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

SCA CASE NO.: 388/2020
FB CASE NO.: 1070/2019

In the matter between:

MAGISTRATES COMMISSION	**First Appellant**
ZOLA MBALO N.O. CHAIRPERSON OF THE APPOINTMENTS COMMITTEE OF THE MAGISTRATES COMMSSION	**Second Appellant**
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

HELEN SUZMAN FOUNDATION	**Amicus Curiae**

RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1. At the heart of this matter is the legality and constitutionality of the Magistrates Commission's ("**Commission**") shortlisting process and its resultant decision to overlook the respondent, Mr Richard Lawrence, for recommendation to the Minister of Justice and Constitutional Development for appointment as a permanent magistrate in Bloemfontein, Petrusburg and Botshabelo ("**shortlisting decisions / process**").

2. Mr Lawrence contends that the Commission's Appointments Committee of the Magistrates Commission ("**Appointments Committee**") did so without due regard to the lawful and mandatory considerations to which it was required to have regard when evaluating a candidate's suitability. Instead, it assessed his application (and excluded him) solely because he is a white male.

3. In doing so, the Appointments Committee ignored Mr Lawrence's experience and record of performance whilst serving as an acting magistrate, and flouted the provisions of section 174 of the Constitution of the Republic of South Africa, 1996 ("**Constitution**") and regulation 5 of the Regulations for Judicial Officers in Lower Courts, 1994 ("**Regulations**")[1] which require that regard is had to a multiplicity of factors, none prevailing over the other.

4. The function of the first and second appellant is to make recommendations to the Minister regarding the requirements for appointment of judicial officers in lower courts,[2] for appointment by the third appellant. The shortlisting process, which precedes the interview and recommendation process, impacts integrally on the Commission's

[1] Published in terms of the Magistrates Act 90 of 1993.
[2] Para 12.23 of the founding affidavit, Vol 1, Record p. 64.

recommendation powers and process, and the Minister's ultimate appointment of magistrates.

5. The appeal, insofar as it deals with the manner in which judicial officers are appointed in terms of section 174 of the Constitution, has profound ramifications for the integrity and legitimacy of the judicial system[3] and the rule of law. As explained in **Amos v Minister of Justice and Others**:[4]

> "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 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."

6. As the Constitutional Court noted in the context of the appointment of judicial officers of superior Courts, "*...the JSC is engaged in a particularly important exercise of public power, which must be done lawfully and rationally*".[5] This applies in equal measure to the selection of magistrates and the public power exercised by the first and second appellants.

7. Mr Lawrence thus challenges the appellants' interpretation and application of the applicable provisions, and the appellants' resultant failure to properly and lawfully

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[3] **Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others** 2013 (7) BCLR 762 (CC) para 63 (judicial officers, both in the District and Regional Courts are a vital part of the Judiciary and the administration of justice).
[4] [2019] ZAWCHC 130 at para 43 (appointment of judicial officers must be performed carefully and with due regard to the legal prescripts).
[5] **Helen Suzman Foundation v Judicial Service Commission** 2018 (4) SA 1 (CC) para 67 (appointment of judicial officers must be performed carefully).

consider his application and does so seeking to uphold the rule of law, his right to fair administrative process and to hold the first and second respondents to the law.

8. In its judgment dated 12 December 2019, the Court a quo *inter alia* declared the shortlisting proceedings chaired by the second appellant as the chairperson of the Appointments Committee for the vacancies of magistrates in the districts of Bloemfontein, Botshabelo and Petrusburg, to be unlawful and unconstitutional.[6]

9. Consequently, the Court a quo reviewed and set aside the shortlisting proceedings and recommendations of the Appointments Committee, as well as the appointments made by the third appellant, the Minister of Justice and Correctional Services for Bloemfontein, Botshabelo and Petrusburg.[7]

10. On appeal, the appellants appeal against the whole of the judgment and order granted by the Court a quo.[8]

11. These submissions are structured as follows:

    11.1. **First**, we deal with the issue, raised *in limine*, of non-joinder;

    11.2. **Secondly**, we address the failure by the Appointments Committee to establish quorum in respect of the Bloemfontein shortlisting process;

    11.3. **Thirdly**, we consider the Commission's failure properly to implement and apply section 174 of the Constitution in the shortlisting process;

    11.4. **Fourthly,** the relief and costs.

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[6] Judgment of the Court a quo: Vol 6, Record p. 1003, para 55.1.
[7] Judgment of the Court a quo: Vol 6, Record p. 1004, para 55.2.
[8] Notice of appeal: Vol 6, Record p. 1023.

NON-JOINDER OF THE CANDIDATES

12. The appellants persist with the contention that there has been material non-joinder of the candidates for the relevant districts.[9] The appellants would have this Court order that the matter is stayed for a period of three months pending the joinder of what they call "the recommended" candidates for appointment.[10]

13. The contention overlooks that the relevant persons have already been made aware of this matter and have elected not to participate. All shortlisted candidates knew about Mr Lawrence's application yet none joined or objected to the relief sought.

Relevant facts relating to joinder

14. Mr Lawrence served his amended notice of motion and supplementary affidavit by email on all candidates shortlisted for the vacant positions in Bloemfontein, Petrusburg and Botshabelo, and invited them to join the proceedings.[11] In response:

    14.1. The shortlisted candidates for Botshabelo and Petrusburg all provided written or telephonic confirmation that they abided the Court's decision;[12] and

    14.2. All but a small number of the shortlisted candidates for Bloemfontein provided written or telephonic confirmation that they abided the Court's decision.[13]

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[9] Appellants' heads of argument at p 7, para 18.
[10] Notice of appeal: Vol 6, Record p. 1023.
[11] Replying affidavit: Vol 3, Record pp 435-436, para 38.15-16; Annexures RJL47-51: Vol 3, Record pp 467- 477.
[12] Replying affidavit: Vol 3, Record pp 435-436, para 38.16-38.17; Annexures RJL52-68: Vol 3Record pp 478-510.
[13] Replying affidavit: Vol 3, Record pp 437-438, paras 38.18-38.23; Annexures RJL78-79: Vol 3, Record pp 521-525.

15. At the time of launching the review application, the hearing of the opposed motion and by the time that the judgment of the Court a quo was delivered in December 2019 – only a shortlisting process had taken place (there had been no recommendations and no appointments).

16. The appellants have placed no evidence before the Court that any of the shortlisted candidates were ultimately recommended or appointed, and have taken no steps to shed any light on the true state of affairs or subsequent events.[14] Accordingly, the ordinary position before this court on appeal pertains. In the words of the Constitutional Court in **Billiton**: "*In general a court of appeal when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards*."[15]

17. There are therefore only "shortlisted candidates", not "recommended" or "appointed" candidates to speak of apparent from the papers (despite the appellants' heads of argument setting out extensive submissions on the rights of such candidates). It was incumbent on the appellants – if they wished to place evidence before the court about such appointments – to do so, either by way of an application to lead further evidence, or by formally seeking and obtaining directions in terms of SCA Rule 11(1)(b) from the President of this Court for notices to be issued to the "appointed" candidates under Rule 11(1)(b) of this Court's rules. They elected not to.

