SYMINGTON

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NUMBER: 388/2020
FB CASE NUMBER:1070/2019

In the matter between

THE MAGISTRATES COMMISSION	FIRST APPELLANT
ZOLA MBALO N.O CHAIRPERSON OF THE APPOINTMENTS COMMITTEE OF THE MAGISTRATES COMMISSION	SECOND APPELLANT
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	THIRD APPELLANT
CORNELIUS MOKGOBO N.O ACTING CHIEF MAGISTRATE BLOEMFONTEIN CLUSTER "A"	FOURTH APPELLANT

and

RICHARD JOHN LAWRENCE	RESPONDENT

and

THE HELEN SUZMAN FOUNDATION	*AMICUS CURIAE*

FILING SHEET

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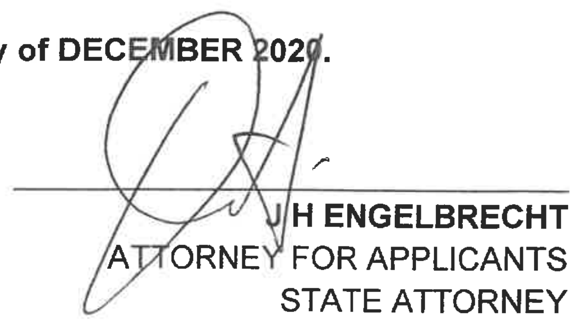
DATED at BLOEMFONTEIN on this 8th day of DECEMBER 2020.



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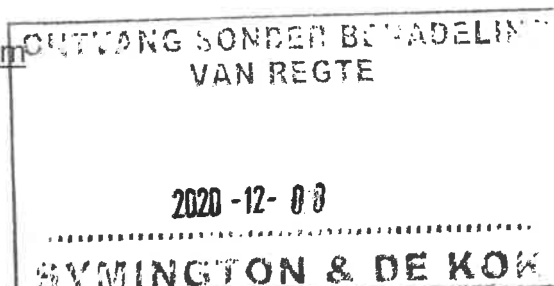

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and

RICHARD JOHN LAWRENCE	RESPONDENT

FIRST TO FOURTH APPELLANTS' HEADS OF ARGUMENT

D.J GROENEWALD

Chambers,
6 December 2020

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A. INTRODUCTION

1. This is an appeal against the whole of the judgment[1] and order so granted by his Lordship Honourable Judge Daffue as concurred by his Lordship Honourable Judge Molitsoane, dated 12 December 2019, in which they;

   1.1. Dismissed the appellants point in limine of non-joinder; and

   1.2. Declared the shortlisting proceedings chaired by the second appellant for the vacancies of magistrates for the Free State relating to the districts of Bloemfontein, Botshabelo and Petrusburg unlawful and unconstitutional;

   1.3. Reviewed and set aside the shortlisting proceedings and consequently also the recommendations of the Appointments Committee of first appellant and the appointments by third appellant of magistrates for the districts of Bloemfontein, Botshabelo and Petrusburg;

   1.4. Ordered the first and third appellants to pay respondent's costs of the application jointly and severally;

2. Leave to appeal was granted by the court *a quo* on 16 March 2020[2].

3. For ease of reference, I herein refer to the first appellant as 'the Commission' and the appointments Committee as 'the Committee'.

[B] THE FACTS

4. The Respondent ("Mr Lawrence") commenced acting as a Magistrate in the Bloemfontein "A" cluster on 2 January 2015. At the time this matter was heard Mr

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[1] High Court judgment: Record: Volume 6: 977-1004

[2] Court order granting leave to appeal: Volume 6: 1020-1021

Lawrence acted as Head of Office of the Petrusburg Magistrate's court, a position which he held since 1 October 2016.

5. On the 16th of March 2018 the first appellant advertised a number of judicial vacancies[3], Mr Lawrence applied for the vacancies at Bloemfontein, Petrusburg and Botshabelo[4].

6. Mr Lawrence was not shortlisted for any of the aforementioned positions and upon request he was informed by the Secretary of the Committee that same was due to him not meeting the section 174(2) of the Constitution-criteria in any of those offices[5].

7. Mr Lawrence was further informed that out of the 10 ("ten") members of the Committee, 7 ("seven") sat and decided which candidates were to be shortlisted for the vacancies in Botshabelo and Petrusburg and 5 ("five") members decided which candidates were to be shortlisted for the vacancies in Bloemfontein[6].

8. At the time the decision was taken not to shortlist Mr Lawrence for the specific offices for which he applied, white males comprised 26.5% of the Free State Cluster "A" lower court judiciary[7].

9. In compiling a list of candidates for consideration of appointment by the Minister the Committee is guided by the shortlisting procedure as approved by the Commission on 7 April 2011[8].

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[3] CB1
[4] CB2-CB40
[5] CB75
[6] CB72
[7] AA: Volume 1:184 para 9.8; CB78;Volume 2:372

10. At the time the decision was taken not to shortlist Mr Lawrence the Committee recommended 45 white individuals for appointment, within different regions, of which 16 were white males[9].

