



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 71827/2013

(1)	Reportable: Yes / No
(2)	Of interest to other Judges: Yes/No
(3)	Date Delivered:
(4)	Signature: 

30/10/2015

In the matter between:

DU PLESSIS S E

Applicant

and

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

First Respondent

THE MAGISTRATE'S COMMISSION

Second Respondent

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] The applicant in this matter seeks an order against the First Respondent ("the Minister") that he appoints her to the position of

Senior Magistrate, Head of Office, Mpumalanga, as advertised during November 2009.

[2] The Notice of Motion is divided into Part 1 and 2. Part 1 was brought as an urgent application¹ in terms of Rule 6(12). The remainder of the prayers read as follows:

- "2. That the 2nd Respondent be ordered to withdraw the advertisement of the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga published on 16 November 2013;*
- 3. That the 2nd Respondent be interdicted and restrained from conducting interviews and compiling a shortlist of applicants pertaining to the aforementioned advertisement, pending the adjudication of PART 2 of this application;*
- 4. That the 1st Respondent be interdicted and restrained from appointing any person, except the Applicant, in the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga, pending the adjudication of Part 2 of this application;*
- 5. That the adjudication of PART 2 of this application be postponed sine die.*
- 6. That the costs of PART 1 of this application be ordered to be costs in the application.*
- 7. Further and /or alternative relief.*

[3] In Part 2, the applicant seeks the following relief:

- "1. That the Applicant be appointed in the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga, as advertised during November 2009.*

¹ Prayer 1

2. *In the alternative to Prayer 1 above, that the decision of the 1st Respondent, not to appoint the Applicant in the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga, be reviewed and set aside and that the 1st Respondent be ordered to appoint the Applicant in the position;*
3. *In the alternative to prayers 1 and 2 above, that the decision of the 1st Respondent , not to appoint the Applicant in the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga, be reviewed and set aside and that the matter be referred back to the 1st Respondent for reconsideration with the directives this Honourable Court may deem fit;*
4. *That the 1st Respondent be ordered to pay the costs of this application;*
5. *Further and/or alternative relief."*

THE ORDER OF JANSEN J

[4] When the matter came before me, counsel for the applicant, Mr. Greeff, advised me that Part 1 had been disposed of and that what was before me was prayers 1 and 2 of Part 2. He also advised me that in essence, prayer 3 of Part 2 was, save for the costs, granted. The latter submission was disputed by counsel for the Minister, Mr Gwala.

[5] I could not get clear answers though in this regard. However, it appears from the documents in the file that the matter came before Jansen J on 27 October 2014 and that the following order was made by agreement between the applicant and the Minister:

- "1. *This matter is postponed sine die;*

2. *It is recorded that the 1st Respondent has proposed to reconsider the appointment of the 23 candidates, of which the Applicant is one and whose appointments were recommended by the 2nd Respondent on 28 February 2011. This process will entail consultation between the 1st and 2nd Respondent;*
3. *If the Applicant is appointed in the position of Senior , Head of Office, Middelburg, Mpumalanga, this matter will be deemed to be finalized, save for the issue of costs;*
4. *Should the Applicant not be appointed in the post described above, the post may not be filled by the 1st Respondent, pending the finalization of adjudication of this application;*
5. *The total costs of this application, including costs of today, are reserved.*

[6] Mr Gwala submitted that the negotiations that occurred after the order was granted by Jansen J were irrelevant.

[7] The Promotion of Administrative Justice Act 2000, Act No. 3 of 2000 ("PAJA ") makes provision for substitution of a decision of a functionary under exceptional circumstances. As a result, whether or not Prayer 3 of Part 2 of the Notice of Motion was disposed of or not is to me of no consequence.

FACTUAL BACKGROUND

[8] The following background facts are common cause between the parties.

[9] The applicant was appointed Magistrate on 01 June 1991. Thereafter, she was appointed, in an acting capacity, as Senior

Magistrate, Head of Office, Middelburg, Mpumalanga, on 01 August 2007 and has been in this position to date, on a three monthly renewal of the appointment.

[10] The post of Senior Magistrate, Head of Office, Middelburg, Mpumalanga was one of the vacant positions that were advertised by the Magistrate's Commission ("the Commission") during November 2009.