[14] The appellant's answering affidavit Vol 3, replying affidavit: Vol 3, Record pp 435-436.
[15] See **Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others** 2010 (5) BCLR 422 (CC) at para 35 (appeal determined based on record at the time of the hearing in the Court a quo).

Notice provided to the shortlisted candidates

18. All short-listed candidates received notice of the application and amended relief. The amended notice of motion and supplementary founding affidavit were served by email on all candidates shortlisted for the vacant positions in the relevant districts.[16] The candidates were therefore duly notified, and thus in a position to make an informed determination as to whether they wanted to participate in the review application.

19. None of the candidates elected to do so. The shortlisted candidates for Botshabelo and Petrusburg all provided confirmation that they abided the Court's decision;[17] and the remaining shortlisted candidates for Bloemfontein either did not respond or did not indicate any intention to participate in the proceedings.[18]

20. In **BoE Trust Ltd NO and Others**[19] ("**BoE Trust**") in dealing with an informal notice sent to possible beneficiaries of a bequest, the Supreme Court of Appeal found the matter to be distinguishable from **Amalgamated Engineering Union v Minister of Labour**[20] and held as follows:[21]

> "The next question is whether a letter addressed to this court, an appellate court, informing it that the charitable organisations have indicated that they abide the court's decision is enough to cure that failure by the appellants? Put differently, was the informal notice informing the charitable organisations of the proceedings and asking them if they wished to intervene (at the appeal stage) sufficient notice? Is this type of extra-judicial notice sufficient? In my view it is. Eventually each of the charitable organisations was properly

[16] Replying affidavit: Vol 3, Record pp 435-436, para 38.16-38.17; Annexures RJL52-78: Vol 3, Record pp 478-521; Replying affidavit: Vol 3, Record pp 437-438, paras 38.18-38.23; Annexures RJL78-79A: Vol 3, Record pp 521-524.
[17] Replying affidavit: Record of appeal at vol 3, pp 435-436, para 38.16-38.17; Annexures RJL52-78: Record of appeal at vol 3, pp 478-521.
[18] Replying affidavit: Record of appeal at vol 3, pp 437-438, paras 38.18-38.23; Annexures RJL78-79: Record of appeal at vol 3, pp 521-525.
[19] [2012] ZASCA 147; 2013 (3) SA 236 (SCA).
[20] 1949 (3) SA 637 (A).
[21] **BoE Trust** at para 20.

> informed of the nature and purpose of the proceedings and unequivocally indicated that it would abide the decision of this court." (our emphasis)

21. The shortlisted candidates for Botshabelo and Petrusburg have unequivocally indicated that they abide. Their joinder is therefore no longer in issue. Where a party has plainly acquiesced to the granting of an order without her or his participation, a court may not insist on joinder, even in circumstances where this is otherwise necessary.[22]

22. That leaves only the appointment decision insofar as the Bloemfontein shortlisting proceedings are concerned. Even in respect of this district, the short-listed candidates were afforded reasonable notice and a reasonable opportunity to participate.[23] In **De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)**[24] the Constitutional Court explained:

> "It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this. They are not, however, an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does, it meets the notice requirements of section 34."[25]

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[22] **Morudi and Others v NC Housing Services and Development Co Limited and Others** [2018] ZACC 32; 2019 (2) BCLR 261 (CC) ("**Morudi**") at para 35 (if a party has plainly acquiesced to the granting of an order without her or his participation, a court may not insist on joinder which is otherwise necessary).

[23] Each shortlisted candidate was emailed a copy of the order which would be sought and invited to participate: replying affidavit: Vol 3, Record pp 435-436, para 38.16; Annexures RJL47-51: Vol 3, Record pp 467-477.

[24] 2002 (1) SA 429 (CC).

[25] Para 11.

23. The question is, with submission, whether a reasonable opportunity to participate in proceedings was afforded to those shortlisted candidates in the Bloemfontein area. Drawing on the principles from the abovementioned decisions, the respondent submits that the shortlisted candidates have all been informed of the nature and purpose of the present matter, and have all either expressly indicated an intention to abide by the decision of the Court or tacitly done so through their silence.

24. Any candidates who may have been recommended or appointed thereafter would have been drawn from the pool of the shortlisted candidates who were notified by the respondent. They have all therefore been informed.

25. Accordingly, it is submitted that all relevant persons have been notified of the proceedings and have elected not to seek to be joined. It would therefore serve no purpose or the interests of justice for this matter to be referred back to the Court a quo. This ground of appeal therefore falls to be dismissed.

26. While the appellants seek to rely on the Constitutional Court's judgment in **Morudi**, such reliance is misplaced since the facts are distinguishable. In **Morudi**, the respondents in that matter seeking joinder had expressly indicated that they were desirous of contesting the proceedings and, for the most part, actually appeared at the proceedings. The candidates in the present matter have – unlike the fourth respondent in **Morudi** – not simply failed to appear for the hearing; rather, they have been repeatedly invited and furnished with copies of the papers, and have still indicated no desire to be involved in these proceedings since March 2019.

27. We accordingly submit that there is no evidence of non-joinder (of "appointed" candidates), and shortlisted candidates were all informed of the proceedings but chose not to join. Nevertheless, to the extent that the Court is minded, out of an abundance of

caution, to give notice of any intended relief it intends to grant, then that can be done on the same basis as this Court's approach in **JSC v Cape Bar Council**.[26] We consider that possibility further below under remedy.

QUORUM OF THE APPOINTMENTS COMMITTEE

Sections 5(2) and 5(4) of the Magistrates Act

28. The Appointments Committee met for Bloemfontein vacancies on 21 January 2019.[27] At that meeting, five members (of ten comprising the Appointments Committee)[28] were present.

29. In terms of section 5(2) of the Magistrates Act 90 of 1993, a majority of the members of the Magistrates Commission must be present in order to constitute a quorum for the meeting.[29] The composition and constitution of the Commission is prescribed in section 3 of the Magistrates Act.[30]

30. The Appointments Committee is a committee established by the Commission, consisting of members designated by the Commission, with delegated powers and duties in terms of section 6(1)(b) of the Magistrates Act. The Commission may also establish an "executive committee" (comprising of members of the Commission)[31] and

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[26] **Judicial Service Commission and Another v Cape Bar Council and Another** 2013 (1) SA 170 (SCA) (dealt with below in detail).
[27] Para 25A(i) of the supplementary founding affidavit, Vol 2, Record p. 240.
[28] Annexure "RJL31" to the founding affidavit, Core Bundle 72.
[29] Section 5(2) of the Magistrates Act reads as follows:
> "The majority of the members of the Commission shall constitute a quorum for a meeting of the Commission."

