

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

REPORTABLE

Case No.: **2338/09**

Date heard: 01 April 2010
Date delivered: 6 May 2010

In the matter between:

JOHANNES JACOBUS CLAASSEN

Applicant

and

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

First Respondent

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Second Respondent

**INDEPENDENT COMMISSION FOR THE
REMUNERATION OF PUBLIC OFFICE
-BEARERS**

Third Respondent

MAGISTRATES' COMMISSION

Fourth Respondent

JUDGMENT

KROON, J:

Introduction:

[1] On 1 August 1997, the applicant was appointed president of the southern divorce court. The appointment was in terms of the then s 10

of the Administration Amendment Act 9 of 1929 as amended by s 2 of the Special Courts for Blacks Abolition Act 34 of 1986.

[2] The applicant contends that he is entitled to remuneration on the same scale as that applicable to a regional court president. He seeks a declarator to that effect and further relief in the form of payment of a sum of money equal to the difference between the salary he received (which equated to that of a regional magistrate) and the salary of a regional court president over the three year period immediately preceding the date on which the present proceedings were launched.¹

[3] The first, second and fourth respondents are the President of the Republic of South Africa, the Minister of Justice and Constitutional Development and the Magistrates Commission established in terms of s 2 of the Magistrates Act 90 of 1993. They oppose the grant of the relief sought by the applicant. The third respondent cited, the Independent Commission for the Remuneration of Public Office-Bearers established in terms of s 2 of Act 92 of 1997 (the Independent Commission), did not enter the lists.

Relevant legislative history

[4] The divorce courts were initially established in terms of s 10 of the Administration Amendment Act, their function being to adjudicate matrimonial causes between Blacks domiciled within their respective areas of jurisdiction (which did not embrace the whole of the country).

¹ The applicant accepts that any claim in respect of a longer period is prescribed.

[5] During the ensuing years, a large number of amendments to the section were passed by Parliament and, *inter alia*, the divorce courts were made accessible to all persons, the operation of the Act was extended to the entire national territory of the republic and the subject matter of the courts' jurisdiction was broadened.

[6] The provisions which are relevant for present purposes are contained in s 10(3). The history of the amendments effected to the subsection since 1929, and the effect thereof, was comprehensively debated, both in the papers as well as in argument. It is only necessary, however, to refer to one earlier amendment before setting out the relevant wording of the subsection as it presently reads after the last amendments effected by the Judicial Matters Second Amendment Act 55 of 2003.

[7] Part B of the Schedule to the Special Courts for Blacks Abolition Act, after amending subsection (3) by providing for the Minister of Justice to determine how many divisions a particular divorce court should have, substituted the following new subsection (3)(b):

'A division of the court shall consist of a president who shall be appointed by the Minister of Justice, at which appointment the provisions of Chapter II of the Magistrates' Courts Act, 1944 (Act 32 of 1944), are *mutatis mutandis* applicable in so far as those provisions relate to a magistrate of a regional division, and sittings of two or more divisions may be held simultaneously.'

(Chapter II of the Magistrates' Courts Act provides *inter alia* for the appointment of magistrates to the courts of regional divisions).

[8] The present wording of subsection (3) is as follows:

- '(3)(a) Every such court shall be a court of law and shall consist of so many divisions as the Minister of Justice may from time to time determine.
- (b) A division of the court –
- (i) shall consist of one or more presiding officers, one of whom shall be the president of the division, who shall be fit and proper persons appointed by the Minister of Justice in a permanent capacity after consultation with the Magistrates Commission; and
- (ii) such persons shall for the purposes of the Magistrates Act, 1993 (Act No. 90 of 1993) be deemed to be magistrates of a regional division as contemplated in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).
- (c)

[9] It is the interpretation to be accorded to subsection 10(3)(b) that is the essential issue between the parties.

[10] For reasons that will appear later it is also necessary to quote the terms of subsection (3A) of s 10 (inserted by Act 55 of 2003):

'Section 9 of the Magistrates' Courts Act, 1944, (Act No. 32 of 1944), relating to the appointment of magistrates in an acting or temporary capacity is applicable with the changes required by the context in respect of the appointment of acting or temporary presiding officers of Courts established under this section.'

[11] Section 9(4) of the Magistrates' Courts Act provides in part as follows:

'(a) A magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorised thereto in writing by the Minister, may –

- (i) whenever a magistrate, additional magistrate or assistant magistrate is for any reason unavailable to carry out the functions of his or her office; and
- (ii) in consultation with the Minister or an officer in the Department of Justice and Constitutional Development designated by the Minister, temporarily appoint any competent person in the place of the magistrate concerned.'