11. Neither of the candidates so shortlisted for appointment, and or those subsequently appointed, were cited as a party to the proceedings before the court *a quo* and Mr Lawrence took no issue with the suitability of the candidates so shortlisted and or their fitness to hold office[10].

12. In approaching the court *a quo* Mr Lawrence argued that the Honourable Court had jurisdiction to entertain the matter by virtue of the provisions of section 21 of the Superior Courts Act 2013 read with the provisions of the Promotion of Administrative Justice Act 3 of 2000[11]

[C] THE ISSUES

13. This appeal concerns the following issues:

    13.1. Whether the appellants point in limine of non-joinder ought to have been upheld;

    13.2. Whether the Committee's meeting in respect of the Bloemfontein shortlisting was quorate having regard to the provisions of section 5(4) read with section 6(7) of the Magistrates Court Act[12] ;

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[8] Volume 2:370-371
[9] ZM7: Volume 2:374-394
[10] RA: Volume 3:417 at par 22.1
[11] FA: Volume 1:27 at par 8.1
[12] 90 of 1993

13.3. Whether in deciding not to shortlist Mr Lawrence the Committee complied with section 174(2) of the Constitution[13] and regulations 5;

[D] APPELLANTS SUBMISSIONS

NON-JOINDER

14. The *ratio* of the Court *a quo* in dismissing the plea of non-joinder can be summarised as follows;

14.1. The Court concluded that all shortlisted candidates knew about the application and if anyone wanted to oppose, he/she would have been able to do so. They (the shortlisted candidates) are all legally qualified people who cannot claim that they were ill-informed of their rights[14];

14.2. When the matter was heard no candidate had the right to be appointed;

14.3. 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 decision might be overturned[15];

15. Essentially therefore the court dismissed the non-joinder of the shortlisted and recommended candidates on the basis that they had, by some means or the other, waived their right to be joined and or based on the fact that they had no direct and substantial interest in the matter, and the non-joinder of the appointed candidates due to the fact that the Minister and or appointed candidates ought to have foreseen that their appointment might be overturned. We shall deal with each of the aforementioned issues separately below.

[13] Act 108 of 1996
[14] Judgment at par 26: Volume 6:987
[15] Judgment at par 28:Volumen 6:988

Shortlisted and recommended candidates

16. In light of the fact that the shortlisting proceedings and recommendations of the Committee were reviewed and set aside, it is submitted that the issue of non-joinder remains relevant and applicable irrespective of the subsequent appointments.

17. The court *a quo* relied on the Supreme Court of Appeal's judgment in the matter of ***JSC v Cape Bar Council,***[16]***("JSC")*** ostensibly, as authority for the contention that the shortlisted and recommended, but not yet appointed, candidates had no direct and substantial interest in the matter. In so doing the court however limited its evaluation of the said judgment and the applicability thereof to the fact '*that 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*[17]'.

18. What the court however failed to do is to evaluate and determine whether these shortlisted and recommended candidates as a matter of fact had a direct and substantial interest in the matter. It is submitted that the court ignored the fact that the judgment sought, namely the setting aside of the shortlisting and recommendations, could not be sustained and carried into effect without necessarily prejudicing the interest of the candidates so shortlisted and recommended. Such an order would have, as it did, removed them from the list of possible "appointees".

[16] 2013(1)SA 170 (SCA)
[17] Judgment at para 27: Volume 6:987

19. It is submitted that the ***JSC*** judgment, with reference to the facts of the matter, is further no authority for the contention that the shortlisted and recommended candidates had no direct and substantial interest in the matter, in fact the contrary might be true. In the ***JSC*** matter no order was sought so to set aside the appointment of Judge Henney[18] further to this the court confirmed that '*the point in limine would clearly be good if the JSC was right in its contention that the first declaratory order inevitably gave rise to the setting aside of Judge Henney's appointment*[19]'.

20. In as far as the court reasoned that these candidates had no right to be appointed, and as such no direct and substantial interests in the matter, it is submitted, with respect, that the court misconstrued the legal requirement and test to be applied in determining whether these candidates had a direct and substantial interest in the matter.

21. It is submitted that the court failed to apply the accepted test, as set out by the Supreme Court of Appeal in the matter ***Gordon v Department of Health, KwaZulu-Natal***[20]***,*** so to determine whether the shortlisted and recommended candidates had a direct and substantial interest. The SCA, with reference to other authorities, confirmed the test to be the following:

> *"[9] The Du Preez and Traub decisions had nothing to do with non-joinder, a fact acknowledged by the LAC. They were concerned primarily with the audi alteram principle in circumstances where a public body had failed to afford*

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[18] At par 11
[19] At par 13
[20] 2008 (6) SA 522 (SCA)

certain individuals a hearing in matters in which their interests and rights were at stake. The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.4 In the Amalgamated Engineering Union case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'.5 The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.6 This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.7

