

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case No: 1865/2012
Heard: 26/06/2013
Delivered: 02/08/2013

In the matter between:

CHILDLINE NORTHERN CAPE

Applicant

and

THE MAGISTRATE'S COMMISSION

First Respondent

**THE CHAIRPERSON, MAGISTRATE'S
COMMISSION**

Second Respondent

**THE MINISTER OF JUSTICE
AND CONSTITUTIONAL DEVELOPMENT**

Third respondent

PRESIDENT OF THE REGIONAL COURT

Fourth Respondent

**DIRECTOR OF PUBLIC PROSECUTIONS,
NORTHERN CAPE**

Fifth Respondent

LEGAL AID SOUTH AFRICA

Sixth Respondent

PUMELELE SIBUSISO HOLE

Seventh Respondent

SPEAKER OF THE NATIONAL ASSEMBLY

Eighth Respondent

**CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

Ninth Respondent

Kgomo JP et Mamosebo AJ

JUDGMENT

KGOMO JP

- [1] The applicant is Childline Northern Cape (Childline) a body corporate whose objective is to protect children from all kinds of violence and to engender a culture of children's rights within the Northern Cape Province. Childline is a non-profit organization affiliated to Childline South Africa. It counts amongst its members, persons, organizations and associations who share and approve of its objectives and functions.
- [2] Childline seeks orders in essentially the following terms:
- 2.1 That the recommendation by the Magistrates Commission (first respondent) to the Minister of Justice and Constitutional Development (third respondent) that Mr Pumelele Sibusiso Hole (seventh respondent) be provisionally suspended from office be declared unlawful and be reviewed and set aside;
 - 2.2 That the decision of the Minister approving the recommendation to provisionally suspend Regional Magistrate Hole on 29 September 2011 from office with immediate effect be declared unlawful and be reviewed and set aside;
 - 2.3 That the decision of the Magistrates Commission and/or The Chairperson of the Magistrates Commission (second respondent) not to uplift Magistrate Hole's suspension in order to allow him to finalize the partheard criminal cases pending before him be declared unlawful and be reviewed and set aside;
 - 2.4 That it be declared that Magistrate Hole shall be entitled to resume his duties with immediate effect, alternatively that Magistrate Hole shall be entitled to resume his

duties with immediate effect in order to resolve the part heard cases before him.

2.5 That the costs of the application are to be paid by any party opposing the relief sought. In the end this application mutated to being unopposed and no costs order was sought or granted against any party.

[3] The Magistrates Commission is a statutory body established under s2 of the Magistrates Act, 90 of 1993. The objects of the Commission encapsulate ensuring that the appointment, promotion, transfer, discharge of and/or that disciplinary steps against judicial officials in lower courts take place without favour or prejudice, and that the applicable laws and administrative directions in connection with such judicial officers are applied uniformly and correctly. The Chairperson of the Commission serves in his official capacity in terms of s3 (1) (a) (i) of the Magistrates Act.

[4] In terms of s13 (3) (a) of the Magistrates Act the Minister has the power to provisionally suspend a magistrate from office. The Minister invoked these powers when he provisionally suspended Magistrate Hole. It is this suspension that forms the subject-matter of these proceedings.

[5] The Regional Court President, Northern Cape, Mr Khandilizwe Nqadala (the fourth respondent), initiated Magistrate Hole's suspension when he lodged certain complainants of improper conduct with the Commission. Following this suspension the Regional President wrote a report on 07 December 2011 to this High Court requesting "a special review of 23 Regional Court [Criminal] matters which are parheard before suspended Kimberley Regional Magistrate, Mr P S Hole, as per

attached list.” The report is Annex “ND8” to Childline’s papers. Three more cases were subsequently added.

- [6] Although the Regional President’s review request was overtaken, rather than superseded, by Childline’s application it remains relevant to bear in mind what he sought to achieve when it comes to the terms of the order to be issued. The concluding paragraph of the report (Annex “ND 8”) reads:

“9. In my view the circumstances described herein constitute ‘delay for considerable period’ due to the fact that ‘the magistrate hearing the matter has been suspended’ as was found in **S v Lapping [1998] All SA (331) (W)**.

10. It is therefore requested that this matter be placed before the High Court or High Court Judge for an order that:

- (a) Proceedings in cases serial numbered 4, 15 and 23 of Mr Clarke’s report be continued and finalized before other regional magistrates and that;
- (b) Cases serial numbered 1-3, 5-14 and 16-22 of Mr Clarke’s report be set aside and started **de novo** before other regional magistrates”.

Acting Regional Magistrate Clarke deputises for Mr Hole and wrote his report to the Regional President on 05 December 2011 recommending the special review set out in Annex “ND8”. Mr Clarke’s report is Annex “ND9” and his views have been incorporated in Annex “ND8”.

