

JUDICIAL CONDUCT COMMITTEE

IN THE COMPLAINT OF:

1. **The Higher Education Transformation Network (HETN)**
2. **Justice4ANNI CAMPAIGN (Justice4Anni)**

Against

Madam Justice Jeanette Traverso (Traverso DJP)

DECISION

Leeuw JP (Molemela JP concurring)

Introduction

1. Madam Justice Traverso presided in the criminal case of **State v Shrien Dewani** (Mr Dewani), in the Western Cape High Court. Mr Dewani was acquitted at the close of the State's case in terms of section 174 of the Criminal Procedure Act No. 51 of 1977 (Criminal Procedure Act). He was represented by Advocate H. F. Van Zyl SC assisted by Advocate P. B. Botha, while Advocate Mopp acted as prosecutor on behalf of the State.

Complaint by Justice4Anni

2. Jacobus Hendrikus Johannes Verschuur (Mr Verschuur) who has deposed to the affidavit on behalf of Justice4Anni, alleges that Madam Justice Trasverso was biased in favour of the defence during the court proceedings. Justice4Anni prepared a dossier which they allege, was compiled by "a campaign group made of independent individuals who have taken an interest in this murder case". This group, amongst others, gathered information from the comments in relation to the case made by journalists in the United Kingdom (UK) and South Africa (SA) and other countries globally.
3. The information relied upon in this complaint was collated by some of their members who attended the court hearing on a daily basis, and expressed and noted "blatant bias" on various issues by Madam Justice Traverso.
4. According to the compilers of the dossier, the allegations against Madam Justice Traverso, are based on "[A]n intensive analysis of the 24 day hearing (which) was carried out, (i) studying tweets on the Twitter website from journalists of mainstream news organisations, (ii) the live news feeds of the News24 and Mirror websites, (iii) studying contemporaneous news articles and (iv) obtaining briefings from individuals who were in attendance at the court hearings". It is important to note that the complainants

state that they have not had direct access to the "official transcript" of the court record.

5. The findings of the group are restated as follows:

- a disregard for fairness on the part of Judge Traverso;
- a rude and aggressive manner towards the Prosecutor in comparison to a friendly and assisting manner towards the Defence lawyers;
- the unexplained refusal to allow key prosecution evidence from being submitted into evidence;
- the making of an incorrect statement in court; and
- ridiculing an expert witness of the State;
- over reliance on statements made in the Plea Explanation of the Accused which have not been tested by questioning or cross examination".

6. The investigation was conducted before the case was finalised and submitted to the Chief Justice and the Minister of Justice and Correctional Services petitioning them to dismiss Madam Justice Traverso from presiding over the trial and also calling upon the

State Advocate to apply for Madam Justice Traverso's recusal from the case. Judgment in respect of the section 174 application was reserved. The report was compiled prior to the decision being handed down.

7. The complainant requests this Committee to determine:

- “(i) whether the conduct of the Judge was unfair, unjust and inequitable in this particular case.
- (ii) whether the constitutional rights of the murder victim and her bereaved family are being attended to properly;
- (iii) whether it brings the judiciary into disrepute;
- (iv) whether it is detrimental to public confidence in the justice system of South Africa; and
- (v) whether it is harmful to the reputation of the Republic of South Africa in a case which has international interest”.

8. Although Mr Verschuur has deposed to an affidavit as a member of the campaign group Justice4Anni, the dossier which allegedly details the facts relied upon comprises tweet messages and reports and opinions of various journalists. Some of these opinions relate to the court proceedings and an analysis of the merits, as well as criticism of Madam Justice Traverso's rulings on the inadmissible evidence tendered by the State and how she evaluated the evidence.¹

¹ See paragraphs 6, 8, 9, 13, 14, 15 and 16 of the dossier.

9. The other complaint is that Madam Justice Traverso was not impartial in that she was biased in favour of the defence counsel and continuously interrupted the State prosecutor when he presented oral submissions, which conduct prejudiced the State in the presentation of its case.²
10. Furthermore, Justice4Anni alleges that it was “worrisome, disturbing and strange” for Madam Justice Traverso to “threaten the prosecutor” that she will disclose what happened in chambers, thus “bullying” the prosecutor to abandoning his line of argument; that she made a false statement in respect of police having gone to the media about the status of the case and furthermore reprimanding the journalist in court for apparently taking photos of Mr Dewani in his vehicle which conduct, the defence claimed, mentally affected Mr Dewani.³

Complaint by Higher Education Transformation Network (HETN)

11. Lucky Thekiso (Mr Thekiso) alleges that he is acting on behalf of HETN and that “the information deposed to in the affidavit is within his knowledge, belief and or opinion based on reasonable inference . . .” There is nothing to suggest that he was authorized by HETN to lodge this complaint and that he has personal knowledge of what transpired during the court proceedings.