[11] The applicant was interviewed by the Commission on 10 November 2010 and subsequently recommended as the only suitable candidate to be appointed in the position. (Underlined by the Commission in its memorandum to the Minister)

[12] The Minister did not appoint her, nor did he, save for two areas, appoint any other recommended candidate in the other posts.

[13] On 07 May 2013, the Secretary of the Commission directed an email to amongst others, the applicant, and advised them that the Minister had decided not to fill the posts of Senior Magistrate as advertised on 01 November 2013 and that these posts would be re-advertised.

[14] On 11 June 2013, the applicant, through her attorneys, requested reasons in terms of section 5(1) of PAJA from the Minister as to why she had not been appointed in accordance with the recommendations of the Commission.

[15] This request was followed by another one on 25 June 2013, this time in terms of section 18(1) of the Promotion of Access to Information

Act 2 of 2000 (PAIA). In the PAIA request, the applicant sought access to the written record of the recommendations that the Commission made to the Minister after interviewing candidates for the position that she applied for. She also requested copies of subsequent correspondence between the Minister and the Commission.

[16] The Deputy Information Officer in the Department acknowledged receipt of her request in terms of PAIA on 10 July 2013 and advised her that it had been referred to the Commission for response.

[17] On 25 July 2013, the Commission wrote to her and attached an extract of the recommendations that it had made to the Minister with regard to the vacancy of Senior Magistrate, Middelburg (Head of Office). This extract is attached to the founding papers as **Annexure B²**.

[18] The Commission declined to provide the applicant with a copy of correspondence from the Minister in terms of which certain concerns about the recommendations of the candidates were raised.

The Commission referred the applicant's request for this information to the Information Officer in the Department of Justice.

[19] The Deputy Information Officer wrote to the applicant on 13 August 2013 and advised her that she could not give her access to the information she requested because it contains "*advice, recommendations*

² This extract appears to have other annexures that the applicant has omitted to attach, such as Annexure CC, which is a list of all candidates that applied for this position and Annexure DDD, a race and gender exposition of Middelburg Court. It is therefore not clear whether the applicant and Mr J H Smith, who was also interviewed, were the only applicants that applied for this position.

and follow-up issues raised with the Chairperson of the Commission” and that the Minister had not yet addressed the issues that had been raised with him.

[20] The applicant lodged an appeal against the decision of the Deputy Information Officer on 18 September 2013. The Minister upheld her appeal on 22 October 2013. He forwarded the correspondence that she requested to her together with this letter.

The applicant alleges in her founding papers that no records were attached to the letter from the Minister. There is no merit in this allegation because, as the first respondent has correctly pointed out in the answering affidavit, she could have taken this matter up with the Minister. There is no indication in the papers, nor does she allege that she made any follow-up in this regard.

[21] On 31 October 2013, the State Attorney wrote to the applicant’s attorneys to respond to their request dated 14 October 2013 *“regarding provision of written reasons for the decision taken by our client not to fill 23 posts of Senior Magistrates country wide*

I deem it necessary to reproduce the relevant parts of the letter.

- “2. We have noted the contents of your letter dated 14 October 2013 regarding provision of written reasons for the decision taken by our clients not to fill the 23 posts of Senior Magistrates country wide.
3. Your client was/were amongst the 23 recommended candidates.
4. On the 08th March 2011, our client received recommendations from the Magistrate’s Commission (the Commission) for the filling of 23

vacant posts of Senior Magistrates in various offices throughout the country.

5. *After considering the recommendations of the commission our client decided not to appoint for the following reason/s:*

- 5.1 *Our client would not fulfill the need to reflect broadly the racial and gender competition (I think he meant "composition") as envisaged in Section 174(2) of Act 108 of 1996 (the constitution) which enjoins the Minister in making judicial appointment to consider such a need.*

- 5.2 *That in respect of the appointment for the vacant office of Head of Office for the Springs Magistrate's Court it was untenable to appoint any other person because of the decision of the North Gauteng High Court which had annulled the appointment of the previous incumbent of the post to higher promotional post thereby resulting in the incumbent concerned to revert to her previous position.*

- 5.3 *That in respect of the vacant office in Port Elizabeth it was not apparent whether the candidate recommended by the Commission had in fact been shortlisted and interviewed for the said vacant post.*

6. *The Minister requested further information from the commission.*

7. *The Commission, having advised that it was untenable to augment the candidate list, the Minister deemed it appropriate and lawful not to fill any of the 23 posts of Senior Magistrates."*

[22] Ultimately, the posts, including the position of Senior Magistrate, Head of Office), Middelburg, Mpumalanga were re-advertised. This triggered the launching of these proceedings.

