REPORTABLE

CASE NO.: (P) I 1857/2004

SUMMARY

DAMASEB, JP *et* **ANGULA, AJ**

2005.07.25

WALTER MOSTERT & ANOTHER *versus* **MAGISTRATES COMMISSION & ANOTHER**

CONSTITUTIONAL LAW: MAGISTRATES ACT, 3 OF 2003

- Institutional independence of the magistracy. Composition of Magistrate's Commission (s 5) challenged as being unconstitutional and threat to the independence of magistracy.

- Test for institutional independence of Judiciary examined.

- S 13 giving power to Minister to appoint Magistrates discussed- such power not absolute and subject to constitutional control.

CASE NO.: (P) I 1857/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WALTER MOSTERT **PLAINTIFF**	**FIRST**
RONEL NICOLENE MOSTERT (Born DE WIT) **PLAINTIFF**	**SECOND**

and

THE MAGISTRATE'S COMMISSION **DEFENDANT**	**FIRST**
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **DEFENDANT**	**SECOND**

CORAM: DAMASEB, JP *et* ANGULA, AJ

Heard on: 2004.10.27

Delivered on: 2005.07.25

JUDGMENT

DAMASEB, JP: These proceedings were brought by way of action.

At the commencement of the proceedings, by agreement between the parties, we ordered, in terms of Rule 33(4) of the Rules of this Court, that claim 1 be separated from the rest of the claims. Arguments were thus confined to claim 1 and this judgment deals with that claim only. It is submitted by Counsel for the plaintiffs in the written heads of argument that '' *the first main claim should be*

dealt with first and separately as the outcome can render further proceedings superfluous''. At the commencement of the hearing Mr. Botes submitted that no evidence is required to decide the dispute raised in claim 1.

Mr. Botes appeared for the plaintiffs while Mr. Hinda appeared for the defendants.

The particulars in respect of claim 1 are set out as follows:

> "7. On 28th January 2003 the Supreme Court of the Republic of Namibia gave down a judgment in the matter Walter Mostert v The Minister of Justice wherein certain requirements were laid down for the creation of an independent body to inter alia regulate and control the appointment, transfer and termination of the services of Magistrates.
>
> 8. Pursuant to the judgment referred to hereinbefore the First Defendant was created and/or established in terms of Section 5 of the Magistrates Act, Act 3 of 2003 (hereinafter the Act.)
>
> 9. The provisions of Section 5 of the Act however is null and void because of inter alia the following:
>
> 9.1 it does not comply with the requirements laid down by the Supreme Court in the Walter Mostert judgment;
>
> 9.2 it does not create an independent body which has to uphold an independent magistracy;
>
> 9.3 it does not contain any provisions as to the procedures and criteria to be applied to the transfer of Magistrates in order to establish and uphold an independent magistracy;
>
> 9.4 it is in conflict and/or breach of Article 78(2) of the Namibian Constitution which requires that courts shall be independent, subject only to the Constitution and Law.

10. In the premises the First Defendant had no locus standi in iudicio to transfer First Plaintiff."

"WHEREFORE FIRST AND SECOND PLAINTIFFS CLAIM:

1. AD CLAIM NO. 1

1.1 That the Honourable Court declare

1.1.1 that the Magistrates Act, Act 3 of 2003 and more particularly Section 5 thereof read with the relevant Regulations does not comply with the requirements laid down to establish an independent magistracy;

1.1.2 that the appointment of the First Defendant in terms of Section 5 of the Magistrates Act, Act 3 of 2003 is null and void in that the said section does not provide for the appointment of an independent body to establish and promote an independent magistracy;

1.1.3 that the decision taken by First Defendant on or about 30th June 2003 at Windhoek to transfer the First Plaintiff with immediate effect to Oshakati is null and void alternatively that the First Defendant had no locus standi in iudicio to make the decision and to transfer the First Plaintiff."

Some preliminary remarks on the particulars of claim are necessary at this early stage. Sub-paragraphs 9.1 and 9.2 of the particulars of claim really amount to the same thing: it seems to me that the reasoning underlying the two sub-paragraphs is that the failure to comply with what are referred to as the "requirements" laid down in the Walter Mostert judgment of the Supreme Court resulted in the lack of an independent magistracy. Sub-paragraph 9.4 is

inextricably woven with sub-paragraphs 9.1 and 9.2 and does not, with respect, constitute a stand-alone ground. As for sub-paragraph 9.3, I take the view that the failure to create Regulations cannot be a ground for declaring s 5 unconstitutional. At best for the plaintiffs it can only be a ground for review of a transfer, in terms of Rule 53 of the Rules of the High Court. In my respectful view, therefore, the nub of the plaintiffs' case is that the Act does not create an independent magistracy because the Magistrates Commission ('the Commission') created by s 5, read with s 2, is not an independent Commission but one under the control of the Minister of Justice the ("Minister").

First plaintiff is a Magistrate who until 30th June 2003 was stationed at Gobabis. It is common cause that on 30th June 2003 the first defendant took a decision to transfer the first plaintiff to Oshakati with immediate effect. This transfer is not accepted by the first plaintiff. Second plaintiff, being the wife of the first plaintiff, makes common cause with him.