[10] All the cases I have referred to also illustrate the point that the order or judgment of the court is relevant to the question whether a party has a direct and substantial interest in the subject matter of any proceedings. It is so that in the course of its reasoning a court makes findings and expresses views which do not form part of its judgment or order. An example in point in the employment arena concerns a potential finding by a court that a successful

appointee was not suitable for appointment. The 'unsuitable' appointee has no legal interest in the matter if the order will be directed at the employer (the author of the unsuitable appointment) to compensate the 'suitable' but unsuccessful applicant. Of course the successful but 'unsuitable' appointee will always have an interest in the order to confirm his/her suitability for the job but this is not a direct and substantial interest necessary to found a basis for him or her to be joined in the proceedings. In a situation where a number of applicants compete for a position, they provide information to the prospective employer to influence the decision in their favour. That is as far as they can take it. Once the employer selects from amongst them it is up to the employer to defend its decision if challenged. This is because the employer, as the directing and controlling mind of the enterprise which is vested with the managerial prerogative to manage it, has a legal interest in the confirmation of its decision as it faces a potential order against it. <u>The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.'</u>

22. As Mr Lawrence had *locus standi* to challenge the shortlisting, recommendations and appointments, so too did the shortlisted and recommended candidates. Those not recommended for appointment can challenged the decision not to recommend them, so also can those recommended for appointment challenge their none appointment.

23. In the matter of ***The City of Johannesburg v The South African Local Authorities Pension Fund*** [21] the SCA accepted that the test often employed to determine whether a particular interest of a third party is the one or the other, is to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against that party, entitling him or her to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first place.

24. It is submitted that the court a quo erred in not considering the aforementioned accepted tests and if same were applied the court would have upheld the point in limine with costs.

The appointed candidates

25. It has by now become well-established that, in the exercise of its inherent power, a court will refrain from deciding a dispute unless and until all persons who have a direct and substantial interest in both the subject matter and the outcome of the litigation, have been joined as parties[22]. In this instance the court *a quo* did however not refrain from deciding the dispute irrespective of the fact that the court recognised that the appointed candidates had a direct and substantial interest in the matter.

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[21] (20045/2014) [2015] ZASCA 4 (9 March 2015).

[22] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657 and 659; Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA) para 9).

26. The court confirmed that *'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 functions to declare the shortlisting processes unlawful*[23]*".*

27. It is submitted, with respect, that the court's decision to decide the dispute without joining those appointed candidates are irreconcilable and contrary to settled law.

28. In as far as the court a quo reasoned that it was justifiable to determine the matter without joining the appointed candidates based on the contention that the Minister and appointed candidates ought to have foreseen that the Minister's decision might be overturned in the event that he so proceed to make appointments, it is submitted that the Minister was not prohibited from making any appointments and it was incumbent on the applicant/Mr Lawrence to ensure that all affected parties were joined.

29. It is submitted that where a third party who has a direct and substantial interest in a matter is not joined in proceedings, it is not a defence to a point of non-joinder to say that such party had knowledge of the proceedings but did not intervene. His mere non-intervention, despite having knowledge of the proceedings, does not make the judgment emanating from those proceedings binding on such party[24].

30. In the matter of ***Morudi and Others v NC Housing Services and Development Co Limited and Others***[25] the Constitutional Court in dealing with the rights of

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[23] Judgment at para 40: Volume 6:995
[24] Amalgamated Engineering Union supra at 660
[25] [2018] ZACC 32

potential shareholders to be joined in proceedings and the requirement to have regard to the prejudicial effect of an order stated the following:

"[31] I have sought to demonstrate that here there was a risk of the applicants' rights being prejudicially affected by an order issued in the main application. This and the authority of Amalgamated Engineering notwithstanding, the High Court determined the main application without any regard to possible prejudice to the applicants' rights. On the contrary, it held that they were not entitled to be given audience as the company – in withdrawing its opposition – had spoken on their behalf. On the authority of Amalgamated Engineering and Cape Bar Council, the High Court could not validly grant an order in the main application without the applicants having been joined or ensuring that they would not be prejudiced. It was incumbent upon that Court mero motu to insist on their joinder."

31. It is accordingly submitted that the court a quo erred by not upholding the point in limine.

The quorum in respect of the Bloemfontein shortlisting process

32. It is submitted that the court *a quo's* finding that the Committee's meeting in respect of the Bloemfontein shortlisting was not quorate and that the decisions at the meeting are unconstitutional, unlawful and invalid[26] is simply irreconcilable

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[26] Judgment a para 40: Volume 6:995

with the plain reading of section 5(4) read with section 6(7) of the Magistrates Act[27]. The aforementioned sections reads as follows:

Meetings of Commission

5. (1) Meetings of the Commission shall be held at the times and places determined-

(a) by the chairman or, if he is not available, by the vice-chairman of the Commission; or

(b) if both the chairman and the vice-chairman 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 chairman and the vice-chairman 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.(own emphasis)***

(5) The proceedings of the Commission shall take place in camera unless the person presiding at a meeting directs otherwise.

[27] 90 of 1993

Committees of Commission

6. (1) The Commission may establish one or more committees 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 it.

