REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No A 214/2008

In the matter between:

ANDRÉ LE ROUX **APPLICANT**

and

MINISTER OF JUSTICE **FIRST RESPONDENT**

MAGISTRATES COMMISSION **SECOND RESPONDENT**

PRESIDING OFFICER: MAGISTRATE

(MR L K AMUTSE) **THIRD RESPONDENT**

Neutral citation: *Le Roux v Minister of Justice* (A214-08) [2014] NAHCMD 60 (20 February 2014)

Coram: VAN NIEKERK J

Heard: 23 March 2010

Delivered: 20 February 2014

Flynote: **Magistrate** – Misconduct - Magistrates Commission – Commission recommending dismissal of magistrate based on misconduct – Minister of Justice dismissing magistrate – Magistrate aggrieved by dismissal launching review proceedings – Point *in limine* taken that mandatory to follow appeal procedure in terms of section 21(4) of Magistrates Act, 3 of 2003 – Held that appeal provided for is appeal in ordinary sense – Permissible to bring review proceedings – Point *in limine* dismissed.

Magistrate – Misconduct – Magistrates Act, 2003 (Act No.3 of 2003) - Presiding officer who investigates alleged misconduct may make finding without having transcribed record of proceedings – Presiding officer need not provide reasons for findings at time they are made – In terms of section 26(12)*(b)* written reasons to be provided to Magistrates Commission within 7 days after conclusion of investigation.

Magistrate – Misconduct – Magistrates Act, 2003 (Act No.3 of 2003) – Magistrate guilty of misconduct given opportunity to resign within 14 days in terms of section 26(17)*(b)* – Magistrate failed to resign - Magistrate requesting documents from Magistrates Commission outside time period of seven days prescribed in section 26(13) and after recommendation for dismissal was forwarded to Minister of Justice – Refusal of Commission to provide documents no ground for setting aside notice conveying opportunity to resign.

Magistrate – Misconduct – Magistrates Act, 2003 (Act No.3 of 2003) – Dismissal of magistrate by Minister of Justice printed on letterhead of Magistrates Commission – Error does not vitiate dismissal – Documents which Minister of Justice considered sufficient to establish that she dealing with dealing with decision of Commission – Power of

Minister under section 21(3) very narrow – Must dismiss magistrate on recommendation of Commission.

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ORDER

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1. The first and second respondents' point *in limine* is dismissed with costs.

2. The application is dismissed with costs.

JUDGMENT

VAN NIEKERK J:

Introduction

[1] The applicant is a former magistrate for the district of Grootfontein. He launched a review application in terms of rule 53 of the High Court rules against his dismissal from office after he was found guilty on five charges of misconduct. In the notice of motion he claims the following relief:

> '1. (a) Reviewing and correcting or setting aside the findings and recommendations of the Presiding Officer of the Disciplinary Committee Magistrates Commission (Mr Amutse) on 15 April and 9 May 2008 respectively.
>
> (b) declaring the findings or part of the findings and recommendations referred to in 1(a) null and void and of no force and effect.

2. (a) Reviewing and correcting or setting aside the notice letter ("ALR5") dated 9 June 2008 of the Second Respondent.

   (b) declaring the notice letter referred to in 2(a) null and void and [of] no force and effect.

3. (a) Reviewing and correcting or setting aside the decision of the Minister or Justice and Attorney-General dated 26 June 2008 (sic 2008-07-04) communicated to the Applicant in a letter dated 11 July 2008 in terms whereof the Applicant was dismissed as Magistrate from office on recommendation of the Magistrates Commission in terms of Section 21(3)(a) of the Magistrates Act, 2003 (Act No. 3 of 2003) with effect from 1 July 2008 on grounds of misconduct.

   (b) declaring the decision referred to in paragraph 3(a) null and void and of no force and effect.

   (c) declaring that Applicant is still a Magistrate of the Magistrates Commission/Ministry of Justice/Government of Namibia.

4. In the alternative to paragraph 3 *supra*,

   Reviewing and correcting or setting aside the decision of First Respondent to be in breach of Article 18 (administrative justice) of the Namibian Constitution and in violation of the provisions of Section 26(17)(b)(ii) of the Magistrates Act, 2003 (Act 3, 2003).