First and second defendants opposed the relief sought and filed a plea. They deny that the Supreme Court judgment laid down requirements for the creation of an independent body to regulate Magistrates. The defendants also plead that first defendant was established by virtue of s 2 and not s 5[1]. The defendants admit that s 5 of the Act does not contain procedures and criteria to transfer magistrates but allege that these are '*elsewhere in the Act, in the regulations promulgated under the provisions of the Act, and under the common law'*.

[1] Nothing really turns on this because it is abundantly clear that what the plaintiffs are challenging is the composition of the Commission created by s 2 of the Magistrate's Act, 3 of 2003.

On 28th January 2003 the Supreme Court, per Strydom CJ (O'Linn *et* Chomba AJJA concurring) handed down judgment in the matter of *Walter Mostert v The Minister of Justice* under Case No.: SA 3/2002. (I shall refer to this judgment as the *'Supreme Court judgment'* but when I refer to the case itself brought by Mr. Mostert I shall refer to it as the *'first Mostert case*'.) In the first Mostert case, Mr Mostert (the first plaintiff in the proceedings now before us), challenged his transfer by the Permanent Secretary of Justice from Gobabis to Oshakati, seeking the following relief:

> "...
>
> 2.1 That the decision of the Permanent Secretary for Justice to transfer the applicant to Oshakati be reviewed and set aside.
>
> 2.2 To declare that the judiciary, including magistrates, are independent in terms of Article 78 of the Namibian Constitution and that the Permanent Secretary has no jurisdiction to appoint, transfer and/or terminate the services of a magistrate, in particular that Section 23(2) of the Public Service Act does not apply to Magistrates.
>
> ...
>
> 3. That the Respondent be interdicted to transfer the Applicant from Gobabis and/or to evict him from the government house situated at Lieutenant Lampe Street, Gobabis, pending the finalisation of the Application referred to in paragraph 2."

In the High Court (per Levy AJ) Mostert was only partly successful and therefore appealed to the Supreme Court. On appeal, the Supreme Court, as far as is relevant, ordered as follows:

> "1. It is declared that:

(a) Section 23(2)(a) of Act 13 of 1995 is not applicable to magistrates and that consequently the order of the Permanent Secretary to transfer the appellant, was ultra vires. This order and the transfer which took place in effect, will however remain in force and effective until 30th June 2003, provided that appropriate legislation is passed and action taken in accordance with such legislation to remedy the defects in the existing transfer, on or before the 30th June 2003.

(b) Section 9 (as amended) and section 10 of the Magistrate's Court Act, Act 32 of 1944, is declared unconstitutional. These provisions will however remain in force until 30th June 2003, on condition that legislation correcting the defects is properly passed and gazetted on or before 30th June 2003.

(c) The transfer of magistrates does not per se constitute a threat to their independence.

(d) Until such time on or before 30th June 2003, when the appropriate contemplated legislation is passed to authorize the appointment of magistrates, the Minister of Justice or such person duly authorized by such Minister may constitute to appoint magistrates in terms of s. 9 of Act 32 of 1944, as amended by Act 1 of 1999."

Following the above order of the Supreme Court, the Government introduced a legislative measure aimed at complying with the order of the Supreme Court. It is that legislative measure which has given rise to the present proceedings. The legislative measure in question is the Magistrates' Act, 3 of 2003 (hereafter 'the Act '). The long title of the Act reads thus:

"To provide for the establishment, objects, functions and constitution of a Magistrates Commission; to provide for the establishment of a magistracy outside the Public Service; to further regulate the appointment, qualifications,

remuneration and other conditions of service of, and retirement and vacation of office by, magistrates; to provide that certain conditions of service of magistrates may be prescribed by regulation; and to provide for matters in connection therewith."

The objects of the Commission are set out in s 3 as follows:

"a) to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, magistrates take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and correctly;

b) to ensure that no influencing or victimization of magistrates takes place;

c) to promote the continuous judicial education of magistrates and to make recommendations to the Minister in regard thereto;

d) to ensure that properly qualified and competent persons are appointed as magistrates; and

e) to advise the Minister regarding any matter which, in the opinion of the Commission, is of the interest for the independence of the magistracy and the efficiency of the administration of justice in the lower courts.

The functions of the Commission are set out as follows in s 4:

(1) The Commission must –

a) prepare estimates of the expenditure of the Commission and the magistracy for inclusion in the annual or additional budget of the Ministry of Justice;

b) compile, after consultation with the Judges' and Magistrates' Association of Namibia, a code of conduct to be compiled with by magistrates;

c) receive and investigate, in the prescribed manner but subject to subsection (4), complaints from members of the public on alleged improper conduct of magistrates or alleged maladministration of justice in the lower courts;

d) receive and investigate, in the prescribed manner, complaints and grievances of magistrates;

e) carry out or cause to be carried out disciplinary investigations into alleged misconduct of magistrates;

f) make recommendations to the Minister with regard to –

i) the suitability of candidates for appointment as magistrates;

ii) the minimum standard of qualification required for the purposes of section 14;

iii) the conditions of service of magistrates, including their remuneration and retirement benefits;

iv) the dismissal and retirement of magistrates; and

v) any matter referred to in section 3(e); and

g) perform any other function entrusted to the Commission by or under this Act or any other law.