- [7] After Olivier J (on long leave) and myself trawled through the records of the cases to be reviewed to get a sense of the magnitude of the task at hand I issued the following directive on 28 March 2012 to the Registrar:

"Directive by the Judge President to all known interested parties: State v Richard Kaleb & 25 other Regional Court Cases.

1. The question whether the proceedings in the 26 parheard matters of Mr Hole, suspended Regional Magistrate, should:

1.1 be set aside; and

*1.2 be ordered to be tried **de novo**;*

Will be decided in the High Court on a date to be determined by the Registrar, in co-operation with interested parties.

2. For this purpose the accused and their legal representatives in such matters should be informed in open court:

2.1 that they are entitled to appear or to be represented at the hearing to argue these questions; and to file heads of argument for this purpose;

2.2 that they are entitled to submit evidence on affidavit in this respect; and

2.3 that they are not obliged to take part in the proceedings and may submit to the eventual ruling by the Court.

3. The Registrar must then be informed in writing of the choice exercised by each of the accused in this regard and the affidavit/s and the particulars of the accused or their legal representatives, for the purpose of the hearing in the High Court, must be made available to the Registrar.

4. Copies of the letters of the President of the Regional Court of 07 December 2011 and 27 January 2012 (together with the annexures thereto), as well as a copy of this directive, must be made available to the Director of Public Prosecutions, whose representative will, of course, also argue the questions and will in addition be entitled to place relevant information before this Court.

5. Copies of the abovementioned documents must also be made available to the Chairperson of the Northern Cape

Society of Advocates, whom I intend to request to make available a senior member of that society to act as amicus curiae at the hearing of this matter."

This directive is Annex "ND12" to the papers.

- [8] This is how the office of the Director of Public Prosecutions (DPP) represented by the Deputy DPP (Mr Pule Tshweu), Legal Aid South Africa (represented by Mr Vincent Mayisela), came to feature in these proceedings. I invited Childline to intervene after having seen an interview that they had given to a local newspaper, the Diamond Fields Advertiser (DFA). As we know now their intervention developed into a life of its own.

- [9] The Speaker of the National Assembly (the eighth respondent), and the Chairperson of the National Council of Provinces (NCOP) (the ninth respondent) have been elected to represent Parliament and the NCOP in terms of ss52 and 64, respectively, of the Constitution of the Republic of South Africa, 108 of 1996. It will be shown later that Magistrate Hole's suspension received the attention of Parliament and how it has dealt with the issue. The National Assembly and the NCOP were initially not cited as parties. Their joinder, following a properly taken point *in limine* by the Minister, delayed the process of hearing this application somewhat.

- [10] The State Attorney filed a Notice to Oppose on 06 November 2012 on behalf of the first to fourth respondents (the Commission, its Chairperson, the Minister and the Regional President, respectively). However, such opposition was withdrawn on 03 May 2013. The DPP and Legal Aid South Africa (the fifth and sixth respondents, respectively) filed Notices to Abide the decision of the Court. Magistrate Hole did

not appoint an attorney neither did he personally file a Notice to Oppose or abide the outcome. We have not seen any reaction from the National Assembly or the NCOP (through the state attorney). This matter is therefore for all intents and purposes unopposed.

[11] It did not always help that everyone abided the decision of the Court or kept their peace. For example, the reason why Legal Aid SA was approached was to act as a sort of an amicus curiae and over-arching umbrella in respect of all parheard matters to ensure that nothing was overlooked. Legal Aid SA would not have attracted any costs in the process. Filing Heads of Argument would certainly have helped.

[12] On Monday 24 June 2013 the Regional Head of Justice and Constitutional Development in the Northern Cape Province, Mr Rodney Isaacs, brought to my attention certain matters pertaining to "Minutes of Proceedings of National Assembly" of "Thursday, 20 June 2013". These matters are: Items 19 (9th Order), 21 (11th Order), 22 (12th Order) and 23 (13th Order) all involving the Judiciary (in its broadest sense) and the Department of Justice. Of relevance to this review is item 23(13th Order) which records:

*"Consideration of Report of Portfolio Committee on Justice and Constitutional Development on **Upliftment of provisional suspension from office of Magistrate PS Hole, Kimberley** (Announcements, Tabling and Committee Reports, 19 June 2013, p 2902).*

Mr L T Landers, as Chairperson of the Committee, introduced the Report. There was no debate.

Question put: That the recommendations of the Committee be adopted, including that the upliftment of the provisional

suspension of Magistrate P S Hole be confirmed, subject to specified conditions. Agreed to.

Upliftment of the provisional suspension of Magistrate P S Hole accordingly confirmed, subject to specified conditions as contained in the Report.”

