IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
(BLOEMFONTEIN)

SCA CASE NO: 388/2020
FB CASE NO: 1070/19

In the matter between:

THE MAGISTRATES COMMISSION	**1st Appellant**
ZOLA MBALO N.O., CHAIRPERSON OF THE APPOINTMENTS COMMITTEE OF THE MAGISTRATES COMMISSION	**2nd Appellant**
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**3rd Appellant**
CORNELIUS MOKGOBO N.O., ACTING CHIEF MAGISTRATE, BLOEMFONTEIN CLUSTER "A"	**4th Appellant**

and

RICHARD JOHN LAWRENCE	**Respondent**

with

THE HELEN SUZMAN FOUNDATION	**Amicus Curiae**

AMICUS CURIAE'S HEADS OF ARGUMENT

INTRODUCTION

1. This appeal concerns the constitutionality of proceedings conducted by the Magistrates Commission ("**Commission**") in January 2019 to shortlist candidates for appointment as permanent magistrates in the Bloemfontein, Botshabelo and Petrusburg districts of the Free State ("**shortlisting proceedings**").

2. One applicant was Mr Richard Lawrence, who had been an acting magistrate in the Bloemfontein Magistrates' Court since January 2015, and the acting head of office in the Petrusburg Magistrates' Court since October 2016. In the shortlisting proceedings, he was excluded from consideration, on the sole basis that he was a white male.

3. The principal issue before the Court a quo was whether this exclusion was permitted by the **Constitution of the Republic of South Africa, 1996** ("**Constitution**") – particularly **section 174**.

4. The appellants argued that section 174(2) of the Constitution permitted the Commission to exclude Mr Lawrence from consideration for appointment in the districts for which he had applied, owing to overrepresentation of white males in those districts (Bloemfontein, Botshabelo and Petrusburg).

5. Admitted as amicus curiae by the Court a quo, the Helen Suzman Foundation ("**HSF**") submitted that section 174(2) of the Constitution, properly interpreted, does not permit a rigid exclusion of candidates for judicial appointment on demographic grounds, without leaving room for exceptions. The appellants disagreed.

6. The Court a quo agreed with the HSF's submissions, concluding inter alia as follows:[1]

> *[51] … the Committee failed to adhere to its own policy 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…*
>
> *[53] … 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 section 174(2) is diligently applied.*

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[1] **Record** v6 p1002-1003.

7. The appellants contend that this reasoning was wrong, and are appealing inter alia on the following grounds:[2]

> *[T]he [appellants] were obliged and entitled in terms of section 174(2) of the Constitution as read with the shortlisting procedure to disregard candidates if the racial and gender needs of the Cluster required from the Committee to provide preference to other race and gender groups, cognisance being had of the flexible approach adopted by the [appellants] in so doing.*

8. In these heads of argument, the HSF takes issue with these claims, and shows:

8.1. firstly, that section 174(2) of the Constitution neither obliged nor entitled the Commission to "*disregard*" any candidate solely on demographic grounds;

8.2. secondly, that the Commission's approach was not "*flexible*", as claimed, but rigid, as it left no room for exceptions to be made for exceptional candidates; and

8.3. finally, that the Commission's rigid approach is inconsistent with the constitutional principle of judicial independence.

9. As in the Court a quo, the HSF makes no submissions on the parties' disputes about non-joinder and lack of quorum.

RELEVANT LAW

10. The relevant parts of section 174 of the Constitution read as follows:

> *(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. […]*

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[2] **Record** v6 p1015: application for leave to appeal, para 17.

(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.

11. The **Magistrates Act, 1993** ("**Act**") prescribes no requirements for the appointment of magistrates, leaving these to be prescribed by regulation.