Subparagraphs (b) and (c) limit the period for which such temporary appointment or a reappointment remains valid.

[12] It requires to be pointed out further that s 9(1)(a) empowers the Minister to appoint a magistrate, and additional or assistant magistrates for every district as well as a magistrate or magistrates for every regional division. Paragraph (aA) provides that the Minister may, in a particular case or generally and subject to such directions as he or she may deem fit, delegate the power conferred on him or her in terms of paragraph (a) *inter alia* to a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate.

[13] The Magistrates Act 90 of 1993 ushered in a new dispensation in respect of the determination of the remuneration payable to magistrates. Section 12 made provision for the Minister of Justice, by notice in the Gazette, and after taking certain administrative steps, to determine the different salary scales applicable to different categories of magistrates.

[14] After two further amendments introduced by s 4 of Act 18 of 1996 and s 35 of Act 47 of 1997 a new s 12 was substituted by s 3 of the Judicial Officers (Amendment of Conditions of Service) Act 28 of 2003. It reads partly as follows:

- (1) (a) Magistrates are entitled to such salaries, allowances or benefits –
 - (i) as determined by the President from time to time by notice in the Gazette, after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office-Bearers established under section 2 of the Independent Commission for the Remuneration of Public Office-Bearers Act, 1997 (Act No. 92 of 1997); and
 - (ii) approved by Parliament in terms of subsection (3).
- (b) Different categories of salaries and salary scales may be determined by the President in respect of different categories of magistrates.
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- (3) (a) A notice issued under subsection (1) (a) must be submitted to Parliament for approval before publication thereof.
- (b) Parliament must by resolution –
 - (iii) approve the notice whether in whole or in part; or
 - (iv) disapprove the notice
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(6) The remuneration of magistrates shall not be reduced except by Act of Parliament.'

[15] The Independent Commission was established to make recommendations concerning the salaries, allowances and benefits of various public office-bearers. The definition of 'office-bearer' in Act 92 of 1997 includes a magistrate appointed in terms of s 9 of the Magistrates' Courts Act read with s 10 of the Magistrates Act. The definition does not include a reference to a presiding officer in a division of a divorce court.

Remuneration determinations made in 2008 and 2009.

[16] The remuneration determinations, referred to below, made by the President in terms of s 12 of the Magistrates Act were duly approved by Parliament as required by s 12(1)(a) and (3).

[17] By Proclamation 48 of 2008 (Gazette No 31546 of 27 October 2008) the President determined, with effect from 1 April 2008, the total annual remuneration payable to various magisterial office-bearers referred to in the schedule to the proclamation, including the following categories: Regional Court President, Regional Magistrate and Chief Magistrate. While the remuneration due to a chief magistrate and a regional magistrate was the same, that of a regional court president was higher. Also included in the schedule was a category designated 'Presiding Officer: Divorce Court', notwithstanding that the definition of 'office-bearer' in the Independent Commission Act did not embrace

that designation, and the total remuneration determined in respect of that category was the same as that of a regional magistrate or chief magistrate.

[18] The determinations in the preceding paragraph were made despite the fact that as appears from Government Notice 1107 of 15 October 2008 (Gazette No. 31513) the Independent Commission had recommended that the remuneration of a presiding officer in the divorce court be equal to that of a regional magistrate, but that the president of a divorce court receive remuneration equal to that of a regional court president.

[19] In 2009 the recommendations of the Independent Commission were of a similar ilk (Government Notice 1078 of 12 November 2009). Again, however, the recommendations were not echoed in the determinations made by the President and the determinations published in Proclamation 75 of 19 November 2009 (Gazette No. 32730) were that, with effect from 1 April 2009, the total yearly remuneration of a chief magistrate and that of a regional magistrate would be the same but that of a regional court president would be higher. The schedule in this proclamation contained no reference to any presiding officer in the divorce court.

Assessment

[20] Consistent with his contention that, on a proper construction of s 10(3)(b) of the Administration Amendment Act, his status and rank, as a president of a division of a divorce court, is equal to that of a regional court president, and that he should be remunerated accordingly, the applicant submitted that the determinations made by the President referred to above, offended against the provisions of the section and were in fact unconstitutional.

[21] One aspect may shortly be disposed of. Some attention was paid during argument to the circumstance that as a matter of fact, there are three divorce courts in the country established in terms of s 10 of the Administration Amendment Act and that each only has one division with one presiding officer. Suffice it to say that I do not consider that this circumstance adds anything to the debate.

[22] Echoing the stance adopted by the applicant in his papers Mr *Beyleveld* (who, with Mr *Moorhouse*, appeared for the applicant) accepted that any recommendations made by the Independent Commission had no binding force. That attitude was correct in law.