[13] The Regional Head, Mr Isaacs, was not in possession of the report subject to which “specified conditions as contained in the Report” was alluded to. When Adv Steve Budlander, his junior Adv (Ms) Ncumisa Mayosi and their instructing attorney Mr Courtenay introduced themselves to me in chambers at 09h10 on the morning of the hearing (25/06/2013) I enquired from them what they were still looking for as the National Assembly granted them what they sought on 20 June 2013. They were unaware of the turn of events. Mr Budlander insisted, as he was entitled, to have sight of the conditions subject to which the suspension was uplifted by the National Assembly.

[14] With their leave (regard being had that they were the only party before me) I contacted Mr Justice Francis Legodi, Chairperson of the Commission, to enquire from him whether he was in possession of those conditions and, if so, whether he would be averse to sharing them with the Court and Childline (the applicant). He was aware of the decision by the National Assembly to uplift the suspension of Magistrate Hole conditionally. However, he was out of office and had not yet had sight of the illusive conditions. As soon as he had done so the Commission would take a decision on what suitable conditions, if any, to impose. However the review application was ripe and ready before us at 10h00 and had to be heard. The Chairperson, of course, did not suggest any deferment.

[15] I requested Mr Budlander to contact the Northern Cape State Attorney to enquire about her availability for assistance even though her clients abided the decision of the Court. She attended Court and addressed us although she was on sick-leave. She intimated that she was well enough and ready to do so, as she personally dealt with the matter previously. Mr Tshweu for the DPP and Mr Mayisela for Legal Aid SA also attended and addressed the Court with the leave of Court and the consent of Childline.

[16] In the interim Mr Mayisela made available to us and all counsel present a report which is dated Wednesday, 19 June 2013 (which pre-dates the report made available by the Regional Head of Justice), entitled: **“The Report of the Portfolio Committee on Justice and Constitutional Development on the upliftment of the provisional suspension from office of Magistrate PS Hole, Kimberley, dated 19 June 2013”**. We enquired from counsel whether we could have regard to these reports from Parliament (of 19 June 2013 (see para 12 above) and 20 June 2013) and if so what their status would be. The consensus was that the contents of the documents may be accepted to convey what they purport to do.

[17] For better comprehension of what was characterized as some of the “controversial” recommendations by the Portfolio Committee at para 10 (10(a)- 10(d)) of the report the entire report is quoted. Paras 1–9 thereof reflect the motivation by the Portfolio Committee and para 10 contains its recommendations to Parliament:

"The Portfolio Committee on Justice and Constitutional Development, having considered the request by the Minister of Justice and Constitutional Development to uplift the provisional suspension from office of Magistrate PS Hole, Kimberly, reports as follows:

- 1. Mr Hole is a Regional Magistrate at Kimberley. He served the Department of Justice and Constitutional Development as an acting judge of the former Transkei High Court from October 2004 to July 2006 and was appointed as a magistrate in December 2006. In March 2007, Mr Hole was appointed as a Regional Magistrate.*
- 2. At its meeting on 22 July 2011, the Magistrates Commission considered the contents of various complaints received from the Regional Court President, Northern Cape Region.*
- 3. Mr Hole was provisionally suspended on 29 September 2011, pending an investigation into his alleged misconduct. The National Assembly approved his provisional suspension with remuneration on 24 November 2011.*
- 4. The Magistrates Commission concluded its investigation on 17 November 2011. Mr Hole was formally charged on the 25 November 2011 with misconduct. The Committee understands that the disciplinary hearing against him is ongoing.*
- 5. Following the suspension, the Legal Aid Board Northern Cape and the relevant Director of Public Prosecutions addressed a memorandum to the Magistrates Commission requesting that Mr Hole's suspension be uplifted in order for him to finalize his part-heard matters.*

6. *Childline Northern Cape also brought an application before the High Court Northern Cape to have Mr Hole's suspension uplifted for him to finalize his part-heard matters: the application is pending before Court.*

Childline alleges that the suspension of Mr Hole is causing tremendous hardship for the women and children involved in these part-head matters on the following grounds:

- There are 23 part-heard matters, of which 13 involve children from seven to 17 years of age. Two matters involve elderly women who are traumatized and in a very poor state of health.*
- If the part-heard matters start afresh, the women and children involved in these matters will be subjected to secondary trauma. It would be difficult for some of them to recall the events of these cases, as some of the incidents happened many years ago.*
- It would not be practical to allocate these matters to other Regional Court Magistrates as there are only **two courts equipped to hear children's cases.***

7. *The Minister recommended that Parliament pass a resolution in terms of Section 13(3)(g) of the Magistrate Act 90 of 1993 to uplift Mr Hole's suspension to enable him to continue with his judicial functions relating to the cases.*

8. ***The Committee is still of the view that the allegations against Mr Hole are extremely serious and that Mr Hole's abuse of process justifies his suspension. However, unlike in most cases relating to suspensions where magistrates are facing criminal charges, the complaints against Mr Hole relate to lack of respect and abuse of authority. The***

Committee agrees, therefore, that the possible prejudice to the victims in these part-heard cases outweighs the reasons for continued suspension.