2) The Commission -

a) may, in the prescribed manner, promote magistrates according to their performance to higher grades;

b) may, subject to this Act, transfer magistrates when it is necessary in the interests of the administration of justice so to do.

3) A committee may, subject to the directions and control of the Commission, perform any of the duties referred to in subsection (1)(a), (b) or (e).

4) Nothing in subsection (1)(c) contained is to be construed as empowering the Commission to interfere with the judicial independence or the judicial functioning of a magistrate. (my underlining)

In terms of s 5:

"(1) The Commission consists of –

a) a judge of the High Court of Namibia, designated by the Judge President, who is the chairperson;

b) the Chief: Lower Courts;

c) one magistrate appointed by the Minister from a list of three magistrates nominated by the Judges' and Magistrates' Association of Namibia;

d) one staff member by the Ministry of Justice designated by the Minister;

e) one suitable person designated by the Public Service Commission;

f) one suitable person designated by the Attorney-General; and

g) one teacher of law appointed by the Minister from a list of two teachers of law nominated by the Vice-Chancellor of the University of Namibia;

2) For the purposes of subsection (1), the Minister must –

a) direct in writing –

i) the Judge-President to designate a judge of the High Court of Namibia; and

ii) the Public Service Commission and the Attorney-General to each designate one suitable person,

to serve as members of the Commission from a date specified in the direction; and

b) invite in writing -

i) the Judges' and Magistrates' Association of Namibia to nominate in writing, within the period specified in the invitation, three magistrates;

ii) the Vice-Chancellor of the University of Namibia to nominate in writing, within the period specified in the invitation, two teachers of law,

for appointment, subject to paragraphs (c) and (g), respectively, of that subsection, as members of the Commission. (my underlinings)

Considering that the plaintiffs' *cause of action* is founded on the decision of the Supreme Court, the first task facing this Court is to distill the *ratio decidendi* from that judgment.

The dispute in the first Mostert case revolved around the power given to the Permanent Secretary of Justice by s 23(2) of the Public Service Act, 1995 to transfer magistrates. The Permanent Secretary, using that power, transferred Magistrate Mostert from Gobabis to Oshakati. Mostert then took the decision on review relying on common law grounds and, for our present purposes, on the ground that the transfer was *ultra vires* because s 23 of the Public Service Act 1995 did not apply to magistrates who, as members of the Judiciary, were outside the purview of that section. In the Supreme Court judgment, Strydom CJ said (at p35):

''Section 23(2) empowers the Permanent Secretary to transfer 'staff members' and it was in terms of this section that the Permanent Secretary of Justice

exercised her powers to transfer the appellant, this notwithstanding the clear provisions of the Constitution that magistrates are part of the Judiciary of Namibia whose independence was guaranteed by the Constitution. This was clearly set out in Articles 12 (1)(a), 78(1) and (2) and 83 of the Constitution."

And then (at pp 36-39) the learned Chief Justice continued as follows:

"Although the Namibian Constitution , as far as Namibia is concerned, envisaged an Act of the Namibian Parliament whereby the jurisdiction of the court and its procedures were to be established, and which would also regulate the appointment of magistrates and other judicial officers, this has not happened so far. In Namibia, act 32 of 1944, with minor amendments, still regulates the procedures and jurisdiction of the court as well as the appointment of officers. One of the amendments to Act 32 of 1944 was to replace sec 9 of the Act with a new section. This was effected by Act No. 1 of 1999 which became law on the 9th March 1999. The amendment empowers the Minster of Justice, or the person delegated by him, to appoint magistrates but subject to the provisions of the Public service Act … Section 10 of Act 32 of 1944, dealing with the qualifications for appointment of judicial officers, is also subject to the law governing the public service.

…

The amendments to sec. 9 of Act 32 of 1944 did not give effect to Article 83(1) of the Constitution which provides that lower courts shall be established by an Act of Parliament and should be independent as further provided for in Article 78(2), read with Article 12(1)(a) of the Constitution. In fact, the amendment, to the contrary, further diminished the independence of, at least the Regional Divisions by doing away with the Appointments Advisory Board established therefor.

…

Notwithstanding the provisions of the Constitution the situation in Namibia, so it seems to me, is that in terms of the provisions of Act 32 of 1944, magistrates are still regarded as part of the civil service and the amendment to sec 9 of the Act did not alter the position. When the Permanent Secretary said that she transferred the appellant in terms of the provisions of act s 23 (2) of the Public Service Act she acted in terms of existing legislation. It further seems to me that the mischief was not caused by sec 23(2) but in fact by the provisions Act 32 of 1944, as amended by Act 1 of 199, and that the appellant should also have attacked those provisions rather than to limit himself to the provisions of

the Public Service Act. It seems to me futile to leave intact the provisions of Act 32 of 1944 which are in conflict with the Constitution. To do so would be to give legal impetus to provisions which are not constitutional. In my opinion it is necessary to finally cut the string whereby magistrates are regarded as civil servants, and that will only be possible once new legislation completely remove them from the provisions of the Public service Act.

...

