IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Case number: **1070/2019**

In the matter between:

RICHARD JOHN LAWRENCE Applicant

and

THE MAGISTRATES COMMISSION 1st Respondent

ZOLA MBALO N.O. 2nd Respondent
(Chairperson of the Appointments Committee of the Magistrates Commission)

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 3rd Respondent

CORNELIUS MOKGOBO N.O. 4th Respondent
(Acting Chief Magistrate Bloemfontein cluster "A")

CORAM: DAFFUE, ADJP et MOLITSOANE, J

HEARD ON: 7 OCTOBER 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 12 DECEMBER 2019

I INTRODUCTION

[1] The shortlisting proceedings of the Appointments Committee of the Magistrates Commission chaired by Regional Court President of the Free State, Ms Mbalo, pertaining to the Free State Province cluster "A," involving the districts of Bloemfontein, Botshabelo and Petrusburg are the focal point of the review proceedings instituted in the High Court.

II THE PARTIES

[2] The applicant is Richard John Lawrence, an adult male person employed as an acting Magistrate in Bloemfontein and head of office of the Petrusburg Magistrate's Court at the time of the institution of these proceedings. Applicant represented himself.

[3] The Magistrates Commission, a statutory body established in terms of s 2 of the Magistrates Act,[1] is cited as the first respondent. The second respondent is Ms Zola Mbalo in her capacity as chairperson of the Appointments Committee established by first respondent. The Committee she chaired was established by the first respondent.[2]

[4] Third respondent is the Minister of Justice and Correctional Services.

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[1] 90 of 1993

[2] Ibid s 6(1)(b) read with s 6(3)

[5] The fourth respondent is Magistrate Cornelius Mokgobo in his official capacity as the duly appointed Acting Chief Magistrate of the Free State cluster "A" during the period 1 March 2019 until 31 May 2019.

[6] The application is opposed by all four respondents. Adv DJ Groenewald appeared for them on instructions of the State Attorney.

[7] In order to avoid confusion, I shall hereinafter refer to the first respondent as "the Commission" and to the Appointments Committee as "the Committee."

[8] The Helen Suzman Foundation applied for and was granted leave to intervene as *amicus curiae.* Adv B Winks appeared for the *amicus* on instructions of Webber Wentzel.

III THE RELIEF SOUGHT

[9] Applicant instituted his application on 8 March 2019, *inter alia* seeking relief on an urgent basis that first and second respondents be interdicted from conducting interviews with and recommending candidates shortlisted for appointment in the vacant and advertised posts for Bloemfontein, Botshabelo and Petrusburg; that third respondent be interdicted from appointing persons in the vacant posts and directing third and fourth respondents to take the necessary steps to renew his contract of employment as acting magistrate until final determination of the relief sought in sub-paragraph (e), to wit that the shortlisting proceedings conducted

for the vacancies of magistrates for these districts be reviewed and set aside. In paragraph (f) an order was sought in terms whereof first and second respondents be directed to reconsider the applications of all qualifying candidates who applied for the aforesaid posts.

[10] On 11 March 2019 paragraphs (a) to (d) of applicant's notice of motion was dismissed, but leave was granted to him to proceed in the ordinary course with the leave sought in paragraphs (e) and (f).

[11] On receipt of the transcript and audio recording of the interviews an amended notice of motion and supplementary founding affidavit was filed on 28 June 2019. Respondents filed their answering affidavit and applicant responded by filing his replying affidavit. The essence of the relief now claimed is an order declaring the shortlisting proceedings conducted for the vacant and advertised magisterial posts for the districts of Bloemfontein, Botshabelo and Petrusburg unlawful and unconstitutional and that the proceedings be reviewed and set aside with such directions as the court may wish to grant.

[12] The amended notice of motion reads as follows:–

"(a) declaring the shortlisting proceedings conducted by the second respondent for the vacancies of magistrate in the Free State, more particularly Cluster A and the districts of Bloemfontein, Botshabelo and Petrusburg unlawful and unconstitutional; **and**

(b) reviewing and setting aside, without directions, all such shortlisting proceedings and all interviews, recommendations or appointment decisions made or taken in consequence of such unlawful shortlisting proceedings to date, more particularly, in so far as such decisions

pertain to the magisterial districts of Bloemfontein, Botshabelo and Petrusburg; **or**

(c) reviewing and setting aside all such shortlisting proceedings with directions, by: ….." The number of directions which applicant alleges the court shall made are set out in paragraph (c), but not quoted, save to mention that provision is made in (c) ix and (c)x for orders prohibiting the third respondent from filling the vacancies, and if he has done so, for such appointments to be set aside.