² See paragraphs 1 to 5 and 12 of the dossier.

³ See paragraph 7, 10 and 11 of the dossier.

12. Mr Thekiso submits that Madam Justice Traverso violated section 14(4)(e) of the Judicial Service Commission Act No. 9 of 1994 (JSC Act) in that she was wilfully or grossly negligent, incompetent and her conduct incompatible with or unbecoming of her office as a Judge and thus rendering her conduct prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.
13. He further accuses Madam Justice Traverso of breaching the Constitution, the JSC Act and the Code of Conduct for Judges, in that she “fundamentally failed to afford the state a fair hearing alternatively that “she conducted the trial coloured by marked prejudice against the State”, and that her conduct has the effect of undermining the authority, integrity and public confidence in the courts.
14. He pertinently states that Madam Justice Traverso “failed to disclose to the State, her prior relationship and friendship with the defence counsel and or affinity with their values, was such that she would be incapable of affording the State a fair hearing”. He goes further to state that Madam Justice Traverso and “the entire defense counsel are Afrikaners. This in itself would not be problematic. However, for the reasons alluded to below and in the context of Judge Traverso’s conduct during the proceedings, her socialization and background are extremely pertinent in the context of her ethical breaches”. Furthermore, states in the alternative, that Madam Justice Traverso “failed to disclose to all

the parties her hostility towards the State, which precluded the State receiving a fair hearing".

15. Mr Thekiso makes reference to a criminal case of Ernie Lastig Solomons which was previously heard by Madam Justice Traverso, in which he alleges that she displayed hostility towards the State. He submits that Madam Justice Traverso should be "reprimanded for behaviour, which demonstrates a pattern of conduct unbecoming of a judge. . . ."
16. He further, in the alternative, alleges that " . . . in the light of the colour composition of both legal teams, Judge Traverso was predisposed towards showing hostility against the Black prosecutor, who was up against the all Afrikaners defence team".
17. In order to substantiate the allegations, Mr Thekiso repeats the issues raised in the dossier of Justice4Anni, but even goes further to make racial comments which are personal attacks on Madam Justice Traverso's family background and her as person of Afrikaner descent. In paragraph 13 of his affidavit, he states the following:

" [13] It is not insignificant that Judge Traverso is the daughter of Blaar Coetzee, the former apartheid Deputy Minister, which oversaw "Bantu Affairs". Judge Traverso, like several members of the defence counsel were apartheid prosecutors. Our new Constitutional dispensation seeks to transcend the divisions of the past. Despite this lofty ideal, in our daily lives we are faced repeatedly with old school thinking, which cannot let go of

the ideas and mentality of our vicious past. Unfortunately, to date we have not examined the problems of perception and bias from the bench by judges schooled, groomed and conditioned in the apartheid laboratory. In our desire to transcend the divisions of the past and pay tribute to our constitutional miracle, we have embraced a fiction that merely by taking an oath of allegiance to the new constitutional order, all apartheid apparatchiks and their progeny would be able to overcome their past racist baggage. This has not been true for the broader society, and not for some members of the legal fraternity.

[14] Judge Traverso has shown she has not made this transition nor embraced a Black majority government. In her conduct, she has exemplified hostility towards the state. When a judge exemplifies hostility towards the state, this undermines his/her impartiality and ultimately erodes confidence in our judiciary. It is rare if not entirely unlikely in this day and age for a judge to articulate their bias or prejudice against the state. This bias can be inferred by considering the totality of circumstances. Judge Traverso's template of truth and understanding of justice reeks of invidious discriminatory purpose or intent. Her conduct displays invidious or illicit discriminatory intent, which can be inferred from the totality of circumstances. [For a discussion of illicit intent to be determined by the totality of circumstances, see *Vill. of Arlington Heights v Metro. Hous. Dev. Corp.*, 429 U.S. 252 536, 541-93 (1977).] The problem of racial tension among the Western Cape judiciary has been a subject of considerable public debate. More recently, racial tensions and disparate treatment of Blacks in the Western Cape is a subject of great political and media scrutiny. In looking at invidious discriminatory purpose, the judicial behaviour and facts have to be connected to the context in which they are embedded, taking into account the social, political and historical environment."

