

**JUDICIAL CONDUCT COMMITTEE
OF THE JUDICIAL SERVICES COMMISSION**

In re: Complaint by Professor Anthony Joseph Arkin on behalf of the South African Zionist Federation

RESPONSE TO THE COMPLAINT AGAINST JUDGE DESAI

A INTRODUCTION

1. The complaint by Professor Anthony Joseph Arkin on behalf of the South African Zionist Federation (SAZF) dated 9 June 2021 against Judge Desai was referred to the Judicial Conduct Committee (JCC). Khampepe ADCJ, the Acting Chairperson of the JCC, issued a ruling in terms of section 17(1)(b) of the Judicial Service Commission Act 9 of 1994 (the Act), designating Dambuza JA, a member of the JCC, to determine the merits of the complaint.
2. Dambuza JA issued an invitation, in terms of section 17(3) of the Act, for Judge Desai to respond in writing to the allegations levelled against him by the SAZF.
3. This response is submitted on behalf and on the instructions of Judge Desai and addresses the merits of the complaint. To the extent that the contents of this response are inconsistent with the allegations contained in the complaint, such allegations must be taken to be denied. Judge Desai, furthermore, reserves his right to respond further to any new matter contained in the Complainant's reply to this response.
4. This response is structured as follows:
 - 4.1. Part B sets out the details of the parties.
 - 4.2. Part C sets out the principles which underpin this response.
 - 4.3. Part D provides an *ad seriatim* response to each factual allegation in the complaint.

- 4.4. Part E draws the necessary conclusion, and requests the dismissal of the complaint.

B THE PARTIES

The Complainant

5. The deponent to the complaint is a resident in Israel, an honorary life president of the KwaZulu Natal Zionist Council, and a member of the South African Zionist Federation (SAZF).
6. The SAZF is an avowedly Zionist pro-Israel lobby group.
7. It must be emphasized that this is not Judge Desai's description of the SAZF. It is the description of the SAZF by the SAZF itself.
8. According to its website the SAZF:

*"...looks after matters relating to Israel and its image in South Africa. As advocates for Israel in this country, our mission is to build strong support and love for the Land and State of Israel. This support remains powerful among the SA Jewish community and millions outside the community. We work pro-actively to reduce the amount of anti-Israel sentiment in South African political, religious, and cultural communities through education, advocacy, and lobbying."*¹

9. One of the core objectives of the SAZF is "Israel Advocacy and Activities".
10. The SAZF website states:

"...The South African Jewish community has always been proudly Zionist, standing our ground and defending Israel on a daily basis. The SAZF's role is to do just that by looking after matters relating to Israel and its image in South Africa. As steadfast advocates for Israel, our mission is to build strong support and love for the State of Israel and its lands. This support remains unwavering among the SA Jewish community. 'The Fed' also works pro-actively to reduce anti-Israel sentiment in South African political, religious, and cultural

¹ <https://www.sazf.org/about-us>

communities. This is accomplished through education, advocacy, and lobbying.”²

11. It is clear that the complaint against Judge Desai by the SAZF forms part of the pro-Israel activities of the SAZF and that the lodging of the complaint is consistent with the aims and objectives of the SAZF. In other words, the complaint against Judge Desai has been lodged with the express aim of furthering the pro-Israel goals and political objectives of the SAZF.
12. This is evident from the website of the SAZF where the complaint against Judge Desai, is listed under the heading “*Current Issues*”.³

The Respondent

13. Judge Desai matriculated at the Trafalgar High School in District Six, Cape Town, and was compelled to pursue tertiary education at The University of Durban Westville (Kwazulu-Natal) because of the Separate Universities Act then being rigidly enforced. He started his professional career in 1976. First as a clerk to Mr AM Omar (later to become South Africa’s first post-apartheid Minister of Justice) and then (1978) as an attorney on Mr Omar’s staff.
14. The historic events in progress at the time – the political and social unrest in response to settler colonialism and apartheid – determined the nature of his practice for the ensuing years. In 1981 he became an advocate and practiced at the Cape Bar until 30 June 1995. During his years as an advocate, he was, *inter alia*, a prominent human rights lawyer and activist and appeared as legal counsel in many important and politically significant matters. His clients included community leaders, human rights activists, several accused in terrorism cases during the Apartheid era, and persons dispossessed of their land rights in Cape Town, in the Eastern Cape and in the North-West Province.
15. He was a founder member of the National Association of Democratic Lawyers (NADEL) which vigorously campaigned for the transformation of the apartheid era legal profession and judiciary. Prior to becoming a judge he was the National Vice-President of NADEL. He was elevated to the bench on 1 July 1995 by the Judicial Service Commission and served as a judge of the Western Cape High Court for 25 years. As an attorney and also as an advocate, Judge Desai chaired the Woodstock Salt River Walmer Estate Civic Association (WOSAWA) which fought and supported the campaigns to save the land in District 6 for restitution purposes. He served as a council member

² <https://www.sazf.org/israel-advocacy>

³ <https://www.sazf.org/issues>

and chairperson of the Cape Peninsula University of Technology. Since 1996 he was the deputy chairperson of the Foundation for Human Rights in South Africa until his retirement in April 2021.