5. Directing that the costs of this application be paid by Respondents on the scale as between attorney and client.

6. Further and/or alternative relief.'

History and factual background

[2] During October 2007 the second respondent charged the applicant with six counts of misconduct as defined in section 24 of the Magistrates Act, 2003 (Act 3 of 2003). It is not necessary to set out the details of the charges. The third respondent was appointed in terms of section 26(4) to act as the presiding officer at the investigation into the charges. The applicant was represented by his legal

practitioner of record during the investigation, which was conducted on 14 and 15 April 2008. After evidence was led and argument heard, the third respondent found that the applicant was guilty on counts 1, 2, 3, 4, and 6 and not guilty on count 5. The applicant was given an opportunity to provide mitigating factors in writing by 30 April 2008, which his lawyer did on his behalf.

[3] On 9 May 2008 the third respondent recommended to the second respondent in terms of section 26(12)*(b)*(iii)(*bb*) that the applicant be dismissed from office. He also forwarded to the second respondent the record of the proceedings at the investigation (section 26(12)*(a)*), a written statement of his findings and his reasons therefor (section 26(12)*(b)*) and the written representations on behalf of the applicant (section 26(12)*(b)*(i)). He also informed the second respondent in writing of the relevant aggravating and mitigating factors (section 26(12)*(b)*(ii)).

[4] On 9 June 2008 the second respondent considered all the documents forwarded to it and came to the conclusion that the applicant was indeed guilty of misconduct and by implication, that the applicant, by reason of the nature of the misconduct in question, was no longer fit to hold the office of magistrate. On the same date the second respondent, acting in terms of section 26(17)*(b)*(i), gave the applicant notice in writing of its decision and gave him the opportunity to resign from office within 14 days of receipt the notice. The applicant did not react.

[5] After expiry of the 14 day period, the second respondent on 26 June 2008 and acting in terms of section 26(17)*(b)*(ii), made a written recommendation to the Minister that the magistrate be dismissed from office in terms of section 21(3)*(a)* and submitted, together with the recommendation, all the documents required by the Act.

[6] On 30 June 2008 the applicant's lawyer wrote to the second respondent and acknowledged receipt of the second respondent's notice dated 9 June 2008. He requested to be furnished with a copy of the record, statement, reasons and recommendations 'in terms of section 26(14)' for the applicant to be able to consider resigning as magistrate.

[7] On 3 July 2008 the second respondent responded as follows:

> 'Please note that your client failed to respond with 14 (fourteen) days in terms of Section 26(17)(i) *(sic)* of the Act as indicated in our letter dated 9 June 2008. As a result your client forfeited the opportunity to resign as magistrate.
>
> Please take note that the matter has been referred to the Minister for finalization.'

[8] On 4 July 2008 the first respondent signed the applicant's letter of dismissal with effect from 1 July 2008. The second respondent forwarded this letter to the applicant's lawyer on 11 July 2008. It was received on 15 July 2008.

[9] On 16 July 2008 the applicant via his lawyer made certain written objections against the validity of the dismissal by the first respondent, which had no effect. Thereafter this application was launched.

The first and second respondents' point *in limine*: should the applicant have approached this Court by way of appeal under section 21(4) of the Magistrates Act?

[10] The first and second respondents took the stance in their answering affidavits and at the hearing that the applicant should have approached the Court by way of appeal and not review. Their contention is that the Magistrates Act itself provides for a special remedy in section 21(4)*(a)* which provides that a magistrate who is aggrieved by his or her dismissal may appeal against the dismissal to the High Court. The submission is further that, although an aggrieved magistrate is not obliged to appeal, as is plain from the use of the word 'may', the only legal remedy available to an aggrieved magistrate is an appeal under the Act. In this sense, they further submit, the appeal procedure is mandatory to the exclusion of any review procedure. The submission further is that, as the applicant did follow the mandatory procedure created by section 21(4)*(a)*, the applicant is not properly before this Court and the application should be dismissed on this ground alone.

[11] The applicant disputes these contentions and in essence submits that the Magistrates Act does not do away with the rule 53 review procedure or with common law review.

[12] There is no express indication in the Magistrates Act of an ouster of this Court's review jurisdiction. On the other hand, it can be understood that the legislature saw fit to specially provide for an appeal procedure, because this Court would otherwise not have authority to question the merits of any decision to dismiss under the Magistrates Act.