[30] Section 3 requires that the Commission consists of *inter alia* a High Court judge, the Minister, magistrates of varying designations, advocates, attorneys, a law teacher, and various other delegates and designated persons.
[31] Section 6(1)(a) of the Magistrates Act.

any function performed by the executive committee is deemed to have been performed by the Commission.

31. The Committee must, like the Commission, have a majority of members present to constitute a quorum.[32]

32. The Appointment Committee comprised ten people. The word "majority" (as required to constitute a quorum) therefore either required that the majority of the Commission be present[33] (being a number far in excess of five members); or majority of the committee members entitled to be present (being ten members).[34] On either interpretation, five members was too few and did not constitute a quorum.

33. The second appellant herself recognised that the meeting was not quorate and for that reason sought to "evoke the provisions of Section 5(4) read with Section 6(7)".[35]

34. The use of the word "shall" in section 5(2) is instructive: it indicates a peremptory meaning,[36] and thus a mandatory requirement with which the Magistrates Commission and its committees must comply.[37] This has already been confirmed by this Court in **Acting Chairperson: Judicial Service Commission v Premier of the Western Cape**

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[32] In terms of section 6(7) of the Magistrates Act, the provisions of section 5 apply *mutatis mutandis* to meetings of committees as they do to meetings of the Magistrates Commission itself.
[33] This interpretation of the majority requirement would ensure that the decision-making of the Commission, through its Appointment Committee, was not only quantitively, but also qualitatively, satisfactory – see in this regard **De Vries and Others v Eden District Municipality and Others**, quoted at para 46 of these heads of argument.
[34] **Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province** 2011 (3) SA 538 (SCA) paras 23-25.
[35] Meeting transcript, Core Bundle 122, line 14-16: "CHAIRPERSON: We need six".
[36] **Pio v Franklin NO and Another 1949 (3) SA 442 (C)** at 451 (the word "shall" when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction).
[37] Section 6(7) of the Magistrates Act.

Province[38] (in the context of the sittings of the Judicial Service Commission) and the appellants do not dispute its peremptory nature.

35. In imposing this requirement, section 5(2) of the Magistrates Act aims to ensure an even-handed, balanced and diverse approach to be brought to proceedings at which judicial candidates are appointed to the Magistrates' Court bench.

36. However, at its meeting for the shortlisting of the candidates for Bloemfontein, the Appointments Committee did not have the required majority of its members present.[39]

37. The Appointment Committee was aware of this. It appears that the chairperson of the Appointments Committee, on the advice of the secretary, relied on the provisions of section 5(4) of the Magistrates Act to "declare" the meeting quorate without due consideration of the meaning of this section.[40]

38. While both deal with quorum, there is a key distinction between sections 5(2) and 5(4):

    38.1. Section 5(2) deals with the quorum for <u>meetings</u>. In terms of this provision, there must be a majority of members present in order for any meeting to be quorate.

    38.2. Section 5(4) deals with the quorum for <u>decisions</u>. As is apparent from a plain reading of this provision, it is designed for the regulation of matters at or during a meeting, including any decisions taken at such meeting.

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[38] 2011 (3) SA 538 (SCA) para 20 (decisions must be supported by a majority of the members of the JSC). See also **JSC v Cape Bar Council** supra para 27.
[39] Supplementary founding affidavit: Vol 2, Record p. 240.
[40] Meeting transcript: Core Bundle 122, lines 9-22. Section 5(4) of the Magistrates Act provides that: "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."

39. Read together, it is apparent that a meeting must initially be quorate – with a majority of members present – before any decision can be validly taken. Section 5(4) of the Magistrates Act does not bestow a discretion on the chairperson of the Appointments Committee to condone non-compliance with section 5(2), but does permit the chairperson to regulate the conduct of the proceedings of a duly quorate meeting. In other words, failing a quorum in terms of section 5(2) of the Magistrates Act, there can be no valid meeting and the application of section 5(4) does not arise.

40. It is submitted that this interpretation is consonant with the accepted principles of statutory interpretation. These are that:

40.1. words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.

40.2. statutory provisions should always be interpreted purposively;

40.3. the relevant statutory provision must be properly contextualised; ; and

40.4. all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.[41]

40.5. a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.[42]

[41] **Cool Ideas 1186 v Hubbard and Another** 2014 (4) SA 474 (CC) para 28 (three fundamental tenets of statutory interpretation).
[42] **National Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) para 18 (the present state of the law on statutory interpretation).

41. In the present matter, in seeking to understand the ordinary meaning of the provision within our constitutional scheme, a critical factor is that the section deals with the appointments of judicial officers that our courts have described as "the backbone of our legal system".[43] From that perspective, it is apparent that section 5(2) of the Magistrates Act was intended to impose a mandatory quorum requirement for good reason. As explained in **Amos v Minister of Justice and Others**:[44]

> "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."

42. The interpretation proffered by the respondent is not only consistent with the ordinary, grammatical meaning of the relevant sections, it upholds the spirit and purport of the need for meetings of the Magistrates Commission and its committees to be quorate and representative of its members.

43. Importantly, section 5 of the Magistrates Act does not only apply to the Appointments Committee; rather, it applies to the Magistrates Commission and all its committees. Taking into consideration the objects and functions of the Magistrates Commission more broadly, as set out in sections 4 and 7 of the Magistrates Act respectively, it cannot be that meetings of the Magistrates Commission and its committees can be left to the whim of the chairpersons thereof.

44. On the appellants' interpretation, it would be permissible for the chairperson to sit alone as a quorum for a meeting of the Appointments Committee simply by invoking the

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[43] **Amos v Minister of Justice and Others** [2019] ZAWCHC 130 (12 September 2019) para 43 (magistrates are the backbone of our legal system).
[44] [2019] ZAWCHC 130 at para 43. (Emphasis added.)

provisions of section 5(4). If this were the case, it would mean that the chairperson alone could be the sole decision-maker in matters pertaining to disciplinary proceedings, the conduct of investigations and the compilation of codes of conduct. Such a position would be untenable, absurd and unbusinesslike, yet it is the inevitable consequence of the appellant's proposed interpretation.

45. Such an interpretation would also render section 5(2) to be of no consequence and superfluous. The interpretation would also defeat the very constitutional purpose and safeguards that section 5(2) seeks to achieve with regard to the process of shortlisting suitable candidates for judicial office.