9. ***As far as possible, the Committee requested that the Magistrates Commission, in future, take into consideration the status of part-heard matters before deciding to recommend the suspension of a magistrate.***

10. *Having considered the Minister's request to uplift the provisional suspension of Mr Hole, the Committee recommends that the National Assembly approves the upliftment of the provisional suspension with the following conditions, namely that¹:*

b) The Magistrates Commission consider starting those part-heard matters afresh where this is necessary and desirable having regard to possible prejudice to the children, women or any other person who has already testified.

[18] Mr Budlander argued that there is great uncertainty and many imponderables on what conditions the Magistrates Commission may impose and when this would be done in compliance with directive 10(b) above. The Court is left speculating, he said, whether the conditions would relate to parheard matters only or whether they will encompass freshly tried cases as well. He submitted that Parliament did not have the powers to direct the Commission to impose conditions, let alone open-ended ones. According to him, in any event, the conditions cannot bind this Court nor would those formulated by the Magistrates Commission. Counsel

¹ Conditions 10(a), (c) and (d) are contentious and are dealt with at para 40 of this judgment.

also urged upon us to adopt the approach that none of the respondents are before Court and to deal with the review as is; unopposed.

[19] Childline take the broad approach that; in the first place, there was no basis or an insufficient one upon which the Commission could have been satisfied, and accordingly advised the Minister, that the allegations against Magistrate Hole were of such a serious nature as to make it inappropriate for him to perform the functions of a Magistrate while the allegations against him are being probed; secondly, that the Commission and the Minister did not consider relevant considerations and; thirdly, that the said decision-makers took no account, alternatively took insufficient account of the victims concerned and therefore violated their rights.

[20] There is no doubt that the decision at issue taken by the Minister constitutes administrative action as contemplated in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). In any event, all the decisions taken by the various institutions and functionaries plainly involved the exercise of public power and were accordingly subject to the principle of legality. In **Pharmaceutical Manufacturers Association of SA and Another: In RE Ex Parte President of the Republic of South Africa and Others** 2000(2) SA 674 (CC) at para 85 the court held:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the

exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

[21] The decision of the Commission and/or its Chairperson not to uplift Magistrate Hole's suspension in order to allow him to finalize the parheard cases pending before him is impugned on four grounds by Childline:

21.1 That the Commission was not authorized by the Magistrates Act, 90 of 1993, to make the decision which it took. Reliance is placed on s13 (2) of that Act which provides that a Magistrate shall not be suspended or removed from office except in accordance with the dictates of subsections (1), (3) (4) or (5). S13(3) (a) is paramount and reads:

"(3) (a) The Minister, on the advice of the Commission, may provisionally suspend a magistrate from office if—

(i) the Commission, after affording the magistrate a reasonable opportunity to be heard regarding the desirability of such provisional suspension, is satisfied that reliable evidence exists indicating that an allegation against that magistrate is of such a serious nature as to make it inappropriate for the magistrate to perform the functions of a magistrate while the allegation is being investigated; and
(ii) an investigation has been instituted by the Commission into such magistrate's fitness to hold office."

S13(3)(b) on the procedural aspects provides that:

"(b) A report in which the provisional suspension in terms of paragraph (a) of a magistrate and the reasons therefor are made known, must be tabled in Parliament by the Minister within seven days of such suspension, if Parliament is then in

session, or, if Parliament is not then in session, within seven days after the commencement of its next ensuing session.”

21.2 Childline makes the further averment that in making its decision the Commission took into account irrelevant considerations and did not consider relevant ones.

21.3 Thirdly, it contends that the Commission, similarly as in the case of the Minister, took no account, alternatively took insufficient account of the rights of the victims concerned and in the circumstances violated their rights;

21.4 Finally, that the Commission placed undue reliance on the dictates of the Regional President in making its decision.

[22] In light of the foregoing grounds for review it becomes pivotal to look into what is it that Magistrate Hole is alleged to have done that gave rise to his suspension. In the absence of opposing affidavits from the decision-makers reliance has to be reposed on Childline’s version of events supplemented by some correspondence or reports from some of the respondents. The specific complaints emanating from the Regional President are not incorporated in the papers before us.

[23] It may be deduced from the Minister’s Report to Parliament, dealt with next, that the Commission afforded Mr Hole the opportunity in a letter dated 18 August 2011 to make representations why he should not be provisionally suspended. Childline disclaims having been furnished with a copy of such a letter or having had sight thereof. It is certainly not in the papers. In terms of Rule 35 (1) read with 35(13) of the Uniform Rules of the Supreme Court, Childline should have compelled discovery. Rule 35(13) reads that:

“(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, to applications.”