(GROUNDS OF REVIEW) OR RELIEF SOUGHT

[23] In Prayers 1 and 2³, the applicant seeks an order to compel the Minister to appoint her in the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga. In the alternative, she seeks an order to review the decision of the Minister not to appoint her in the said position.

[23] The basis for the relief sought in prayer 1 is the fact that she was recommended by the Commission for appointment as she was found to be the only suitable candidate.

[24] In respect of the alternative prayer, the basis for the relief sought appears to be what the applicant has stated in paragraph 22 of the founding affidavit where she said the following: .

"I humbly submit that the 1st Respondent's refusal to appoint me in the relevant position constitutes unfair administrative action, performed without good cause and therefore stands to be reviewed and set aside by this Honourable Court"

[25] The question is whether, on the facts, the relief sought is competent.

The case for the applicant during oral submissions was substantially altered and or supplemented. Mr. Greeff submitted that the Minister did not appoint her because she is a white woman. This should be contrasted with an allegation in the replying affidavit that the Minister failed to give reasons for not appointing her, and as a result, it should be presumed that the Minister acted without a valid reason.

³ Notice of Motion, prayers 1 and 2

The applicant argues that the refusal to give reasons justifies not only a review of the decision, but is also good reason why I should substitute the decision of the Minister and appoint the applicant.

[26] Despite a record of proceedings having been filed, the applicant did not deem it necessary to supplement her founding papers and or amend the nature of the relief she seeks.

[27] Applicant persisted with her contention that this review is in terms of PAJA and not Rule 53.

[28] It is trite that a party that proceeds with a review application without a record of proceedings only has himself to blame should it be found that he should have challenged some information arising from such record.

Consequently, the relief sought by the applicant is as she has prayed in the Notice of Motion and justified in the founding affidavit.

THE ANSWERING AFFIDAVIT, REPLYING AFFIDAVIT AND RECORD OF PROCEEDINGS

[29] Most of the allegations in the founding affidavit dealt with the relief sought in Part 1 of the Notice of Motion.

In as far as the relief sought in Part 2 is concerned, the only relevant allegations may be summarised as follows;

[29.1] The Commission recommended to the Minister that the applicant be appointed to the position of Senior Magistrate, Head

of the Office, Middelburg, because she was the only suitable candidate for the position.

[29.2] The Minister has, without good reasons, refused to appoint her.

[29.3] The Minister failed to provide reasons for his decision, as such, it must be presumed that he acted without good cause.

[30] Although the Notice to oppose was filed on behalf of the “Respondents”, it is only the Minister that has filed an answering affidavit dated 03 December 2013. This affidavit dealt with both Parts 1 (urgent application) and 2 of the application.

[31] On 17 January 2014 a record of proceedings was filed on behalf of the “Respondents”). This was served on the applicant’s attorneys on 26 February 2014. The record of proceedings includes, amongst others, correspondence exchanged between the Minister and the Commission with regard to the concerns raised by the Minister on the recommendations of the latter.

[32] The applicant filed a notice dated 12 March 2014 and declared that she did not intend to amend Part 2 of her Notice of Motion and or to file any supplementary affidavit.

[33] Having perused the letter that the Minister wrote to the Commission in response to its memorandum of recommendations, I am of the view that the letter written by the State Attorney that purports to

give reasons why the posts were not filled does not do justice to reasons why the Minister decided not to fill the advertised vacancies.

It may be a question of semantics, but the State Attorney in my view left out the real reasons in as far as it may have been relevant for the post that the applicant applied for. The letter was addressed to the Chairperson of the Commission, Mr. Judge MF Legodi and dated 15 June 2011⁴. It is necessary to reproduce the relevant parts of the letter.

“ RECOMMENDATION FOR THE FILLING OF POST OF SENIOR MAGISTRATES AT VARIOUS LOWER COURTS

The memorandum received from the Magistrate’s Commission regarding the above refers.

After considering the recommendations of the Commission in respect of the 23 vacant posts of Senior Magistrates at the various Lower Courts country-wide and the accompanying profiles of the candidates recommended by the Commission, I have found the information placed at my disposal inadequate to enable me to make the appointments as recommended by the Commission. Based on the reasons stated below, I have deemed it necessary to refer the matter back to the Commission for its reconsideration.