46. This position is consonant with the decision in **De Vries and Others v Eden District Municipality and Others**,[45] which dealt with the proper interpretation of the quorum provision in the Local Government: Municipal Structures Act 117 of 1998. In this regard, the Western Cape High Court held as follows:[46]

> "Democracy and universal suffrage are foundational values of our country (s1 of the Constitution). The objects of a municipality include the provision of democratic and accountable government to local communities (s152(1)(a); see also s41(1)(c) and s195). It seems to me that these values are better served by a quorum requirement that has regard to the majority of the full number of allocated councillors than one which is limited to incumbent councillors. On the respondents' argument, important decisions of the council to which (say) 30 seats had been allocated could be taken at a meeting attended by only 30% of the number of councillors intended for that council and with the support of only 16% of the said intended number. And if one accepts the respondents' construction of s30(1) while rejecting the attempt to explain s35(1), one would have an ever-reducing quorum where two out of three incumbent councillors could constitute a valid meeting. In this way the democratic voice of the community might, even if only temporarily, be stifled through a quirk of circumstance."

[45] [2009] ZAWCHC 94.
[46] Id para 38. (Emphasis added.)

47. The appointment of magistrates could hardly be of lesser importance, given the need to ensure the independence and proper functioning of the judicial branch of government. Yet this is the effect of the appellants' interpretation.

48. The absurdity that would arise from such an interpretation would render section 5(4) of the Magistrates Act unconstitutional. In line with section 39(2) of the Constitution, an interpretation which is constitutionally compliant must be preferred over an interpretation which is not.[47] As the Constitutional Court stressed in **JASA**,[48] dealing with the independence of the judiciary, "[t]he constitutional and statutory provisions at the core of this matter must be interpreted within the context of the Constitution and its values as a whole."[49] According to the Court: "The principles of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of our constitutional democracy."[50]

49. Those, with respect, are particularly weighty factors militating against the appellants' contention that the chairperson of the Appointments Committee could of her own accord override the quorate requirements mandated under the Magistrates Act.

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[47] **Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society and Others** 2020 (2) SA 325 (CC) para 45 (legislation must be interpreted through the "prism of the Bill of Rights).
[48] **Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others** 2011 (5) SA 388 (CC).
[49] Para 37.
[50] Para 40.

Consequence of the Appointments Committee not being quorate: Bloemfontein district

50. As a result of the Appointments Committee not being quorate, it follows that there was no valid meeting in terms of section 5(2), and no valid decisions could be taken at this meeting, in respect of the Bloemfontein shortlisting proceedings.

51. This coheres with the position in, for example, **Democratic Alliance v South African Broadcasting Corporation SOC Ltd (SABC) and Others; Democratic Alliance v Motsoeneng and Others**,[51] in which the Western Cape High Court held that: "[B]ecause the board lacked a quorum it was unable to make a valid decision to seek the Minister's approval for Tugwana's appointment or to make the appointment pursuant to ministerial approval."[52]

52. The failure to reach a quorum means that no lawful decisions can be taken.[53]

53. In line with the above, any decisions taken by the Appointments Committee in respect of Bloemfontein constituted an incompetent decision, owing to it having been improperly convened without a quorum. The Appointments Committee could therefore not take any valid decisions at its meeting in respect of Bloemfontein. This is so for good reason. The qualifications and number of members have been selected for a purpose and that purpose would be defeated if the body were to be deprived of the services of the requisite members.[54]

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[51] [2017] 1 All SA 530 (WCC).
[52] Id at para 63.
[53] **Imatu and Another v City of Matlosana Local Municipality** [2014] ZALCJHB 122; 2014 (35) ILJ 2459 (LC) para 58.
[54] Ibid, para 56, rely on **Schierhout v Union Government (Minister of Justice)** 1919 AD 30.

54. The effect goes further. As the High Court pointed out recently in **Amos**[55]:

> "Furthermore, given that the appointments committee was not properly constituted, as only 3 of the requisite 5 members thereof were present during the interviews, all of the candidates who were shortlisted and who were interviewed by it were shortchanged, and none of them had a fair and proper opportunity to put forward their best case in relation to why they should be considered for the position. There can be no doubt that with a full complement of interviewers the interview process would have been a more thorough one, and may have resulted in a more reasoned and thus more acceptable outcome, and possibly a different one."

55. The consequence of not following the quorum requirement in respect of judicial appointments has been made plain by this Court. In **Acting Chairperson: Judicial Service Commission and Others v Premier of the Western Cape Province**,[56] it was held that the Judicial Service Commission had not been properly constituted and therefore its decisions were unlawful in the absence of the Premier. Accordingly, this ground of appeal falls to be dismissed.

INTERPRETATION AND APPLICATION OF SECTION 174(2) OF THE CONSTITUTION AND REGULATION 5

The right to just administrative action and review under PAJA

56. The respondent submits that the Court a quo was correct in declaring the shortlisting proceedings to be unlawful and unconstitutional, as well as in reviewing and setting aside the shortlisting, recommendations and appointments proceedings that arose as a result thereof.[57] The shortlisting proceedings and subsequent decisions of the appellants are reviewable on various ground

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[55] **Amos** supra at para 33. See also para 42.
[56] 2011 (3) SA 538 (SCA) para 23-25.
[57] Judgment of the Court a quo: Vol 6, Record pp 1003-1004, paras 55.1-55.2.

enumerated in terms of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**").

57. The appellants do not appear to dispute that they are bound to act in compliance with the Constitution and PAJA.[58] While the High Court determined the matter on the basis of legality, a PAJA review was at all times foreshadowed by Mr Lawrence in the application papers[59] (a point conceded by the appellants in the application for leave to appeal).[60]

58. The shortlisting decision constitutes administrative action for *inter alia* the following reasons:

58.1. The decisions are taken in terms of empowering legislation (the Magistrates Act);

58.2. The decisions have a direct external legal effect because a decision not to shortlist is finally determinative of a candidate's rights; and

58.3. the decision is not otherwise excluded from the application of PAJA.[61] In this regard, section 1(gg) of PAJA, which is one of the nine pertinent exclusions from the ambit of what would otherwise be 'administrative action', refers to "[a] decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law'. This

[58] Para 9.17 of the answering affidavit, Vol 1, Record p. 187. No qualm is raised with the application of PAJA.
[59] Para 11.1 of the founding affidavit, Vol 1, Record p. 44.
[60] Notice of application for leave to appeal, Vol 6, Record p. 1011.
[61] **Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others** 2005 (6) SA 313 (SCA) para 21 (definition of administrative action in PAJA).

exclusion applies only to the Judicial Service Commission and does not include (or refer to) the Magistrates Commission.

The proper interpretation and application of section 174 of the Constitution and regulation 5

59. In shortlisting candidates, the starting point is section 174 of the Constitution. The section provides that:

> "(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.
>
> …
>
> (7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice." (our emphasis).

60. The legislation envisaged in section 174(7) is the Magistrates Act 90 of 1993. Section 10 of the Magistrates Act provides that "*[t]he Minister shall, after consultation with the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts Act*".

