IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAALSE PROVISIONAL DIVISION)

Case number: 26026/2006

Date:

In the matter between:

ANNAH MALEFSANE KGOELE	Applicant
and	
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
JOHANNAH JABHILE IKANENG	Second Respondent
CHAIRPERSON OF THE MAGISTRATES COMMISION	Third Respondent

JUDGMENT

PRETORIUS J.

The applicant requests the following relief:

"1. *Extending the period of 180 days referred to in section 7 (1) of the Promotion of Administrative Justice Act 3 of 2000;*

2. *Reviewing and setting aside the decision of the first respondent to appoint the second respondent as the Chief Magistrate, Molopo;*

3. *Substituting the decision of the first respondent to appoint the second respondent as the Chief Magistrate, Molopo, with a decision to appoint the applicant as Chief Magistrate, Molopo;*

4. *Directing that the costs of this application be paid jointly and severally by those respondents that oppose any part of the relief sought;"*

The respondent did not oppose the application to extend the 180 days referred to in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000. The court therefore grants prayer one in the notice of motion.

The background to the matter is that the applicant applied to be appointed as the Chief Magistrate: Molopo. The Magistrate's Commission in terms of section 10 of the Magistrate's Act provided a recommendation to the Department of Justice in which it was set out that four candidates were suitable to be appointed in the vacant post. Section 10 of the Magistrates Act

no 90 of 1993 sets out:

> *"The Minister shall, after consultation with the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts Act."*

The Commission found:

> *"The commission found the following candidates, **in a order of preference**, appointable to the office of Chief Magistrate, Molopo:*
>
> *Ms A M Kgoele*
>
> *Ms J J Ikaneng*
>
> *Ms H Habib*
>
> *Ms R Terblanche"*

and further made the following recommendation:

> *"It is recommended that the Minister be advised to appoint one of the candidates discussed under paragraph 3.7 to the post of Chief Magistrate, Molopo."*

The applicant contends that the Minister's decision should be reviewed and set aside in terms of the provisions of the Constitution and section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The reason being that after the Commission's memorandum had been compiled, a memorandum was compiled by Mr Skosana, the Chief Director:

Court Services in the Department of Justice and Constitutional Development. Mr Skosana is also a member of the Magistrate's Commission.

In this memorandum the following recommendation was made:

> *"Altough in the end the Commission ranked Ms Kgoele slightly above Ms Ikaneng, the following factor give Ms Ikaneng an edge over Ms Kgoele* ***and her appointment is recommended by the department"*** *(my emphasis)*

and

> *"Chief Magistrate: Molopo: Based on motivation advanced under paragraph 3.1 above* ***it is recommended that the Minister appoints Ms JJ Ikaneng as Chief Magistrate for Mmabatho and Head of the Molopo cluster."****(my emphasis)*

The Minister took the decision to appoint the second respondent on 6 October 2005. On 5 December 2005 the applicant requested reasons from the Minister:

> ***"Request for reasons in terms of section 5 (1) of the Promotion of Adminstrative Justice Act, Act 3 of 2000***
>
> *I applied for the post of Chief Magistrate/Cluster Head: Molopo/ Mmabatho as advertised by the Magistrates Commission. I was short listed for this post and was interviewed by the Commission. I have information that I was recommended by the*

Commission as its first choice of candidates for this post.

I have now been informed that you have appointed Ms JJ Ikaneng to the position.

I hereby request, in terms of section 5 (1) of the Promotion of Administrative Justice Act, Act 3 of 2000 that you provide me with written reasons for your decision to appoint Ms Ikaneng to the post instead of me."

No response was received from the Minister or the department furnishing reasons for the decision by the Minister. Mr Budlender, for the applicant, argued that not only did the Minister not reply to the letter, but no reasons were forthcoming when the record of proceedings was filed in terms of rule 53 neither were any reasons for the decision furnished in the opposing affidavit. The Minister did not file an affidavit in this application.

Section 5(1) of the Promotion of Administrative Justice Act 3 of 2000 provides:

"(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action."

It is so that the applicant has no right to be appointed as the Minister has the discretion to appoint any one of the four persons recommended by the Magistrate's commission, but that does not preclude the applicant requesting reasons in this situation. The appointment of the second respondent clearly falls within the ambit of the definition of administrative action as set out in section 1 of the Promotion of Administrative Justice Act:

> *"administrative action" means any decision taken, or any failure to take a decision, by—*
>
> *(a) an organ of state, when—*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*
>
> *which adversely affects the rights of any person and which has a direct, external legal effect,"*

The appointment of magistrate's is not excluded in the Act, as the provisions of the Act only excludes the appointment of judges by the Judicial Services Commission.