C PRINCIPLES UNDERPINNING THIS RESPONSE

16. At the outset, Judge Desai submits that his response to the complaint set out below must be considered in the context of the following principles to which he subscribes and which are relevant to this complaint.
17. *Firstly*, silence by judges in the face of injustice and violations of basic human rights, particularly given the history of South Africa, is inconsistent with judicial office.⁴ It is precisely for that reason that the oath required of judicial officers under section 6 of schedule 2 of the Constitution, requires a judge to swear or affirm that he or she will uphold and protect the human rights entrenched in the Constitution. Judicial officers, therefore, have a particular duty to confront injustice, promote equality for all under the law and condemn racism in all its forms.⁵
18. *Secondly*, judges do not exist in isolation. They do not perform their functions in a cloistered monastery isolated from society. They are members of the community with their own beliefs, opinions, and sympathies. As the Constitutional Court has explained:

⁴ Cameron, Davis & Marcus 'The Administration of Justice, Law Reform and Jurisprudence', Annual Survey of South African Law, 1993, p 795. See also Richard Goldstone 'Do Judges Speak Out?' (1994) 111 SALJ 258 at 259.

⁵ See for example the recent June 2020 public statement signed by seven justices by the California Supreme Court, "*In view of recent events in our communities and through the nation, we are at an inflection point in our history. It is all too clear that the legacy of past injustices inflicted on African Americans persists powerfully and tragically to this day. Each of us has a duty to recognize there is much unfinished and essential work that must be done to make equality and inclusion an everyday reality for all. We must, as a society, honestly recognize our unacceptable failings and continue to build on our shared strengths. We must acknowledge that, in addition to overt bigotry, inattention and complacency have allowed tacit toleration of the intolerable. These are burdens particularly borne by African Americans as well as Indigenous Peoples singled out for disparate treatment in the United States Constitution when it was ratified. We have an opportunity, in this moment, to overcome division, accept responsibility for our troubled past, and forge a unified future for all who share devotion to this country and its ideals. We state clearly and without equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing. We say this as persons who believe all members of humanity deserve equal respect and dignity; as citizens committed to building a more perfect Union; and as leaders of an institution whose fundamental mission is to ensure equal justice under the law for every single person. In our profession and in our daily lives, we must confront the injustices that have led millions to call for a justice system that works fairly for everyone. Each member of this court, along with the court as a whole, embraces this obligation. As members of the legal profession sworn to uphold our fundamental constitutional values, we will not and must not rest until the promise of equal justice under law is, for all our people, a living truth.*" <https://newsroom.courts.ca.gov/news/supreme-court-california-issues-statement-equality-and-inclusion>

“...absolute neutrality” is something of a chimera in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge’s performance of his or her judicial duties.”⁶

True impartiality does not require a judicial officer to have no sympathies or opinions when it comes to violations of human rights, injustices and inequality. What is required is the ability to adjudicate issues reflecting different points of view and doing so with an open mind.

D AD SERIATUM RESPONSE TO THE COMPLAINT

Ad para 4

19. The complaint relates to matters and events as far back as 2009, twelve years ago. The SAZF does not provide any coherent explanation for why it took them twelve years to lodge this complaint

Ad para 7

20. These allegations are denied and are addressed later in this response.

Ad para 8

21. Judge Desai, accompanied by his late wife, Faieza, attended a gathering of international human rights activists in Egypt during December 2009. He did so in his personal capacity, not in his capacity as a judge.
22. The international human rights activists gathered in Egypt during December 2009 intended on embarking on a non-violent protest action on the first anniversary of “*Operation Cast Lead*”, an Israeli military operation that killed more than 1300 Palestinians. Judge Desai did not participate in the planned protest action described by the SAZF as the “Gaza March”. The Gaza March did not take place after it was prevented by the Egyptian authorities.

⁶ *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing (CCT2/00) [2000] ZACC 10; 2000 (3) SA 705; 2000 (8) BCLR 886 (9 June 2000)* at para 14

Ad para 9

23. This allegation is incorrect and is denied.
24. The organization of the planned Gaza March was a collaborative effort by a range of international human rights activists, peace activists and non-governmental organisations from countries across the world.