12. In turn, **Regulation 5** of the **Regulations for Judicial Officers in the Lower Courts, 1993** ("**Regulations**") provides as follows:

> ***Filling of vacancies***
>
> *In the appointment or 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. Relevant, too, is **Regulation 4(3)**, which provides as follows (with emphasis added):

> *If the Commission, after due consideration of an application, is of the opinion that the candidate is suitable for the office applied for, the Commission must forward the documents referred to in this regulation, together with a recommendation on the appointment of the candidate to the office in question, to the Minister.*

14. The Commission adopted a **Shortlisting Procedure** in 2011,[3] which inter alia directs the Commission's appointments committee to:

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

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[3] **Record** v3 p370-371: Procedure to be followed by the Appointments Committee for shortlisting purposes, as approved by the Magistrates Commission on 7 April 2011 ("**Shortlisting Procedure**").

- *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 shortlist of the most suitable candidates for appointment.*

[emphasis added]

15. The **Shortlisting Procedure** also sets out the criteria for shortlisting as follows:

> *Section 174(2) of the Constitution –*
> *The racial and gender demographics at a specific office, within an administrative region / regional division and on a national level on a specific rank are to be considered to inform the application of section 174(2). Section 174(2) seeks to address imbalances created in respect of previously disadvantaged groupings.*
> *...*
> *Relevant experience –*
> *...*
> *Qualifications –*
> *...*
> *Needs of the specific office –*
> *...*
> *Appropriate managerial experience or managerial skills –*
> *...*

16. Importantly, the **Shortlisting Procedure** further directs as follows (emphasis added):

> *The criteria listed above are <u>not applied in any fixed order or sequence of precedence or prioritisation</u>. <u>The circumstances and the candidature received for each vacancy determine how the criteria are to be applied</u> in relation thereto.*
>
> *[e.g. ... 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. The decision to re-advertise will not be taken lightly and the impact on service delivery at the relevant court will be balanced with the needs of the specific community.]*

PROPER INTERPRETATION OF SECTION 174(2)

17. In the absence of appellate precedent on the proper interpretation of section 174(2) of the Constitution, it is appropriate to have regard to commentaries by jurists who have devoted attention to the matter.

18. **Susannah Cowen SC** outlines the debate about section 174(2) of the Constitution lucidly as follows (original emphasis):[4]

> *Some argue that the section (and its reference to racial composition of the country) requires that each court must be demographically representative with reference to the racial classifications used under apartheid: Black, Indian, Coloured and White. Others say that it is wrong to perpetuate notions of identity that were arbitrarily imposed by the apartheid regime and that such interpretations will lead people to believe that they are entitled to be judged 'by one of one's own race'. Rather we must reject the labels we were given and resist demographic calculations: a broadly representative bench can still be achieved.*

19. Cowen SC proceeds to argue against treating demographic identity as a qualifying or disqualifying criterion in judicial selection (original emphasis):[5]

> *While [section 174(2)] 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…*
>
> *In this regard, many express the view that being black, or being a woman, constitutes a valid criterion for judicial selection. This approach is misleading because the criteria for judicial selection are that a person be appropriately qualified and a fit and proper person. If a person is not appropriately qualified and is not a fit and proper person, it is irrelevant whether they are black or female. That person does not qualify for judicial office.*
>
> *It is also misleading because it encourages the thinking that being black or female somehow enhances a candidate's fitness and propriety for office. Yet, in a society*

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[4] **Cowen**, *Judicial Selection in South Africa*, University of Cape Town, Democratic Governance and Rights Unit, 2013, at 69.

[5] *Id*, 71-72.

committed to non-racialism and non-sexism, we should be vigilant not to assume that any qualities relevant to judging flow from membership of a group.

20. Similarly, **Justice Dennis Davis** comments as follows (with emphasis added):[6]

> *Here lies the core difficulty: the judiciary should be broadly representative of the demography of South Africa, but, if at the same time, questions of race and gender representivity overwhelm the selection process, the possibility of a non-racial Bench in which the humanity of the judge rather than the race and gender thereof is the critical consideration becomes all the more difficult to attain…*
>
> *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 for merit and hence are appropriately qualified, are then appointed above the higher-ranked candidates in order that the requirement of the Constitution in terms of section 174(2) is met.*

21. In short, interpreting section 174(2) of the Constitution sensibly alongside section 174(1) means that section 174(1) sets the criteria for judicial selection ("*appropriately qualified*" and "*fit and proper*") while section 174(2) sets an additional consideration, which cannot be mutated into a criterion.