IV UNCONTESTED EVIDENCE

[13] At the time of the institution of proceedings herein applicant was employed as an acting magistrate in Bloemfontein and head of office of the Petrusburg Magistrate's Court. Both courts fall in Free State cluster "A."

[14] Applicant's competency and experience are not in dispute. In fact, he received accolades from more than one of his seniors in several progress reports attached to the founding affidavit. His acting contract was extended several times on the basis of a senior magistrate and Acting Chief Magistrate indicating that he "remains an asset to this office" and "I unreservedly recommend that his contract be extended for another term"[3]. The fourth respondent said the following:

" **Insight**

His record of proceedings gives an accurate, detailed and comprehensive reflection of what has transpired in any given case and his judgments are to the point, well-reasoned and always supported by relevant authority.

[3] Progress report of 22 November 2016 at pleadings p 101 and progress report of 18 June 2018 at pleadings p 129

Conclusion and recommendation

Mr Lawrence is an asset to this office and cluster and I recommend that his contract be extended for another term."[4]

[15] Under applicant's guidance the Petrusburg Court improved from the second best performing court in cluster "A" and the fifteenth best performing court in the country to the best performing court in the Free State and in the country according to NPA's statistics.[5]

[16] During 2018 the Commission invited applications to fill several judicial vacancies which included six vacancies for magistrates in Bloemfontein and one vacancy for head of office for each of the towns of Petrusburg and Bothsabelo. Applicant applied for the post of magistrate in Bloemfontein as well as the post of head of office in both Botshabelo and Petrusburg.[6] He was not shortlisted to be interviewed.

[17] The Committee tasked to do shortlisting consisted of the following people: the chairperson, Ms Zola Mbalo and nine members, to wit Mr MSA Maila, MP; Ms CC September, MP; Mr BG Nthebe, MP; Mr M Samuel Makamu; Mr MM Mokoena; Mr Desmond Nair; Dr Gomolemo Moshoeu; Ms Yoliswa Sidlova; and Ms PM Tengeni.[7]

[18] The following members were present during the shortlisting proceedings for Botshabelo and Petrusburg, to wit Ms Mbalo; Mr Makamu; Ms Sidlova; Ms September MP; Mr Mokoena; Ms Tengeni and Mr Nthebe, MP. Only five members were present

[4] Progress report of 9 September 2016: pleadings p 97A
[5] Pleadings pp 127 & 133
[6] Pleadings p 142
[7] Annexure "RJL31", pleadings p 207

during the shortlisting process for Bloemfontein, they being Ms Mbalo; Ms Sidlova; Mr Mokoena; Ms Tengeni; and Mr Nthebe, MP.[8] Therefore, according to the uncontested evidence, Ms Mbalo and four members decided upon the fate of candidates for a major office such as Bloemfontein, whilst in the case of Botshabelo and Petrusburg she and six members were present during the shortlisting proceedings.

[19] The applicant was not considered at all for any of the posts that he applied for. In fact, no white person was considered for the vacant magistrates' posts in Bloemfontein or that of the head of court post in Petrusburg.

[20] The shortlisting proceedings were finalised and certain people recommended for appointment. We have not been informed during the hearing of the application what the position was pertaining to the appointment of people in the various vacant positions, but it transpired after argument and during preparation of this judgment that appointments had in fact been made. On 4 November 2019 third respondent appointed 207 magistrates country wide, effectively from 1 February 2020.

[21] Applicant was informed as follows in an email of the Committee secretary dated 26 February 2019:[9]

"The Chairperson of the Appointments Committee directed that you be informed that you cannot be included in the short-list for any of the posts you

[8] Ibid

[9] See annexure "RJL 33" at p 210

have applied for as you do not meet the section 174(2) of the Constitution-criteria in any of those offices."

V THE DISPUTES

[22] Applicant made numerous allegations and even accusations in his papers, including his heads of argument. He repeated himself and was argumentative in the extreme. Instead of relying in his affidavits on evidence of a factual nature in order to bring his case within the legal bases relied upon, he argued his case in the affidavits and repeated his arguments in two sets of heads of argument. Applicant's argumentative and offensive approach is deplorable. His attack is typical of the subjective nature that can be expected of a person acting and arguing in his own interest.

[23] Respondents allege that, notwithstanding applicant's provocative attitude, it is not apparent on what cause of action applicant relies. The Constitutional Court emphasised in *Bato Star*[10] that it is desirable for litigants who seek to review administrative action to clearly identify both the facts upon which they base their cause of action and the legal issues for this cause of action, legal argument is not called for in the affidavits. Having said this, I believe that the following is a fair summary of the issues raised by the parties which will be considered by me herein later:

23.1 Respondents' first ground of opposition is non-joinder. It is their case that the application should fail insofar as applicant failed to join all candidates shortlisted by the Committee.