[13] In *Tikly v Johannes NO* 1963 (2) SA 588 (T) the court distinguished between three types of appeal in the following way (at 590G-591A):

> 'The word 'appeal' can have different connotations. In so far as is relevant to these proceedings it may mean:
>
> (i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information (*Golden Arrow Bus Services v Central Road Transportation Board*, 1948 (3) SA 918 (AD) at p. 924; *S.A. Broadcasting Corporation v Transvaal Townships Board and Others*, 1953 (4) SA 169 (T) at pp. 175 - H 6; *Goldfields Investment Ltd v Johannesburg City Council*, 1938 T.P.D. 551 at p. 554);
>
> (ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong (e.g. *Commercial Staffs (Cape) v Minister of Labour and Another*, 1946 CPD 632 at pp. 638 - 641);
>
> (iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly (e.g. *R v Keeves*, 1926 AD 410 at pp. 416 - 7; *Shenker v The Master*, 1936 AD 136 at pp. 146 - 7).'

[14] Prof. Hoexter in her work *Administrative Law in South Africa* at 66-67 discusses the first two types of appeal mentioned in *Tikly*, namely an appeal in the wide sense and an ordinary appeal and states as follows:

> 'The distinction becomes significant when the question arise whether an appellate body is entitled to correct illegalities committed by the administrator – in other words, whether it is allowed to review the decision as well as pronounce on its merits. An appeal body that is confined to the record will not necessarily be in a position to do this effectively, since the record itself may be distorted by the illegality. If there was a failure to observe procedural fairness, for example, this would probably not be apparent on the face of the record. For this reason only bodies exercising wide jurisdiction can properly exercise review powers.
>
> It is often unclear from the legislation which form of appeal is intended, however. Sometimes it expressly states that the appellate body may perform review functions, but more often than not it simply invites the appellate body to 'confirm, vary or set aside' the original decision. Baxter [*Adminstrative Law* (1988) 261-3] offers the following pointers to the existence of wide appellate jurisdiction:
>
> - *Lack of record.* If there is no provision for the keeping of a record, the appeal jurisdiction will most certainly be wide.
> - *Procedural powers.* There is a strong indication of wide jurisdiction where the powers of inquiry are identical to those of the administrator.
> - *Decisional powers.* A wide appellate jurisdiction is indicated where the decision of the appellate agency is deemed to be that of the administrator. A narrower jurisdiction may be intended where the appellate body is empowered to 'substitute' its decision or merely 'confirm, vary or set aside' the original decision.'

[15] The factors mentioned by Baxter are not exhaustive. In *Tikly* the court analysed the provisions of the relevant statute and regulations, which included provisions that the appellant and other parties may adduce evidence before a 'revision court' and that generally 'the law of procedure in civil proceedings in a magistrate's court shall

mutatis mutandis apply in respect of all proceedings of a revision court'. The court came to the conclusion that such an 'elaborate procedure for a trial hearing of an essentially judicial character could not have been designed merely for an appeal or review *stricto sensu*' (at 593A) and that the statutory appeal to the revision court was an appeal in the widest sense (at 591G; 592H).

[16] Although no reference was made to *Tikly's* case, it was submitted on behalf of the first and second respondents that section 21(4)*(b)* of the Magistrates Act prescribes an elaborate procedure for the prosecution of the appeal against dismissal.

[17] In my view there is nothing 'elaborate' about the procedure. Section 21(4)*(b)*(i) merely provides that an appeal must be noted in writing within 30 days of the date of receipt of the notice of dismissal and that the notice of appeal must set out the full grounds of appeal and be served on every party to the matter. Significantly, sub-paragraph (ii) provides that the appeal 'must be prosecuted as if it were an appeal from a judgment of a magistrate's court in a civil matter, and all rules applicable to the hearing of such an appeal apply with the necessary changes to an appeal under this subsection.' In terms of section 21(4)*(c)* the High Court must hear the appeal and may confirm or set aside the dismissal appealed against or give such other order, including any order as to costs, as it may consider fit. If the High Court sets aside the dismissal, the first respondent must reinstate the magistrate (section 21(4)*(d)*). Taking all these factors into consideration it is clear that the appeal contemplated is one in the 'ordinary' sense. This conclusion is similarly reached when one applies the factors listed by Baxter *(supra).* In my view the point *in limine* is not good and must be dismissed.

