

IN THE NORTH GAUTENG HIGH COURT,
PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
13/05/11	
DATE	SIGNATURE

Case No: A757/2008

Date heard: 11/05/2011

Date of judgment: 27/05/2011

In the matter between:

MINISTER FOR JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

APPELLANT

and

AM KGOELE

RESPONDENT

JUDGMENT

DU PLESSIS J:

[1] In February 2005 the Magistrates Commission¹ ("the Commission") distributed a notice that the post of Chief Magistrate, Molopo was vacant. The Commission called for applications for this post.

¹ Established under section 2 of the Magistrates Act, 90 of 1993

[2] The respondent in this appeal² was one of a number of applicants.

Under section 10 of the **Magistrates Act, 90 of 1993** the Minister for Justice and Constitutional Development (the appellant in this appeal) has the power and the duty “after consultation with the Commission” to appoint magistrates. The Minister did not appoint the respondent, but one Ms Ikaneng. The Minister took the decision on 6 October 2005.

[3] In August 2006 the present respondent, as applicant, launched an application in this court. She sought orders aimed at reviewing and setting aside the Minister’s decision. The respondent also sought an order substituting the Minister’s decision with a decision to appoint her as the Chief Magistrate, Molopo.

[4] The matter came before Pretorius J. On 7 December 2007 the learned judge handed down a written judgment and granted the following presently relevant orders:

“2 The decision of the first respondent to appoint the second respondent³ as Chief Magistrate, Molopo, is reviewed and set aside.

3 The decision of the first respondent to appoint the second respondent as the Chief Magistrate, Molopo is substituted with the

² The applicant in the court *a quo*.

³ Ms Ikaneng was the second respondent in the application.

decision that the applicant is appointed as Chief Magistrate, Molopo."

The Minister was also ordered to pay the present respondent's costs.

[5] In August 2008 the appellant (the Minister) was granted leave to appeal against the two orders quoted above and against the costs order. That appeal is now before this court. I shall refer to the appellant as "the Minister" and to the present respondent, applicant in the court *a quo*, as "the respondent".

[6] Events have overtaken the orders of the court *a quo*: In an affidavit explaining why she will not appear to oppose this appeal, the respondent explains that she has been appointed as a judge of the High Court. Accordingly, she no longer seeks appointment as the Chief Magistrate, Molopo. The respondent has so informed the State Attorney. She has also informed the State Attorney that she is prepared to abandon the judgment in her favour provided that the appellant seeks no costs order against her. Mr Tshidzumba who appeared for the Minister informed us that no costs order is sought against the respondent and that the Minister does not seek an order setting aside the costs order made by the court *a quo*.

[7] Section 21A(1) of the **Supreme Court Act, 59 of 1959** provides:

"When at the hearing of any civil appeal to ... any Provincial ... Division ... the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on that ground alone".

[8] In view thereof that the Minister is not seeking a costs order, there are two issues before us, namely whether respectively paragraphs 2 and 3 of the order of the court *a quo* should be set aside. No order that this court could make in respect of either of these issues will have any practical effect: the appointment of the respondent to the post of Chief Magistrate, Molopo is no longer a practical option.

[9] Section 21A(1) that I have quoted does not preclude a court of appeal from dealing with appeals where the orders will have no practical effect. The court has a discretion.^{4 5} Mr Tshidzumba submitted that in this case we should exercise our discretion and deal with the issues. His argument was that the judgment of the court *a quo* sets a precedent to which the Minister is bound unless this court overturns it.

⁴ *Land en Landbouontwikkelingsbank van Suid Afrika v Conradie* 2005 (4) SA 506 (SCA) at paras. 6 and 7. And see *Herbstein & Van Winsen: The Civil Practice of the High Courts* (Fifth Edition), p.1239

[10] In order to deal with counsel's argument it is necessary briefly to deal with the reasons of the learned judge *a quo*. I start with the reasons for reviewing and setting aside the of the Minister's decision.

[11] The respondent sought to review the Minister's decision under the provisions of **Promotion of Administrative Justice Act, 3 of 2000** (PAJA). It was argued neither before the court *a quo* nor before this court that the Minister's decision did not constitute "administrative action" reviewable under PAJA.⁶

[12] Section 5(3) of PAJA provides: "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." In this case the Minister gave no reasons at all. She did not file an affidavit giving reasons. The court *a quo* reasoned that in the circumstances the decision was not taken for good reason and on that basis reviewed and set aside the Minister's decision. Mr Tshidzumba submitted that good reason for the Minister's decision appears from the papers as a whole and that the learned judge *a quo* should have had regard thereto in determining whether the presumption in section 5(3) of PAJA has been rebutted.

⁶ See *Wessels v Minister for Justice and Constitutional Development and Others* 2010 (1) SA 128 (GNP).

[13] I assume in the Minister's favour that in order to decide whether the presumption has been rebutted, the court must have regard to all the evidence before it. The judgment of the court *a quo* does not hold to the contrary. The court found that the factual⁷ presumption created by section 5(3) was not rebutted. Whether that is or is not so, is a question of fact. To determine whether the court *a quo* was right or wrong on the facts is an academic exercise upon which this court should not embark.

[14] Section 8(1)(c)(ii)(aa) of PAJA provides that in "exceptional cases" a reviewing court may make an order to substitute its decision for that of the administrator. The subsection itself makes it plain that an order substituting the court's decision for that of the administrator should not be lightly made. It is settled law that the courts are reluctant to substitute their own decisions for that of the administrator.⁸ The learned judge *a quo*, in granting paragraph 3 of the order quoted above did not hold otherwise. Whether this case was indeed exceptional is a question of fact and the answer to that question is moot.

[15] In my view the issues in this case "are of such a nature that the judgment or order sought will have no practical effect or result". There

⁷ De Ville: *Judicial Review of Administrative Action in South Africa*, p. 295.

⁸ See the discussion in De Ville *op. cit.*, p. 386 to 388. See also *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) at para. 14

is in my view no basis for this court to exercise its discretion not to dismiss the appeal on that ground.

In the result the following order is made:

The appeal is dismissed.



B.R. Du Plessis

Judge of the High Court

I agree.



W.R.C. Prinsloo

Judge of the High Court

I agree.



N.P. Mngqibisa-Thusi

Judge of the High Court

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No appearance for the respondent.