61. Regulations have been published under the Magistrates Act for judicial officers in lower courts, 1994 ("**Regulations**"). In terms of regulation 5 of the Regulation:

> "In the appointment or promotion of a magistrate, only the qualifications, level of education, efficiency and competency for the office of persons who qualify for the relevant appointment or promotion shall be taken into account." (our emphasis)

62. Regulation 3 of the Regulations sets the requirements for appointment as a magistrates, and states:

> "(1) A person may not be appointed as a magistrate or an additional magistrate of a district court, or as a magistrate of a regional court, unless he or she is-
>
> (a) appropriately qualified;
>
> (b) a fit and proper person; and
>
> (c) a South African citizen"

63. Lastly, the Appointments Procedure of the Appointments Committee has been approved by the Magistrates Commission on 7 April 2011.[62] It identifies various criteria for shortlisting purposes. These are:

63.1. “Section 174(2) of the Constitution”;

63.2. “Relevant experience”;

63.3. “Qualifications”;

63.4. “Needs of the specific office”; and

63.5. “Appropriate managerial experience or managerial skills”.

64. The Appointments Procedure stipulates further that “*[t]he criteria listed above are not applied in any fixed order or sequence of precedence or prioritisation*.”

65. From the above framework for the appointment of magistrates, the following is apparent:

[62] Annexure "ZM4", Vol 2, Record p. 370.

65.1. While race and gender "must" be considered, it is a consideration or factor and not a prerequisite;

65.2. Race and gender are not the only considerations – there are others related to experience, qualification and needs of the office;

65.3. No one factor takes precedence over or is more weighty than any other.

65.4. Section 174(1) imposes minimum requirements for appointments: being, appropriate qualification and fitness and propriety.

66. In order to be lawful, the decision must be reached within the confines of that framework.

67. There is always a question of weight of the factors and the Commission's discretion in balancing those factors, within lawful and reasonable bounds. Certain factors may, depending on the candidate and the circumstances, assume greater significance. For example, relevant experience may assume greater significance if all the candidates are the same race and gender; and race may assume a greater significance if there is very poor representivity. There can, however, be no blanket approach which places the consideration of one factor above another as a matter of default or irrespective of circumstance.

68. Moreover, there can be no rigidity. Our courts have spoken firmly against adopting a rigid approach to restitutionary measures. For instance, in **Minister of Finance and Others v Van Heerden**[63] ("**Van Heerden**"), the Constitutional Court highlighted[64] that no measure should "*constitute an abuse of power or impose such substantial and undue*

[63] 2004 (6) SA 121 (CC).
[64] Id at para 44.

harm on those excluded from its benefits that our long-term constitutional goal would be threatened."

69. The need for vigilance, caution and balance was also emphasised in **South African Police Service v Solidarity obo Barnard**[65] ("**Barnard**") where the majority judgment cautioned that "*Our quest to achieve equality must occur within the discipline of our Constitution*."[66]

70. Numerical targets are to be voided, unless authorised by the statute. In **Solidarity and Others v Department of Correctional Services and Others**[67] ("**Solidarity**"), the Constitutional Court explained that: "It is of fundamental importance that the basis used in setting the numerical goals or targets be the one authorised by the statute. A wrong basis will lead to wrong targets."[68] Nothing in the legal scheme permits of numerical targets: section 174 is framed as a general need for representivity and uses the term "broadly representative". It goes no way to imposing a numerical target.

The short-listing process – targeted unconstitutionality

71. The following is apparent from the record and affidavits exchanged in the review:

    71.1. As the written reason for the decision makes clear, Mr Lawrence was not shortlisted on the sole basis that he did "not meet the section 174(2) of the Constitution-criteria in any of those offices".[69] The Commission therefore

[65] 2014 (6) SA 123 (CC).
[66] Id at paras 30-31.
[67] 2016 (5) SA 594 (CC).
[68] Id para 78.
[69] Para 9.14 of the founding affidavit, Vol 1, Record p. 34, read with annexure "RJL33" (Core Bundle 75), confirmed in the answering affidavit, Vol 1, para 6.2 Record p. 169.

firmly locates the reasons for Mr Lawrence's exclusion solely and exclusively on the basis of race and gender.

71.2. In these proceedings, the appellants contend that "*race and gender indeed [are] a determinate factor*".[70]

71.3. The Commission's answering affidavit says that the Appointments Committee's approach to shortlisting is to identify a "target group" (comprising candidates from the racial and gender demographic it regarded as under-represented)[71] and that "*[t]he information relating to the target group is displayed on a screen to all members*" [72] and only if there is "*no suitable candidate … in any of the target groups, the Appointments Committee then looks towards other candidates*".[73]

71.4. Moreover, the Commission states that "*[t]he process is implemented in a nuanced and flexible manner and there is no bar on the shortlisting of white males*".[74]

72. But the *ex post facto* contentions in the answering affidavit are not borne out by the record, which is where the Court looks to for the real reasons for the decision.[75]

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[70] Paragraph 9.7 of the answering affidavit Vol 1, Record p. 184.
[71] Para 8.5 of the answering affidavit Vol 1, Record p. 175.
[72] Para 8.6 of the answering affidavit Vol 1, Record: p. 176.
[73] Para 8.7 of the answering affidavit Vol 1, Record p. 176.
[74] Para 8.19.2 of the answering affidavit Vol 1, Record p. 182.
[75] This Court has stressed that the decision-maker's decision must be gleaned from the decision itself and not ex post facto motivated. See **National Lotteries Board and Others v South African Education and Environment Project** 2012 (4) SA 504 (SCA) ("National Lotteries Board") at para 27 (endorsed by this Court further in **PG Group Ltd and Others v National Energy Regulator of South Africa and Another** 2018 (5) SA 150 (SCA), at para 41:

> "*The criticism by counsel for the appellants that the 'expansive attempts' by the experts employed by NERSA to justify its determination of maximum prices 'range far and wide but have precious little to do with the considerations that actually motivated' the decision, is by no means unmerited. The dust of this conflict seems to have obscured what was a relatively*

73. What is crystal clear from the record is that the Commission was fixated on selecting only shortlisted candidates from within that group and that no flexibility or deviation from the target group was permitted.

74. The following extracts from the record show this naked exclusion and rigid target setting:

74.1. "*I am of the view that if we have 17 white persons in the province already, that is enough*";[76]

74.2. "*I think that three [white male magistrates] is enough for now*";[77]

74.3. "*Ja, No we are not looking for white males in your cluster* ***at all***";[78]

74.4. "*Anything you need except for white*";[79]

74.5. "***not white****. Just female,* ***but not white***";[80]

74.6. "*….Female whites, are we not accepting?* ***No****.*" [81]

74.7. "*If we can find more of the other two races that are lacking then* ***we do not consider any white person***";[82]

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straight-forward issue that fell to be decided on certain elementary and undisputed principles of economics, ***the common cause facts and the reasons NERSA set out when it gave its decision in October 2011. Any further reasons are irrelevant to the task at hand – see National Lotteries Board & others v South African Education and Environment Project 2012 (4) SA 504 (SCA) paras 24-28****."* (our emphasis).