Ad para 10

25. These allegations are factually inaccurate insofar as the numbers are concerned.

Ad para 11

26. The number of “1300 protesters from 43 countries” referred to in this paragraph is disputed.

Ad para 12

27. Judge Desai was not a member of an official South African “*delegation*” to the march as alleged in this paragraph. He was an attendee in an extra-judicial capacity at a gathering of international human rights activists in Egypt during December 2009.

Ad para 13

28. The alleged facts referred to in this paragraph are based on a newspaper article which constitutes hearsay evidence. Judge Desai has no control over the descriptions of events by a journalist in a newspaper article.

Ad para 14 and 15

29. Judge Desai is of the view that the calls for implementation of the Goldstone Report, a global movement for Palestinian rights and the implementation of boycott, disinvestment and sanctions measures in relation to Israeli violations of human rights in Palestine and the Occupied Territories, as set out in the Cairo Declaration, are justified and consistent with international human rights law.

30. The Goldstone Report concluded that Israel was guilty of serious violations of international law in its military operations in the Palestinian Territories. The Goldstone Report inter-alia concluded as follows⁷:

“The Mission found that, in the lead up to the Israeli military assault on Gaza, Israel imposed a blockade amounting to collective punishment and carried out a systematic policy of progressive isolation and deprivation of the Gaza Strip. During the military operation, houses, factories, wells, schools, hospitals, police stations and other public buildings were destroyed, with families, including the elderly and children, left living amid the rubble of their former dwellings long after the attacks ended, as no reconstruction has been possible due to the continuing blockade. Significant trauma, both immediate and long-term, has been suffered by the population of Gaza. More than 1400 people were killed. The Gaza military operations were directed by Israel at the people of Gaza as a whole, in furtherance of an overall policy aimed at punishing the Gaza population, and in a deliberate policy of disproportionate force aimed at the civilian population. The destruction of food supply installations, water sanitation systems, concrete factories and residential houses was the result of a deliberate and systematic policy to make the daily process of living, and dignified living, more difficult for the civilian population. Israeli forces also humiliated, dehumanized and carried out an assault on the dignity of the people in Gaza, through the use of human shields, unlawful detentions, unacceptable conditions of detention, the vandalizing of houses, the treatment of people when their houses were entered, graffiti on the walls, obscenities and racist slogans. The Israeli operations were carefully planned in all their phases as a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability. Responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations.

Israel failed to take feasible precautions required by international law to avoid or minimize loss of civilian life, injury to civilians and damage to civilian objects. The firing of white phosphorus shells over the UNRWA compound, the intentional strike at the Al Quds hospital using high explosive artillery shells and white phosphorous,

⁷ Section 39(2) of the Constitution requires the JCC to consider international law when interpreting the Bill of Rights.

the attack against Al Wafa hospital, were violations of international humanitarian law. The kinds of warnings issued by Israel in Gaza cannot be considered as sufficiently effective in the circumstances to comply with customary law. There were numerous instances of deliberate attacks on civilians and civilian objects (individuals, whole families, houses, mosques) in violation of the fundamental international humanitarian law principle of distinction, resulting in deaths and serious injuries. Israeli attacks were also launched with the intention of spreading terror among the civilian population. In several cases, Israeli armed forces did not allow humanitarian organisations access to the wounded and medical relief, as required by international law. In one incident investigated, involving the deaths of at least 35 Palestinians, the Mission found that Israeli forces launched an attack which a reasonable commander would have expected to cause excessive loss of civilian life. By deliberately attacking police stations and killing large numbers of policemen, most of whom were civilian non-combatants, Israel violated international humanitarian law.

The Mission found that Israel used white phosphorous, flechettes and heavy metal weapons. The use of white phosphorous, flechettes and heavy metal (such as tungsten) is restricted or even prohibited in certain circumstances. Flechettes, as an area weapon, are particularly unsuitable for use in urban settings while the Mission is of the view that the use of white phosphorous as an obscurant should be banned. The Mission also investigated several incidents in which Israeli armed forces used local Palestinian residents as human shields. Israel's questioning of Palestinian civilians under threat of death or injury to extract information constitutes a violation of the Fourth Geneva Convention. Israeli forces in Gaza rounded up and detained large groups of persons protected under the Fourth Geneva Convention. Severe beatings, humiliating and degrading treatment and detention in foul conditions suffered by individuals in the Gaza Strip under the control of the Israeli forces and in detention in Israel, constitute a violation of international humanitarian and human rights law. Israel's treatment of women during detention was contrary to the requirements of international law. Israel's rounding-up of large groups of civilians and their prolonged detention under the circumstances described in the Report constitute a collective penalty and amounts to measures of intimidation or terror prohibited the Fourth Geneva Convention. Israel's attacks against the Palestinian Legislative Council building and the main prison in Gaza constituted deliberate attacks on civilian objects in violation of

international humanitarian law. Israeli armed forces unlawfully and wantonly attacked and destroyed without military necessity a number of food production facilities, drinking water installations, farms and animals. Israeli forces carried out widespread destruction of private residential houses, water wells and water tanks unlawfully and wantonly. Israel also disregarded the inviolability of United Nations premises, facilities and staff, and this is unacceptable.