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[6] **Davis**, "Judicial appointments in South Africa", *Advocate*, vol 23, issue 3, December 2010, at 42.

22. It follows from the above that all qualified candidates must at least be considered, and their relative merits tested, even if they belong to overrepresented demographic groups. Their demographics cannot be used as a disqualifying criterion but as a factor – indeed, an important factor – to be weighed among their individual merits. Section 174(2) must thus be interpreted in a manner that at least allows exceptions to be made for exceptional candidates.

23. Section 174(2) of the Constitution must, moreover, be interpreted in harmony with the founding values and other relevant provisions of the Constitution, most notably those that concern race and gender equality:

23.1. **section 1(b)**: "*The Republic of South Africa is one, sovereign, democratic state founded on the following values: … (b) Non-racialism and non-sexism*";

23.2. **section 9(1)**: "*Everyone is equal before the law and has the right to equal protection and benefit of the law*"; and

23.3. **section 9(3)**: "*The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, [etc]*".

24. Our constitutional approach to race and gender transformation was most recently set out in ***Solidarity***, where the Constitutional Court held, in short, that the State is permitted to pursue demographic transformation by means of flexible targets, but not rigid quotas or job reservations.[7]

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[7] ***Solidarity v Department of Correctional Services*** [2016] ZACC 18; 2016 (5) SA 594 (CC), paras 50-64, applying ***South African Police Service v Solidarity obo Barnard*** [2014] ZACC 23; 2014 (6) SA 123 (CC), para 54.

25. The appellants appear to accept this position,[8] but contend that the impugned shortlisting process did not fall foul of this constitutional standard because the process was "*flexible*" in that "*the Committee shortlisted white males in other districts*".[9]

26. We now interrogate whether this claim is true.

RIGIDITY OF THE COMMISSION'S APPROACH

27. The appellants' claim of flexibility relies on a logical misdirection. It rests exclusively on the plea that they appointed white candidates in "*other districts*" than Bloemfontein, Botshabelo and Petrusburg. But that is no answer to the case against them. The notice of motion is clear: the decision under review is the decision in respect of Bloemfontein, Botshabelo and Petrusburg.[10] And in respect of those districts, their decision could not have been more rigid.

28. A simple analogy exposes the absurdity of the appellants' defence. A hotelier who bans any homosexual couples from staying at Hotel A cannot claim that this ban is not absolute because he allows homosexual couples to stay at Hotel B. This does not render the illegal and discriminatory practice at Hotel A any less illegal and discriminatory.

29. As the Constitutional Court held in ***Solidarity***, the hallmark of a rigid quota is that it allows no deviations or exceptions.[11] The appellants are unable to point to any evidence that the Commission gave itself even the slightest room to make an exception for a white

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[8] Appellants' heads of argument, para 65.

[9] *Id*, para 66.

[10] **Record** v1 p3: amended notice of motion, para (e).

[11] ***Solidarity***, para 51.

candidate for Bloemfontein, Botshabelo or Petrusburg – no matter how exceptional she or he might be. On the contrary, the record reveals an obdurately rigid determination to "*take away the white*"[12] – to disqualify any white candidate, without even considering her or his application, and thus without any possibility of assessing whether an exception might be merited.

30. It is not in dispute that the appointments committee did not even consider the contents of Mr Lawrence's application.[13] The appellants attempt to obscure this by referring to three occasions in the transcript when Mr Lawrence's name was mentioned.[14] But a reading of those references reveals that the committee "*considered*" nothing about Mr Lawrence but his whiteness – their scant consideration of his application was the very definition of skin-deep. It is not in dispute that they never considered his individual merits.