- (i) *the Commission has, in respect of all the vacant posts, submitted only one name of its preferred candidate in respect of each of the vacant posts for my consideration. This is a departure from 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 to a judicial office from which I may make an appointment. Respectfully, the submission of only one candidate*

⁴ Page 163 - 164 of the Record of Proceedings

deprives me of the opportunity to consider different attributes that need to be taken into consideration in the appointment of incumbents to fill these important senior posts, most of which are for the Head of 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;

[34] In sub-paragraphs (ii), (iii) and (iv), the Minister addressed his concerns with regard to specific areas, namely, Springs, Phuthaditshaba and Port Elizabeth respectively. Strangely enough, the State Attorney decided to capture this in his letter to the applicant's attorneys, despite the fact that they are irrelevant for applicant's purposes.

[35] The Minister went on to state the following in the closing paragraphs:

"I would imagine that the Commission may decide to re-advertise some of the vacant posts if it is of the view that a competitive candidature could not be realized from the pool of applications received in respect of such vacant posts.

I am grateful that the Commission is currently reviewing its shortlisting and interviewing criteria. I am hopeful that the new criteria will address the concerns raised above and will go a long way in accelerating the transformation of the Lower Court judiciary and expedite the appointment process"

[36] The Commission replied to the Minister by letter dated 28 February 2012. It acknowledged the fact that it could not review its own decision, but nevertheless placed certain difficulties it encountered in filling posts. In essence, the Commission does not receive sufficient

applications for senior posts and part of the reason is that there is not much of a difference in the salary scales between entry level and senior posts, whereas the latter has more responsibilities.

This, according to the Commission, limits a pool from which recommendations could be made.

[37] With regard to submission of only one candidate, the Commission explained in paragraph (iv) of its letter that *“Due to the fact that only three candidates were shortlisted per post, it was found that in the majority of cases only one candidate was found suitable for appointment and that is why only one name was submitted to you.”*

[38] The Commission went on to discuss and respond to specific issues raised by the Minister with regard to certain areas.

[39] It should be noted that the post of Senior Magistrate, Middelburg Court, is not specifically addressed in both the Minister’s and the Commission’s letter. However, from my reading of the general concerns raised by the Minister and taking into account the recommendations of the Commission for that post, it is clear that the issue there was about submission of only one name to the Minister to consider for appointment.

[40] I have already indicated in the preceding paragraphs that there are certain Annexures that were attached to the submission to the Minister (from the Commission) that the applicant has omitted to attach to her founding papers, such as a list of candidates who applied for the position of Senior Magistrate at Middelburg.

I am compelled to accept that the Commission received more applications than two, if one has regard to its answer to the Minister.

[41] The Minister⁵ accepted the challenges faced by the Commission in the recruitment process of Senior Magistrates. He however, emphasized the importance of extending the pool from which he may appoint candidates to enable him to comply with his constitutional imperatives.

In this regard, and taking into account the fact that time had elapsed since the advertisements were made, the Minister concluded by advising the Commission that it “*may deem it advisable to re-advertise the above vacant offices of Senior Magistrate with a view to attracting a larger pool of applicants*”.

The Minister concluded by informing the Commission that “*Under the circumstances I am unable to make any appointment from the information placed at my disposal by the Commission*”

[42] The Commission advised the applicant, and others, by email dated 07 May 2013 that the posts were going to be re-advertised.

The email reads as follows:

“Dear Cluster Heads

The Magistrate Commission at its meeting held on 1 March 2013 resolved to note the decision by the Minister , after his consideration of the recommendations by the Commission, not to fill the posts of Senior Magistrates which were advertised by the Commission on 1 November 2009. In the circumstances the posts, with the exception of the two posts at Phuthaditjhaba and Springs, will be re-advertised

⁵ Letter dated 30 November 2012, page 174-175 of the Record of Proceedings.

during the next round of advertisements. The following is a list of the posts which will be re-advertised:

[43] It is common cause that the post that the applicant applied for falls in this category.

[44] In as far as Part 2 of the Notice of Motion is concerned, **the following issues were raised in the answering affidavit.**

[44.1] The fact that the Commission recommended only one candidate to the Minister for appointment flies against the provisions of Section 174(2) of the Constitution of the Republic of South Africa in terms of which the Minister is enjoined to consider the need for the judiciary to reflect broadly the racial and gender composition of South Africa when making judicial appointments.