Israel's blockade of Gaza amounts to a violation of Israel's obligations as an Occupying Power under the Fourth Geneva Convention. The deliberate actions of the Israeli forces and the declared policies of the Government indicate the intention to inflict collective punishment on the people of the Gaza Strip. Israel violated its obligation to allow free passage of all consignments of medical and hospital objects, food and clothing that were needed to meet the urgent humanitarian needs of the civilian population.

There is strong evidence that Israeli forces committed grave breaches of the Fourth Geneva Convention in Gaza, including: willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, and extensive destruction of property. As grave breaches, these acts give rise to individual criminal responsibility. The use of human shields also constitutes a war crime under the Rome Statute of the International Criminal Court. Israeli acts that deprive Palestinians in the Gaza Strip of their means of subsistence, employment, housing and water, that deny their freedom of movement and their right to leave and enter their own country, that limit their rights to access a court of law and an effective remedy, could lead a competent court to find that the crime of persecution, a crime against humanity, has been committed.

In the West Bank, with acts of violence by settlers against Palestinians (which have increased), Israel failed to protect the Palestinians, and sometimes acquiesced to the acts of violence. Israel used excessive force against Palestinian demonstrators, including the use of firearms, including live ammunition, and the use of snipers resulting in the deaths of demonstrators, in violation of international law. Israel has discriminatory "open fire regulations" for security forces dealing with demonstrations, based on the presence of persons with a particular nationality, violating the principle of non-discrimination in international law. Israel has failed to investigate, and when appropriate prosecute, acts by its agents or by third parties involving serious violations of international

humanitarian law and human rights law. Israel's removal of residential status from Palestinians could lead to virtual deportation and entail additional violations of other rights.

Israeli practices of detention of Palestinians in Israeli prisons before and during the military operations are generally inconsistent with human rights requirements. The practice of administrative detention by Israel contravenes the right not to be arbitrarily detained, and Israel's use of secret evidence as a basis for the administrative detention is inconsistent with the ICCPR. The detention of members of the Palestinian Legislative Council by Israel is in violation of the ICCPR also constitutes an instance of collective punishment prohibited under article 33 of the GC IV. The same can be said about the massive detention of adults and children, often in inhuman or degrading conditions and without the guarantees required by international law.

Israeli checkpoints are often a site of humiliation. The extensive destruction and appropriation of property, including land confiscation and house demolitions in the West Bank including East Jerusalem, not justified by military necessity and carried out unlawfully and wantonly, amounts to a grave breach of the Geneva Conventions. The continued construction of settlements constitutes a violation of article 49 of the Fourth Geneva Convention. As movement and access restrictions, the settlements and their infrastructure, demographic policies vis-à-vis Jerusalem and Area C of the West bank, as well as the separation of Gaza from the West Bank, prevent a viable, contiguous and sovereign Palestinian state from arising, they are in violation of the ius cogens right to self-determination.”

The prolonged situation of impunity has created a justice crisis in the OPT that warrants action. Israel's system of investigation and prosecution of serious violations of human rights and humanitarian law, in particular of suspected war crimes and crimes against humanity, has major structural flaws that make the system inconsistent with international standards. The few investigations conducted by the Israeli authorities on alleged serious violations of international human rights and humanitarian law and, in particular, alleged war crimes, lack the required credibility and conformity with international standards. There is little potential for accountability for

*serious violations of international humanitarian and human rights law through domestic institutions in Israel.*⁸

Ad para 16

31. It is denied that Judge Desai “*lent his stature as a judge*” to the drafting and issuing of the Cairo Declaration. There is no factual evidence in the complaint to support this allegation.

Ad para 17 and 18

32. This allegation is based on hearsay evidence in the form of a newspaper article.
33. It is prejudicial to Judge Desai to have to respond some twelve years later, to a complaint, based not on detailed facts, but on interpretations and descriptions of events at the time and statements he is alleged to have made by a journalist in a newspaper article.
34. The attention of the JCC is drawn to the SAZF’s misleading description of the evidence.
35. The SAZF relies on a newspaper article, referred to as annexure **A4**. The pages of the article attached as **A4** do not appear to report or state anywhere that the dinner event referred to was “*a public dinner event*” and that Judge Desai was one of the “*guest speakers*”. These details, if they are not in the hidden portion of **A4**, appear to have been added by the SAZF in order to embellish its complaint. What is the SAZF’s explanation for this misleading description of the evidence placed before the JCC?
36. The article attached as A4 does not appear to deal with a dinner and it is incomplete. Judge Desai does not recall the dinner event but agrees with the statement referred to in paragraph 18 which states “*that the Israeli occupation of Palestine was one of the longest continuing breaches of human rights in the world*”. Judge Desai admits that he met and spent a long time with Hedy Epstein, a Holocaust survivor, who supported the Palestinian cause.