For as long as magistrates remain subject to the provisions of the Public Service Act, which virtually designates them as employees of the Government and which requires of them prompt execution of Government policy and directives, their independence will be under threat and, what is just as important, is that magistrates would not be perceived by the public as independent and as a separate arm of government. I therefore agree with the order of the Court a quo that sec. 23(2) did not apply to magistrates.

...

The effect of all this is that the Permanent Secretary could, in my opinion, not act and transfer magistrates in terms of the provisions of sec. 23(2) of the Public Service Act". (underlinings are mine)

Strydom CJ continued as follows in respect of s 23(2) (at pp 32- 34):

''In regard to the independence of the Courts, and bearing in mind that we have shared for a long time the same legislative enactment concerning the magistrate's courts (Act 32 of 1944) with South Africa, the general observations by Chaskalson CJ, in the Van Rooyen case, supra, as to what is necessary for protection of the independence of the various Courts at different levels is, in my opinion, also applicable to Namibia. It was pointed out by the learned Judge that the South African Constitution dealt differently with the appointment of Judges, on the one hand, and other judicial officers, on the other hand. This applies also to Namibia. In terms of Article 82 of our Constitution Judges of the High and Supreme Courts are appointed by the President on the recommendation of the Judicial Service Commission whereas Lower Courts, which shall be presided by magistrates ''...shall be appointed in accordance with procedures prescribed by Act of parliament''. Article 83 (2).''

Strydom CJ then went on to cite the following passages from the *Van Rooyen* judgment[2] at 269:

[2] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening* 2002 (5) SA 246 para. 22-28)": For a spirited critique of the reasoning in Van Rooyen, see: *The Meaning of Institutional Independence in Van Rooyen v The State*, Franco *et* Powell, SALJ, vol. 121 (Part 3) pp 562-579.

> "The constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required. Section 165(2) of the Constitution pointedly states that 't(he courts are independent'. Implicit in this is recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent. This does not mean that particular provisions of legislation governing the structure and functioning of the courts are immune from constitutional scrutiny. Nor does it mean the lower courts have, or are entitled to have their independence protected in the same way as the higher courts."

In paragraphs 24 and 25 it was pointed out –

> "But magistrates courts are courts of first instance and their judgments are subject to appeal and review. Thus higher courts have the ability not only to protect the lower courts against interference with their independence, but also to supervise the manner in which they discharge their functions. These are objective controls that are relevant to the institutional independence of the lower courts.
>
> [25] Another relevant factor is that district and regional magistrates' courts do not have jurisdiction to deal with administrative reviews or constitutional matters where the legislation or conduct of the government is disputed. These are the most sensitive areas of tension between the legislature, the executive and the judiciary. Measures considered appropriate and necessary to protect the institutional independence of courts dealing with
> such matters, are not necessarily essential to protect the independence of courts that do not perform such functions."

And in paragraph 28 the learned Judge expressed himself as follows:

> "…The jurisdiction of the magistrates' courts is less extensive than that of the higher courts. Unlike higher courts they have no inherent power, their jurisdiction is determined by legislation and they have less extensive constitutional jurisdiction. The Constitution also distinguishes between the way judges are to be appointed and the way magistrates are to be appointed. Judges are appointed on the advice of the Judicial Service Commission; their salaries, allowances and benefits may not be reduced; and the circumstances in which they may be removed from office are prescribed. In the case of magistrates, there are no comparable provisions in the Constitution itself, nor is there any requirement that an independent commission be appointed to mediate actions taken in regard to such matters. That said, magistrates are entitled to the

> protection necessary for judicial independence, even if not in the same form as higher courts." (underlinings are mine)

Having thus quoted from the Van Rooyen judgment, Strydom CJ concluded as follows (at p34):

> "From the extracts out of the *van Rooyen*- case it seems clear that all courts are entitled, in terms of the particular Constitution, to the protection of their institutional independence but, depending on the nature of their jurisdiction and the hierarchical differences between the higher courts and the lower courts, this protection need not be in the same form. Coming to the situation in Namibia it seems to me that we have the same hierarchical differences between our higher and lower courts which is dealt with in much the same by our Constitution, as is the case in South Africa. It follows therefore that I am of the opinion that also in Namibia the protection of the institutional independence of the lower courts need not be in the same form as that necessary for the High and Supreme
> Courts and I say so for the reasons set out in the van Rooyen case-, supra. (my underlining for emphasis)

In the Canadian case *The Queen in Right of Canada v Beauregard (1986) 30 DLR (4th) 481 at 491 (SCC),* Dickson CJC, speaking of judicial independence, said:

> 'Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of the of individual judges to hear and decide the cases that come before them: no outsider- be it government, pressure group, individual or even another Judge should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence'.

In *Valente v The Queen (1986) 24 DLR (4th) 161 (SCC)* the Canadian Supreme Court held that:

> "(i)t would not be feasible , however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s 11 (d) of the Charter , which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of independence for purposes of s 11 (d) must bear some relationship to that variety".

