IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
(SITTING AS THE EQUALITY COURT)

CASE NO: 74236/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

16.8.2021
DATE

SIGNATURE

In the matter between:

MARTIN KROUKAMP	**FIRST COMPLAINANT**
SOLIDARITY	**SECOND COMPLAINANT**

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**FIRST RESPONDENT**
DIRECTOR GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELPOMENT	**SECOND RESPONDENT**

MAGISTRATE COMMISSION	**THIRD RESPONDENT**
THE CHAIRPERSON OF THE MAGISTRATE COMMISION	**FOURTH RESPONDENT**

JUDGMENT

RAULINGA J,

1. The complainants have approached the Equality Court ("this Court"), for a claim based on alleged unfair discrimination. This follows a decision by then Minister of Justice and Constitutional Development ("the Minister"), not to fill twenty-three (23) posts of Senior Magistrates in various Magistrates Offices throughout the country.
2. In this matter the complainants are seeking the relief sought set out in Part B of the founding affidavit deposed to by the first complaint. The relief sought is as follows:-

   2.1 Declaring that the decision of the Minister to not appoint the first Complainant in the position of Senior Magistrate for the District of Alberton constitutes an unfair discrimination (and/or unfair discrimination) on the basis of race and/ or unfair discrimination in contravention of sections 6,7 and/ or 8 of the Promotion of Equality

and Prevention of Unfair Discrimination Act, 4 of 2000. ("the Equality Act");

2.2 Restraining the Minister from engaging in unfair discrimination practices, including but not limited to, failing to make properly motivated appointments to the positions of magistrate or senior magistrate on the basis of considerations of race and gender alone;

2.3 Directing the Minister to take steps to stop the unfair discrimination inherent in race and gender based appointments for persons to be appointed to the positions of magistrate or senior magistrate;

2.4 Directing the Minister to appoint the first complaint to the position of a senior magistrate for the district of Alberton ("Palm Ridge, Katlegong") in line with the recommendation of the Magistrate Commission; and

2.5 Costs of the application.

3. During November 2009, the Magistrate Commission advertised 23 posts of Senior Magistrates that were vacant throughout the country. The first complainant applied for the post of Senior Magistrate in the Alberton Office. The Magistrate Commission prepared a shortlist of the candidates for all the various posts throughout the country.

4. The first complaint was one of the candidates shortlisted and interviewed, together with others, for the post of Senior Magistrate, Alberton.
5. On 28 February 2011 and after the interviews, the Magistrate Commission submitted a memorandum to the Minister in which it made recommendation that the Minister appoints certain candidates. In its memorandum, the Magistrate Commission recommended only one candidate for appointment in respect of each of the 23 posts of the Senior Magistrates. The candidates recommended by the Magistrates Commission for appointment into the 23 vacant posts reflected, broadly, all races and genders in South Africa. The complainant was among the candidates recommended for appointment to the post of Senior Magistrate, Alberton.
6. On 15 June 2011 the Minister requested the Magistrate Commission to provide him with further information regarding its recommendation as contained in the memorandum. The further information was required because, based on the recommendation by the Magistrate Commission, the Minister found that the information at his disposal was inadequate to enable him to make the judicial appointments.
7. On 28 February 2012 the Magistrate Commission responded to the Minister's request for information. In its, response, the Magistrate

Commission stated that there was not enough pool to draw candidates for appointment into the various posts hence they recommended only one name for each post.

8. One is alive to the fact that the Magistrates Commission recommended to the Minister that the first complainant be appointed to the position of senior magistrate at Alberton. According to the recommendation, the committee that conducted the interviews had unanimously resolved to recommend the first complainant as the only suitable candidate for the position, after consideration of all relevant factors.

9. Having weighed the fact that the first complainant is a white male, together with his other attributes, the Magistrates Commission came to the conclusion that the first complainant was appropriately to be recommended for appointment to the position. The Magistrates Commission noted in its explanation that the race and gender balance at the (then) Alberton Office would not be disturbed through the promotion of the first complainant. The recommendation included a summary of the race and gender composition at the level of senior magistrate, and also included an explanation of the race and gender composition of the Lower Court Judiciary.