[10] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490

Applicant served all shortlisted candidates with copies of the papers and all of them, save for four shortlisted in respect of the Bloemfontein vacancies abide in the decision of the court. No one indicated any objection to the relief claimed.

23.2 According to applicant the Committee was not quorate during the shortlisting proceedings pertaining to Bloemfontein. Reliance is placed on s 6(7) read with s 5(2) of the Magistrates Act. This submission will be evaluated hereunder together with respondents' submissions in respect of s 5 and 6.[11] In short, it is respondents' submission that the

[11] The two sections read as follows: "**5 Meetings of Commission**
(1) Meetings of the Commission shall be held at the times and places determined-
(a) by the chairperson or, if he or she is not available, by the vice-chairperson of the Commission; or
(b) if both the chairperson and the vice-chairperson of the Commission are not available, by the majority of the members of the Commission.
(2) The majority of the members of the Commission shall constitute a quorum for a meeting of the Commission.
(3) If both the chairperson and the vice-chairperson of the Commission are absent from a meeting of the Commission, the members present shall elect one of their number to preside at that meeting.
(4) The person presiding at a meeting of the Commission may regulate the proceedings and procedure thereat, including the quorum for a decision of the Commission, and shall cause minutes to be kept of the proceedings.
(5) The proceedings of the Commission shall take place *in camera* unless the person presiding at a meeting directs otherwise.
6 Committees of Commission
(1) The Commission, for the proper performance of its functions-
(a) shall establish an executive committee consisting of two or more members of the Commission designated by the Commission; and
(b) may establish such other committees as the Commission may deem necessary, consisting of one or more members of the Commission designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that purpose and for the period determined by the Commission.
(2) The Commission may extend the period of an appointment made by the Commission under subsection (1) or withdraw such appointment during the period referred to in that subsection.
(3) The Commission shall designate a chairperson for every committee and, if the Commission deems it necessary, a vice-chairperson.
(4) *(a)* A committee shall, in accordance with the policy laid down by the Commission and subject to the directions of the Commission, perform such functions of the Commission as the Commission may assign to such committee.
(b) Any function so performed by the executive committee referred to in subsection (1) *(a)* shall be deemed to have been performed by the Commission.
(5) On completion of the functions assigned in terms of subsection (4) to a committee referred to in subsection (1) *(b)*, such committee shall submit a written report thereon to the Commission.
(6) The Commission may at any time dissolve any committee.
(7) The provisions of section 5 shall *mutatis mutandis* apply to a meeting of a committee." (emphasis added)

second respondent as chairperson could rule in terms of ss 5(4) read with 6(7), as she did, that the meeting was quorate although a majority of members did not attend.

23.3 According to applicant the Committee selectively applied s 174(2) of the Constitution and in that process regarded race as an "overarching and sole consideration" insofar as white people were totally disregarded. This is denied by respondents who extensively dealt with their views on the issue.

23.4 According to applicant the Committee did not consider the relevant factors as required by regulation 5 of the Magistrates Act[12]; it is applicant's case that his elimination by the Committee before considering the regulation 5 factors constitute an abuse of and an incorrect application of s 174(2) of the Constitution. Again, this issue was put in contention by respondents.

VI EVALUATION OF THE PARTIES' SUBMISSIONS

Non-joinder

[24] Applicant served his amended notice of motion dated 28 June 2019 together with his supplementary founding affidavit by e-mail on all candidates shortlisted for the vacant positions in Bloemfontein, Petrusburg and Botshabelo.[13] He invited them to

[12] The regulation reads as follows: "Filling of vacancies: In the appointment or a promotion of a Magistrate, only the qualifications, level of education, relative merits, efficiency and competency for the office of persons who qualify for the relevant appointment or promotion shall be taken into account."
[13] Pleadings, pp 291 – 294 and supplementary affidavit paras 5 - 8, pp 298 - 301

join the proceedings notwithstanding his belief that they did not have a direct and substantial interest in the review application.

[25] In response to respondents' non-joinder plea, applicant explains how he gave notice of the application and attaches proof of service.[14] He did this although the Committee decided to play cat and mouse insofar as it declined to advise him which candidates had been recommended for appointment.[15] The State Attorney, instructed by respondents, relied on so-called confidentiality.

[26] In my view all shortlisted candidates knew about the applicant's application and if anyone wanted to oppose, he/she would have been able to do so. They are all legally qualified people who cannot claim that they were ill-informed of their rights.