[24] Nevertheless, the Minister’s Report to Parliament, Annex “ND3” dated 29 September 2011, gives a good idea of what such complaints entailed and why Mr Hole was provisionally suspended. This report is also the instrument impugned by Childline. Substantial parts thereof are reflected below. To reproduce the entire report will unduly encumber this judgment.

“PROVISIONAL SUSPENSION OF A MAGISTRATE: MR P S HOLE, REGIONAL MAGISTRATE AT KIMBERLEY

1. PURPOSE

The purpose of this report is to inform Parliament on the provisional suspension from office of Mr P Hole, Regional Magistrate at Kimberley, pending the outcome of an investigation into his fitness to hold office as a magistrate, as required by section 13(3)(b) of the Magistrates Act, 1993 (Act 90 of 1993).

2. ----.

2.4 The transcription in case no. RCZ856/2009 – State v P Loeto and Others and case no. RCZ641/2010 – State v Mbalula and Others contain various remarks, utterances and discussions by Mr Hole which, in the Commission’s view, inter alia displayed an abuse of judicial power as well as discussions, remarks and comments on matters pertaining to the magistrate’s profession in a manner which brought the judiciary into disrepute and which is detrimental to the image of the office of magistrate and which does not uphold and promote the good name, dignity and esteem of the office of

magistrate and the administration of justice. This also includes causing the Regional Court President Mr Nqadala to be ridiculed in public, by using the court as the platform to do so.

2.5 In case RCZ856/2009 – State v P Loeto in which Mr Nqadala was subpoenaed to appear in the criminal proceedings on 7 July 2011, the following extracts from the typed record of proceedings give an indication of Mr Hole's conduct:

- When Mr Nqadala objected because he felt the prosecutor had no basis to think he had any information about the rape case before the court proceedings the following transpired:

"Court: Please don't try and lead us astray. Your objections have no substance whatsoever. I shall not waste this Court's time by hearing that any further."

"Nqadala: So I should not even raise the second objection your worship?"

"Court: I'm not interested.

- By taking up a matter with his Head of Office in court by asking Mr Nqadala to read from the disputed letter and stating to Mr Nqadala the following:

"Court: You will recall Mr Nqadala, that I objected to you writing to me among other persons in this fashion."

By questioning his Head of Office's qualifications and on whether he knew the meaning of an accused's right to a fair trial the following transpired:

"Court: Mr Nqadala, what qualifications do you hold?"

"Court: And your knowledge of fair trial rights of accused includes or does not exclude the possibility of a Regional Court President writing to a junior Magistrate under him and saying things like these about the people that I try?"

"Court: *Do you know anything about the residual rights of an accused person to a fair trial?"*

- *By stating to Mr Nqadala about a letter regarding the fast tracking of juvenile accused:*

"Court: *Do you think your inclusion of a letter which discloses information that paints the Accused in a bad light amounts to an abomination?*

Nqadala: *A what?*

Court: *An abomination.*

Nqadala: *Abomination of what?*

Court: *Do you need an Interpreter?"*

- *By saying the following to Mr Nqadala:*

"Court: *We come back to square one. Why did you do it?*

Nqadala: *I told you that I did not disclose that information to you... (interjection)*

Court: *You will not – I'm sorry, you will not say "you" to me, you understand.*

Nqadala: *What should I say?*

Court: *You don't know what to say?*

Nqadala: *Maybe.*

Court: *And you call yourself a Regional Court President?*

Nqadala: *Your Worship ... (interjection).*

Court: *Please, please, please.*

Nqadala: *I don't think it – I don't think it will help ... (interjection).*

Court: *Please Mr Nqadala, you will show absolute respect for this court. You understand, Sir? Don't come here with an attitude. Do you understand, Sir? You will address me properly as a judicial officer sitting in this case. And please, wipe that smile off your face."*

- *At a later stage posing the following question to Mr Nqadala:*

"Court: *Don't you think Mr Nqadala, you are a disgrace to the profession"*

And

"Court: *You see Mr Nqadala, you will agree that over the past year there have been complaints against you about abuse of office some of which emanated from myself. Isn't that correct?"*

- *The court further questioned Mr Nqadala about his right to allocate or re-allocate cases to magistrates and thereafter said the following to Mr Nqadala:*

"Court: *Very well. What I will do Mr Nqadala, I will stand down. I will allow you to go to your junior officers and find out how it came about that a trial that I'm seized with, suddenly found its way before another Magistrate."*

The proceedings were apparently held in open court while according to the charge sheet two of the accused are under the age of 18 years and the proceedings should have been held in camera in terms of section 153 of the Criminal Procedure Act, No. 51 of 1977.