10. The memorandum containing the recommendation of the first complainant also included recommendations for the appointment of magistrates to 22 other vacant and funded posts of senior magistrate countrywide. The candidates recommended by the Magistrates Commission reflected, broadly, all races and genders in South Africa. The injunction in section 174(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") was therefore complied with in the recommendation of the Magistrates Commission.

11. In mid-2011, the Minister enquired about why only one candidate per post had been recommended, and also questioned how the Magistrates Commission could contend that there was a pursuit of constitutional ideals through the recommendations. In this regard, he placed particular emphasis on the recommendation of white males for three of the positions.

12. The Magistrates Commission then provided a comprehensive response in February 2012. It considered itself bound by its earlier decision, but offered further information. The Magistrates Commission gave a comprehensive explanation of its difficulties in alliterating applications from suitable candidates, particularly females in the case of senior magistrates. In these circumstances, only three candidates were

shortlisted per post and in the majority of cases only one candidate was found suitable for appointment and that is why only one name was submitted to the Minister.

13. In respect specifically of the position, the Magistrates Commission advised that four candidates had been interviewed, of whom only two found to be appointable (the first complainant and a Ms Dawry, an Indian female). However, Ms Dawry received preference for appointment at Johannesburg for operational reasons and the Magistrates Commission considered that the first complainant had proven his leadership and effectiveness whilst in the post. The Magistrates Commission highlighted that the race and gender balance of the Alberton office would not be disturbed by his appointment. More generally, the response from the Magistrate Commission gave the Minister information on the candidates considered for selection and the reasons why they were not recommended. Most importantly, the Magistrates Commission provided the Minister with the curriculum vitae of all candidates that have been interviewed, so that the Minister was placed in a position to exercise a discretion and not simply rubber-stamp the recommendation of the Magistrate Commission.

14. On 30 November 2011, the Minister wrote to the fourth respondent (the Chairperson). He accepted the explanation for the recommendation of only one candidate per post- Trial Bundle p13. He however, still declined to make the appointments, asserting that he found the pool of candidates from which he was required to make appointments inadequate for purposes of making appointment, that aim at the advancement of the constitutional imperative regarding the transformation of the judiciary: The Minister considered that this was more significant especially at the level of Senior Magistrate where these vacancies occur, as it is at the management echelon of the judiciary where we still experience acute underrepresentation of Black and Woman judicial officers. The Minister concluded that in view of the dearth of the pool from which recommendations were made and lapse of time since the advertisements were made, it would be advisable to re-advertise the positions concerned. The Minster declined to make any appointment; and in May 2013, the secretary of the Magistrates Commission advised that the posts would be re-advertised.

15. I pause to reiterate that, despite the Minister's acceptance of the explanation for the recommendation of only one candidate per post, he repeatedly reverted to his explanation that he could not make an

appointment based on only one recommendation, although he offered no explanation competent in law for why this was so. The Minister sought to place reliance on section 174(4) of the Constitution, which finds application in respect of the appointment of judges of the constitutional Court. Under the Constitution, the appointment of magistrates is to be done in accordance with an Act of Parliament- in the present case the Magistrates Act, 1993. The Magistrates Act does not provide that any particular number of candidates fall to be recommended to the Minster for consideration. It seems to me that the Minister is clutching at straws by hiding behind the application of section 174(4) of the Constitution. Surprisingly, in his reasons offered to the first complainant, the Minister did not say that he is unable to make an appointment because only one candidate per post had been recommended to him. In my view, the only other reason for the non-appointment of the first complainant to the post of senior magistrate of Alberton is because he is not black and a woman. This is so because, the Magistrate Commission found that the first complainant met all the criteria for appointment.

16. Consequently, after the posts were advertised, the first complainant in December 2013 launched these proceedings, in which he sought interim relief preventing the Position from being filled whilst he was pursuing final

relief, contending that the decision of the Minister not to appoint him constitutes unfair discrimination on the basis of race and or gender in contravention of section 6,7 and or 8 of the Equality Act.