(2) The Commission may extend the period of an appointment made by it under subsection (1) or withdraw such appointment during the period referred to in that subsection.

(3) The Commission shall designate a chairman for every committee and, if it deems it necessary, a vice-chairman.

(4) A committee shall, subject to the directions of the Commission, perform such functions of the Commission as the Commission may assign to it.

(5) On completion of the functions assigned to it in terms of subsection (4), a committee shall submit a written report thereon to the Commission, whereupon the committee shall automatically dissolve.

(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.(own emphasis)***

33. It is inescapable from a plain reading of section 5(4) that the person presiding at the Committee of the Commission (the second appellant) may regulate the proceedings and procedure thereat, including the quorum for a decision of the Committee.

34. The decision required at the Committee was to determine who to shortlist for interviews. The second appellant being the Chairperson of the said Committee was therefore empowered by law to regulate the quorum for the aforementioned decision. Cognisance being further had of the fact that the Committee sat over a number of days

35. In ***Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the mv 'Jade Transporter'***,[28] Corbett JA pointed out that our courts have remarked in various judgments that '*it is dangerous to speculate on the intention of the Legislature*' and '*the Court should be cautious about thus departing from the literal meaning of the words of a statute. . . . It should only do so where the contrary legislative intent is clear and indubitable'.*

36. In the more recent judgment from the Supreme Court of Appeal in the matter of ***Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others***[29] the following was confirmed regarding the interpretation of statutes:

> *"The principle remains the same. As a general rule the words of a statute must be given their ordinary, grammatical meaning in the context in which they appear, unless to do so 'would lead to absurdity*

[28] 1987 (2) SA 583 (A) at 596I-597B
[29] (1306/18) [2020] ZASCA 02 (31 January 2020)

so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the Court is justified in taking into account' (Venter v R). In that event the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the legislature.

[68] The principle laid down in Venter's case has generally been used to 'cut down' the wide meaning of the words employed by the Legislature. However, as it was put by Centlivres CJ in Barkett v SA Mutual Trust & Assurance Co Ltd:

> *'But there may, it seems, be exceptional cases where it is permissible for a court of law to expand the literal meaning of words used by the Legislature. See Halsbury (2 ed., Vol. 31, para. 635), where reference is made to the cases of Hewett v Hattersley, 1912 (3) K.B. 35 and Swan v Pure Ice Co. Ltd., 1935 (2) K.B. 265.'*

In Swan v Pure Ice Co Ltd, Roper LJ observed:

> *'But they were, in my judgment, amply justified by the authorities, which are summed up in Maxwell on the Interpretation of Statutes, 7th ed., p. 217, as follows:— "They (i.e., the authorities) would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice,*

inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that his amendment probably does."'

37. It is submitted that section 5(4) in its ordinary, grammatical meaning and in the context in which it appears makes it clear that the Chairperson can regulated the quorum for a decision. The legislatures intention is not obscure or corrupt nor does it lead to absurdity so '*glaring that it could never have been contemplated by the legislature*' or where it '*would lead to a result contrary to the intention of the legislature*'.

38. The intention by the legislature was for the Chairperson to be empowered to regulate the proceedings and the procedure thereat, including the quorum for a decision to be taken.

39. The court *a quo* has by consequence declared the provisions of section 5(4), and the legislative powers of the Chairperson, invalid in that, in light of the judgment, a Chairperson cannot and may not regulated and determine a quorum for a decision to be taken.

40. In circumstances where the applicant, Mr Lawrence, has not challenged the validity of section 5(4) it is submitted that the findings of the court *a quo* was irregular.

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

41. It is unclear from a reading of the judgment of the court *a quo* on what basis the court came to the conclusion that the shortlisting proceedings were unlawful and unconstitutional with reference to the provisions of PAJA and or the principle of legality.

42. Evident from the judgment is that the court *a quo* concluded that the Committee failed to adhere to its own policy in that it did not consider the candidature of all applicants whose applications were compliant and that according to the court white people and Mr Lawrence in particular was not considered at all[30].

43. The court then ultimately concluded that *'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[31]'*.

44. It is submitted that the court erred in fact by concluding that the Committee did not comply with its own policy. The shortlisting procedure[32] (not challenged by Mr Lawrence) confirmed that one of the criteria to be applied by the Committee in deciding to shortlist an applicant is *'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 in order to inform the application of section 174(2). Section 174(2) seeks to address imbalances created in respect of previously disadvantaged groupings'*.

[30] Judgment at para 51: Volume 6:1002
[31] Judgment at para 53: Volume 6:1003
[32] ZM4: Volume 2:370-371

45. Further to this the Committee is entitled to *"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."*

46. It is submitted that the Committee's actions were justifiable, rational and fair having regard to the provisions of the procedure so adopted. Further to the aforementioned the court *a quo* ignored the fact that whites in general were shortlisted and that there was no blanket ban on the shortlisting of white individuals.

47. The transcript of the meeting of the Committee further confirms that Mr Lawrence was, as matter of fact, considered but not shortlisted due to the over-representation of white males[33].