[27] The issue of non-joinder has again been dealt with authoritatively in *JSC v Cape Bar Council*:[16]

"[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) para 7; Andries Charl Cilliers, Cheryl Loots and Hendrik

[14] Replying affidavit paras 38.8 – 38.27 at pp 511 - 518
[15] Replying affidavit par 38.7 p 511 read with annexures "RJL44" – "RJL46" at pp 542 - 545
[16] 2013(1) SA 170 (SCA)

Christoffel Nel *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited.)"

[28] The position may now be different than when we heard the application. At that stage no candidate had the right to be appointed. Now appointments have been done and if the application succeed, the appointments must also be declared unlawful and set aside. This is the relief applicant seeks in paragraphs (b) and (c)x of the amended notice of motion. In my view the Minister and all appointed candidates knew that if the Minister would be proceeding with appointments in the face of the pending review application, his decisions might be overturned. The point *in limine* is dismissed.

Principle of legality

[29] The principle of legality dictates that power should have a source in law. It is applicable whenever public power is exercised.[17]

[30] This principle has again been discussed in *JSC v Cape Bar Council* where the following principles were restated:[18]

"[20] The court a quo agreed with the contention that the impugned decisions of the JSC are excluded from review under PAJA by s 1(gg). Nonetheless it found these decisions reviewable, in principle, under the doctrine of legality. The correctness of this finding is not challenged by the JSC on appeal. As a result, the doctrine of legality can, for present purposes, be stated without elaboration and purely as the underlying substructure for this court's consideration of the remaining issues.

[21] As Ngcobo CJ said in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49, it has by now become axiomatic

[17] AAA Investment (Pty) Ltd v Micro Finance Regulatory Council & another 2007 (1) SA 343 (CC) at par 29
[18] Loc cit at paras 20, 21 & 22

that the doctrine or principle of legality is an aspect of the rule of law itself which governs the exercise of all public power, as opposed to the narrow realm of administrative action only. The fundamental idea expressed by the doctrine is that the exercise of public power is only legitimate when lawful (see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56). By way of example it was held in *Fedsure,* on the basis of the legality principle, that a body exercising public power has to act within the powers lawfully conferred upon it. And in *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of South Africa* 2000 (2) SA 674 (CC) (para 20) it was held that the principle of legality also requires that the exercise of public power should not be arbitrary or irrational (see also *Albutt supra* para 49 and the cases cited in footnote 43).

[22] The JSC's power to advise the President on the appointment of judges of the High Court is derived from s 174(6) of the Constitution. Hence it is undoubtedly a public power. In the event, this court has recently held that the proper composition of the JSC is a matter for review under the doctrine of legality (see *Acting Chairperson: Judicial Services Commission v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA)). Moreover, in accordance with legal principle that became well settled in many cases since *Pharmaceutical Manufacturers*, the decisions of the JSC that are challenged by the CBC are, in principle, subject to review on the basis of irrationality. This brings me to the first challenge based on the alleged improper composition of the JSC when the decisions not to recommend any of the unsuccessful candidates were taken." (Emphasis added)

[31] Although applicant is somewhat evasive as to his cause of action, there cannot be any doubt that he also relies on the principle of legality. The deliberations of the Committee are relevant to consider whether there was compliance with the principle of legality and/or whether it acted rationally. The following *dicta* of the Constitutional Court in Helen *Suzman Foundation v JSC*[19] are apposite:

[19] 2018(4) SA 1 (CC) paras 23 & 67

"[23] Surely, deliberations are relevant to the decision they precede and to which they relate. Indeed, *HC SANRAL* correctly says so. They may well provide evidence of reviewable irregularities in the process, such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors, a failure to consider relevant factors, and the like. Absent disclosure, these irregularities would remain hidden. Deliberations are the most immediate and accurate record of the process leading up to the decision.

[67] Where a claim to blanket non-disclosure is asserted, the court must engage in a balancing exercise. An important factor in weighing-up the JSC's interest against that of review applicants in general is that the JSC is engaged in a particularly important exercise of public power, which must be done lawfully and rationally. Generally the only way to test the legality of the exercise of this power completely and thoroughly is to afford an applicant for review access to *all* material relevant to that exercise of power. If a public functionary can withhold information relevant to the decision, there is always a risk that possible illegalities remain uncovered and are thus insulated from scrutiny and review. That is at variance with the rule of law and our paramount values of accountability, responsiveness and openness. This affects not only the individual litigant, but also the public interest in the exercise of public power in accordance with the Constitution. It must, therefore, be in truly deserving and exceptional cases that absolute non-disclosure should be sanctioned."