The above dicta were cited with approval by Ackerman J in *De Lange v Smuts NO and Others 1998 (3) SA 785*at 813-814 *(CC*). In *Van Rooyen, supra,* (at 270 J para 27) Chaskalson CJ said;

> "I am not persuaded that any reason exists to qualify the approval given to the passages from Valente by Ackerman J in De Lange v Smuts. Judicial independence can be achieved in a variety of ways; the most rigorous and elaborate conditions of judicial independence' need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system".

Decisions of the Supreme Court of Namibia are binding on this Court and all those below it by virtue of Article 81 of the Namibian Constitution. Sitting as the High Court we are bound by and must therefore apply the *ratio* in the Supreme Court judgment; and it is this: all courts are guaranteed institutional independence, but Lower Courts (magistrates courts included) do not have to enjoy the same kind of rigorous protection given to the higher courts. What is also clear from the passages in the van Rooyen judgment, cited with approval by Strydom CJ, is that in South Africa the institutional independence of the magistracy does not require an independent body to regulate its affairs.

In *Van Rooyen* the learned Chief Justice Chaskalson laid down that the test for measuring the institutional independence of the Courts , including the magistracy, is an objective one, a test, as he put it, which is appropriate for both ‘ *independence as well as impartiality’* ; and it is this:

> ’The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel’’. Relying on the American case of *US v Jordan 49 F 3d 152 (5th Cir 1995) at 156,* the learned Chief Justice continued: ‘’The perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information. As a United States court has said, ‘ we ask how things appear to the well- informed , thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person’’.
>
> Bearing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country’s complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts. Professor Tribe’s comment on the separation of powers, already cited with approval by this Court, seems especially relevant in this regard:
> ‘What counts is not any abstract theory of separation of powers, but the actual separation of powers ‘’ operationally defined by the Constitution’’. Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers , but that might not in fact have found their way into our Constitution’s structure’. This comment seems to be particularly appropriate when considering what the objective observer might conclude about the independence of the magistracy’’.

Taking into account the complex social reality of South Africa , the need to look at the Constitution itself to see how separation of power is ‘actually’ constructed and not leap to abstract principles one might wish to have embodied in the Constitution , is what Chaskalson CJ refers to as the ‘’ *properly*

contextualized objective test'' (Van Rooyen, para 35 at 273 F) for assessing compliance with institutional judicial independence: and that, it seems to me, is what Strydom CJ had in mind when he said that he relies on the reasons given in *Van Rooyen* for coming to the conclusion that although institutional judicial independence is guaranteed to all courts , the scheme adopted for effecting it may differ depending on which court we are looking at and that only in respect of the High and Supreme Courts is a more rigorous standard required.

Guided by this approach, I now turn to a consideration of the issues raised in these proceedings. I need to mention at the outset that the requirement of institutional independence of the Judiciary is not subject to any limitation and, therefore, there can be no 'justification', in the constitutional sense, for interference or abridgement of the independence of the Judiciary. (See: *Van Rooyen* para 35 at 273 H.) Therefore, if I find that the impugned provision is in conflict with the independence of the magistracy , it must give way as nothing can save it.

The thrust of Mr. Botes' argument can be summed up as follows: the way the Commission is composed, in particular, the fact that the Minister (a political officer bearer) appoints **three** members of the Commission places the Commission under the control of the Minister and therefore the Commission is not an independent body. The argument then continues thus in paragraph 20 of the written heads of argument:

> *"If one reads Section 4(f) of the Act together with Section 5 (the constitution of the Commission), it is clear that the control that the Permanent Secretary previously had*

over Magistrates, in terms of the Public Service Act, is only substituted with the direct control of the Minister of Justice himself. It is evident from the sections that; -

20.1 *The Commission can only make recommendations to the Minister with regard to the suitability of candidates for appointment as Magistrates, the qualifications that Magistrates must comply with, the condition of service of Magistrates, including their remuneration and retirement benefits. The final say in the dismissal and retirement of magistrates also rest with the Minister, the argument continues.*

20.2 *The Minister not only has the final say in the above matters, but he also controls the Commission that must make the recommendations to him. Not only does he have a direct say in the appointment of 3 members of the Commission of seven members, but 3 of the other members are also Public Servants. Only the Chairman is appointed by the Judge-President. As a result of the constitution of the Magistrates' Commission in this matter an independent body to establish and uphold an independent Magistracy was not created and established. Section 5 of the Act therefore is null and void as it does not pass constitutional muster."*

Mr. Botes then goes on to argue that the Act, in its present form, and more specifically due to the content of ss 4(1)(f) and 5 thereof, make a mockery of the principle of separation of powers and therefore the independence of the Judiciary. Mr. Botes goes on to say that the Act is not in its entirety inconsistent with the core values of judicial independence but that the problem lies with s 4(1)(f) and s 5 of the Act – which sections it is said - undermine the independence of magistrates. He argues that the inconsistency is compounded by the fact that no Regulations have been promulgated to provide for guidelines and procedures in terms of which the transfer of magistrates is regulated. The only applicable Regulation presently, he says, is Regulation 2 which requires any vacancy in the magistracy to be advertised.

In oral argument Mr. Botes continued the attack in much the same way as in the written heads of argument. He persisted that of the 7 members of the

Commission **six** (6) are public servants and that the Commission is not a body independent of the Executive. He submitted that the lack of independence is clear when one compares the Commission with the Judicial Service Commission created by Article 85 of the Constitution[3]. He argued that the influence of the Minister on the Commission is too severe and that the there is a complete failure of a minimum and effective system of checks and balances in the appointment process of Commission members.