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<https://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx>

Ad para 19

37. It is correct that Judge Desai acted as the local chair of the Russel Tribunal on Palestine. It is denied that his conduct in doing so breached judicial ethics.

Ad para 20 and 21

38. The contents of these paragraphs constitute expressions of irrelevant political opinion and reflect the SAZF's unsurprising political opposition to the Russell Tribunal.

Ad para 22

39. These allegations are without factual basis and are denied.
40. Judge Desai chaired the local organising committee of the Russel Tribunal on Palestine.
41. The details and composition of the Russel Tribunal on Palestine appear at www.russelltribunalonpalestine.org.
42. Judge Desai is not a member of the Russell Tribunal, he is not a member of the Jury of the Russell Tribunal nor is he a Patron or a member of the Support Committee of the Russel Tribunal.

Ad para 23 to 24

43. Judge Desai was invited by the Muslim Judicial Council (MJC), in his capacity as a community leader, to a private event in December 2018 at which a Hamas delegation was present. The event was not a meeting initiated by Judge Desai and he was not a member of a "*delegation*" at this meeting as alleged.
44. The remarks made by Judge Desai referred to in this paragraph were made at a private event. The words referred to in paragraph 23 were plainly meant to convey that the intellectual resolution of the Palestine issue was to be led from the ground level by the recognised leadership of the Palestinian people.

Ad para 25

45. Judge Desai has no knowledge of the current status of the Founding Charter of Hamas referred to in these paragraphs.

Ad para 26

46. The complaint based on the allegations in this paragraph are solely related to the merits of a judgment and order by Judge Desai and fall to be dismissed in terms of section 15(2)(c) of the JSC Act.
47. It is denied that the applicants' pro-Palestinian stance or otherwise was relevant to the legal issue in the case, which concerned the legality of a restriction on the number of persons attending a gathering for which permission had been granted by the City of Cape Town in terms of the Regulation of Gatherings Act.
48. The application had been allocated to Judge Desai in his capacity as the urgent duty judge in the week in which the application was heard.
49. The City of Cape Town was represented in the litigation by attorneys and Advocate Olivier SC of the Cape Bar, an experienced senior counsel. No application for the recusal of Judge Desai was brought in the proceedings nor was any objection taken by any of the parties to Judge Desai hearing the matter.
50. No appeal was brought by any party against the order granted by Judge Desai on 19 September 2015 or pursuant to the reasons handed down on 8 December 2016.
51. The SAZF was not a party to the litigation and has no legal interest in the order granted by Judge Desai in the matter.
52. The present complaint does not concern a delay in handing down judgment in case number 18021/2015 nor have any of the parties to the litigation complained to the JCC in that regard.
53. It is denied that Judge Desai was obliged to recuse himself in the case or that he was obliged to "*disclose his interest in BDS to the parties*", an "*interest in BDS*", a concept which is not explained by the SAZF with any degree of factual specificity.

54. Judge Desai was the urgent duty judge and had a duty to sit in any case in which he was not obliged to recuse himself.⁹

Ad para 27 and 28

55. It is correct that Judge Desai attended a meeting in November 2020 at the invitation of and as a guest of the MJC in his capacity as a community leader in the Muslim community in Cape Town. Ambassador Jarrar was present at this meeting. It is denied that the meeting at the MJC was hosted by the ANC in the Western Cape. Judge Desai attended a private meeting at the MJC offices at the request of the MJC, a non-political religious organisation. He was not requested by the ANC to attend the meeting.
56. It is denied that Judge Desai's attendance at this meeting breached any cannons of judicial ethics.
57. The SAZF refers to a report of this meeting but fails to state what conclusions it seeks to draw from the contents of the report, other than that Judge Desai is photographed with Ambassador Jarrar.
58. It is impermissible for a complainant to rely on documentation referred to in a complaint without explaining what conclusions recording alleged breaches of judicial ethics are sought to be drawn from such documentation.

Ad para 29

59. This allegation is devoid of a factual foundation and is denied.
60. The meeting referred to was held by the MJC at its offices, not the ANC, and Judge Desai was invited to the meeting in his capacity as a Muslim community leader not as a judge. The statement in this paragraph that the meeting was between a political party and an ambassador is false.
61. The contents of the second sentence in this paragraph are also false. The report of the meeting referenced at paragraph 28 does not refer to Judge Desai participating in a meeting of political solidarity with the Palestinian cause. The reference to "*Judge Desai*" appears once in the report under the

⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999)* at para 48

heading “*image*” with reference to the photograph of participants at the meeting.