17. On 23 September 2014, Mngqibisa-Thusi J granted a postponement to allow the Minister to re-consider the non-appointment of the first complainant and the candidates recommended for appointment to the other 22 positions. She also granted an order keeping the Position vacant until the proceedings in this case have been finalised.

18. Proceedings in this matter commenced in August 2017. The evidence of the first complainant was led on 21 August 2017. After the complainants closed their case, Counsel for the first respondent then indicated that he wished to move for absolution from the instance. Arguments on absolution from the instance were heard on 23 August 2017. This application was dismissed with costs on 13 October 2017.

19. On 6 December 2018, the respondents led the evidence of the Minister, who had been the Minister at the time the decision had been taken. After the Minister's testimony, the respondents closed their case, counsel for the parties made their submissions on 17 December 2020 where after judgment was reserved.

20. It is the case of the first complainant that the Minister paid no attention whatsoever to the content of the recommendation that he be appointed to the position for which in the balancing exercise that involved considerations of demographic representivity together with considerations of merit. The first complainant pleaded that the decision of the Minister, based on considerations of race and gender, flies in the face of the requirement that affirmative action must be applied in a situation sensitive manner that takes into account the qualities and attributes of particular applicants. This, so the first complainant asserts, violates sections 6,7 and 8 of the Equality Act.

21. In making out his case, the first complainant recognized that it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. He emphasized that this did not mean that positions could be left vacant on the basis that the application of race and gender considerations alone militated against the appointment of candidates. It was the case of the first complainant that service delivery was being adversely affected by the Minister's pre-occupation with race and gender representation to the exclusion of other relevant considerations, such as his competency. He

also stated that the Minister took into account the fact that he is a white-male.

22. The first complainant conceded in cross-examination that the reason the Minister did not make any appointment is because he had been presented with insufficient information as he was presented with one name only for each of the 23 posts. He conceded that even in instances where African males or females were recommended, no appointment was made.

23. The respondents argue that the Minister did not appoint any of the candidates into the 23 posts, and therefore there is no discrimination, let alone unfair discrimination. They submit that there is a clear distinction between a decision not to appoint a candidate and a decision not to fill the position itself.

24. The evidence and argument of the respondents is that the complainant bear the onus to prove a prima facie case. According to them on the facts before Court, they have not managed to prove on a balance of probabilities, a case of discrimination or that such discrimination was unfair. However, if the complainants make out a prima facie case of discrimination, the respondents have an onus to discharge, should the complainants prove a prima facie case for discrimination based on any of the prohibited grounds in terms of the Equality Act. As such, the

respondents argue that assuming that the complainants have shown that there was a prima facie case of discrimination against them, the respondents can discharge the onus that was shifted to them only by placing facts before the Court that objectively prove that the discrimination either did not take place as alleged, or, the discrimination was not unfair because it was not based on any of the prohibited grounds.

25. The respondents base their argument on the contention that the first complainant was not unfairly discriminated against because, he was white and male or because he is not a woman- he was not discriminated against on the basis of his race and gender. The case of the respondents is that the Minister decided not to fill the posts because there was an insufficient pool of candidates for appointment that were recommended by the Magistrates Commission.

26. In his letter of 15 June 2011, the Minister also stated that: "This is a departure from the established practice in terms of which I am provided with a list of candidates who the Commission has found to be fit and proper for appointment for a judicial office from which I may make an appointment. Respectively, the submission of only one candidate deprived me of the opportunity to consider the different attributes that need to be taken into consideration in the appointment of the incumbents

to fill these important senior posts, most of which are at the head office. I have also noticed that in respect of the recommendations for the Alberton, Durban and Worcester vacant posts the Commission purports that its recommendation is based on the constitutional imperative contemplated in section 174(2) of the Constitution when it does not appear to be the case".

27. The respondents furthermore, submit that no appointment was made in respect of any of the 23 posts for the same reason, namely that the Magistrates Commission had recommended only one name for each of the 23 posts and that the recommendations of the Magistrates Commission took away the discretion of the Minister. The respondents persist on the fact that the first complainant conceded that even in instances where African males or females were recommended, no appointment was made. Therefore, the fact that the Minister did not appoint anyone, black or white, male or female is disposite of the matter.