Mr. Hinda, on the other hand, submitted that the Supreme Court judgment could not have laid down requirements for an independent Commission as the first Mostert case was concerned with the review of the decision of the Permanent Secretary to transfer Mostert in terms of s 23 of the Public Service Act. The case also dealt with the independence of the Judiciary, Mr. Hinda conceded. Mr. Hinda seems to be suggesting that the independence of the Judiciary is not necessarily the same thing as creating an independent Magistrates Commission as it is not a Tribunal such as is contemplated in article 78 (2). Mr. Hinda also submitted that s 4(1)(f) is not challenged by the plaintiffs in their particulars of claim and cannot be declared unconstitutional by this Court. He strenuously argued that there is no basis for the conclusion that the Magistrate' Commission is under the control of the Minister.

I will consider each of Mr. Botes' arguments and the counter arguments, but I first need to repeat, and break up the constituent parts of s 5 for it is this provision that is the central focus of the dispute between the parties to these proceedings. In terms of s 5 of the Act the Commission consists of 7 members:

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[3] *Article 85(1) provides: There shall be a Judicial Service Commission consisting of the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organization or organizations representing the interests of the legal profession in Namibia.*

the Judge designated by the Judge President is the chairperson of the Commission. The Chief: Lower Courts is an *ex officio* member, and there is an additional person appointed by the Public Service Commission. Provision is made for two direct appointments by the Minister, being a staff member of the Ministry designated by the Minister of Justice, and a suitable person designated by the Attorney General (who is also the Minister of Justice[4]). The Minister is then given further power to select one person from a list of three persons nominated by the Judges' and Magistrates' Association, and another person from a list of two persons nominated by the Vice Chancellor of the University of Namibia.

Based on the plaintiffs' submissions, it seems they do not have any problem with the presence on the Commission of a Judge designated by the Judge President. With the remainder of the Commission members they have a problem of one or other kind, as I have shown above. It is to that I now turn.

a) *does the minister appoint 3 members of the Commission ?*

The first point taken by Mr. Botes that the Minister appoints 3 members of the Commission is not correct. The Minister appoints only 2 persons independently , one of whom does not have to be a civil servant but has to be a 'suitable person'. In my view, the fact that an appointment of a person on the Commission is made by a political office bearer does not necessarily negate the independence of the Commission.

[4] This is so because the Minister of Justice, and the Attorney-General (an office created by Article 86 of the Constitution, is now the same person in terms of the latest re-organisation by the Second President of the Republic: Proclamation No. 4 of 2005 published in Government Gazette No. 3436 of 24 May 2005.

b) *does s 4(1)(f) create direct control by the minister, or give her final say in appointment of magistrates?*

Section 4(1)(f) of the Act is not sought to be set aside. I agree with Mr Hinda that its unconstitutionality is not the case that the defendants, in claim 1 of the pleadings, have been called upon to meet. The argument thereon seems to be intended to strengthen the case for the unconstitutionality of s 5 in that the power given to the Minister under s 4(1) (f) becomes unbridled if the Commission is also under the Minister's control. I must point out that the power of the Minister to appoint is not contained in s 4(1) (f) but in s 13 of the Act. Section 4(1) (f) provides for the power of the Commission to recommend appointments to the Minister. Section 13 provides as follows:

> "13. Appointment of magistrates on permanent establishment
>
> (1) The Minister may, on the recommendation of the Commission but subject to subsection (2), appoint as many magistrates as there are posts on the permanent establishment of the magistracy.
> (2) No person may be appointed under subsection (1) as a magistrate unless such person-
> (a) is either-
> (i) a Namibian citizen; or
> (ii) a permanent resident of Namibia; or
> (iii) an employee in the Public Service;
> (b) is qualified to be so appointed in terms of section 14; and
> (c) is certified by the Commission to be in all respects suitable for appointment as a magistrate.
> (3) The appointment of every magistrate must be effected on such contract of employment, not being inconsistent with this Act, as the Minister may approve on the recommendation of the Commission."

Mr. Botes suggests that the Minister has absolute power whether or not to act on the recommendation of the Commission in respect of appointments. I

think that is not correct. Apart from the fact that it cannot be used to undermine the independence of the magistracy, the exercise of the Minister's s 13 power, in my view, is subject to Article 18 of the Namibian Constitution and susceptible of constitutional scrutiny and, therefore, of curial challenge.

In the words of Chaskalson CJ in *Van Rooyen* (para 37 at 274 F):

> 'Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute."