[32] It is alleged on behalf of respondents that no unfairness or non-compliance with either regulation 5, or the Constitution occurred in the shortlisting process adopted by the Committee.[20] Respondents' deponent states the following pertaining to

[20] Answering affidavit paragraph 8 p 249 - 257

applicant's allegation that no white candidates were considered for the posts in cluster "A"[21]:

"This by no means suggests that there was a blanket ban imposed on individuals from specific race groups. I pause to point out that a total of 65 white individuals were shortlisted for the positions advertised of which 20 were white males."

She continues as follows[22]:

"8.19.1 There was clearly a need for invoking restitutionary measures having regard to the over representation of white males;

8.19.2 The process was implemented in a nuanced and flexible manner and there were **no bar** on the shortlisting **of white males**." (my emphasis)

Further on she said[23]:

"… white magistrates already comprises 26.5% of the Free State Cluster "A" lower court judiciary, making white individuals by far the most over-represented group. The appointment of a white male would therefore have been contrary to the objectives of section 174(2) of the Constitution."

[33] I do not agree that Ms Mbalo's averments under oath are a true reflection of the Committee's deliberations pertaining to the Free State cluster "A." I shall deal later herein with this contention in detail with reference to several extracts of the Committee's deliberations as transcribed.

Was there a quorum in respect of the Bloemfontein shortlisting process?

[34] The Committee consisted of ten persons, including the chairperson, Ms Mbalo. Ms Mbalo and four members attended the

[21] Answering affidavit paragraph 8.18 p 256
[22] Answering affidavit paragraph 8.19 p 256
[23] Answering affidavit paragraph 9.8 p 258

Committee meeting dealing with the shortlisting for Bloemfontein. She states that she has exercised the powers granted to her in terms of s 5(4) read with s 6(7) of the Magistrates Court Act and avers that the Committee was quorate pertaining to the Bloemfontein shortlisting process.[24]

[35] The applicable principles in respect of the interpretation of legislation have been explained in several judgments of the Supreme Court of Appeal and the Constitutional Court.[25] The decisions are clear. Over and above that stated in the judgments referred to, I reiterate what Lewis JA said:[26] "Words without context mean nothing."

[36] A reading of s 5(2), read with s 6(7), indicates unambiguously that a majority of the members of the Committee shall constitute a quorum for a meeting. The respondents' argument is based on the provisions of s 5(4) read with s 6(7). It is their contention that the chairperson of the Committee may decide during the meeting that a decision may validly be taken by a minority of members. This

[24] Answering affidavit paragraph 8.14 p 255

[25] In an oft-quoted judgment Wallis JA summarised the current state of our law regarding the interpretation of documents, including contracts, as follows in *Natal Joint Municipal and Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]:
"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." (emphasis added). See also: Bato Star Fishing Pty Ltd v Minister of Environmental Affairs 2014 (4) SA 490 CC at para 89 and Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society & others [2019] ZACC 47 delivered on 11 December 2019 at paras 18 and 38 – 42

[26] Novartis v Maphil [2015] ZASCA 111 (3 September 2015) at para 28

would presumably be the case where the meeting was quorate initially, but where members have left for the one or the other reason prior to a decision being taken. If this is correct, five, six, seven, or eight of the required ten members of the Committee may decide to walk out after deliberations as they were dissatisfied with the manner in which the meeting was held and only thereafter, the chairperson decides to call upon the remaining members – the minority - to decide on an issue. In such an event, five, four, three or two members may be held to be a quorum for a decision to be validly taken. Mr Groenewald on behalf of the respondents conceded that in regulating the quorum, the chairperson must act within the bounds of reasonableness. For this submission, he relied on *Bertie van Zyl Pty Ltd & Another v Minister of Safety and Security & others.*[27]

[37] It is accepted that a contextual or purposive reading of a statute must remain faithful to the actual wording thereof as the Constitutional Court confirmed in Bertie van Zyl,[28] but ambiguity must be dealt with by looking at the purpose and the context in which the legislation was drafted. Sub-sections 5(2) and s 5(4) are contradictory and can with the best will in the world not be married to arrive at the conclusion reached by the second respondent who was clearly and incorrectly influenced by the Committee's secretary, Ms Van Zyl.[29] The two sub-sections do not make sense if read together and as submitted on behalf of respondents. Respondents' interpretation will lead to illogical, insensible and

[27] 2010 (2) SA 181 (CC) at paras 21 & 22

[28] At par 22: "A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute."