Ad para 30 to 34

62. The allegations in these paragraphs that Judge Desai engaged in conduct incompatible with judicial office are denied.
63. It is correct that on 3 June 2020 Judge Desai spoke at a webinar hosted by the Embassy of the Islamic Republic of Iran on the 31st anniversary of the passing of Imam Khomeini. The reference to the words spoken by Judge Desai at the webinar are taken out of context to further the political agenda of the SAZF. It is apparent from paragraph 32 of the complaint that Judge Desai’s reference to “*the Great Satan*” was in relation to a description used by Imam Khomeini, not Judge Desai. Judge Desai was in effect repeating a description which had been used by Imam Khomeini.
64. The reference to then leader of the United States as having “*two horns*” obviously cannot be interpreted literally, it was more of a metaphorical utterance in the context of a somewhat colourful turn of phrase which had been used by the late Imam Khomeini.

Ad para 35

65. The Iran Tribunal referred to in this paragraph is a non-binding International People’s Tribunal formed in 2007 which aimed to investigate allegations of human rights violations in Iran during the 1980’s.
66. In other words, the Iran Tribunal referred to and relied on by the SAZF in this paragraph, has the exact same non-binding legal status as the Russel Tribunal on Palestine, which the SAZF critiques as being biased and procedurally unfair. Israel refused to participate in the proceedings of the Russell Tribunal on Palestine as did Iran in the Iran Tribunal
67. It bears mentioning that while lambasting Judge Desai’s supporting role as chair of the local organising committee of the Russell Tribunal on Palestine as a breach of judicial ethics, the SAZF misleadingly fails to disclose to the JCC that the Iran Tribunal is presided over by retire Judge Johann Kriegler, a retired Justice of the Constitutional Court, who acts as the President of the Tribunal.¹⁰

¹⁰ <https://irantribunal.com/johann-kriegler/>

Ad para 37 and 38

68. Judge Desai holds the view that the statements contained in annexure **A10** are justified and consistent with the obligations of states to prevent crimes against humanity and war crimes under international human rights law. It is denied that Judge Desai's signature of the statement constituted a violation of the Act, the Code or judicial ethics.
69. The SAZF does not disclose that annexure **A10** was also signed by Zak Yacoob, a retired justice of the Constitutional Court.
70. The document marked annexure **A10** is incoherent and incomplete and does not warrant a further response.

Ad para 39 to 42

71. It is denied that Judge Desai contravened article 12(1)(b) of the Code.
72. The allegations in paragraph 40 are denied.
73. There is no factual evidence in the complaint. There is no factual evidence or detail in the complaint that Judge Desai "*expressly approved of its aims and gave his imprimatur to its activities and its goals.*"
74. The only "*clearer evidence*" relied on by the SAZF is a video clip of Judge Desai attending a private meeting at which, as stated above, he was invited by the MJC in his capacity as a community leader and at which representatives of Hamas were present. The contents of the response above in relation to what was said by Judge Desai at this meeting are repeated in response to this ground of complaint.
75. It is plain that the SAZF diametrically disagrees with the political views of Hamas. The SAZF's political views of Hamas are, however, irrelevant to the question of whether Judge Desai breached article 12(1)(b) of the Code.
76. The SAZF's characterisation of Hamas as a violent terrorist movement are inconsistent with the international foreign policy of the South African government which has not only not designated Hamas as a terrorist entity but has welcomed the fact that Hamas is open to international mediation to

comprehensively address all the issues causing tension in the Israeli - Palestinian situation.¹¹

77. There is no factual basis or evidence in the complaint that Judge Desai “*in his words and conduct*” endorsed, supported or was party to inflammatory or hateful language against an ethnic community as alleged at paragraph 42 of the complaint.
78. The allegation has no factual basis and rests exclusively on the weak foundation that by attending a meeting at which representatives of Hamas were present, Judge Desai thereby allegedly endorsed and publicly agreed with the aims, policy and objectives of Hamas.
79. By way of illustration and analogy, it could hardly be contended that the attendance of South African judges at meetings at which foreign judges based in a country with a problematic human rights record means that those South African judges endorsed the views and policies of the foreign countries concerned.
80. Thus, when Chief Justice Mogoeng and the Heads of Court led a delegation to China in April 2018, it cannot be legitimately contended that they thereby endorsed the policies of the Chinese government and its ruling party, in which, as Chief Justice Mogoeng noted, the rule of law is absent and the Chief Justice of China serves as a standing member of the ruling party.¹²

Ad para 43 and 44

81. The contents hereof do not engage factual aspects requiring a reply and are matters for legal argument in due course, to the extent required.
82. Judge Desai is entitled to hold political views in his capacity as a citizen provided he exercises such rights in a manner consistent with the independence and impartiality of the judiciary as protected by the Constitution.