[76] Meeting Transcript:Core Bundle 127, line 5-7.
[77] Meeting Transcript: Core Bundle 125, line 4-5.
[78] Meeting Transcript: Core Bundle 109, line 10-11.
[79] Meeting Transcript: Core Bundle 112, line 24.
[80] Meeting Transcript: Core bundle 110, line 18.
[81] Meeting Transcript: Core bundle 111, line 15.
[82] Meeting Transcript: Core Bundle 125, line 19-20.

74.8. An unnamed commissioner adds for distressing effect: "***Take away the white.[83] Take away the white"***.[84] (our emphasis)

74.9. "***No, we are not looking for white males in your cluster at all."***[85] (our emphasis)

75. The fixed resolve to exclude any and all white candidates on account of their race, is clear. It is not so much a case of targeting of preferred candidates (as the Appointments Commission tries to recast what happened in its answer). The record makes plain that what happened was the targeted exclusion of white candidates.

76. In any event, the appellants' reasons for the decision and reliance on section "174-criteria" itself demonstrates the Commission's error of law: section 174(2) of the Constitution is *not a basis to exclude*, but a factor to be balanced with other factors in the process of appointing a candidate. It is not a self-standing basis for exclusion and could not be relied on as one (unlike the section 174(1) requirements, such as fitness and propriety, which are prerequisites).

77. Moreover, the Commission's admitted process, through a "targeted approach", is itself unlawful. The legislative scheme does not permit a "target group" approach precisely because no one factor overrides or takes precedence over any other factor. The starting point of the entire enquiry was therefore flawed and not in compliance with the statute.

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[83] Meeting Transcript: Core Bundle 110, line 24.
[84] Meeting Transcript: Core Bundle 111, line 1.
[85] Meeting transcript: Core Bundle 109, line 1-19.

78. It is therefore not necessary to show that there was an outright prohibition on the appointment of white men in order to show that the law was not applied. Yet this was in any event what occurred in respect of the impugned decisions.

79. The record also shows that the process was rigid, inflexible, quota-driven and failed to take account of other factors. The blanket exclusion of white persons for any consideration at all – no matter how well they may have ranked in respect of the other factors – tells the story. No one outside of the target group was considered for the Bloemfontein vacancies. They were targeted for exclusion.

80. There was also a rigidly applied numerical quota: "*I am of the view that if we have 17 white persons in the province already, that is enough*."

81. And no amount of excellence could ensure consideration of a white candidate. This is apparent from the exchange which appears in the record, when no suitable candidate within the target group was available and when a good white female candidate was available:

    81.1. The second appellant states, when the Appointments Committee begins to run out of preferred or target candidates: "*We are running out of – let us go down. Maybe we find a mistake [to see if a targeted candidate was left off]*";[86]

    81.2. The response is: "*nothing from that list then.* ***The person that I think would be a good candidate, but we said it cannot be a white female?***";[87]

[86] Core bundle 112.
[87] Core bundle 113, line 19-21.

82. The above exchange shows that the target group was not departed from and that any white candidate – no matter how good, and no matter that the Commission had run out of its preferred candidates to fill the position – was fastidiously excluded from further consideration and not assessed. The Commission thus used the issue of race to mechanistically squeeze out of contention any and all other factors in favour of the candidate.

83. As a result of this approach, as the record bears out, Mr Lawrence's application was not considered at all (see the next section of the heads for detail).

84. The respondent submits that the rigidity of the approach and failure to have regard to any factor other than race was:

84.1. both unlawful and unconstitutional; and

84.2. failed to comply with the provisions of section 174 of the Constitution, regulation 5 of the Appointments Procedure or the Appointments Procedure.

85. The appellants place significant reliance on the judgments of **Van Heerden**, **Insolvency Practitioners**, **Barnard** and **Solidarity** in an effort to justify the conduct and decisions of the Appointments Committee. However, this reliance is misplaced for *inter alia* the following key reasons:

86. The present matter is not grounded in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("**PEPUDA**") or the Employment Equity Act 55 of 1998 ("**EEA**") – the record bears out that no regard to PEPUDA or the EEA was had by the

Appointments Committee at the time (and the appellants are bound by the record).[88] Rather, the basis of the present matter is a judicial review premised on the right to just administrative action of the decisions of the appellants within the governing framework for the appointment of magistrates. The legislation envisaged in section 174(7) of the Constitution for the appointment of magistrates is the Magistrates Act. It is that Act and its Regulations which provide the factors and strictures by which the Appointment Committee must do its work. And it is that Act and its Regulations which stipulates how those factors must be assessed and weighed.

86.1. The respondent does not seek to impugn the provisions of section 174 of the Constitution, regulation 5 of the Regulations or the Appointments Procedure. Rather, the respondent challenges the manner in which the Appointments Committee and other appellants have interpreted and applied these provisions in conducting the proceedings and taking their decisions.

86.2. The validity of the framework for the appointment of magistrates, being section 174 of the Constitution, regulation 5 of the Regulations and the Appointments Procedure, is therefore not in issue before this Court. There is no need to enquire into whether these provisions meet the three-part test contained in **Van Heerden**.

86.3. Section 174 of the Constitution, regulation 5 of the Regulations and the Appointments Procedure do not contain any numerical goals or targets to be achieved, and do not permit of the targeted exclusion of white

[88] See **National Lotteries Board supra**, footnote 75, and authorities therein.

candidates from consideration. Yet this was the approach adopted by the Appointments Committee.

Failure to properly consider the respondent's application

87. It is apparent from the transcript of the meeting that the Appointments Committee failed to properly consider the respondent's application.

88. Instead, his application was dismissed out of hand on the basis that he is a white male. The following extracts from the transcripts in respect of Mr Lawrence are relevant:[89]

> "*UNIDENTIFIED PERSON: There is a Mr Lawrence from Petrusburg, but I think he must be acting. Just get me 337, he is acting.*
>
> *MS NALIA: If I may, I do not know if I am allowed to interfere.*
>
> *CHAIRPERSON: Yes.*
>
> *MS NALIA: Our cluster has 11 white males. I was also looking at it against the cluster establishment. Given the numbers that we have, the low numbers that we have in terms of coloured males, Indian males in the cluster and given the 5 needs of that community, especially Botshabela.*
>
> *CHAIRPERSON: Yes?*
>
> *MS NALIA: We have, there is a need, there is existing - if I may just give you a compliment of that office.*
>
> *CHAIRPERSON: Before we go there, we are to consider 10 people who have for instance will not be ... (indistinct). We just need to know who has applied and then we will see if the person fits.*
>
> *MS NALIA: Mr Lawrence is ... (intervention)*
>
> *CHAIRPERSON: Not necessarily that the person ... (indistinct, everybody is talking simultaneously).*
>
> *MS NALIA: Acting magistrate.*

[89] Meeting transcript: Record of appeal at CB96, line 21 CB97, line 16.