[29] Record of proceedings, p 29

unbusinesslike consequences. The purpose of insisting that a majority of members of the Commission and/or the Committee shall constitute a quorum would be flouted if the chairperson may change the quorum requirements willy-nilly to twenty, thirty or forty percent of the total members. Such interpretation may result in a situation where all ten members may be present at the start of the meeting at say, 8 o'clock the morning, but by the time material decisions are to be taken after tea, half or more of them have decided to leave, leaving it to the minority to decide on important issues such as the shortlisting of candidates for crucial posts such as judicial officers. Such an approach would be illogical and leading to chaotic decisions being taken in respect of serious matters such as the eventual appointment of magistrates.

[38] One of the members of the Committee, a person of the stature of Dr Moshoeu, the Chief Executive Officer of the South African Judicial Education Institute ("SAJEI"), did not attend the Bloemfontein shortlisting process. She might have provided important and relevant advice pertaining to the attendance of training courses, such as those attended by applicant, and the difficulty to give in-house training to someone who has never before acted as a magistrate.

[39] I agree with the following *dicta* of Sher, J:[30]

"The appointment of judicial officers is a delicate matter which the public has a right to expect will be carried out carefully and with due and scrupulous regard for the legal prescripts concerned. It is fundamentally embarrassing when those who are involved with the process get it wrong, because of a basic

[30] Magistrate AK Amos v Minister of Justice & 2 others, case no 9469/17, an unreported judgment of the Western Cape Division delivered on 12 September 2019 at par 43

failure to attend to the fundamentals, particularly when they, of all persons, would surely be expected to know what the law requires of them. As a constitutional state we cannot allow the process of the appointment of magistrates, who are the backbone of our legal system, to be dealt with in a haphazard or lackadaisical fashion. That the body which is tasked with the selection and interview of candidates for judicial office must be quorate is something which has been apparent at least since the judgment of the Supreme Court of Appeal in *Acting Chairperson: JSC & Ors v Premier of the Western Cape* and it is distressing to note that at least in respect of the appointment in question in this matter in 2017, this was not the case."[31] (emphasis added)

[40] The shortlisting, recommendation and appointment of judicial officers are serious matters deserving to be treated fairly, in terms of the applicable legislation and prescripts and according to constitutional values. If the Committee's meeting in respect of the Bloemfontein shortlisting was not quorate, as I have found, the decisions at that meeting are unconstitutional, unlawful and invalid. The fact that the appointees to the various posts in cluster "A" have not been cited as parties in this proceedings cannot undermine the court's function to declare the shortlisting processes unlawful.

Non-compliance with s 174(2) of the Constitution and regulation 5

[41] It is understood that attention should be focused on the shortlisting process and not the requirements for eventual appointment. However, the shortlisting process cannot be evaluated without considering the authorities, the views of eminent authors and ss

[31] The JSC matter referred to by Sher, J can be found at 2011 (3) SA 538 (SCA) paras [19] - [21]

174(1) and 174(2) of the Constitution. These two sub-sections read as follows:

"**174 Appointment of judicial officers**

(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

[42] Justice DM Davis[32] stated the following in respect of judicial appointments and in particular how judges should be appointed:

"The preferable approach, in my view, is to find candidates who are the very best in terms of criteria of merit which are established by the JSC. Merit, of course, is a contested concept and it would be wrong, as is so prevalent in the discourse of the legal community, to conflate the concept of merit with the standard of a middle-aged white senior counsel. To the contrary, life experience of the diversity of South Africa, empathy with the history of South Africa, a deep grasp of the constitutional values enshrined in the text and a true commitment to the transformation of South African society, that is which affirms and promotes substantively the constitutional values of dignity, freedom and equality, should be yardsticks in the development of a standard which justifiably constitutes merit.

Assume however that this application of merit yields a ranking of candidates, the application of which may not ensure the requisite representivity. At this stage, the provisions of section 174(2) would apply to ensure that candidates who may not have been the first or second choice on the ranking by the JSC but that notwithstanding, comply with the test of merit and hence are appropriately qualified, are then appointed above the higher-ranked

[32] *Judicial appointments in South Africa, Advocate,* Dec 2010 at p 42

candidates in order that the requirement of the Constitution in terms of section 174(2) is met."

The learned judge also referred in his article to the following:

"On 15 September 2010, the JSC issued the following statement regarding criteria to be appointed:

'The following criteria are used in the interview of candidates and in the evaluation exercise during the deliberations by the members of the Commission.

Criteria stated in the Constitution

1. Is the particular applicant an appropriately qualified person?
2. Is he or she a fit and proper person, and
3. Would his or her appointment help to reflect the racial and gender composition of South Africa?