It also needs to be mentioned that the *locus* of the power to appoint is usually a matter of political choice which does not necessarily detract from the independence of those being appointed. Judges are appointed by the President on the recommendation of the Judicial Service Commission. The President is the Head of State and Government, wielding enormous power and influence not comparable to that of a Minister. I see nothing in the Constitution which suggests that magistrates should be appointed by an independent body. That would in any event be requiring standards more rigorous than those in place for the appointment of Judges and would go against the spirit of the Supreme Court judgment. I do not therefore see on what basis the fact that the Minister is the appointing authority for Magistrates can, without more, be objectionable if Judges are appointed by the President who wields ultimate executive power in the Republic. (See generally the First Certification Judgment: *Ex parte Chairperson of the Constitutional Assembly*: *In re Certification of the Constitution of the*

Republic of South Africa, 1996 (4) SA 744 (CC) (1996) (10) BCL 1253, para 124; and also *Van Rooyen*, para 59 at 281 A-B).

c) *are 3 Commission members public servants ?*

True, Chief: Lower Courts is a public servant under the current arrangements. The law then allows the Minister to appoint another person to the Commission from the Ministry of Justice. The other person to be appointed by the Minister is a *'suitable person'*. It is wrong, as I said earlier, to conclude that that person is a public servant. We do not need to decide whether, considering the rest of the membership of the Commission, a public servant is a *'suitable person'* in terms of the section. The issue is not raised in the pleadings. It is incorrect to argue therefore that 3 members of the Commission are, by law, public servants. The law has no such requirement. Only 2 members are by law public servants. Whether **in fact** 3 members of the Commission are public servants and what the effect of that is, is not part of the plaintiffs' case and an issue we are not now called upon to decide. (We have been asked to decide a legal question and not a factual one.) The other member of the Commission is a person nominated by the Public Service Commission. Again, the law does not say that person has to be a public servant.

d) ministers' choice from nominees by judges and magistrates association and the vice chancellor: objectionable?

I understand it to be the plaintiffs' case that the fact that the Minister makes a choice from a list submitted to the Minister by the Judges and Magistrates Association , and the Vice Chancellor, creates the perception that the Minister

has control over those persons when they sit as Commissioners. The underlying assumption in the submission on behalf of the plaintiffs is that as soon as the Minister has made the choice of one person from a list submitted the Minister , the person chosen becomes a stooge of the minister ready to do the Minister's bidding on the Commission. Now, in my view, nothing could be further from the truth. As Chaskalson CJ said in Van Rooyen when a similar point was made (para 47 at 227):

> *"'The language in which these conclusions of the High Court are expressed is unfortunate. The findings imply that Parliament changed the composition of the Magistrates' Commission to give the Legislature and Executive control over the Magistrates Commission so as to enable the Minister to manipulate the Commission and the magistracy. Implicit in these findings is also the unjustifiable innuendo that the persons appointed to the Commission pursuant to this scheme would be seen to be willing to do the bidding of the Minister. This is a recurring theme of the judgment which is ill-considered and not sustainable on a proper analysis of all the relevant circumstances.''*

He continued (para 47 at 284):

> ''The other members of the Commission are also responsible members of the community, including members of opposition political parties. <u>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."</u> (my underlining for emphasis)

The Minister has no say which persons are nominated by those tasked with the duty of making nominations. If the minister interferes with the nominations of either the Judges and Magistrates' Commission, or the Vice Chancellor, that conduct will be subject to judicial review. That the Judges' and Magistrates' Association and the Vice Chancellor will choose individuals who are competent and of integrity must be assumed in the absence of any allegation, let alone

proof , that they will not. The nominees are to be chosen by those tasked to do so from a pool, one must assume, which they feel comfortable to draw from. The list is not provided to them by the Minister. It would be impermissible for the Minister , to do so. They can come up with a short-list, using procedures open to them to assist them carry out their statutory duty, of persons **any one** of whom, in their judgment, can be chosen to sit on the Commission.

The undeniable *'complex social reality'* of Namibian society is that there was no equal opportunity of access to education. Race determined one's prospects of advancement on the social ladder, as did gender. Happily, enormous strides have been made since independence to bring about transformation in the Judiciary and people from different races are now well–represented in the magistracy. The same cannot be said about gender representation. A lot still needs to be done in that respect. The stark reality remains that because not too many Namibians had access to university education prior to independence, there are bound to be fewer Namibians, as law lecturers, in institutions such as the Law Faculty of the University from which one of the candidates to the Commission must be drawn. If they are there they may be less qualified than their foreign counterparts. When the Vice – Chancellor makes his nominations he may do so giving consideration to providing a list from which the Minister may choose one person to advance any of the criteria aimed at redressing past- discriminatory practices. The same goes for the Judges' and Magistrates Commission. Those required to make nominations do so independently of each other. They may not necessarily know what the balance is on the Commission. Who better than the Minister to have regard to such considerations as ensuring proper balance on the Commission by looking at the designation and appointment already made , and using the nominations received , if the

possibility exists, to choose persons from those nominations to achieve some form of representativeness of the Commission? The Minister may wish to achieve racial balance; or want to achieve gender or ethnic balance by choosing from nominees chosen by an independent body, and an independent person. That would not be out of kilter with Namibia's complex social reality and would be unrelated to any desire on the Minister's part to manipulate the Commission. A well informed, thoughtful observer (not a cynical or suspicious one) knowledgeable about the Namibian society will appreciate the argument why the Legislature chose to empower the Minister to choose a person from a short-list submitted by the Judges and Magistrates Association, and the Vice Chancellor in order to seek to redress the need for representativity on the Commission. Such an interpretation of why the power is given is reasonable in view of Namibia's history.