[44.2] The fact that the Commission recommended only one name for appointment to the Minister is tantamount to making the appointment of the candidate itself. The Minister is not bound by the recommendations of the Commission.

[44.3] After considering the explanation that was provided by the Commission with regard to its recommendations, the Minister decided not to fill any of the posts.

[44.4] The Minister did not decide not to appoint the applicant. No final decision has been taken. The post is still vacant. The applicant can challenge the decision if the post is filled by someone else.

[44.5] The decision of the Minister not to fill the advertised posts was rational in all respects when considered objectively.

[44.6] There is a distinction between a decision not to appoint a candidate and one not to fill an advertised post. The re-advertisement of the posts means that the decision to appoint is deferred to a later date.

[44.7] The applicant has not stated which of her rights has been adversely affected by the decision of the Minister not to fill the posts. The applicant does not have a right to be appointed to the post.

[44.8] The appointment of the applicant would not address gender transformation.

[45] The applicant filed a **replying affidavit** and raised the following issues;

[45.1] She requested reasons in terms of Section 5 of PAJA from the Minister in June 2013 which reasons she has not been provided with.

[45.2] She has a legitimate expectation to be appointed to the position because she was recommended by the Commission as the only suitable candidate for the post. This right was further adversely affected by the re-advertisement of the position

[45.3] The Minister is obliged to appoint her because of the mandatory provisions of Section 10 of the Magistrate's Act, Act 90 of 1993 ("Magistrates Act").

[45.4] The Minister has appointed an additional three white females in 2013 despite the statistical composition of Senior Magistrates dated 2009 which suggested an overrepresentation of this category.

[45.5] The explanation of the Chairperson of the Commission that there was a lack of a sufficient pool from which to make recommendations was incorrect.

[45.6] The appointment of Magistrates by the Minister is not an executive function as alleged in the answering affidavit. It is an administrative function and is reviewable in terms of PAJA.

ISSUES FOR DECISION

[46] Having considered the nature of the relief sought in the notice of Motion, the questions that I am required to decide are;

[46.1] whether the applicant is / was entitled to be appointed in the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga.

[46.2] in the alternative, whether the Minister made a decision not to appoint the applicant in the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga; and if so, whether the decision is reviewable in terms of PAJA.

SUBMISSIONS BY THE PARTIES

[47] I deem it necessary to dispose of the following preliminary points raised by the applicant.

Locust Standi of deponent to the answering affidavit of the Minister

[48] The Minister filed a supplementary affidavit to explain the circumstances under which JB Skosana deposed to an affidavit on his behalf. This, in my view should have laid to rest the objection with regard to *locus standi* of JB Skosana to depose to an affidavit on behalf of the Minister.

Whether the Minister performs an executive or administrative function when he appoints Magistrates

[49] The confusion around this issue appears to emanate from paragraph 24.3 of the answering affidavit of the Minister wherein the following was stated:

“ I submit that the appointment of judicial officers is an executive function as opposed to administrative function”

Mr. Greeff argued that section 174(2) of the Constitution that the Minister relies on deals with the appointment of judges, and not magistrates. The appointment of Magistrates is regulated by the Magistrates Act.

He submitted further that the appointment of magistrates is an administrative function that is susceptible to review in terms of PAJA.

He referred to cases such as **Wessels v Minister for Justice and**

Constitutional Development and Others (594/09) [2009] ZAGPPHC 81; 2010 (1) SA 128 (GNP) (2 June 2009) and Minister of Defence and Others v Dunn (131/06) [2007] ZASCA 75; [2007] SCA 75 (RSA); [2008] 2 All SA 14 (SCA) ; 2007 (6) SA 52 (SCA) (31 May 2007)

[50] My understanding is that Section 174(2) of the Constitution was referred to as an illustration of the Constitutional imperatives that should be taken into account in the appointment of judicial officers. Magistrates are judicial officers.

[51] There is ample authority, as Mr. Greeff has correctly submitted, to the effect that the Minister performs administrative function when he appoints Magistrates and that such decisions are reviewable in terms of PAJA.

[52] In his heads of argument and oral submissions, Mr. Greeff addressed the following issues;

[52.1] The Minister was compelled, after consultation with the Commission, to appoint the applicant.