Supplementary Criteria

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
   (a) Technically competent
   (b) Capacity to give expression to the values of the Constitution
4. Is the proposed appointee an experienced person?
   (a) Technically experienced
   (b) Experienced in regard to values and needs of the community
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?'"[33]

It will be shown later that the Magistrates Commission's criteria are differently worded, but in my view the core principles should remain the same.

[33] Ibid at p 43

[43] Susannah Cowen[34] said the following in respect of judicial selection:

> "In public discourse there are few who would dispute that a fundamental transformation of the judiciary on race and gender lines is not necessary but the meaning and implementation of the section has been highly contentious….
>
> If we seek to remedy these wrongs, a quest for a broadly representative bench is in line with the Constitution's aspiration to create a just society that is based on non-racialism and non-sexism. While it must mean that the bench we seek must be made up primarily of judges of African descent, we needn't resort to the crude tactics of apartheid to get there.
>
> We also need to take a view on how being black or female ought to influence the selection process in a specific case…..
>
> The difficult case arises where two qualified candidates are being considered but the candidate who will not enhance racial or gender representivity is appreciably better qualified in an important respect. In that case, the consideration of the need for racial and gender representivity on the bench requires careful evaluation and cannot be the only relevant consideration…
>
> Finally, we ought not to be too quick to assume that the legitimacy of the bench will be best enhanced if race and gender representivity is accelerated. We must obviously aim to meet the objective of racial and gender representivity with due expedition and treat it with priority, because the judiciary's legitimacy depends on it. But its legitimacy will ultimately depend on how well the judiciary is able to perform the functions the Constitution entrusts to it.
>
> It is thus critical that the mechanisms that we use to assess the suitability of a judge for office are appropriately tailored to that end."

[44] The respondents' case is that the Committee acted fairly in approaching the shortlisting process as it did. It *inter alia* relied on the procedure to be followed by it as approved by the Magistrates

[34] Judicial Selection in South Africa Democratic Governance Rights Unit (DGRU) (2010) at pp 69 - 73

Commission on 7 April 2011.[35] The document is clear: the Committee must;

"
- Consider whether in respect of each application received, the requisite information and documentation prescribed in law as well as further requirements stipulated in the advertisement have been provided. If any of the above are found to be lacking, the candidature of the applicant is automatically disqualified.

- Consider the candidature of **all applicants** whose applications contain all requisite information and documentation mentioned above.

- Determine whether the applicants whose applications are in order as contemplated above are suitable for appointment based on the requirements of legislation and any other applicable criteria.

- Draw up a short-list of the most suitable candidates for appointment.

- Invite the short-listed candidates to an interview by the Appointments Committee / Magistrates Commission on a date, time and place determined." (emphasis added)

[45] Under the heading of criteria for short-listing purposes the following must be taken into consideration, although not in any fixed order or sequence of precedence:

"
- Section 174(2) of the Constitution.
- Relevant experience.
- Qualifications.
- Needs of the specific office.

[35] Annexure "ZM4" p 446

- Appropriate managerial experience or managerial skills."

[46] It is also noted: "Whereas in a situation where gender or race transformation present itself as the most pressing need such a consideration will be given priority accordingly, to the extent that it may be preferred to re-advertise the position if no suitable transformation candidate amongst any of the formerly disadvantaged groups can be found to fill it."

[47] The Committee presented evidence in the words of its chairperson in the answering affidavit, but in order to establish what actually occurred during the shortlisting meetings, one has to look at the transcripts. I accept that it is not called for to quote evidence in detail in a judgment, but it is important to refer to the following to show that the Committee had a total disregard for the legislation, regulation 5, their own shortlisting process and the rights of whites to at least be considered during the shortlisting process:

[48] In respect of Petrusburg the following was said:

"Magistrate Nulliah: This is a one man station. It is a predominantly Afrikaans speaking community that we have there…." to which second respondent and others eventually responded:

Chairperson: Not white. Just female, but not white.

Unidentified person: Take away the white.

Unidentified person: Take away white.

Magistrate Nulliah: The reason I stated white female is because, but you have given me a little bit of insight as to how to proceed. I looked at the Afrikaans community.

Chairperson: We are also looking for experience ma'am.

Ms Nulliah: We are also looking for experience. Acting experience and managerial experience. So are we out of white positions?

Ms Nulliah: Female whites, are we not accepting?

Unidentified person: No."[36]

Further on the chairperson said: "Anything you need, except for white."[37]

And later on: "Chairperson: And if we say we take her (a black female) then we are going to need persons to compare her with and there are no other females. So let us look at males, African, coloured and Indian."[38] It is evident that the Commission concluded, incorrectly and unlawfully so, that a female should not or could not be compared with male persons. This is discrimination in a pure form, but needs no further attention. Fact of the matter is that no whites were considered.