28. One must mention that it is not completely accurate that the Magistrates Commission did not give a full discussion report where other candidates' attributes were discussed. The Commission provided the Minister with curriculum vitae of the candidates in question. The Minister accepted that he had received an explanation from the Chairperson of the Magistrates

Commission, which included a specific explanation on the selection of the first complainant as the suitable candidate to bring stability to the office and to provide effective leadership when it was needed.

29. Apposite to these proceedings is what this Court said on 13 October 2017, when the application for absolution from the instance was dismissed. It was recorded that:

> *"in my view the mere fact that the Minister rejected the recommendation of the Magistrates Commission for the appointment of the twenty-three (23) candidates, including the first complainant, on the basis that "have also noticed that in respect of the recommendations for Alberton, Durban and Worcester (sic) vacant posts, the Commission purports that its recommendation is based on the constitutional imperative contemplated in section 174(2) of the Constitution when it does not appear to be the case". The mere mention of "underrepresentation of Black and Woman judicial officers" connotes a decision possibly based on race although not necessarily discriminatory. No clear interpretation maybe given to these terms- it leaves one groping in the dark. It is therefore necessary that the respondents must answer to these allegations or close their case as they so wish. We cannot read our*

own meaning into the words of the Minister. We are not certain what the Minister's interpretation of section 174(2) of the Constitution is".

30. We now know that the Minister came and testified. In my view, the Minister was clutching at straws. He could not convincingly explain why he steered away from all the responses the Commission gave to him through the exchange of a number of correspondence which offered him additional information. He remained fixated to his explanation that only one recommendation per post and the limited pool of available candidates was the reason why the first complainant and other candidates were not appointed.

31. However, it is glaringly clear that the main reason for the non-appointment of the first complainant was that 'I have found the pool of the candidates from which I am required to make appointments inadequate for purposes of making appointments that aim at the advancement of the constitutional imperative regarding the transformation of the judiciary. This is more significant especially at the level of Senior Magistrate where these vacancies occur, as it is at the management echelon of the judiciary where we still experience acute underrepresentation of Black and Woman judicial officer'.

32. In my view, the Minister's evidence did not add any value to the version of the respondents already tendered to the Court. His evidence didn't tilt the scales in favour of the respondents' case. The version of the complainants was not rebutted- it remains intact.

33. The Equality Act prohibits unfair discrimination. It is a statute that gives effect to the equality provisions of the Constitution in section 9. On the basis of the principle of subsidiarity; it is the provisions of the Equality Act that must be applied and no direct reliance may be placed on section 9 of the Constitution, although the interpretation of the prohibition on unfair discrimination may well track the jurisprudence of the Constitutional Court on unfair discrimination- **S V Mhlungu**[1].

34. It is trite law that a litigant cannot circumvent legislation enacted to give effect to a Constitutional right by attempting to rely directly on the constitutional right –**MEC for Education, Kwazulu Natal v Pillay**[2]. It is also trite that constitutional values in section 1(c) and 195 of the Constitution do not create actionable rights and cannot be relied upon to found a right to public participation or media access, in the appointment process for purposes of an application- **Britannia Beach Estate (Pty) Ltd and Others**

[1] 1995 (7) BCLR 793 (CC); 1995 3 SA 867 (CC) para 59.
[2] 2008 (1) SA 474 CC at para 40.

V Saldanha Bay Municipality[3], **Chinwa V Transnet Limited and Others**[4]. The values play an important role in interpreting provisions of the Constitution, including those in the Bill of Rights. The respondents must rely on section 9(2) of the Equality Act and not on section 174(2) of the Constitution-principle of subsidiary.

35. Compared to a challenge directly on section 9 of the Constitution, the Equality Act offers some significant procedural advantages for complaints. This assists in so far as conduct is challenged; the Equality Act shifts the burden of proof once the complainant has made out a prima facie case of discrimination- Equality Act section 13(1). In my view, the complainants have produced evidence of a character that, is not answered convincingly, and justifies a reasonable and fair person, such as this Court, to find in favour of the complainants. That conclusion applies to the circumstances of this case. Therefore, the respondents are saddled with the full onus.