UNIDENTIFIED PERSON: Mr Lawrence is not a magistrate, he is an acting magistrate.

MS NALIA: Acting magistrate."

89. Thereafter, Mr Lawrence's name is raised again subsequently, and his application again immediately dismissed:[90]

"*MS NALIA: Botshabelo. Which is the next office?*

MS NALIA: Petrusburg.

UNIDENTIFIED PERSON: Petrusburg.

CHAIRPERSON: Petrusburg, okay.

MS NALIA: This position was previously occupied initially by as I remember Mr Mchaiya and then he was - came through to Bloemfontein and acting magistrate Mr Lawrence has been there, but as indicated earlier our cluster establishment, we are sitting with 11 white males at presently.

CHAIRPERSON: No, we are not looking for white males in your cluster at all.

MS NALIA: All right.

CHAIRPERSON: And even females, how are your white females?

MS NALIA: We have only got six, so we can - I looked at the demographics, we can maybe look at one or two white females, but other than that we have to place, for us we have to place emphasis also on the coloured and the Indian females."

90. The Appointment Committee's sole regard to race is further evinced later in the meeting:[91]

"*CHAIRPERSON: Not white. Just female, but not white.*

MS NALIA: In that position?

CHAIRPERSON: Yes.

[90] Meeting transcript: Record of appeal at CB 109, line 1-19.
[91] Meeting transcript: Record of appeal at CB 110, line 18 – CB 111, line 20.

MS NALIA: Then we are looking definitely at - but then I was looking at - but as you said we have got to be very careful about the interpreter. So I am going to take that into account.

UNIDENTIFIED PERSON: Take away the white.

MS NALIA: All right.

UNIDENTIFIED PERSON: Take away white.

MS NALIA: Sorry?

UNIDENTIFIED PERSON: (Person talking in the background).

MS NALIA: The reason I stated white female was because, but you have given me a little bit of insight as to how to proceed. I looked at the Afrikaans community. It is – but when I say Afrikaans, it is the Sothos and Tswanas that speak, they speak Afrikaans and the court setup etcetera, that is what I looked at.

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

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

CHAIRPERSON: And also if there are transfer.

MS NALIA: Female whites, are we not accepting?

UNIDENTIFIED PERSON: No.

MS NALIA: All right.

UNIDENTIFIED PERSON: We have to look at females of colour for your managerial positions.

MS NALIA: All right."

91. As noted by the Court a quo: "*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*."[92]

[92] Judgment of the Court a quo: Vol 6, Record para 50.

92. The Court a quo went on to reflect that: "*In the process 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 [Mr Lawrence] in particular was not considered at all*."[93]

93. The Court a quo thus concluded that: "*Insofar as the Committee acted as a gatekeeper, preventing any whites to be interviewed, it lost the opportunity to duly consider whether application 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*."[94]

94. The approach of the Appointments Committee is not consistent with the proper interpretation and application of section 174 of the Constitution, regulation 5 of the Regulations or the Appointments Procedure. Rather than considering race as one of the factors to be taken into account, the Appointments Committee repeatedly excluded candidates solely on their basis of their race, including in respect of the respondent.

95. This approach does not meet the threshold required by our courts of balance and vigilance in respect of restitutionary measures. The rigid and unwavering approach taken by the Appointments Committee to all white candidates had the like effect of eliminating Mr Lawrence from consideration too.

Grounds of review

96. In the light of the above, the respondent submits that the proceedings and decisions of the Appointments Committee, as well as the subsequent decisions of the Magistrates

[93] Judgment of the Court a quo: Vol 6, Record para 50.
[94] Judgment of the Court a quo: Vol 6, Record para 53.

Commission and the Minister, were properly reviewed and set aside by the Court a quo. Moreover, the Court a quo was entitled to grant the setting aside relief in the exercise of its just an equitable remedial discretion in terms of section 172(1)(b) of the Constitution.

97. Given the important role that the Magistrates Commission and the Appointments Committee play in ensuring that the judiciary is able to function independently and effectively, and that it is able to fulfil its mandate, the respondent submits that the conduct of the appellants cannot be countenanced.

98. The Committee failed to understand the test to be applied, and therefore misapplied the test, factors and ultimately the law, in reach its decision.

99. The respondent's grounds of review include the following:

Failure to comply with a mandatory and material procedure or condition (section 6(2)(b) of PAJA) and procedural unfairness (section 6(2)(c) of PAJA)

100. As set out above, the Appointments Committee was not quorate in respect of its deliberations regarding Bloemfontein. In such circumstances, the Appointments Committee failed to comply with a mandatory and material procedure or condition prescribed by the Magistrates Act. As a consequence of this, the meeting was not properly constituted, and no valid decisions could be taken at the meeting.

101. To the extent that the Magistrates Commission or the Minister sought to action the recommendations of the Appointments Committee in respect of Bloemfontein following the inquorate meeting, this would similarly be procedurally unfair and non-complaint with section 6(2)(c) of PAJA.

102. Consequently, the proceedings and decisions of the Appointments Committee, as well as the Magistrates Commission and the Minister, in respect of Bloemfontein fall to be reviewed and set aside.

The action was materially influenced by an error of law (section 6(2)(d) of PAJA)

103. It is submitted that the proceedings and decisions of the Appointments Committee were materially affected by a lack of understanding of the proper interpretation and application of section 174 of the Constitution, regulation 5 of the Regulations and the Appointments Procedure. The Appointments Committee appears to have interpreted race and gender as the only considerations of relevance when making their recommendations, and worse, used race as a basis to exclude deserving candidates from any consideration at all. This interpretation is not, however, borne out by the provisions themselves, and led to an impermissible and unconstitutional implementation.

104. The consequence of having been materially influenced by this incorrect interpretation is that the Appointments Committee failed to consider the merits of Mr Lawrence's application and the suitability for appointment. It also failed to consider properly the suitability of all the other short-listed candidates. Rather, his application and that of other white candidates was either not considered or immediately dismissed on the basis of race. The result is that, as the High Court in **Amos** stressed: "*none of them had a fair and proper opportunity to put forward their best case in relation to why they should be considered for the position*."[95] Accordingly, there "*can be no doubt that with a full complement of interviewers the interview process would have been a more thorough*

[95] **Amos** supra, para 33.

one, and may have resulted in a more reasoned and thus more acceptable outcome, and possibly a different one".

105. The proceedings of the Appointments Committee and the decisions taken as a result thereof fall to be reviewed and set aside.

Relevant considerations were not considered (section 2(e)(iii) of PAJA)

106. In excluding Mr Lawrence on the basis of being a white male alone, the Appointments Committee failed to consider Mr Lawrence's application for permanent appointment, including his qualifications, expertise and experience.