[49] Six vacancies were advertised for Bloemfontein, but the Commission filled one post prior to the shortlisting process. This appears to be irregular, but need not to be considered. In respect of Bloemfontein Magistrate Nulliah indicated that there were five vacancies (instead of the original six) and then the following transpired after her input that one white female may be considered for shortlisting:

"A coloured male, a coloured female and when I look at the cluster establishment as a whole, we can take one white female.

Chairperson: And why do you say so ma'am? Why do you chose these races?"[39]

Later on: "Chairperson: But you still want a white female?

Magistrate Nulliah: We can have one white female against an entire cluster background.

Chairperson: I think that three is enough for now, what is the view of the other commissioners?" Hereafter there was the following response:

[36] Record of proceedings p 29 & 30
[37] Ibid p 31
[38] Ibid p 33
[39] Ibid p 42

"Mrs Sidlova: Chair, I do not know. I would rather we do not, if we can find more of the other two races that are lacking, then we do not consider any white person."[40]

[50] In respect of the shortlisting for Botshabelo the following was recorded:

"Unidentified person: There is a Mr Lawrence from Petrusburg, but I think he must be acting.

Magistrate Nulliah: If I may, I do not know if I am allowed to interfere."[41] After an introduction of the cluster establishment everybody was talking at the same time when Mr Lawrence's name came up. No doubt he was not even considered for Botshabelo, not to talk of the other two districts. His name was not even mentioned in respect of those two districts. It is apparent from the record that Magistrate Nulliah tried her best to arrange that Ms Marinda Pretorius, a white female, be transferred to Botshabelo, but the chairperson said: "So we cannot take Marinda (Pretorius) there."[42]

[51] The Committee was prepared, in the case of Bloemfontein, to shortlist people who had never acted before as magistrates on the basis that if they are appointed, the other magistrates could train them.[43] A so-called two-two system was even called for in terms whereof two people who have acted previously be appointed with two who have not acted so that the first two could train the

[40] Ibid p 44
[41] Ibid pp 15 & 16
[42] Ibid p 17
[43] Ibid p 48

inexperienced two.[44] In the process the Committee failed to adhere to its own policy[45] in that it did not consider the candidature of all applicants whose applications were compliant. White people and applicant in particular was not considered at all.

[52] Magistrates are not appointed on probation as in the past. Once appointed, the Department might be stuck with a person that is incapable to perform as a judicial officer. Therefore it is a sound principle, as is the case in the High Court, the Supreme Court of Appeal, as well as the Constitutional Court, to recommend candidates for appointment only once they have shown an ability to cope as judicial officers.

[53] It is unnecessary to dwell on the expertise and experience of applicant. Insofar as the Committee acted as gatekeeper, preventing any whites to be interviewed, it lost the opportunity to duly consider whether applicant was not perhaps such an excellent candidate that he should be recommended for appointment notwithstanding the obligation to ensure that s 174(2) is diligently applied.

[54] The *amicus curiae* contributed to the resolution of the dispute, but did not ask for any costs in its favour. Applicant, being successful, is entitled to costs against first and third respondents and such an order shall be made.

VII ORDERS

[44] Ibid p 49
[45] Record, annexure ZM 4, p 446

[55] Consequently, the following orders are made:

1. It is declared that the shortlisting proceedings chaired by second respondent for the vacancies of magistrates for the Free State relating to the districts of Bloemfontein, Botshabelo and Petrusburg were unlawful and unconstitutional.
2. The aforesaid shortlisting proceedings and consequently also the recommendations of the Appointments Committee of first respondent and the appointment by third respondent of magistrates for the districts of Bloemfontein, Botshabelo and Petrusburg are reviewed and set aside.

3. First and third respondents shall pay applicant's costs of the application jointly and severally, the one to pay the other to be absolved.

4. The *amicus curiae*, the Helen Suzman Foundation, shall be responsible for its own costs.

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J P DAFFUE, ADJP

I concur

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P E MOLITSOANE, J

On behalf of Applicant : Mr RJ Lawrence (In person)
Instructed by : Frank Botha Attorneys
BLOEMFONTEIN

On behalf of Respondent(s)	:	Adv DJ Groenewald
Instructed by	:	State Attorney BLOEMFONTEIN
On behalf of the *amicus curiae*	:	Adv B Winks
Instructed by	:	Webber Wentzel Attorneys c/o Symington & de Kok BLOEMFONTEIN