[52.2] Employment equity cannot be an absolute bar to appoint a suitable candidate. The facts of this matter are identical to those in the matter of **Solidarity obo Barnard v South African Police Service (165/13) [2013] ZASCA 177; 2014 (2) SA 1 (SCA); [2014] 2 BLLR 107 (SCA); [2014] 1 All SA 319 (SCA); (2014) 35 ILJ 416 (SCA) (28 November 2013)** ("the Barnard case)

[53] Further arguments were advanced in the supplementary heads of heads that were handed in from the bar. Mr. Greeff submitted that:

[53.1] This application is brought in terms of PAJA and not Rule 53

[53.2] A refusal to appoint is an administrative action. He referred to paragraph 52 in the Barnard case. (This paragraph does not, in my view support this contention.)

[53.3] The applicant was discriminated against on the basis of her race and gender.

[53.4] The applicant's rights, being legitimate expectation to be appointed were determined when the post was re-advertised on 17 November 2013. The decision not to fill the posts, he argued, was no longer applicable because the act of advertising indicates a desire to fill them.

[53.5] The refusal to appoint the applicant was taken without good reason and should be set aside.

[54] On what should happen should the decision of the Minister be set aside, Mr. Greeff argued that the court is in as good a position as the Minister to appoint the applicant because her CV is in the court file, she has been acting in the position for almost eight years and she was recommended by the Commission as the only suitable candidate to fill the position. He referred to cases in this Division and elsewhere where the courts have substituted the decision of a functionary and appointed a candidate. **(Kgoele v Minister of Justice and Constitutional**

Development and Others⁶, and Gordon v Department of Health, KwaZulu Natal 2008 (6) SA 522 (SCA)

[55] He submitted that referring the matter back to the Minister for reconsideration would not serve a purpose because the court already did that in 2014 and he did not appoint her. The result of a referral back is a foregone conclusion and would be a waste of time. In this regard he referred to the judgment of Hiemstra J in the matter of **Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72 (T)** where the learned Justice enumerated special or exceptional circumstances that would allow a court to substitute the decision of an administrative body. These are; where the result would be a foregone conclusion, where further delay would unjustifiably prejudice the applicant and where the functionary has exhibited bias or incompetence to such a degree that it would be unfair to expect the applicant to submit to its jurisdiction again.

[56] The issues raised by Mr Gwala in his heads of argument and oral submission are as follows;

[56.1] The applicant's case, and indeed her grounds of review is as it stands in the founding affidavit. Her case is built around the allegation that the refusal to appoint her constitutes an administrative action performed without good cause. The test in this regard is whether the decision reached by the Minister is one

⁶ Confirmed on appeal by a Full Bench in Minister of Justice and Constitutional Development & Others v Kgoele [2011] ZAGPPHC 157 (27 May 2011)

that a reasonable decision maker would not reach (**Bato Star fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at 513 para (44)**)

[56.2] The test for validity of administrative action is not whether the decision is wrong, but whether it can be impugned on the grounds set out in section 6 of PAJA. (**Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, SASSA and Others 2014(1) SA 604) (CC)**)

[56.3] Judicial review is concerned with the correctness of the process, not the decision. (**Krumm and Another v The Master and Another 1989 (3) SA 944 (D) 951I – 952A-B)**)

[56.4] The Minister did not make a decision not to appoint the applicant, but one not to fill any of the 23 advertised posts . The applicant's application is pre-mature. There is a distinction between a decision not to appoint a candidate and a decision not to fill the position itself. The decision not to appoint the applicant is one that would arise after the post has finally been filled by another person.

(The Department of Justice v Commission for Conciliation Mediation and Arbitration and Others (2004) (25) ILJ 248 (LAC) para 71-74.

[56.5] The Minister would have acted irrational if he had proceeded to appoint candidates under circumstances where the pool from

which he was expected to choose was limited. Only one name was recommended by the Commission for appointment. This is not a recommendation, but is tantamount to restricting the Minister's discretion.

[56.6] In appointing Magistrates, the Minister does so after consultation with the Commission, but is not bound by the recommendations of the Commission. **[Van Rooyen and Others v The State and Others 2002 (5) SA 264 (CC) para 103 & 109.]**

The meaning of "after consultation with" is that the Minister has the ultimate decision, which must be taken in good faith. **[Macdonald v Minister of Minerals and Energy 2007 (5) SA 642 para 17-18.]**

[56.7] There is no right or legitimate expectation to be appointed to a post.⁷

Legitimate expectation relates to a fair process that should be followed before an administrative decision that adversely affects the rights of an individual is taken.