Ad paragraph 45 and 46

¹¹ <http://www.dirco.gov.za/docs/2021/isra0514.htm>

¹² <http://www.supremecourtofappeal.org.za/index.php/news/speeches-and-conference-papers/category/14-conference-papers?download=35:report-to-beijing-china-by-south-african-heads-of-courts-delegation-led-by-chief-justice-mogoeng-30-march-2018-07-april-2018>

83. These allegations are denied and have been dealt with earlier in this response.
84. The allegations in paragraph 45(c) that Judge Desai met with the ANC are false and are denied. As stated earlier, Judge Desai attended a meeting at the invitation of the MJC at which the Palestinian Ambassador was present.
85. Save for referring to a photograph of Judge Desai with the ambassador and stating that the Ambassador engaged the leadership of the ANC on the importance of Palestinian solidarity, there is no factual evidence whatsoever which is provided that Judge Desai “*endorsed*” the Ambassador’s “*partisan views*” on the issues of Palestine and Israel.

Ad para 48 to 49

86. These allegations are denied.
87. There is no factual evidence provided in the complaint or in the video clip relied on by the SAZF that Judge Desai “*identified himself as a Judge of the High Court*” or that he “*promoted Hamas’ cause to advance the agenda of Hamas.*”
88. It is simply unacceptable for the SAZF to make broad, sweeping and generalised allegations of judicial misconduct against a judge without specifying the detailed factual basis for such allegations.

Ad para 50(a)

89. These allegations are denied.
90. As stated above, the meeting at the MJC attended by Judge Desai was at the invitation of the MJC not the ANC or the Palestinian Ambassador.
91. Judge Desai was invited to the meeting in his capacity as a Muslim community leader not in his official capacity as a Judge. The report of the meeting on the MJC website, referenced at paragraph 28 of the complaint does not identify Judge Desai as a judge except under the photograph of the meeting participants.

92. The report of the meeting is headed “*MJC(SA) meets Palestinian Ambassador*” and does not contain a reference to any quotes or statements made by Judge Desai at the meeting.
93. There is no factual evidence either in the complaint or the MJC report of the meeting which supports the allegation that Judge Desai “*used his office to show his support for the ambassador’s political cause and to attract attention to that cause*”.
94. Judge Desai’s mere presence at a meeting at which members of the ruling party were present, does not constitute a breach of judicial ethics or a violation of Article 12(1)(d) of the Code.
95. It can hardly be suggested that the physical presence of a member of the judiciary at a private or official event at which politicians are present, contravenes judicial ethics and/or Article 12(1)(d) of the Code.

Ad para 50 (b)

96. These allegations are denied and have already been addressed earlier in this response.

Ad para 51

97. These allegations are denied. They have already been addressed earlier in this response.

Ad para 52

98. For the reasons set out above, the legal conclusions which the SAZF seeks to draw in this paragraph are without merit and are denied.

Ad para 54

99. It is denied that Judge Desai committed an “*egregious breach of article 13(1)*” as alleged in this paragraph.

100. This complaint has already been addressed earlier in this response. It is a complaint directed solely at the merits of a judgment and order granted by Judge Desai.
101. There was no legal basis for Judge Desai to have recused himself from hearing the application which he had been allocated as the urgent duty judge. No application for his recusal had been brought at the hearing.
102. Judge Desai was not aware of the political beliefs of the applicants nor were such beliefs relevant to the legal issues to be determined in the litigation.
103. None of the parties objected to Judge Desai hearing the matter. None of the parties appealed against either the judgment granting the main order or the order on costs.
104. The City of Cape Town was represented by Senior Counsel at the hearing. Had the City entertained any doubts about the partiality of the presiding judge, the matter would no doubt have been raised in chambers or in open court with Judge Desai.
105. This aspect of the complaint by the SAZF is contrived and falls to be dismissed as singularly lacking in merit.