The objection that the individuals chosen by the Minister from the short-lists are, or create the impression of being, under the control of the Minister is ill-considered and must therefore fail.

e) the public service commission's appointee: objectionable?

The Public Service Commission is a body envisaged by Article 112 of Constitution of Namibia , which states:

> *"(1) There shall be established a Public Service Commission ...*
>
> **(2)** *The public Service Commission shall be <u>independent</u> and act <u>impartially</u> ..."* (my underlining for emphasis)

The Public Service Commission is one of the few bodies and functionaries in the Constitution specifically given the mantle of 'independence' and 'impartiality'. How any person nominated by the Public Service Commission can be described as being under the control of the Minister is not clear to me. There is no allegation in the pleadings that there is in existence legislation affecting the Public Service Commission which , contrary to Article 112 of the Constitution, compromises the independence of the Public Service Commission created by the Constitution , and therefore makes the person appointed by the Public Service Commission to the Commission a mere instrument of the Minister for that reason. It must be assumed, therefore, that the Public Service Commission is a body which acts independently of the government of the day and that the fact that it appoints a member of the Commission does not detract from the independence of the Commission or indeed that of the magistracy.

INDEPENDENCE OF MAGISTRATES vs INDEPENDENT COMMISSION

Mr. Botes' recurrent theme is that an independent Magistrate's Commission is a prerequisite for an independent magistracy. As I said before, the plaintiff's deny that; by which I understand them to mean that we do not need to have an independent Magistrate's Commission in order to have an independent magistracy. As I have shown in the extracts from the *Van Rooyen* judgment, in the South African context, the *Final* Constitution of South Africa did not decree an independent Magistrate's Commission and since that was not a requirement in terms of the *Constitutional Principles* which had to be satisfied for the *Final* Constitution to be valid, the absence in that Constitution of the requirement of an independent Magistrates Commission was found not to be inconsistent with

those *Principles*. To echo the words of Chaskalson CJ in *Van Rooyen* (para 66 at 283 A-C)[5]:

> " The Court held [in the First Certification Judgment] that as far magistrates are concerned , the guarantee of independence accorded to all courts by s 165 of the Constitution and the provisions of s 174(7) dealing specifically with magistrates , was sufficient guarantee of independence.''

Likewise, the Namibian Constitution does not have any requirement for an independent Magistrates Commission. All it says is that magistrates shall be appointed in accordance with procedures prescribed by an Act of Parliament. The Supreme Court judgment does not, and could not, require the creation of a Magistrate's Commission or a similar body; even less an independent one for that matter. The creation of such a Commission is thus a matter of political choice as long as it does not negate the independence of the magistracy. Applying, as I should, the *properly contextualized objective test of institutional independence of the Judiciary,* I come to the conclusion that the independence of the Namibian magistracy is sufficiently guaranteed by the following:

i) Article 78 (2) and (3)[6] of the Constitution;

ii) Article 83[7] of the Constitution, since interpreted in the Supreme Court judgment to mean that the magistracy must be placed outside the public service;

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[5] See: The First Certification Judgment, *supra*, at 454C.

[6] (2) The Courts shall be independent and subject only to this Constitution and the law.
(3) No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.

[7] (1) Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.
(2) Lower Courts shall be presided over by Magistrate's or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament.

iii) Constitutional scrutiny by the Superior Courts of any legislation and administrative action bearing on such matters as the appointment, remuneration, transfer and discipline of magistrates.

What counts is not any abstract theory of separation of powers, but the actual separation of powers 'operationally defined' by the Namibian Constitution.

I am not persuaded, having regard to the text of the Namibian Constitution, that an independent Commission is required. Even if I am wrong in that, and the Supreme Court judgment in fact a) required the establishment of a body known as a Magistrates Commission or a similar body, and b) an independent Magistrate's Commission or body, the plaintiffs have failed to establish that the statutory scheme of the Act fails to create an independent Magistrate's Commission. The Act places the magistracy outside the Public Service as required by the Supreme Court judgment and also reasserts the independence of the magistracy in very unequivocal language in ss 3 (a),(b) and (d), 4 (2) (b), 4(1)(f), and4 (4*), supra* . The Commission is composed of 7 members, chaired by a Judge. An independent Public Service Commission appoints one member. Although the act of appointment is made by a political office bearer, two of the other members of the Commission are persons nominated by a body and a person who are independent of the Executive. Thus 4 out of 7 members of the Commission are, by law, independent persons. A well-informed, thoughtful and `objective observer, rather than the hypersensitive, cynical, and suspicious one, will not come to the conclusion that the Act, in view of the composition of the Commission, negates an independent magistracy in Namibia.

In the premises:

Claim 1 (one) of the plaintiffs particulars of claim is dismissed with costs, including the costs of one instructing and one instructed Counsel.

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DAMASEB, JP

I agree

_____

ANGULA, AJ

ON BEHALF OF THE FIRST AND SECOND PLAINTIFFS: **Mr. LC Botes**

Instructed By: **Grobler & Co.**

ON BEHALF OF THE FIRST AND SECOND DEFEDANTS: **Mr. G. S. Hinda**

Instructed By: **Government Attorney**