It was conceded by Mr Basson, for the respondent, that no reasons were given by the Minister. There was also no explanation forthcoming to explain the failure of the Minister to give reasons.

In **Goodman Brothers (Pty) Ltd v Transnet Ltd 2001 (1) SA 853 (SCA)** at p 42 Olivier JA found:

> *"One need hardly look further for a more obvious fundamental right which justifies the application of s 33 of the Constitution to the present case. The right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally.* ***The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action.***" (my emphasis)

The provision of section 5 (3) of Promotion of Administrative Justice Act provides:

> *"(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was*

taken without good reason."

This applies to the matter in hand. There can be no question that this creates a rebuttable presumption. In the present matter there has been no attempt whatsoever to rebut this presumption; - to the contrary counsel for the first respondent has conceded that no reasons had been given and no explanation for the failure to give reasons had been furnished. There has been no justification either for not giving reasons, although there had been a formal request by the applicant on 5 December 2005. There was no attempt by the first respondent to explain the failure to give reasons.

Section 5 (3) refers to "adequate reasons" – in this instance **no reasons** were furnished and therefore the presumption of section 5 (3), that the administrative action was taken without good reason, must prevail.

I therefore need not consider or adjudicate the other grounds of review. The question is what the court has to do in this instance to rectify the failure by the Minister to give reasons.

Although the Minister has the discretion and power to make appointments, it will be futile to send the matter back to the Minister, as it is clear that the same decision will be made. The memorandum by mr Skosana to the Minister may seriously have impeded the Minister's discretion, as it is not done in the fair manner of the Magistrate's Commission, who recommended four

candidates in order of preference. In the memorandum by the department the second respondent is recommended. There is no room for doubt as to which candidate the Department prefers. This departmental memorandum was never supplied to the applicant for her comment, before the decision by the Minister was made.

In the **Minister of Defence v Dunn 2007 (6) SA 52 (SCA)** Lewis JA found at p 61 E – F:

> *"The decision-maker may, in order to give effect to procedurally fair administrative action, afford a person who will be affected the opportunity to be heard in person. Even where that is not the case, the* audi *principle nonetheless applies: a person in respect of whom administrative action is to be taken is entitled to a hearing and to make representations."*

This matter is, however distinguishable from Dunn's case as Dunn was never the preferred candidate.

In **The New Constitutional and Administrative Law** Volume 2, Cora Hoexter, at page 290 sets out:

> *"The courts' respect for the distinction between appeal and review makes them extremely reluctant to usurp the decision-making powers that the legislature has delegated to the administration. As Hiemstra J put in the leading case of* Johannesburg City council v Administrator, Transvaal, *the court*

is 'slow to assume a discretion which has by statute been entrusted to another tribunal or functionary'."

In **Visser v Minister of Justice and Constitutional Affairs and Others 2004 (5) SA 183 (T)** Swart J found at p 188:

"If so, the recommendation of the Committee in the mind of first respondent should have been accorded much more weight. Its composition (see above) denotes it not only as a responsible knowledgeable body but one which is widely representative of all interests of the community in the appointment."

The same applies to the Magistrate's Commission as it is composed of representatives of all interested parties in the community.

In **van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening) 2002 (5) SA 246 (CC)** at par 109 Chaskalson CJ found:

"Thus, the appointment of a Magistrates Commission, presided over by a Judge, and drawn from diverse sections of the legal community to advise the Executive in relation to the appointment of magistrates is a check on the exercise of executive power, and not a flaw in the appointment process."

In **Administrative Law of South Africa (2007)** Prof Cora Hoexter at p347 commented:

"At common law a breach of procedural fairness would ordinarily lead to the invalidity of the administrative decision concerned.

Baxter indicated that the principles of fairness are 'considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question' so that the merits cannot justify a breach of fairness...

As far as Promotion of Administrative Justice Act is concerned, invalidity would again seem to be natural and logical result of non-compliance with the rule of fairness. Not only is procedural unfairness listed as a ground of review in terms of s 6 (2) (c) of the Promotion of Administrative Justice Act but setting aside remains the default remedy of our administrative law."

In this matter the applicant was ranked above the second respondent by the Magistrate's Commission, but a further memorandum was submitted by the department to the Minister, recommending the second respondent. The applicant had no access to this memorandum before the Minister exercised her discretion and appointed the second applicant. Thereafter the Minister failed completely to supply any reasons when requested to do so, although the Promotion of Administrative Justice Act does not exempt the Minister from doing so. The Minister also failed to furnish reasons for not furnishing the applicant with reasons.