18. Madam Justice Traverso has responded to the complaints and has also attached part of the record which relates to the allegations in the complaint, as well as the judgment handed down in the application for the discharge of the accused in terms of section 174 of the Criminal Procedure Act.
19. In addition, affidavits were filed in support of Madam Justice Traverso from the following: Hennie Francois Van Zyl SC and Mr Pieter André Botha, who are members of the Cape Bar and represented Mr Dewani in the case, Ms Penelope Magona a practicing advocate in the Cape Bar who was one of the assessors sitting with Madam Justice Traverso in this matter and Mr Johann Gerber, who was also an assessor in this matter.
20. They all refute the allegations and accusations levelled against Madam Justice Traverso. It is not in dispute that Madam Justice Traverso did engage both the State and Defence Counsel when they made oral submissions, however they submit, it was not in the tone and spirit alleged by the complainants.
21. Furthermore, the Director of Public Prosecutions of the Western Cape (DPP) Mr RJ de Kock, states in a letter dated 26 February 2015, in relation to the complaints, that the State did not avail itself of the available legal remedies of applying for the recusal of Madam Justice Traverso because there was nothing in her conduct that warranted such a course of action. He had consulted with the prosecution team when the complaints were

published in the media. He further states that “... as the prosecuting authority we recognise that litigation can at times be robust and our analysis of exchange between the presiding officer and the State representatives recognise that these formed part of the rigours of trial as opposed to racial bias on the part of the judge”.

Analysis

22. The complaints against Madam Justice Traverso were published in the media, and before they were formally lodged with this Committee. A petition was submitted to the Minister of Justice and Correctional Services demanding the removal of Madam Justice Traverso from presiding in the matter. That was before she handed down her judgment in the application for the discharge of the accused. This conduct undermined section 165(3) of the Constitution.⁴

23. Furthermore, the publication of the complaints attracted unsolicited responses from the public such as that from Emeritus Professor GJ (Deon) Knobel, who seized the opportunity to comment on the merits of the case and even criticise the demeanour of Madam Justice Traverso. Section 14 prescribes the procedure to be followed when a complaint is lodged with the Committee.⁵ Section 14(1) of the JSC Act provides that the

⁴ Section 165(3) No person or organ of state may interfere with the functioning of the courts.

⁵ Section 14(1) & 14(3) of the JSC Act provides that:

(1) Any person may lodge a complaint about a judge with the Chairperson of the Committee.

complaint must be lodged with the Chairperson of the Committee, and should either be in a form of an affidavit or affirmed statement.

24. Justice4Anni's complaint is based on a dossier which is composed of opinions by individuals in either twitter messages or comments on the case proceedings and probably anticipating the outcome of the case, which opinions are not made under oath by the persons who professed to have been present in court.
25. Mr Verschuur's affidavit does not attest to the truthfulness or veracity of the allegations and he cannot profess to the truth thereof, because he was not personally in court during the proceedings. It is stated in the dossier on page 3 thereof that: "The team's concerns were raised after a number of members who had attended the court hearings noted apparent bias on the part of Judge Traverso in favour of the Defence over a number of days. This was progressively reinforced as more and more members made similar complaints in the discussion group of blatant bias on various issues".
26. It is evident that the twitter and facebook messages and group discussions were compiled by people who have not presented

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- (3) A complaint must be –
- (a) based on one or more of the grounds referred to in subsection (4); and
 - (b) lodged by means of an affidavit or affirmed statement, specifying –
 - (i) the nature of the complaint; and
 - (ii) the facts on which the complaint is based.

their facts on affidavit which opinions are being presented by Mr Verschuur as complaints lodged in terms of section 14(3)(b) of the JSC Act when in fact he was not the author thereof. These twitter and Facebook messages do not constitute a proper substantiation of his allegations. Mr Verschuur's unsubstantiated complaint has no merit and falls to be dismissed.

27. Furthermore, the complaint about the State prosecutor's intimidation, is neither borne out by the record of proceedings filed with the Committee, nor is there any complaint or confirmatory affidavit from the State Advocate, Mr Mopp in that regard. Instead, the office of the DPP has distanced itself from the complaints and allegations levelled against Madam Justice Traverso and have intimated that had there been any impression formed by the prosecuting authority that the presiding Judge was biased, they would have initiated formal proceedings for her recusal from the case. My analysis of the exchanges between Madam Justice Traverso and counsel does not reveal any rudeness or unbecoming conduct on her part. A robust engagement of counsel by a Judge cannot, without more, constitute misconduct warranting censure or racial bias. I am fortified in this conclusion by the remarks made in two judgments of the Constitutional Court.