48. The Constitution is the supreme law of South Africa and all other law is subject to it.[34] Thus, its interpretation cannot depend on the legislation enacted under it[35]and or any policy adopted in respect thereof. Section 174(2) of the Constitution makes it clear that '*the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are*

[33] Transcript:CB96 par 20-CB97 par15;CB109 par 5

[34] Section 2 of the Constitution provides: 'This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

[35] See Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others (1306/18) [2020] ZASCA 02 (31 January 2020) at para 22

appointed.' It is a constitutional imperative which is echoed in the adopted shortlisted procedure.

49. The court *a quo* disregard the legal and factual submissions of the appellants in totality in as far as the appellants contended that it was rational and fair in the circumstances to exclude Mr Lawrence from being shortlisted.

50. It is appropriate to deal with the manner in which the Committee conducts its business in deciding who to shortlist[36]:

50.1. The Commission advertised posts nation-wide in 3 newspapers. Applications are received on a prescribed form together with documents as required by regulation 4 of the Regulations for Judicial Officers in the Lower Courts, 1994.

50.2. The Secretariat of the Commission condense the information contained in the application documents and cv's onto a profile in a database. A date for short-listing is determined by the Appointments Committee.

50.3. Members of the Committee and the Chief Magistrates or Cluster Heads, as they are called, for the 14 Administrative Regions are invited to the meeting. The Cluster Heads have no voting rights. Their purpose at the meeting is to advise the Committee of the needs of the Cluster in general as well as the needs of each individual office where posts were advertised. These "needs" range from whether it is a Head of Court post

[36] AA par 3.6-3.12:Volume 2:330-332

which will mean that the short-listed candidate will have to have experience in civil, criminal and family law to the intricacies of the community that is served by the office e.g. local beliefs and traditions.

50.4. Before the meeting Cluster Heads are required to submit records of the race and gender composition[37] of the Cluster as well as that of each office that has been advertised in order for the Secretariat to place this before the members at the meeting.

50.5. At the short-listing meeting, the Chairperson will start off by asking the Cluster Head to tell the Committee more about the office and its needs. The race and gender composition of a Cluster is considered[38] and then the Committee looks closely at the race and gender composition of an office as well. All the needs identified will determine a target group to short-list from.

50.6. The information relating to the target group is displayed on a screen to all members starting with the candidates with the most experience on top. Information relating to candidates who have acted as Magistrate, irrespective of their race and gender, is also specifically displayed and Cluster Heads are requested to inform the Committee of people who are acting in their respective areas of jurisdiction.

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[37] Race and gender breakdowns:CB77-79

[38] Transcript of proceedings: CB83;par 25-CB85 par 85;CB123-CB124

50.7. Should no suitable candidates be found in any of the target groups, the Committee then looks towards other candidates that will fit the requirements of the office in question.

51. Further to this what was common cause and or could not be disputed, was the fact that white males were disproportionately over represented within the Cluster and that white persons in general and white males specifically were shortlisted for other offices.

52. What the court *a quo* was therefore required to determine, having regard to the above facts, was whether the Committee acted unlawfully and or otherwise contrary to the provisions of section 174 of the Constitution in deciding not to shortlist Mr Lawrence based his race and gender.

53. Section 174 of the Constitution states that:

Appointment of judicial officers 174.

(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.

54. None of the subsequent provisions either refers to and or sets out a procedure to be adopted by the second appellant in having regard to the need for the judiciary

to reflect broadly the racial and gender composition of South Africa. Save for the provisions of section 174(1) and 174(2) it is submitted that the Constitution does not provide any further assistance. No other procedure, regulation and or policy is applicable and of assistance, save for the one mentioned above.

55. Evident from the aforementioned requirements are; firstly that the individuals so appointed, and also shortlisted, must be a fit and proper person. In the proceedings before the court *a quo* Mr Lawrence took no issue with the shortlisted candidates' competence and fitness to hold office. It is accordingly submitted that the first requirement had been met, namely that those who were shortlisted, and subsequently appointed, were fit and proper persons.

56. The authority and entitlement of the Committee to have regard to section 174(2) was not disputed, only the manner in which same was invoked.

57. In terms of the shortlisting procedure, which was not the subject of the review application, it is evident that the Committee may invoke the provisions of section 174(2) '*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'*.

58. The question then remained how it is to be determined whether or not the Committee implemented the provisions of section 174(2) correctly.

59. The appellants argued that the starting point is to accept that substantive equality for all South Africans is the key to the transformation required by the

Constitution[39]. In ***Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others***[40] the Constitutional Court confirmed that:

> *"[1] Restitutionary measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order. Hence the Bill of Rights, which is a cornerstone of our democratic order, includes remedial measures.'*

60. In ***Minister of Finance v Van Heerden***[41] ("Van Heerden") the Constitutional Court developed a threefold test in determining whether "restitutionary" measures adopted will pass muster under section 9(2) of the Constitution. Of importance is the fact that the Court confirmed that the measures taken under section 9(2) are "integral to the reach of our equality protection."[42] Similarly it is submitted that the measures taken in terms of subsection 174(2) are equally integral to the reach of our equality protection and transformation of the judiciary, which is the ultimate objective of section 174(2).