31. It is also not in dispute that Mr Lawrence was, in fact, an exceptional candidate.[15] The fact that the committee was unprepared even to consider making an exception for Mr Lawrence, thus, speaks for itself. The committee's approach – to the Bloemfontein, Botshabelo and Petrusburg vacancies – was rigid both in design and in execution. It was thus unconstitutional.

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[12] **Core Bundle** p110 line 24.

[13] See **Core Bundle** p109 lines 5 to 11.

[14] Appellants' heads of argument, para 47, referring to Core Bundle p96 line 20, p97 line 15, and p109 line 5.

[15] See, for example, **Core Bundle** p24: annex RJL21 to the founding affidavit: Mr Lawrence's application for appointment: "*When starting as Acting Head of Office in Petrusburg it was statistically ranked 56 in South Africa. In 2017/18 Quarter it improved to 15th in SA and 2nd in Free State. In 2017/18 Quarter 2 it further improved to 8th in SA and 1st in Free State and again in 2017/18 Quarter 3 Petrusburg was 5th in SA and 1st in Free State*." Also see **Record** v1 p71-137 for the motivations for renewing Mr Lawrence's acting appointment on the basis of his exceptional performance.

32. The appellants also take issue with the Court a quo's finding that the impugned decision was inconsistent even with the Commission's own Shortlisting Procedure.[16] They point to the provision that "*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.*"

33. But they fail to quote the very next sentence of the Shortlisting Procedure: "*The decision to re-advertise will not be taken lightly and the impact on service delivery at the relevant court will be balanced with the needs of the specific community.*"[17] There is nothing in these parts of the Shortlisting Procedure that suggests an application may be disregarded out of hand on demographic grounds, and the latter part forbids the Commission from rejecting a qualified (let alone exceptional) candidate "*lightly*", and without considering the impact on service delivery.

34. Moreover, the Shortlisting Procedure elsewhere explicitly guards against rigidity:[18]

> *The criteria … are <u>not applied in any fixed order</u> or sequence of precedence or prioritisation. The circumstances and <u>the candidature received</u> for each vacancy determine how the criteria are to be applied in relation thereto.*

35. Even if it did not, it would be impermissible to interpret the Shortlisting Procedure in a manner that allows rigid job reservation, in conflict with our constitutional equality law.

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[16] Appellant's heads of argument, paras 44-45.

[17] **Record** v3 p371.

[18] **Record** v3 p371 (emphasis added).

36. Thus, plainly and properly interpreted, the Shortlisting Procedure clearly dictates that every complete application must at least be considered. The appellants' reliance on the Shortlisting Procedure to justify its decision is thus difficult to understand.

INCONSISTENCY WITH JUDICIAL INDEPENDENCE

37. The Commission's rigid approach is unconstitutional for a further reason: it undermines judicial independence, which is a pillar of the rule of law, a founding value enshrined in **section 1(c) of the Constitution**.

38. If the Commission (the gatekeeper of permanent appointments to the magistracy) rigidly refuses to consider candidates belonging to overrepresented demographic groups, then the exceptional candidates from such groups can only be – and will be – appointed in an acting capacity for an indefinite series of renewable terms. This means that these acting magistrates – wielding the same vast public power as permanent magistrates – will have none of the security of tenure that is the bedrock of judicial independence.[19]

39. This problem has been flagged by none other than the **Deputy Minister** (to whom the Minister delegated the authority to make acting appointments). In June 2015, he warned the Chief Magistrates' Forum as follows:[20]

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[19] ***Justice Alliance of South Africa v President of the Republic of South Africa and Others*** [2011] ZACC 23; 2011 (5) SA 388 (CC), §73: "*It is well established on both foreign and local authority that a non-renewable term of office is a prime feature of independence. Indeed, non-renewability is the bedrock of security of tenure and a dyke against judicial favour in passing judgment… Non-renewability fosters public confidence in the institution of the judiciary as a whole, since its members function with neither threat that their terms will not be renewed nor any inducement to seek to secure renewal.*"

[20] **Record** v2 p201: first answering affidavit, annex ZM3: letter from Deputy Justice Minister John Jeffery to the Chair of the Chief Magistrates' Forum, 24 June 2015.