2.6.....

2.7 The Commission in the circumstances resolved to extend the mandate of Messrs H Louw and J Baloyi, both regional Magistrates at Johannesburg, who have been designated by the Ethics Committee of the Magistrates Commission to conduct a preliminary investigation following separate complaints lodged with the Commission by Mr Nqadala against Mr Hole on 22 April 2010 and various dates thereafter. The investigating team was requested to include the further complaints received from Mr Nqadala as part of the preliminary investigation and as soon as possible report to the Commission in accordance with the provisions

of regulation 26(3) of the Regulations for Judicial Officers in the Lower Courts, 1994.

3 DISCUSSION

3.1 In order to advise the Minister on his provisional suspension from office pending the outcome of the investigation, Mr Hole was afforded the opportunity pending the outcome of the investigation, to comment on the desirability of such provisional suspension. A letter dated 18 August 2011, addressed to Mr Hole, is attached (Annexure A).

3.2 Mr Hole responded in writing on 29 August 2011, a copy which is attached for your convenience.

3.3 At its meeting held on 17 September 2011, the Commission, having considered Mr Hole's response dated 29 August 2011, resolved to recommend that Mr Hole be provisionally suspended from office in terms of section 13(3)(a) of the Magistrates Act, 1993, pending the investigation into his fitness to hold office. The Commission is of the view that the transcribed court proceedings present reliable evidence indicating that the allegations against Mr Hole are of such a serious nature as to make it inappropriate for him to perform the functions of a magistrate while the allegations are being investigated.

4

5 CONCLUSION

In the light of the foregoing, I decided to provisionally suspend Mr Hole, Regional Magistrate at Kimberley, from office with immediate effect, pending the outcome of an investigation into his fitness to hold the office of a Magistrate.

This report is submitted for consideration by Parliament in terms of section 13(3)(c) of the Magistrates Act, 1994."

[25] Mr Hole disputed the allegations against him. Of importance in his response are the following:

25.1 *"The further allegations are made at paragraph 2 of the letter from the Commission that I abused power in calling the President to appear and that the President was called to provide evidence in respect of the charge I was trying. Once again this is untrue. The President was called to explain why it was in his interest to cast slur and to undermine the integrity of the court system by seeking to unlawfully influence a sitting magistrate. See Part B of the bundles A and B. See also the typed record of the proceedings of 7 June and 7 July in Part C of bundle A. See further the proceedings of 7 June and 7 July in part B of Bundle B.*

It should be evident from the parts I refer to why the President was called and what he was examined about. It would appear that the idea that the President was called in relation to the merits of each case is inferred from the copies of the subpoenas. If that is so then the argument is contrived. All manner of persons are called in different cases and they are not necessarily people who bear knowledge about e.g. a murder for instance although they may assist the court on a specific issue relating to the case"

25.2 *"The Commission further suggests that I made utterances that were an abuse of power and had the effect of bringing the judiciary into disrepute. Sadly it is not spelt which such utterances are referred to. Given this dearth of particularity all I can say is that what I said was said by a*

judicial officer sitting on the bench in the execution of his sworn duty. It was said bona fide and was necessary for the orders and rulings I made to be understood and placed in context. It would be unlawful of the Commission to seek to suspend me for so doing. Besides, the allegations against me are built on a manipulation of the truth in an instance where the President has seriously misled the Commission."

[26] Childline intimates that the Commission adopted a cart-before-the-horse process. It bemoans the fact that the Commission only addressed the issue of Mr Hole's parthead cases at its meeting held on 05 November 2011 after he had already been provisionally suspended. The Commission notified the Regional President on 29 November 2011 that at that meeting it was decided that Mr Hole be charged with misconduct and that the charge sheet was served on him on 28 November 2011. In the same letter the Commission enquired from the Regional President *"whether in your view Mr Hole should be called back to finalize his parthead matters or whether those cases should be started de novo."*

[27] The above letter from the Commission evoked a drawn-out response on 06 December 2011 from the Regional President with aspects thereof betraying a partisan inkling and a modicum of a predisposition. It reads in part:

"(5)(e)One of the accused in these cases has already 'out rightly indicated that he would ask Mr Hole to recuse himself. 'It can be expected that this could be a song that will be played by many of them as it often happens;

(f) (T)he fears sought to be addressed by partially lifting Mr Hole's suspension to finalize the part-heard cases would in fact be exacerbated;

(g) *It is something unheard of that suspension of a judicial officer who has already been served with a multiplicity of serious charges of unfitness and impropriety, as is the case with Mr Hole, would be lifted or partially lifted so as to enable such impugned judicial officer to finalize part-heard cases. If the impugned judicial officer is unfit to hold the office of a magistrate, he cannot be said to be fit when it relates to part-heard cases. Any suggestion of such partial upliftment of the suspension would cut against the grain of basic disciplinary procedures, and serve to shoot down the very disciplinary exercise the Magistrates Commission is holding against Mr Hole.*