Ad para 55

106. This allegation, which appears to be directed at article 14(3)(a) of the Code not article 14(3)(c) as alleged, is denied.
107. It is argued that Judge Desai's chairing of the local organising committee of the Russell Tribunal on Palestine, does not constitute the acceptance of "*an appointment*" within the meaning of the term in article 14(3)(a) nor does his serving as a chair of that committee constitute conduct which is likely to be seen to be inconsistent with an independent judiciary, undermining separation of powers or the status of the judiciary.
108. Once again, the SAZF save for generalised, irrelevant and opinionated commentary by Professor Antony Arkin, provides no factual basis to support this allegation nor does it provide details as to exactly how Judge Desai's serving as chair of that committee would undermine the status of the judiciary.
109. Two points bear emphasis here:

- 109.1. *Firstly*, the Code at Note 14(v) recognises that serving on certain types of bodies, such as a trustee of a charitable institution “*and the like*” is acceptable.
- 109.2. *Secondly*, on the SAZF’s reasoning, a judge whether on active service or retired, would be entirely prohibited from serving in any capacity on a non-binding tribunal or similar body.
110. As indicated earlier, Justice Kriegler, far from serving as the chair of an organising committee, in fact presided over the Iran Tribunal. On the SAZF’s reasoning, Justice Kriegler has committed an egregious breach of judicial ethics in doing so.

Ad para 57

111. The allegations in this paragraph are a repetition of earlier allegations in the complaint and have been dealt with above. They are denied.
112. There is no factual evidence in the complaint that Judge Desai pledged his support for Hamas and its objectives and that he advocated for “*overt political positions on public forums*” in support of Hamas.

Ad para 58 and 59

113. The legal conclusions drawn in this paragraph are without merit and are denied.

Ad para 61 to 66

114. These allegations are a verbatim regurgitation of the SAZF’s earlier allegations.
115. They have already been dealt with in this response. They are denied in their entirety.

Ad para 67

116. These allegations are denied and have already been dealt with earlier in this response.
117. As stated earlier, the Gaza March did not take place due to the actions by the Egyptian authorities. Judge Desai, therefore, did not take part in any march in Gaza. The statement at the outset of the third sentence in this paragraph is therefore factually incorrect.

Ad para 68 and 69

118. These allegations are denied and have already been dealt with earlier in this response.

Ad para 70 to 73

119. These allegations are denied in their entirety.
120. It is correct that Judge Desai was appointed as Legal Services Ombud with effect from 16 December 2020.
- 120.1. In terms of section 47(1) of *the Legal Practice Act 28 of 2014* (LPA), the Legal Services Ombud is appointed by the President.
- 120.2. In terms of section 47(2) of the LPA, the Legal Services Ombud is independent and subject only to the Constitution and the law and he or she must be impartial and exercise his or her powers and perform his or her functions without fear, favour or prejudice.
121. The complaint contains no factual basis or evidence to support an allegation that Judge Desai has to date not or will not perform his functions and responsibilities in terms of the LPA other than in accordance with the law. The unsupported imputation of bias and breaches of ethical rules to Judge Desai in his capacity as Legal Service Ombud warrants censure.
122. The complaint contains no factual evidence to support the broad and generalised allegation that, “...*through his actions, the public have reason to lose faith in the dignity and integrity of the legal profession.*”

123. It should be pointed out that neither the SAZF nor Professor Antony Arkin constitute “*the public*”. They are partisan complainants in the complaint against Judge Desai.
124. The fact that the SAZF and the Professor do not like Judge Desai’s views on violations of international human rights law by the Israeli Occupying Power in Palestine, does not mean that the public has lost faith in the dignity and integrity of the legal profession.
125. The reference to Judge Desai’s appointment in 2020 as Legal Services Ombud as being an “*aggravating factor*” is nonsensical and has no basis in law. There is no legal basis on which an appointment to an office which occurred in 2020 can be taken into account as an aggravating factor in relation to alleged unproved and unsubstantiated breaches of judicial ethics by the incumbent which allegedly occurred over a decade before that incumbent took office.

CONCLUSION

126. Whilst Judge Desai has chosen to deal with the complaint *ad seriatim* as the decisions of the JCC require, the “*complaint*” does not constitute a complaint in the ordinary sense. The Complainants have gone through the Judge’s life with a fine tooth comb in an attempt to discredit the Judge and to curb and curtail the space for human rights advocacy. This scatter-shot approach is patently unfair and cannot reasonably and rationally constitute the basis of a valid complaint. Despite all their attempts they have not been able to make out a valid case against the Judge.
127. It is also grossly unfair to confront a retired judge with perceived improper conduct which allegedly occurred during his tenure as a judge and which relate to events that may have occurred more than a decade ago.
128. Ultimately, Professor Arkin and the SAZF seek to protect and conceal human rights abuses which are apparent in, *inter alia*, the Goldstone Report. Judge Desai is implacably opposed to the human rights abuses everywhere. There is simply no moral equivalence between a party who seeks to promote and protect human rights and one who violates it.
129. Your Ladyship, seized with the complaint, must also make a decision whether it is proper for a judge to engage in activities to promote human rights and condemn gross abuses where they occur.

130. Judge Desai submits that the complaint is without merit and falls to be dismissed.

31 AUGUST 2021

CAPE TOWN