.

Further, in this judgment there is once again reliance on rape myths: the accused and the complainant being practically married, in a long standing relationship thus it was not as if a stranger raped the complainant; she must have been willing to have intercourse (thus some blame is attributable to her); the assault was not serious and it was the first time the accused had abused the complainant (minimising the harm suffered by the complainant). The sentence imposed is a radical departure from the minimum sentence contemplated by legislation passed by Parliament. The departure is justified largely on grounds founded in rape myths and prejudicial gender stereotypes.

The Criminal Law (Sentencing) Amendment Act, 2007[41] amended the Minimum Sentences Act in order to expressly spell out the factors that, when considering a sentence for rape shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) The complainant's previous sexual history;
(ii) An apparent lack of physical injury to the complainant;
(iii) An accused person's cultural or religious beliefs about rape; or
(iv) Any relationship between the accused person and the complainant prior to the offence being committed.

[39] Para 23
[40] 2001 (4) SACR 166 (C)

[41] Section 3 (aA)

Three of these are factors relied upon in the above cases, admittedly before the amendment, to deviate from minimum sentences.

Le Roux and Others v Dey[42]

In this matter the nominee distanced himself from specific paragraphs of *the majority judgment (co-authored by Justice* Froneman and Justice Cameron) *which consider* 'expression about constitutionally protected groups'. In doing so, Justice Mogoeng did not disclose the basis of his disagreement. This undermines judicial accountability – which requires articulating the rationale for judicial dissent.

The aspects of the judgment which Mogoeng dissented from relate to, amongst others:

- The Court's affirmation that *'the Constitution discountenances anti-gay sentiments'*.
- The assertion that *'[t]o simply call someone Muslim, Christian, gay, black, white, lesbian, female, male, an old-age pensioner, atheist, Venda, or Afrikaans-speaker is not actionably injurious.' And that it '…cannot be actionable simply to call or to depict someone as gay even though he (sic) chooses not to be gay and dislikes being depicted as gay – and even though stigma may still surround being gay.'*

- The constitutional protection of lesbian and gay people: *'The Constitution does not condone individual prejudice against people who are different in terms of race, sex, sexual orientation, conscience, belief, culture, language or birth. These are unfair grounds for differentiation and the equality provision of the Bill of Rights protects against discrimination based on them.'*

- Constitutional protections for personal choices in relation to sexual orientation: *'The Bill of Rights, while respecting sexual orientation, and protecting gay and lesbian people against unfair discrimination, also protects autonomy of choice in relation to sexual orientation. Many of the Constitution's provisions protect the right to choose to live in a certain way – the rights to language, culture, religion and equality embody protection of autonomous choices, which should be constitutionally protected.'*

[42] Le Roux and Others v Dey [2011] SA 274 (CC)

The absence of reasoning for his dissent raises questions as to Justice Mogoeng's views on the parts of the Constitution that recognise and uphold the rights and protections of gay and lesbian people (such rights and protection were specifically included by the drafters of the Constitution and have been borne out in numerous cases decided in by the High Courts and the Constitutional Court over the past 17 years).

By failing to provide reasoning, Justice Mogoeng has effectively sidestepped the possible public and legal scrutiny of his judgment. Justice Mogeong has fallen short of the fundamental principle of judicial accountable and transparency, which is particularly important for Constitutional Court judges (whose decisions are not subject to appeal).

We trust that the JSC will consider the above concerns and provide the nominee with an opportunity to respond to the issues raised herein.

Yours faithfully

WOMEN'S LEGAL CENTRE

J.L. WILLIAMS (Ms)

Director

ANNEXURE "1"

1. **Masimanyane Women's Support Centre**

   Masimanyane Women's Support Centre is a non-profit international women's organisation based in East London, South Africa. With a specific focus on violence against women, sexual and reproductive health and rights and the gendered nature of HIV and Aids, we aim to build the capacity of women and human rights advocates to claim and realise women's human rights. This is done through the development of new knowledge and the utilisation of a rights-based approach.

2. **Melanie Judge (Activist)**

   Melanie is a feminist and an LGBT activist. She holds a Master's degree in Development Studies, an Honours degree in Psychology and a Business Management diploma. Melanie's work has focused on strategy development, training, and advocacy in the fields of HIV/AIDS, and gender and sexual rights in South Africa and Africa. She has been extensively involved in lobbying and advocating for the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people. Her journal articles and opinion pieces have been published both nationally and internationally. Melanie is an independent contractor. She is an Associate of Inyathelo – the South African Institute for Advancement and serves on the Executive Committee of the Coalition of African Lesbians.

3. **Open Democracy Advice Centre**

   ODAC's mission is to promote open and transparent democracy; foster a culture of corporate and government accountability; and assist people in South Africa to be able to realize their human rights.

4. **People Opposed to Women Abuse (POWA)**

   People Opposing Women Abuse was established in 1979 as a response to the high levels of violence against women experienced in the community. POWA was primarily initiated by

volunteers and offered services to women who experienced domestic violence, sexual harassment, rape and adult survivors of incest. The Organisation has a strong gender sensitive stance and seeks to empower women through the process of counselling, education, advocacy and lobbying. POWA also undertakes research into gender-based violence in Africa.

5. **Rape Crisis Cape Town**

We have a vision of a South Africa in which rape survivors suffer no secondary trauma, and are supported throughout their interaction with the Criminal Justice System (CJS).

Our mission is to promote an end to violence against women, specifically rape, and to assist women to achieve their right to live free from violence. Rape Crisis Cape Town seeks to achieve its mission through counselling and training of women, thereby reducing the trauma experienced by rape survivors, and encouraging reporting of rape and the conviction of rapists.

6. **Tshwaranang Legal Advocacy Centre**

The Tshwaranang Legal Advocacy Centre was established in 1996 to promotes and defend the rights of women to be free from violence and to have access to appropriate and adequate services. This purpose is achieved through research and policy, litigation and advocacy, training, and public awareness activities.

7. **UCT Law Race and Gender Unit**

The Law, Race and Gender Unit ("LRG") was established in 1993 by Professors Christina Murray and Kate O'Regan to provide legal decision-makers with an understanding of the ways in which the history and social context of South Africa inform the application and interpretation of our laws. Since then LRG has provided training on issues relating to race, gender ethics, HIV, and gender based violence to well over a thousand judicial officers.

8. **UCT Gender, Health and Justice Research Unit**

The Gender, Health and Justice Research Unit at the University of Cape Town. Faculty of Health Sciences (Division of Forensic Medicine and Toxicology) conducts progressive research in the area of women's rights. Faced with staggering levels of violence against women in South Africa, the Unit is dedicated to improving access to health and justice services for survivors of gender-based violence. The Unit uses interdisciplinary methods from various academic fields including law,

mental health, the social sciences, and public health to contribute to policies and laws and to advocate for social justice.