[56.8] Discrimination does not arise in the present matter because no one, black, white, male or female was appointed.

[56.9] The case of Barnard that the applicant relies on was subsequently overturned by the Constitutional Court.

⁷ Administrator, Transvaal v Traub. supra

[56.10] The applicant has not established exceptional circumstances that would entitle the court to substitute the decision of the Minister

THE LAW

[57] Section 174 (2) of the Constitution of the Republic of South Africa, Act 106 of 1996 reads, as follows

"(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed".

[58] The appointment of Magistrates is specifically regulated by Section 10 of the **Magistrate Act 1993, Act 90 of 1993**, as amended, which reads as follows:

" The Minister shall, after consultation with the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrate Court Act"

[59] The following provisions in PAJA are relevant.

Sections 5(1)(2) and (3) Reasons for administrative action

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

(2) The administrator to whom the request is made must, within 90 days after

receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

[60] The applicant prays for an order for substitution of the decision of the Minister to not appoint her with one of appointing her to the position of Senior Magistrate, Head of Office, Middelburg, Mpumalanga (Section 8(1)(c)(ii)(aa)

DISCUSSION

[61] The question of the nature of the relief sought and the grounds of review dominated the proceedings before me. Mr. Greeff spent most of the time that he was on his feet to convince me that the facts of this matter are similar to the Barnard case and that the decision not to fill the posts has no practical effect because it refers to the applicant. He also devoted most of his argument in presenting cases where the courts have substituted the decision(s) of functionaries.

[62] According to Mr. Greeff, it can be deduced from the papers as a whole that the reason the applicant was not appointed is because she is not from the Previously Disadvantaged category.

[63] I agree with the submission of Mr. Gwala that there is a difference between a decision not to appoint an applicant for a post and a decision

not to fill a post.

I may add that in my view, the evidence required to justify each one of them would be different.

[64] It is common cause that when the applicant requested reasons from the Minister, she had already been informed that none of the posts would be filled. Furthermore, before she launched this application, she was in possession of the recommendations that the Commission made to the Minister with regard to her suitability for appointment as Senior Magistrate, Middelburg. She had also been placed in possession of correspondence exchanged between the Minister and the Commission in terms of which the former raised concerns about submission of only one name to him for appointment. In short, she was in possession of the reasons why the posts were not filled.

[65] There is no merit in the allegation that the Minister did not provide her with reasons. The documents that the applicant had in her possession before she launched this application constitute sufficient reasons. **(Koyabe and Others v Minister for Home Affairs and Others (CCT 53/08) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) (25 August 2009)**

See also **South African Police Service v Solidarity obo Barnard (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014)** paragraph [194] at 183C-F

[66] The applicant has built this case around herself, forgetting that there were 23 posts at stake and the reasons given for not filling them were not specifically directed at the individuals, but the recruitment processes of the Commission. It was never about her, but the entire recommendations made by the Commission in as far as it had submitted one name only for consideration. How the Minister was expected to consider one name is a mystery.

The applicant insists that a decision was made not to appoint her. This is not the case.

[67] I may as well deal with the cases that the applicant alleges that they are “in all fours” with hers.

In the **Kgoele** matter, the learned Justice Pretorius substituted the decision of the Minister because she found that he failed to provide reasons, not only when he was requested to do so, but even in the court documents. This case is clearly distinguishable.

[68] In the **Barnard** case, the issue was whether the National Commissioner was entitled to invoke employment equity plan to justify not appointing the applicant. The Constitutional Court ruled that the decision was rational. I agree with counsel for the Minister that the issue of employment equity does not arise in the matter before me. In fact, the Commission recommended the applicant on the basis of her being a woman.

[69] The employer in the **Gordon** matter did not have an affirmative action policy to justify the appointment of a less qualified candidate of another race. The facts of the matter before me are clearly different because no other person, black, white, male or female was appointed.

[70] In the matter of **CJW Marketing CC v Limpopo Provincial Liquor Board and Others**⁸ Pretorius J substituted the decision of the licensing Board and granted an application for a liquor licence because she found that the Board relied on insufficient evidence contained in the inspection report.

[71] There is no evidence or even an allegation in the matter before me to the effect that the Minister's observations were wrong or that the pool of candidates was sufficient. The applicant only made a bare denial to a statement that the Commission struggles to find suitable candidates to fill senior positions.