<u>The conviction on count 6</u>

[18] Having said this, it does seem to me that one of the complaints raised against the third respondent's decision is really a ground of appeal. It is to the effect that count 6 of the charge sheet amounts to an impermissible splitting of charges. Mr *Brandt*, who appeared on behalf of the applicant, mentioned this complaint, but stated that he is not pressing the point. It seems to me that count 6, which alleges

that the applicant is guilty of misconduct because he acted in a manner as set out in section 24(d), (e) and (k) of the Magistrates Act. All the allegations and evidence led on this count relate to a series of events which took place on the same date and at the same place and appear to be interrelated. I suppose this is why the drafter of the charge sheet combined all three the different forms of misconduct in one count. Although this is probably in a technical sense not correct, it seems to me that this manner of charging the applicant was, if anything, to his benefit, as the end result was that a splitting of charges was in fact avoided. For all these reasons I think the applicant's counsel was correct in taking the stance that he did.

The third respondent's decision

[19] In the founding affidavit the applicant takes issue with the third respondent's decision to convict him and alleges that the third respondent failed to apply his mind to the charges against the applicant and the facts placed before him and simply convicted the applicant without giving any reasons except those set out in annexure "ALR 4" and without having the written/ transcribed record in his possession.

[20] I agree, however, with the submission made on behalf of the respondents that the there was a factual basis for the finding by the third respondent that the applicant was guilty of misconduct on counts 1, 2, 3, 4, and 6.

[21] I further agree that the third respondent did not need to have the transcribed record in his possession in order to make this finding as he was the presiding officer and had heard all the evidence presented.

[22] Lastly I agree with the submission made on behalf of the respondents that the third respondent was not obliged to provide reasons for his finding at the stage that he was making the finding. Section 26(11) merely requires that the presiding officer must, at the conclusion of the investigation, make a finding on the charge and inform the magistrate charged whether he or she is guilty or not guilty of misconduct as charged and, in the case of a finding of guilty, afford that magistrate an opportunity to state any mitigating factors or to comment in writing on the matter. Reasons only need to be provided to the Commission in writing within seven days after the

conclusion of the investigation (section 26(12)). The third respondent indeed provided such reasons, although the applicant complained for the first time in his heads of argument that this occurred only after the seven day period required by the Act. In the premises I am not inclined to entertain the complaint.

The second respondent's decision

[23] The applicant's complaint against the second respondent is that it failed to provide him with the written record of proceedings, the third respondent's statement of findings, the accompanying reasons and his recommendations to the second respondent and that it simply ignored his lawyer's letter (annexure "ALR6") in which these documents were requested "before our client will be able to consider resigning as a magistrate."

[24] Section 26(13) provides that the 'Commission must, at the written request of the magistrate charged made within seven days of the date on which he or she was informed of the finding of the presiding officer, furnish that magistrate with a copy of the record, statement, reasons and recommendation referred to in subsection (12)'. By the time the applicant made the request on 30 June 2008, the 14 day period during which he had had a choice to resign instead of being dismissed, had already passed, and, it would appear, the second respondent had already forwarded its recommendation to the first respondent that she should dismiss the applicant. Even if the second respondent had provided the documents as requested, the matter was already in the hands of the first respondent. The provision or non-provision of the documents is simply not a factor in the matter, because by then the applicant had forfeited the right to exercise the option to resign, instead of being dismissed. His claim in the notice of motion that the so-called 'notice letter' ('ALR5') should be declared as null and void and of no force and effect can simply not be upheld.

[25] The stance of the respondents is that the applicant should have requested these documents earlier and that it was not obliged to provide documents which were requested out of time or, put differently, that the applicant was not entitled to the documents because he requested them late. I am not convinced that this stance is necessarily correct, but it is not necessary to make decision on this matter for

purposes of this case. My view is that even if the respondents are wrong, the refusal to provide the documents in this case does not have any impact upon the second respondent's decision to recommend the applicant's dismissal and the ultimate implementation of that recommendation by the first respondent.