(h) *Mr Hole committed some of the misconduct actions in the course of and under the guise of his judicial proceedings as well, and there can be no guarantee that he cannot commit even worse misconduct if recalled to finalize the part-heard cases. In fact in the abuses that he committed he would use the court platform for the said purposes. He would convene court as if he was convening an informal meeting, irrespective of whether it was legally and procedurally permissible to hold the court in such manner and in those instances.*

(i) *I am in the process of sending these part-heard cases to the High Court for them to be set aside so as to expedite prompt attention and finalization of these cases before other magistrates. In fact a plan is already in place to achieve this in the event of these proceedings being ordered to start de novo before other magistrates, and the plan would ensure that these cases could get finalized many times faster than if Mr Hole were to do them alone to finalize them. The plan includes spreading the 20 cases to the ±8 regional magistrates in the Kimberley area/cluster who have indicated*

their preparedness to fit and finalize these cases at the earliest available time.

6. *In the circumstances it is recommended that the Magistrates Commission rejects any notion or requests for partial upliftment of Mr Hole's suspension for the purposes of finalizing his part-heard cases."*

[28] The Regional President's *en bloc* suggested approach is not practicable. Each of the 23 or so cases that are still live must be treated separately and on their merits. If, for instance, Mr Hole's suspension is lifted to dispose of his partheard matters only the concomitance thereof would be that (for present purposes) he would be fit and proper and therefore competent to complete all those cases.

28.1 If therefore his recusal is demanded or applied for in a particular case and it is unwarranted for lack of proper grounds he is not only entitled to refuse to stand down but would in fact be duty bound to refuse. In **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 1999 (4) SA 147 (CC) para 104 the Court held:

"While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer

justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the Judiciary would be undermined, and in turn, the Constitution itself."

- 28.2 On the other hand should Mr Hole recuse himself on no sound or legal basis a review application could be brought by an accused to set aside his recusal in which event the High Court may enjoin him to proceed with the trial to its logical conclusion. See **Newell v Cronje and Another** 1985 (4) SA 692 (ECD) at 699 B-700C. Mullins J states:

"The applicant has in his affidavits established very real and serious prejudice which will result from a trial de novo. Such a trial is likely to have a very serious effect on his health. He has limited funds, which have been severely depleted by the trial thus far. A material defence witness was a very reluctant witness who may be antagonised by again being compelled to attend court ---. A further factor to be borne in mind is, however, that the State will have a second opportunity of adducing evidence, and possibly calling additional witnesses in the light of its knowledge of the applicant's defence.

This Court has the power to review untermiated proceedings in a lower court 'where grave injustice might result or where justice might not by other means be attained.' Wahlhaus and Others v Additional Magistrate, Johannesburg, and Another 1959 (3) SA 113 (A) at 119G - 120E. In my view the Court will be

more ready to do so where the purpose of the review is to maintain the continuity of and to seek the completion of the untermiated proceedings, and not, as in most cases, to nullify such proceedings. In the passage referred to above it is stated that in general the court "will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity, and not the frustration, of the proceedings, that is sought by the applicant."

*It is not essential for an applicant in a case such as this to establish a gross irregularity. It is sufficient if the decision of the magistrate causes serious prejudice resulting in a miscarriage of justice. **R v Marais** 1959 (1) SA 98 (T) at G 101F - 102A (referred to with approval in Wahlhaus' case); **Haysom v Additional Magistrate, Cape Town, and Another** 1979 (3) SA 155 (C) at 160B - H; **Goncalves v Addisonele Landdros, Pretoria** 1973 (4) SA 587 (T) at 596F ---.*

*The point was also taken in the papers that the parties were not given an opportunity of addressing the first respondent on whether or not he should recuse himself. That he should have done so is in my view clear. Cf **S v Suliman** (supra at 393F). Instead the first respondent appears to have acted precipitately and somewhat petulantly, without even giving himself time to consider the position or to refer to authorities ---.*

In my view, in the special circumstances of this case, the application should succeed and I would make an order that first respondent's recusal as presiding officer be set aside, and requiring first respondent to resume the hearing of the matter on a date to be arranged."

28.3 The state may also oppose a recusal on the basis that its witness is dead or has become incompetent to testify or cannot be traced etc.

[29] The case of **S v Lapping** [1998] 1 SA 331 (W) that the Regional President relies on in para 6 above does not support him in some respects. On the other hand it would guide the Commission as regards where not to tread. The following extracts are pertinent:

29.1 At 334 the Court states:

"It is not possible for the proceedings to be set aside simply because a magistrate, the Attorney-General and the accused's attorney agree thereto. There are several examples in the law reports of proceedings being set aside where the incorrect procedure had been followed, even with the consent of the accused. The most striking is perhaps in R v Price 1955(1) SA 219 (A)."