... I am extremely concerned about persons acting for extended periods as acting magistrates ...

... I am concerned about persons who have become reliant on an acting position and hence have no other source of income. These circumstances may impinge on the person's independence as they may be reluctant to upset the Head of Court concerned or the Ministry.

I have raised the period of two years as a period after which I require more extensive motivation as to why the applicant should continue to be appointed ...

40. Then, in August 2015, he elaborated as follows (with emphasis added):[21]

I am also mindful of the fact that certain categories of person – in particular White males, coloured males in the Western Cape and Indian males in KwaZulu-Natal are disadvantaged when it comes to permanent appointment because of the existing demographics and will take that into account.

I however cannot appoint a de facto permanent magistrate through the back door so the continued acting appointments of such persons cannot continue indefinitely. The motivation for such a person would also need to be a strong one.

41. Finally, in April 2017, he warned as follows (with emphasis added):[22]

I, however, cannot continue with the de facto permanent appointments indefinitely, and the motivation for these appointments should therefore be convincing. Chief Magistrates are aware of the demographics in their respective areas and should therefore not continue to promote with me the same person for further acting stints well knowing that the person will most probably not be shortlisted due to the demographics in that area…

It is therefore very important that heads of court clearly indicate in each and every application the number of acting appointments in his/her area, their race and gender, as well as the period for which the said persons have been acting in these courts.

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[21] **Record** v2 p205: first answering affidavit, annex ZM3: letter from Deputy Justice Minister John Jeffery to the Chair of the Chief Magistrates' Forum, 7 August 2015.

[22] **Record** v2 p207: first answering affidavit, annex ZM3: letter from Deputy Justice Minister John Jeffery to the Chair of the Chief Magistrates' Forum, 21 April 2017.

42. In Mr Lawrence's case, the Chief Magistrate's motivations for renewing his tenure were so "*strong*" and "*convincing*" (as required by the Deputy Minister) that, at the time of the shortlisting proceedings, he was serving his **48th** uninterrupted three-month acting term, and entering his **fifth year** as an acting magistrate.[23]

43. Having directed that he would not appoint "*de facto permanent magistrates*", the Deputy Minister nevertheless renewed Mr Lawrence's tenure **47 times**. This clearly shows that Mr Lawrence was an exceptional candidate. Indeed, this has never been in dispute.

44. The upshot of this undisputed evidence is that, if the Commission rigidly refuses (as it has here) to consider candidates from overrepresented demographic groups in a particular district, without allowing room for exceptions, then exceptional candidates can and will nevertheless be appointed as "*de facto permanent magistrates*", with none of the security of tenure that is vital to judicial independence.

45. It is instructive to note that, in ***Van Rooyen***, the Constitutional Court struck down section 9(4) of the Act precisely because it did not prescribe a fixed term for acting appointments (that is why the three-month term now prevails):[24]

> *Section 9(4) does not require the temporary appointment made in terms of that section to be for a fixed or determinate period… An appointment to hold office at the discretion of "the State" is clearly inconsistent with security of tenure that is an essential element of judicial independence.*

46. Consequently, a decision to disqualify all candidates from overrepresented demographic groups, without exception (like that taken by the Commission in respect of Bloemfontein,

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[23] See the detailed motivations and consequent renewals in the **Record** v1 p71-137.

[24] ***S v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)*** [2002] ZACC 8; 2002 (5) SA 246 (CC), §247.

Botshabelo and Petrusburg) undermines judicial independence, a pillar of the rule of law. It follows that section 174(2) of the Constitution cannot be interpreted to require or permit such a decision. The decision is unconstitutional.

CONCLUSION

47. For the reasons set out in these heads of argument, the HSF submits that the judgment of the Court a quo cannot be faulted and should be upheld.

Adv. BEN WINKS

Counsel for the amicus curiae

Johannesburg

17 February 2021