61. It is submitted that the court *a quo* ought to have applied the *Van Heerden* test in the context of the implementation of measures so intended to give effect to the

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[39] Langa, Transformative Constitutionalism, page 3
[40] [2018] ZACC 20
[41] 2004 (6) SA 121 (CC).
[42] At par 30

provisions of section 174(2) of the Constitution. Had the court *a quo* so applied the aforementioned test the following would have been apparent:

61.1. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality[43] .

61.2. In respect of the first yardstick the Court stated the following:

'[38] *The measures of redress chosen must favour a group or category designated in section 9(2). The beneficiaries must be shown to be disadvantaged by unfair discrimination. In the present matter, the Minister and the Fund submitted that the differentiated contribution scheme was set up to promote the attainment of equality between members of the CPF and new members who were in the past excluded on account of race and or political affiliation. This objective they would advance by identifying three separate indicators of need for increased pensions for new parliamentarians. On the facts, however, it is clear that not all new parliamentarians of 1994 belong to the class of persons prejudiced by past disadvantage and unfair exclusion. An overwhelming majority of the new members of Parliament were excluded from parliamentary participation by past apartheid laws on account of race, political affiliation or belief. [53]*

[39] The starting point of equality analysis is almost always a comparison between affected classes. However, often it is difficult, impractical or

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[43] At par 37

undesirable to devise a legislative scheme with "pure" differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or "hard cases" or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies. In this regard I am in respectful agreement, with the following observation of Gonthier J, in Thibaudeau v Canada:

"The fact that it may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial."

[40] In the context of a section 9(2) measure, the legal efficacy of the remedial scheme should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion. It is clear that the existence of exceptional cases or of the tiny minority of members of Parliament who were not unfairly discriminated against under the apartheid regime, but who benefited from the differential pension contribution scheme, does not affect the validity of the remedial measures concerned.'

61.3. It cannot be disputed that the measures adopted by the Committee benefitted those who have been disadvantaged by unfair discrimination in the past, and more specifically if regard is had to the wording of section 174(2) it was aimed at achieving representation of these groups which would be more aligned to the racial and gender demographics of the country. Of importance is the fact that *the distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies.*

61.4. In respect of the second questions the CC in Van Heerden stated the following:

'The second question is whether the measure is 'designed to protect or advance' those disadvantaged by unfair discrimination. In essence, the remedial measures are directed at an envisaged future outcome. The future is hard to predict. However, they must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end. Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9(2)[44].'

61.5. The measure invoked is not only designed to achieve the constitutionally authorised end envisaged in section 174(2) it is further reasonably likely to achieve the end.

61.6. In respect of the third requirement the Court held that:

'The third and last requirement is that the measure "promotes the achievement of equality". Determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context of our broader society. It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be

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[44] At par 41

taken to advance the position of those who have suffered unfair discrimination in the past. As Ngcobo J observed in Bato Star:

> *"The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities."*

However, it is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long-term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened[45]*.'*

61.7. In the present context the question can be asked whether the measures adopted by the Committee advanced the achievement of a judiciary so too broadly reflect the racial and gender demographics of South Africa. This answer must certainly be answered in the affirmative.

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[45] at par 44

62. This then leaves the question as to whether or not the measures adopted by the Committee amounted to a quota system or whether it was otherwise arbitrary, capricious and or displayed naked preference.

63. In ***S v Makwanyane***[46] Ackerman J stated:

"We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution"

63.1. In ***Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others***[47] the Constitutional Court stated the following in respect of rationality:

"[55] While there may be an overlap between arbitrariness and rationality these are separate concepts against which the exercise of public power is tested. Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. Rationality does not speak to justification of the action but to a different issue. Rationality seeks to

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[46] [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC)

[47] Supra a footnote 40

determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained.

[56] The discretion to choose suitable means is that of the repository of public power. The exercise of that discretion is not susceptible to review on the ground of irrationality unless there is no rational link between the chosen means and the objective for which power was conferred."

64. Having regard to the arguments submitted above it is evident that there was a rational link between the chosen means and the objective for which power was conferred.

65. In the matter of ***Solidarity and Others v Department of Correctional Services and Others***[48] the Constitutional Court once again had opportunity of considering whether and when a measure will amount to a quota system or rigid application and thus be arbitrary, the Court stated as follow:

"[51] In Barnard this Court, although not defining a quota exhaustively, held that one of the distinctions between a quota and a numerical target is that a quota is rigid whereas a numerical target is flexible.[31] Therefore, for the

[48] (CCT 78/15) [2016] ZACC 18; (2016) 37 ILJ 1995 (CC); 2016 (5) SA 594 (CC); [2016] 10 BLLR 959 (CC); 2016 (10) BCLR 1349 (CC) (15 July 2016)

applicants to show that the numerical targets constituted quotas, they need to first show that they were rigid. The applicants submitted that the targets were rigid and were applied rigidly. The 2010 EE Plan made provision for deviation from the Plan and, therefore, for deviation from the targets in certain circumstances. These include cases where a candidate whose appointment would not advance the achievement of the targets of the 2010 EE Plan but could, nevertheless, be appointed if he or she had scarce skills or where the operational requirements of the Department were such that a deviation from the targets was justified or was warranted.