107. In failing to do so, the Appointments Committee ignored the first requirement contained in section 174(1) of the Constitution, which is to assess whether the candidate is a fit and proper person. Further, the Appointments Committee also ignored regulation 5 of the Regulations and the Appointments Procedure, both of which mandate that a range of factors must be taken into account.

108. As noted by the Court a quo, in failing to consider these relevant considerations – considerations which they were legally required to consider – the Appointments Committee "*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*."[96] The same logically and legally applies in respect of all other shortlisted candidates who were summarily excluded from consideration because they were white.

[96] Judgment of the Court a quo: Vol 6, Record para 53.

109. Accordingly, the proceedings of the Appointments Committee and the decisions taken as a result thereof fall to be reviewed and set aside.

Arbitrariness (section 6(2)(e)(vi) of PAJA) and irrationality (section 6(2)(f) of PAJA)

110. The respondent submits that the proceedings of the Appointments Committee and the decisions taken as a result thereof were arbitrary and irrational in that they were not rationally connected to the information before the Appointments Committee. As explained in **Insolvency Practitioners**:[97]

> "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 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."

111. The basis for this is three-fold:

111.1. First, the Appointments Committee did not comply with the framework for the appointment of magistrates: section 174 of the Constitution, regulation 5 of the Regulations or the Appointments Procedure. In deciding to only consider the race and gender of the respondent and consequently ignoring all other relevant considerations, the Appointments Committee created their own criteria for the selection of candidates that was not countenanced by

[97] **Insolvency Practitioners** at para 55.

the legal provisions to which they are bound. The Committee not only ignored all other relevant considerations. By its wrong-headed approach, it also thereby ignored all other relevant candidates.

111.2. Second, there are no targets set in section 174 of the Constitution, regulation 5 of the Regulations or the Appointments Procedure. In determining that there was any over-representation of white males, they did so without there appearing to be any objective criteria, facts or evidence before them. But in any event, even if they thought there was some evidence to do so, the law did not permit them to set the targets they did and target white candidates for exclusion.

111.3. Third, having unilaterally determined their own criteria to be applied in determining whether there was an over-representation of white males, the Appointments Committee thereafter imposed a rigid quota system which had the effect of completely excluding certain candidates from consideration, including Mr Lawrence.

111.4. By doing so and having regard to race in a manner not permitted by the Constitution, the Appointments Committee took a decision in contravention of section 174(7) of the Constitution, which requires that the appointment "take place without favour or prejudice".

112. Accordingly, the proceedings of the Appointments Committee and the decisions taken as a result thereof fall to be reviewed and set aside.

Unreasonableness (section 6(2)(h) of PAJA)

113. The respondent submits that the exercise of power or performance of the functions of the Appointments Committee was so unreasonable that no reasonable person could have so exercised the power or performed the function. As set out above, this is so for several reasons:

113.1. The interpretation and application of section 174 of the Constitution, regulation 5 of the Regulations and the Appointments Procedure was flawed and unreasonable in nature, and applied in a manner that had discriminatory results.

113.2. It was further unreasonable for the Appointments Committee to fail to consider any factor other than the race and gender of Mr Lawrence and the other candidates, despite being legally mandated to take into consideration a wide range of factors.

113.3. The Appointments Committee acted unreasonably in failing to apply any objective criteria in determining whether there is an overrepresentation of white males. There does not appear from the record to have been any basis in fact for the criteria applied by the Appointments Committee.

113.4. The Appointments Committee acted with rigidity that does not behove the reasonable decision-maker.

114. Accordingly, the proceedings of the Appointments Committee and the decisions taken as a result thereof fall to be reviewed and set aside.

RELIEF AND COSTS

115. The Court a quo was correct to declare the shortlisting proceedings of the Appointments Committee for the vacancies of magistrates in the districts of Bloemfontein, Botshabelo and Petrusburg to be unlawful and unconstitutional, and to review and set aside the shortlisting proceedings and recommendations of the Appointments Committee. That outcome was dictated by section 172(1)(a) of the Constitution, and no discretion was permitted to the court once it had concluded there was an unconstitutionality.

116. The Court was also correct to review and set aside the appointments made by the Minister for the abovementioned districts. The further relief setting aside the consequential appointments (if there were any) is relief this Court is entitled to grant in the exercise of its just and equitable remedial discretion under section 172 of the Constitution. No evidence has been placed before this Court to suggest why this would not be just and equitable, despite it being peculiarly within the appellants' knowledge.

117. To the extent that this Court, out of caution, wishes to verify itself that the shortlisted candidates (from whose ranks the "appointed" candidates must have been chosen) are satisfied with any order the court proposes to make, then we respectfully submit that it is open to the Court to follow the approach adopted in **JSC v Cape Bar Council**[98] and to issue similar directions as set out at para 7 of the judgment:

> "*After leave to appeal had been granted by the court a quo and in an obvious attempt to avoid the non-joinder debate, the CBC formally sought and obtained directions in terms of Rule 11(1)(b) from the Deputy President of this court. Pursuant to these directions Judge Henney and the six unsuccessful candidates were called upon to indicate whether they consented to be bound by the judgment of this court on appeal, notwithstanding the fact that they had not been joined as parties to the proceedings. Any of those who refused to consent were granted leave, in terms of the directions, to file affidavits with this court. Once such affidavit had been filed, so the directions further provided, that party would be considered to have been formally joined. If none*

[98] **JSC v Cape Bar Council** supra.

of those called upon expressly conveyed their refusal to consent, so the directions concluded, this court would proceed to give judgment without entertaining the non-joinder issue."

118. Without conceding that there was a non-joinder, but alive to the fact that the appellants have not sought to place proper evidence before the Court about the "appointments" or utilise Rule 11(1)(b) of the Court's Rules to call for any joinder or other directions to be issued, the respondent shall alongside these heads deliver a request in terms of Rule 11(1)(b) for the President of the Court to consider giving such directions as she considers just and expedient, including whether to call upon the shortlisted candidates to indicate whether they consent to be bound by the judgment of this Court on appeal.

119. Accordingly, and subject to the approach the President chooses to follow in respect of Rule 11, the appeal falls to be dismissed. The order would take the following form: "The appeal is dismissed, with costs including the costs of two counsel."

120. In respect of costs, if Mr Lawrence is successful, and the appeal is dismissed, he is entitled to his costs jointly and severally from the appellants, including the costs of two counsel. If the respondent is unsuccessful, the ordinary principles of **Biowatch Trust v Registrar Genetic Resources and Others**[99] should apply, given that the matter concerns the application of important constitutional principles.

Max du Plessis SC

Toni Palmer

Sithandiwe Mdletshe

Chambers, Durban

8 February 2021

[99] 2009 (6) SA 232 (CC (losing party should not be mulcted with successful party's costs in constitutional litigation).