[72] I agree with counsel for the Minister that the Minister is not bound by the recommendations of the Commission. As stated in the **Van Rooyen case (para 109)**, the role of the Commission is to check on the exercise of executive power with regard to appointments of Magistrates. The final decision lies with Minister.

[73] As I have stated above, the applicant had sufficient material at her disposal when she launched this application. The founding papers before

⁸ case number 38803/2006

me should be evaluated against the background of the following trite principles:

[73.1] The founding papers in an application are not the equivalent of a declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in motion proceedings, be sufficient to resist an objection that a case has not been adequately made out.

The founding papers take the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the founding papers such facts as would be necessary for determination of the issue in the Applicant's favour, an objection that the founding papers do not support the relief claimed, is sound: **see Hart v Pinetown Drive-Inn Cinema (Pty) Ltd 1972(1) SA 464 (D) at 469 C - E**, which was approved, *inter alia*, in **Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999(2) SA 279 (T) at 323 G - J**.

[73.2] Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. Secondary

facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions and accordingly do not constitute evidential material capable of supporting a cause of action: **see Radebe and Others v Eastern Transvaal Development Board 1988(2) SAT 785 (A) at 793 C - E; Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others 2003(4) SA 207 (C) at 217 B - E.**

[73.3] A party to motion proceedings who bears the onus is required to set out the evidence on which it relies to discharge such onus: **Swissborough Diamond Mines (Pty) Ltd supra at 323 F - 325 C; Academy of Learning (Pty) Ltd v Hancock and Others 2001(1) SA 941 (C) at 955 H - I.**

[73.4] The fact that answering and replying papers have been filed, do not preclude an objection *in limine* that the founding papers contain insufficient information to sustain the relief claimed: **Hart supra at 465 E - G.**

[74] Having evaluated the content of the founding papers before me, it is clear that the high-water mark of the applicants' case is that she was interviewed by the Commission and found to be the only suitable candidate for appointment in the position of Senior Magistrate, Head of the Office, Middelburg, Mpumalanga. The Commission recommended her for appointment in that post. However, the Minister has, without

good cause, failed to appoint her as recommended.

Prayer 1: order to compel the Minister to appoint the Applicant

[75] The applicant would have to prove that the Minister is bound by the recommendations of the Commission. I have already dealt with this issue. Therefore, the applicant has not made a case for the relief sought in prayer 1.

Prayer 2: alternative to prayer 1; that the decision of the Minister not to appoint her be reviewed and set aside.

[76] Taking into account the exchange of correspondence amongst all the role players, it is beyond my comprehension why the applicant would insist that her cause of action lies in the alleged failure by the Minister to appoint her. The applicant has not dealt with the reasonableness or rationality of the decision of the Minister not to fill the 23 posts, including the one that forms the subject matter of this application.

[77] Instead, the applicant has focused her attention on a review in terms of PAJA on the basis that the Minister has taken a decision not to appoint her without a good reason.

I have already made a finding that in fact, the Minister has provided reasons and that the reasons were, under the circumstances sufficient.

[78] The onus was on the applicant to attack the reasonableness of the reasons that were provided. The reasons given are that;

[78.1] the Commission submitted one name only for him to consider for appointment in various advertised posts, including the one that the applicant applied for.

[78.2] the Minister found that his discretion was being constrained as he had a limited pool to choose from. In fact, there was no choice.

[78.3] the Minister could not comply with the constitutional imperatives contemplated in Section 174(2) of the Constitution.

[78.4] after consultation with the Commission, the Minister decided not to fill the advertised 23 posts. They were re-advertised. The affected parties, including the applicant, were duly advised.

[79] The question is whether the Minister has followed the correct processes, not whether the decision is correct. The Minister has consulted the Commission with a view to understand its reasons for forwarding one name only for him to consider. The final decision rests with the Minister.

[80] On the evidence before me, I am of the view that the decision was taken for a good cause. I accordingly make the following order;

1. The application is dismissed with costs.



TAN MAKHUBELE AJ

Acting Judge of the High Court

APPEARANCES**Applicant:****Advocate JJ Greeff**

Instructed by:

Wynand Prinsloo & v Eeden

C/O Kemp De Beer & Goosen

Rietfontein, PRETORIA

First Respondent:**Advocate M Gwala**

Instructed by:

The State Attorney

PRETORIA

Matter heard on:

25 & 26 June 2015