And

[56] In his separate judgment (second judgment), Nugent AJ disagrees with my conclusion that the numerical targets of the 2010 EE Plan were not quotas and with my reliance on the provisions relating to deviations in this regard. He expresses the view that the deviations were not part of the 2010 EE Plan but were separate. In effect he says that they may not be taken into account in deciding whether the numerical targets were rigid and, therefore, constituted quotas. I disagree.

[57] The targets in the 2010 EE Plan should not be viewed in isolation as does the second judgment. The correct approach is to look at the 2010 EE Plan holistically including the provisions relating to deviations. After all, the deviations were deviations from those targets. The provisions relating to deviations were part of the 2010 EE Plan, were intended to be part of it and were understood even by the applicants to be part of the 2010 EE Plan. That is why the parties ran the trial on the basis that the provisions relating to deviations were part of the 2010 EE Plan. It is a general rule of appellate adjudication that disputes should be adjudicated on the same basis on which

the parties dealt with them in the court of first instance. This rule is subject to one or two exceptions none of which is present in this case."

66. The Constitutional Court accordingly found that the "targets" did not amount to a quota system seeing that deviation was allowed and viewed holistically the plan of the DCS was flexible. Similarly in these circumstances it is not disputed that the Committee shortlisted white males in other districts and thus it cannot be argued that by invoking the requirements of section 174(2) the appellants acted arbitrary or displayed naked preference. The conduct of the Committee should be viewed holistically having regard also to the fact that in Cluster A there was a pressing need for transformation.

67. In ***South African Police Service v Solidarity obo Barnard***[49] the Constitutional Court with reference to the test in Van Heerden concluded that;

"Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so. It says measures of this order may be taken. Section 6(2) of the [EEA], whose object is to echo section 9(2) of the Constitution, is quite explicit that affirmative action measures are not unfair. This however, does not oust the court's power to interrogate whether the measure is a legitimate restitution measure within the scope of the empowering section 9(2)[50]."

68. The Court held further that:

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[49] 2014 (6) SA 123 (CC)
[50] at paras 36-7

"As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally[51]*."*

69. In the matter of ***Prinsloo v Van der Linde***[52] the Constitutional Court stated that:

'In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.'

70. The appellants complied with the shortlisting procedure so adopted, the said procedure has a legitimate and constitutional objective/purpose, the measures so adopted advanced the said objective, it was flexible and capable of achieving the authorised end.

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[51] at para 39

[52] 1997 (3) SA 1012 (CC) at par 25.

71. The court *a quo* failed to consider and determine the matter with references to the above authorities which ultimately led to a finding which is incorrect and contrary to settled law.

72. Further to this the court *a quo* failed to have regard to the matter of ***Albutt v Centre for the Study of Violence and Reconciliation***[53] in which the Constitutional Court confirmed that:

> *"The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the ground of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution."*

73. In as far as the application was upheld with reference to the principle of legality it is submitted that the principle of legality dictates that there must be a rational connection between the decision taken and the purpose for which the decision was taken[54].

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[53] [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.

[54] Democratic Alliance v President of the Republic of South Africa & others [2012] ZACC 24; 2013 (1) SA 248 (CC) para 32.

74. For a decision to be rational, there must be a rationally objective basis justifying the impugned conduct.[55] In the ordinary meaning of the term, a decision is 'rationally' connected to the purpose for which it was taken if it is connected to that purpose by reason, as opposed to being arbitrary or capricious.[56] A determination of whether a decision is rationally connected to its purpose calls for a factual enquiry blended with a measure of judgment.[57]

75. It is submitted that had the court *a quo* evaluated the facts with reference to the above principles the court would have found that the appellants complied with the provisions of section 174(2) of the Constitution and dismissed the application.

76. The means so selected to achieve the constitutionally permissible objective, section 174(2), are rationally related to the objective sought to be achieved. None of the candidates' shortlisted fitness to hold office has been challenge and therefore the provisions of section 174(1) has not been compromised in the process.

77. Mr Lawrence mere dissatisfaction with the means adopted by the appellants did not justify the setting aside of the actions taken.

[E] ORDER SOUGHT

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[55] Merafong Demarcation Forum V President of the Republic of South Africa & others 2008 (5) SA 171 (CC) para 63.

[56] Calibre Clinic Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another [2010] ZASCA 94; 2010 (5) SA 457 (SCA) para 58.

[57] Minister of Home Affairs & others v Scalabrini Centre, Cape Town & others [2013] ZASCA 134; [2013] 4 All SA 571 (SCA) para 66.