36. Regarding the issue of differentiation, in as far as discrimination is concerned, the test is whether there is unequal treatment of people "based on attributes and characteristics attaching to them"- **Harsen V Lane**[5].

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[3] 2013 (11) BCLR 1217 (CC) at para 16-17.
[4] 2008 (4) SA 367 (CC) at para 74 to 76.
[5] 1998 (1) SA 300 (CC) at para 48.

37. It is correct that section 174(2) of the Constitution provides no basis for absolute and unconditional priority to be given to women and black people.

38. Ledwaba J held in **Singh V Minister of Justice and Constitutional Development and Others**[6], that it is important to consider the provisions of section 174(2) in the context of the Constitution as a whole. The specific notion of race and gender in section 174(2) of the Constitution should not be misunderstood to be excluding the other important factors mentioned in section 9(3) of the Constitution.

39. In *casu*, the Minister ignored the advices of the Magistrates Commission that it had taken into account the prescripts of section 174(2) when making the recommendation in respect of the first complainant. He also ignored the specific information provided namely that the appointment of the first complainant would have no adverse effect on the composition of that office. If the decision of the Minister had been informed by the quest for diversity that is mandated by section 174(2), the explanation would have been sufficient to justify the appointment of the first complainant. It seems to me that the Minister focused on the race and gender of the first complainant, to the exclusion of his other qualities that

[6] 2013 (3) SA 66 (Eqc) at para 27.

recommended him for appointment. In my view, this amounts to unfair discrimination.

40. There is one other important aspect that the complainants raise. It is this that, there are statutes that regulate the appointment and promotions of magistrates. These are the Magistrates Act 90 of 1993 (Magistrates Act) and the Magistrates' Court Act 32 of 1944. (The Magistrates' Court Act).

41. The Minister has a duty and the power to appoint any appropriately qualified, fit and proper person to the office of Magistrate in terms of section 10 of the Magistrates' Act read with section 9(1) of the Magistrates' Court Act.

42. However, the Minister only makes appointments of magistrates after consultation with the Magistrates Commission. As Chaskalson CJ recognised in **Van Rooyen and Others V State and others (General Counsel of the Bar of South Africa intervening)**[7], the Magistrates Commission consists of responsible members of the community; leading him to the conclusion that; There is no reason to believe that the members of the Commission will not discharge these and their other duties, with integrity, or that viewed objectively there is any reason to fear that they will not do so.

[7] 2002 (5) SA 246 (CC).

43. However, nothing in the statute suggests that the Minister is obliged to follow the recommendation of the Magistrates Commission. The Minister is not bound by the recommendation of the Magistrates Commission- **Van Rooyen** (Supra) at page 109.

44. It is however relevant to mention that material to the conclusion above is that, the recommendations of this specially constituted body play an important constitutional role. The learned Chief Justice held in **Van Rooyen**, supra at para 109, that, 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, echoing the sentiment expressed in the First Certification Judgment with regard to the Judicial Service Commission- **Ex-parte Chairperson of the Constitutional Assembly**: In re Certification of the Constitution of South Africa[8].

45. Once it is recognised that he Magistrates Commission fulfils the role of a constitutional check upon the decision-making power of the Executive, then it must follow that the Minister must have reasons competent in law for declining to follow the recommendations.

[8] 1996,(4) SA 744 (CC) at para 123-124.

46. Indeed, in the present matter, the Minister, when making appointments in the exercise of the power under section 10 of the Magistrates Act, must bring into account the requirements of section 174(1) and 174(2) of the Constitution. –that the person appointed is suitably qualified, who is fit and proper person to be appointed as a judicial officer, and that the need for the judiciary to reflect broadly the racial and gender composition of South Africa.

47. Judge Davis, in his article; Judicial Appointments in South Africa, opines that the preferable approach is first to find the candidates who are the very best in terms of criteria of merit: if the ranking of candidates then achieved does not ensure the requisite representivity; he suggests that section 174(2) would then apply to ensure that candidates who may not have been the first or second choice on the ranking- but that notwithstanding, comply with the text of merit and hence are appropriately qualified, are then appointed above the higher-ranked candidates in order that the requirement of the Constitution in terms of section 174(2) is met.