28. In **Berner v ABSA Ltd 2011 (3) SA 92 (CC)** at para [31] this Court held that:

"The presumption of impartiality "is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the

oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice'. Their oath of office requires them to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.⁶ And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This presumption therefore flows directly from the Constitution."

29. The Court stated in paragraph [86] that "A litigant, who bases a reasonable apprehension of bias on remarks and interventions made by a judicial officer in the course of a trial or argument, has a formidable hurdle to overcome: the presumption of impartiality. The complainant must show that the remarks complained of 'were of such number or quality as to go beyond any suggestion of mere irritation . . . and establish a pattern of conduct sufficient to dislodge the presumption of impartiality and replace it with a reasonable perception of bias'."

See also **S v Basson 2005 (1) SA 582 (CC)**

30. Furthermore, in paragraph 96 to 97 the Court said the following: "[96] That said, however, while some of the remarks may have been unfortunate, particularly those directed at the applicant's attorney and the trial Judge or the manner in which the trial Judge approached the case, they amount to no more than irritation or impatience. As pointed out earlier, an appellate court's benefit of the full record, issues as crystallised and written argument on those issues, will inevitably lead the court to form a

⁶ Section 165(2) of the Constitution.

provisional impression favourable to one side. Judicial officers will put questions to counsel or their legal representatives based on those impressions and thereby provide litigants with the opportunity to rebut any incorrect impression formed. This does not give rise to a reasonable apprehension of bias."

"[97] Indeed, robust debate may facilitate open-mindedness and bring clarity to the difficult issues that appellate courts often have to decide. What must be emphasised here is that the presumption of impartiality and the double-requirement of reasonableness must both be taken into account in deciding whether a reasonable litigant would entertain a reasonable apprehension of bias. The requirement postulates a well-informed litigant. And a well-informed litigant will know that appellate courts, having the benefit of the record, crystallised issues and written argument will engage counsel in a way that is often robust, and may at times be overly so."

Racism

31. The racial attacks on the person of Madam Justice Traverso by HETN, which suggest that she was influenced by her background as a South African who is Afrikaans speaking, are unwarranted. The allegations are not substantiated by any facts and offend the spirit and purport and objects of the Bill of Rights. The further complaints based on race undermine the integrity and oath of office taken by Madam Justice Traverso.
32. Mr Thekiso has a right to express his opinion on the performance of Judges, but this does not give him the right to insult a Judge and make snide remarks which tend to undermine the respect

and dignity to be accorded to the judiciary of this country. Madam Justice Traverso has a right to be treated with dignity and respect. Section 10 of the Constitution provides that:

“Everyone has inherent dignity and the right to have their dignity respected and protected.” The language used by Mr Thekiso as well as the unsubstantiated insults directed at Madam Justice Traverso, offends her right entrenched in this section.

33. The complaints raised by Mr Thekiso/HETN as well as those raised by Justice4Anni in paragraphs 1 to 5, 7, 10 and 11 of the dossier, are based on opinions which are not substantiated by any reliable facts and are not borne out by the record of proceedings. The opinions and remarks by Mr Thekiso and Justice4Anni are solely related to the merits of the judgment or order. It must be borne in mind that of the Code of Judicial Conduct provides that complaints against judges that are related to the merits of a decision cannot give rise to valid complaints and are to be dealt with through the normal appeal and review process. Disenchantment about a judicial decision does not justify disciplinary proceedings.⁷ The rest of the complaints by HETN and Justice4Anni are frivolous and lacking of substance.

Conclusion

⁷ See Article 8(D) of the Code of Judicial Conduct for Judges which provides that: Since Judges are fallible and can err in relation to fact or law; such errors are to be dealt with through the normal appeal and review procedures. Such errors, even if made by courts of final instance, cannot give rise to valid complaints. Complaints against judges that are related to the merits of a decision or procedural ruling are to be dismissed at the outset. Disenchantment about a judicial decision does not justify disciplinary proceedings. Section 15(2)(c) of the JSC Act specifically provides that a complaint against a judge must be dismissed if it is solely related to the merits of judgment or order.

34. The complaints by Justice4Anni and HETN are dismissed in terms of section 15(2)(c) and 15(2)(d) of the JSC Act.