78. Appellants seek an order in the following terms:

78.1. The appeal is upheld with costs;

78.2. The order of the Court a quo is set aside and replaced with the following:

i. *The point in limine of non-joinder is upheld;*

ii. *The application is stayed for a period of three months pending the joinder of the recommended candidates for appointment whose rights may be affected by the order sought;*

iii. *The applicant is ordered to pay the wasted costs of the respondents occasioned by the hearing of the matter on 7 October 2019.*

iv. *In the event of the joinder referred to in (1) not taking place, the application is dismissed with costs.*

v. *The three month period referred to in paragraphs 1 shall be calculated from the date of this order.*

Alternatively and in the event that the appeal in respect of the point in limine is dismissed the Appellants seek an order that:

vi. *The application is dismissed with costs.*

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D. J GROENEWALD

COUNSEL FOR APPELLANTS

CHAMBERS PRETORIA

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NUMBER: 388/2020
FB CASE NUMBER:1070/2019

In the matter between

THE MAGISTRATES COMMISSION	FIRST APPELLANT
ZOLA MBALO N.O CHAIRPERSON OF THE APPOINTMENTS COMMITTEE OF THE MAGISTRATES COMMISSION	SECOND APPELLANT
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	THIRD APPELLANT
CORNELIUS MOKGOBO N.O ACTING CHIEF MAGISTRATE BLOEMFONTEIN CLUSTER "A"	FOURTH APPELLANT

and

RICHARD JOHN LAWRENCE	RESPONDENT

CHRONOLOGY OF EVENTS

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1. 7 April 2011: Shortlisting procedure approved by the Commission.
   (**Record: Volume 2: page 370-371**)
2. 2 January 2015: Mr Lawrence commenced acting as Magistrate.
3. 16 March 2018: First Appellant advertised a number of judicial vacancies.
   (**Core Bundle: page 1)**
4. 29 March 2018: Mr Lawrence applied for vacancies.
   (**Core Bundle: page 2-40**)
5. 18-19 January 2019: Meetings in respect of shortlisting held.
   (**Core Bundle: page 81-190**)

6. 26 February 2019: Mr Lawrence provided with reasons for his non-shortlisting.

(Core Bundle: page 75)

7. 7 October 2019: Review application heard by court a quo.
8. 12 December 2019: Judgment handed down by court a quo.
9. 16 March 2019: Leave to appeal granted.

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and

RICHARD JOHN LAWRENCE	RESPONDENT

APPELLANTS' LIST OF AUTHORITIES

JUDGMENTS:

1. *JSC v Cape Bar Council 2013(1)SA 170 (SCA)
2. *Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA)
3. The City of Johannesburg v The South African Local Authorities Pension Fund (20045/2014) [2015] ZASCA 4 (9 March 2015).
4. Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 657 and 659.
5. Morudi and Others v NC Housing Services and Development Co Limited and Others [2018] ZACC 32

6. Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the mv 'Jade Transporter' 1987 (2) SA 583 (A) at 596I-597B
7. *Airports Company South Africa SOC Ltd v Imperial Group Ltd & Others (1306/18) [2020] ZASCA 02 (31 January 2020)
8. *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others [2018] ZACC 20.
9. *Minister of Finance v Van Heerden2004 (6) SA 121 (CC).
10. S v Makwanyane [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).
11. *Solidarity and Others v Department of Correctional Services and Others [2016] 10 BLLR 959 (CC)
12. South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)
13. Prinsloo v Van der Linde 1997 (3) SA 1012 (CC) at par 25.
14. Albutt v Centre for the Study of Violence and Reconciliation [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 51.
15. Democratic Alliance v President of the Republic of South Africa & others [2012] ZACC 24; 2013 (1) SA 248 (CC) para 32.
16. Merafong Demarcation Forum V President of the Republic of South Africa & others 2008 (5) SA 171 (CC) para 63.
17. Calibre Clinic Consultants (Pty) Ltd & another v National Bargaining Council for the Road Freight Industry & another [2010] ZASCA 94; 2010 (5) SA 457 (SCA) para 58.

18. Minister of Home Affairs & others v Scalabrini Centre, Cape Town & others [2013] ZASCA 134; [2013] 4 All SA 571 (SCA) para 66.

STATUTORY PROVISIONS:

19. Section 174 of the Constitution, Act 108 of 1996.

20. Section 5(4) read with section 6(7) of the Magistrates Court Act 90 of 1993.

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

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THE MAGISTRATES COMMISSION	FIRST APPELLANT
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CORNELIUS MOKGOBO N.O ACTING CHIEF MAGISTRATE BLOEMFONTEIN CLUSTER "A"	FOURTH APPELLANT

and

RICHARD JOHN LAWRENCE	RESPONDENT

CERTIFICATE IN TERMS OF RULE 10A(b)

I, the undersigned,

DIRK GROENEWALD
(Advocate of the High Court)

hereby certify that I have been responsible for the drafting of the heads of argument and that rules 10 and 10A(a) have been complied with as far as reasonably possible.

D Groenewald
Counsel for the Appellants