In this instance the Minister did not comply with the provisions of section 5 (3) of the Promotion of Administrative Justice Act and the Minister's decision should be set aside.

The question as to what the remedy should be, is not an easy question to answer. In terms of section 8 of Promotion of Administrative Justice Act the court may substitute it's own decision for that of the adm nistrator, who will be the Minister in this instance. Section 8 (1) (c) (ii) (aa) of the Promotion of Administrative Justice Act provides:

> *"(c) setting aside the administrative action and—*
>
> *(i) remitting the matter for reconsideration by the administrator, with or without directions; or*
>
> *(ii) in exceptional cases—*
>
> *(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;*

In **Commissioner, Competition Commission v General Council of the Bar of South Africa and others 2002 (6) SA 606 (SCA)** at par 14 – 15 the Supreme Court held that such a remedy should be granted:

> *"Suffice it to say that the remark in Johannesburg City Council v Administrator, Transvaal, and Another that 'the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary' does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture."*

and:

> *"...Baxter Administrative Law at 682 - 4 lists a case where the Court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says at 684:*
>
> > *"The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers . . .; sometimes, however, fairness to the applicant may demand that the Court should take such a view."*
>
> *This, in my view, states the position accurately.* ***All that can be said is that considerations of fairness may in a given case require the Court to make the decision itself provided it is able to do so.***" (my emphasis)

In the present case it is clear that the decision would be a foregone conclusion if the recommendation of the Department is followed, and would delay the process unnecessarily. The Promotion of Administrative Justice Act recognises that setting aside is the primary remedy. Correcting the decision must only be done in "exceptional" cases.

In **Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72 (T)** Hiemstra J found in common law three instances in which special

circumstances will allow the court to substitute the decision of the administrator, namely:

- Where the end result is a foregone conclusion, and it would be a waste of time to remit the decision to the original decision-maker.
- Where further delay would cause unjustifiable prejudice to the applicant.
- Where the original decision-maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the applicant to submit to its jurisdiction again.

I find that in this case exceptional circumstances do exist due to the fact that the end result is a foregone conclusion having regard to the Department's memorandum and recommendation and the lack of reasons from the Minister. Further delay in this matter will cause unjustifiable prejudice to the applicant. The memorandum by the Department showed bias in that it only recommended the second respondent failing to follow the procedure and method that the Magistrate Commission had used.

In **Gauteng Gambling Board v Silverstar Development Ltd and Others 2005 (4) SA 67 (SCA)** at par 38 Heher JA found:

> *"[38] For the reasons which follow I am satisfied that despite the manifest advantages which the Board holds (by comparison with a court) as a decision-maker, the particular facts of the present case are such as to remove it from the limitations imposed by*

the general principles outlined in para [31]."

In this instance the court is in as good position as the Minister to make the decision. I cannot find that the Minister will have more information at her disposal to come to a decision. All the facts, relating to the appointment of the applicant, have been extensively covered in the papers before me which includes:

- The memorandum from the Magistrate's Commission, with the recommendations;
- The memorandum by the Department of Justice recommending the second respondent;
- An affidavit deposed to on behalf of the third respondent setting out the process and procedure used by the third respondent when a chief Magistrate has to be appointed;
- The record of proceedings;
- The pleadings.

The respondent did not deal with the question of substitution, although the relief set out in the notice of motion made it clear that the applicant was seeking substitution.

If the first respondent wanted to resist such an order, it was imperative for the first respondent to place "facts and circumstances" before the Court. In **Gauteng Gambling Board v Silverstar Development Ltd and Others**

(supra) at par 39:

> *"The result is that the Court a quo was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter."*

I have considered all the facts and cannot but find that in this instance I have to make the bold decision to review and set aside the first respondent's decision and to substitute the decision.

The following order is made:

1. The period of 180 days referred to in section 7 (1) of the Promotion of Access to Justice Act 3 of 200 is extended;
2. The decision of the first respondent to appoint the second respondent as Chief Magistrate, Molopo is set aside;
3. The decision of the first respondent to appoint the second respondent as the Chief Magistrate, Molopo is substituted with the decision that the applicant is appointed as Chief Magistrate, Molopo.
4. The costs of the application to be paid by the first respondent.

C Pretorius

Judge of the High Court

Case number	:	26026/2006
Heard on	:	28 November 2007
For the Applicant	:	S Budlender
Instructed by	:	Rudman
For the Respondent	:	JL Basson
Instructed by	:	State Attorney
Date of Judgment	:	