The first respondent's decision to dismiss the applicant

[26] In the founding papers the applicant attacks this decision on the ground that he has reason to believe that she has never read and considered the record of the proceedings of the investigation in respect of his misconduct and that she never considered the second respondent's recommendation, the applicant's representations made to the third respondent and other documents mentioned in section 26(17)*(b)(ii)* and that her decision to dismiss him is therefore vitiated. In this regard he refers to a letter which his lawyer addressed to the secretary of the second respondent on 16 July 2008 (annexure "ALR9"). The submission is that the first respondent did not apply her mind to the decision to dismiss the applicant and merely acted as a rubber stamp.

[27] The first respondent emphatically denies these allegations and pertinently states that she did consider the record of proceedings, the second respondent's recommendation and the documentation relating to the option to resign. She also refers to the letter of dismissal in which she indicated that she considered these documents.

[28] From annexure "ALR9" it appears that the applicant's allegations are based on the contents of the letter of dismissal signed by the first respondent. It is on the letterhead of the second respondent and dated 26 June 2008. It is addressed to the applicant and the relevant part reads as follows:

> 'Kindly take note that after reading and considering:
>
> (i) the record of proceedings of the investigation;
>
> (ii) the recommendation of the Magistrates' *(sic)* Commission in terms of Section 26(1)(ii);

(iii) your refusal or failure to resign in terms of Section 26(17)(ii) of the Magistrates Act, 2003 (Act No.3 of 2003).

I have decided to dismiss you as magistrate from office on the recommendation of the Magistrates' *(sic)* Commission in terms of Section 21(3)(a) of the Magistrates Act, 2003 (Act No.3 of 2003) with effect from 1 July 2008 on the grounds of misconduct.'

[29] As I understand it, the applicant makes the deduction that the second respondent did not forward all the documentation to the first respondent and that she therefore did not consider all the documentation because she only mentions some of the documentation in the dismissal letter. The deduction is also based on the fact that she signed the letter of dismissal prepared by the second respondent on its own letterhead.

[30] The first respondent acknowledges in her affidavit that she should have had the letter of dismissal printed on the letterhead of the Minister of Justice. I agree. It seems to me that the person who prepared the second respondent's submission to the first respondent erred by printing the draft letter of dismissal on the second respondent's letterhead and that the error was compounded when the draft letter was not reprinted on the first respondent's letterhead. Be that as it may, the fact of these errors does not in itself vitiate the dismissal by the first respondent. It is clear that she followed the recommendation by the second respondent and signed the letter of dismissal.

[31] In this regard the provisions of section 21(3) of the Magistrates Act should be noted. It provides that if 'the Commission in terms of section 26(17)(ii) recommends to the Minister that a magistrate be dismissed on the ground of misconduct, the Minister must dismiss the magistrate from office.' In *Minister of Justice v Magistrates' Commission and Another* 2012 (2) NR 743 (SC) it was held (at 755E-G) that these words are '..... clear and unambiguous and should therefore be given their simple ordinary meaning. In its most basic meaning, the word *must* is obligatory and does not give the minister a choice or a discretion not to dismiss.' The Supreme Court continued to state (at 755I-756B):

> '[30] The power of the minister in terms of s 21(3) is very narrow. She does not have the power to disagree with the determination by the commission and the high court on the substantive question whether there are grounds for the removal of the magistrate. That is an issue reserved first for the commission and then the court. Her role is only to make sure that the decision referred to her is indeed a decision of the commission. In order to perform this narrow power, the Act requires that the record, reasons, representations and comments are forwarded to her.'

[32] By complaining that the first respondent acted as a mere rubber stamp, the applicant appears to require of the first respondent to apply her mind to the merits of his dismissal. Clearly the applicant misconceives the first respondent's powers. From the documentation she considered she would have been able to establish that she was indeed dealing with a decision of the second respondent. No more was required. In my view there is no basis on which this Court should interfere with the first respondent's decision.

Order

[33] The result is, therefore, as follows:

1. The first and second respondents' point *in limine* is dismissed with costs.

2. The application is dismissed with costs.

_____(signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the applicant: Mr F C Brandt
of Chris Brandt Attorneys

For the respondent: Ms C Machaka
Office of the Government Attorney