[23] The crisp submission of counsel was, however, that while the position of a presiding officer in a division of the divorce court was in terms of s 10(3)(b)(ii), deemed to be equated in rank and status and for remuneration purposes to a magistrate of a regional division, a closer analysis of paragraph (b)(i) and (ii) requires the further interpretation

that the president of a division of a divorce court is deemed to be equal in rank and status to a regional court president.

[24] In pressing for the interpretation of a more expansive deeming provision (ie including a provision that, for the purposes of the Magistrates Act, presidents of a division of a divorce court be deemed to be regional court presidents as contemplated in the Magistrates' Courts Act) counsel submitted that discrimination against presidents of divorce court divisions would otherwise result, which the legislature could not have intended. Put differently an intention to treat presidents of a division of a divorce court as equal to regional court presidents must be imputed to the legislature.

[25] Counsel submitted that the equality contended for was underscored by the fact that just as regional court presidents had certain powers in terms of s 9(4)(a) of the Magistrates' Courts Act to make temporary appointments of magistrates (paragraph 11 above) so also the president of a division of a divorce court had certain 'corresponding' powers in terms of s 10(3A) of the Administration Amendment Act to make temporary appointments of presiding officers in a division of a divorce court (paragraph 10 above).

[26] At the same time the legislature sought to differentiate between a president of a division of a divorce court and another presiding officer in such a division just as there is a differentiation between a regional court president and a regional court magistrate. A differentiation

between a regional court president and a president of a division of a divorce court was accordingly unfair and unreasonable, and because the legislature is presumed to intend fairness and reasonableness rather than inequity, the interpretation contended for on behalf of the applicant should be upheld.

[27] I do not find the argument persuasive. It may be pointed out that a chief magistrate similarly has certain corresponding powers to make temporary appointments of magistrates, and moreover, as recorded in paragraph 12 above a chief magistrate, like a regional court president, can be given certain delegated powers to make permanent appointments (a power which cannot be delegated to a president of a division of the divorce court). Yet the remuneration of a chief magistrate, (like that of a president of a division of a divorce court), is equal to that of a regional magistrate and lower than that of a regional court president.

[28] The intention of the legislature must be sought in the language utilised by it in the provisions in question, and according same its ordinary grammatical meaning, seen in the context of whole statute and associated enactments.

[29] A textual analysis of s 10(3)(b) reveals the following: if there is only one presiding officer in a division of a divorce court that officer serves as the president of that division; if there are more than one presiding officer in a division one of them is to be president of the

division; the reference to 'fit and proper persons' in paragraph (b)(i) is a reference to the presiding officers appointed including the presiding officer designated as president of the division; the reference to 'such persons' in paragraph (b)(ii) is a reference to the 'fit and proper persons' mentioned in paragraph (b)(i) and it is the 'such persons' who, for the purposes of the Magistrates Act (a limited purpose) are deemed to be magistrates of a regional division as contemplated in the Magistrates' Courts Act, ie all presiding officers in a division of a divorce court, including the one designated president of the division. The position remains the same as when the amended subsection set out in paragraph 7 above was still on the statute book, there being no indication of any change of intention thereafter.

[30] In my judgment, the conclusion recorded above reflects the clear meaning of the language in the subsection and the intention of the legislature. Had the legislature intended that a president of a division of a divorce court be deemed to be a regional court president as opposed to a puisne regional magistrate, it could very easily have said so. It opted, however, to make its contrary intention clear.

[31] No doubt there were policy considerations at play why the legislature chose to take the course that it did, such as office complements, work loads etc.

[32] Mr *Goosen*, who, with Ms *Rawjee*, appeared for the respondents concluded his argument by a reference to the provisions of the

proposed Jurisdiction of Regional Courts Amendment Act 31 of 2008. The purpose of the Act is to confer on courts for regional divisions jurisdiction in respect of certain civil disputes, including matters regulated by s 10 of the Administration Amendment Act. Provision is made that each divorce court established under the Administration Act becomes a court of a regional division and that 'any person holding office as a presiding officer of a divorce court shall hold office as a magistrate of the regional division in question'. The Act has not yet commenced, but its terms fortify the conclusion I have reached in this matter.

Order

[33] The application is dismissed with costs such costs to include the costs of two counsel.

F KROON
Judge of the High Court

Appearances:

For the applicants:

Adv Beyleveld & Adv Moorhouse
Instructed by Brown Braude & Vlok attorneys
Port Elizabeth
(Ref: C L Jessop)

For the respondent:

Adv Goosen & Adv Rawjee
Instructed by the State attorney
Port Elizabeth
(Ref.Nr. 1670/2009/K)