48. The position of the Minister in this case, seems to be that no matter how hard the Magistrates Commission tried to explain the suitability of the first complainant to be appointed as Senior Magistrate at Alberton, he

was not prepared to appoint a white male to that post. His position seems to be that a white male cannot be recommended for an appointment, given the constitutional injunctions. Nothing in section 174(2) of the Constitution prohibits the recommendation, or appointment, of a white male.

49. In this matter, even though the Minister sought in evidence to deny that he didn't appoint the first complainant based on a racial discrimination, his after- the fact denial is bellied by the contemporaneous election to couple the reasons for declining appointment in three cases to the race and gender of the recommended applicants.

50. It is necessary to reiterate what I said in the judgment for absolution from the instance- that it was not possible to clearly discern what the Minister meant: Now that the Minister has testified, it is easy for one to make a credibility finding, based on the oral testimony of the Minister and his demeanor. The ambiguity of the language used maybe determined, based on his body language and oral testimony. Having gone through this exercise, I am convinced that the reasons provided by the Minister are not adequate but are instead contradictory to the relevant provisions in the Equality Act- see **Minister of Environmental affairs and Tourism V Pham**

Fisheries (Pty) Ltd[9]. In my view, the reason given for the non-appointment of the first complainant was that he was a white male, albeit that the language used was in veiled terms. This in my view amounts to unfair discrimination. The Minister has failed to discharge the burden of showing that the discrimination in the present case was fair.

51. Included in the preamble of the Constitution of South Africa are the following:

"We, the people of South Africa,

- Recognise the injustices of our past;...
- Believe that South Africa belongs to all who live in it,
- United in our diversity,...
- We, therefore, through our freely elected representatives, adopt this Constitution as the Supreme law of the Republic so as to-
    - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights"..

[9] 2003 (6) SA 407 (SCA) at para 40.

52. We may not become a united society and heal the divisions of the past, if we apply the apartheid inequalities in reverse. Painful as the injustices of the past might have been, we must endure the pain and soldier on.

53. One has recently looked at the racial and gender composition of the lower Courts both district and regional. The demographics of the racial complexion has since made a lot of progress- there is a drastic change from what it used to be immediately after 1994 and during the later years. More black magistrates (African, Coloured and Indian) have been appointed to the posts of magistrates and regional magistrates. This complexation is testimony to the fact that, while transformation is still paramount to a diverse society, it is also evident that we must continue to appoint white people as judicial officers, mindful of the affirmative action policy. We cannot rule out the interest of non-designated groups out of the equation at the outset. Since the dawn of democracy more Black people have been appointed to the judicial office. This resulted in the Black community gaining more confidence in the judiciary. Consequentially the white community will continue to have confidence in the judiciary when they see some of their own appointed as judicial officers.

54. In the result, the complainants' application succeeds.

55.The following order is made:

55.1 It is declared that the decision of the Minister to not appoint the first complainant in the position of Senior Magistrate for the District of Alberton constitutes unfair discrimination and or unfair discrimination on the basis of race and or unfair discrimination in contravention of section 6, 7 and 8 of the Equality Act.

55.2 The Minister is directed to immediately appoint the first complainant to the position of Senior Magistrate for the district of Alberton (Palm Ridge, Katlehong), in line with the recommendation of the Magistrate Commission.

55.3 The Minister is ordered to pay costs of this application.

JUDGE T. J RAULINGA

JUDGE OF THE HIGH COURT

Appearances:

Complaint's Counsel	: Adv. M.J Engelbrecht SC
Complainant's Attorneys	: Serfontein Viljoen & Swart Attorneys
Respondent's Counsel	: Adv D.B Ntsebeza SC
	Adv: M Gwala SC
	Adv. L Makaphela
Defendant's Attorney	: State Attorney
Date of hearing	: 17 December 2020
Date of judgment	: 16 August 2021