29.2 At 336 the Court proceeded:

"The trial magistrate in the present matter is obviously totally incapable of continuing with the trial unless and until her suspension from service is terminated. It goes without saying that this Court cannot interfere with the exercise of the discretion contained in section 23(7) of the Public Service Act which resulted in her suspension, for the purpose of ensuring that the trial proceeds before her. Nor can it be assumed that the trial magistrate will ultimately be dismissed and thereby remain incapacitated from continuing with the trial. In the meantime, however, the trial is being delayed. The familiar truism "justice delayed is justice denied"

has found expression --- in section 35(3)(d) of the Constitution Act 108 of 1996, as follows:

"Every accused has a right to a fair trial, which includes the right–

(d) to have their trial begin and conclude without unreasonable delay."

I have found no decision in South Africa where a Court has sanctioned proceedings being commenced de novo in any case other than where the magistrate is permanently unable to continue."

29.3 At 338 the Court reasoned as follows:

"If, in theory, illness of a magistrate for a considerable period could, depending on the facts, justify an order that a trial commence de novo before another magistrate, then, on a parity of reasoning, such an order would be justified if delay for a considerable period could result from the fact that the magistrate hearing the matter has been suspended. In each case, the incapacity of the magistrate to continue with the trial is total, albeit not necessarily permanent ---. Where an accused wishes a new trial to take place, as the accused in casu does, the grant of such an order in the circumstances of a case such as the present, would also accord with the provisions of section 35(3)(d) of the Constitution which I have already quoted."

29.4 Finally, the Court concluded at 339:

"In the present matter, the only alternative to an order directing a new trial would be to postpone the trial indefinitely in the hope that the trial magistrate will be able to complete it. It is impossible to say whether the

trial magistrate will ever be able to do so. Speculation in this regard will involve inter alia prejudging the result of her pending criminal trial which has not yet commenced. If convicted, she may appeal. In the meantime the present matter, which commenced more than seven months ago, could not proceed."

[30] The preceding issues bring me to the joint-memorandum by Legal Aid SA (Mr Mayisela) and the Deputy DPP (Mr Tshweu), supported by four legal representatives of some of the accused (attorneys M Fletcher, S Squires, R Bode and Adv Fourie), dated 01 June 2012. I abstract the following salient parts of the submissions made to the Commission, a copy of which was endorsed to the Judge President (Northern Cape). The joint-memorandum also features in the report of the Portfolio Committee. See para 17 above, in the Portfolio Committee's para 5.

30.1 "1.2 Secondly, the memorandum also serves to request the Magistrates Commission to review the reasons submitted by the Regional Court President, as per **2/1/S RC** dated **06/12/2011** in response to the Magistrates Commission's facsimile, Danie Schoeman, dated **29/11/2011**, with regard to whether Mr Hole comes back to finish his partly-heard matters or not."

30.2 "1.12 We are of the view that Mr Hole remains a fit and proper person as defined in the Magistrates Act until his matter is finalized and found to be otherwise an unfit person. It does appear that the suspension of Mr Hole was not based on his judicial incompetence but rather on other issues.

1.13 Adv Pillay [of the DPP's office] who has provided a list of the cases has agreed to personally monitor the finalization of

these cases as it would not be in the interest of justice to expect these much traumatized victims to testify again. The Prosecutors and Legal Aid legal representatives will be in a position to adjust their programmes to accommodate these cases.”

30.3 “**3 THE IMPACT OF THE VICTIMS OF CRIME AND ACCUSED SHOULD THE PARTLY HEARD MATTERS START DE NOVO**

3.1 It is the submission of all interested parties that it **will not be in the interest of justice** that Mr Hole’s partly-heards be commenced **de novo**, for the following reasons²:

- (v) Starting the proceedings de novo would also create an opportunity for accused and even witnesses to adapt their evidence.
- (vi) It would be difficult for the old women and children who have tried to forget about the incidents to re-construct the events that happened many months/ years ago. They have received therapy to clear the events from their memory. It would be like scratching open an almost healed wound.
- (vii) Accused persons will not be [accorded] their [constitutional] right in having their matters started and finished within reasonable time.
- (viii) Some of the accused have been in custody for a very long time (in excess of a period of two years) and the speedy finalization of their cases is not guaranteed.
- (ix) It will not be practical to distribute all cases amongst Regional Court Magistrates as suggested by the Regional Court President because only two courts are

² The essence of paras (i)-(iv) is captured in para 6 of the Portfolio report quoted in para 17 above.

properly equipped to hear children's matters in so far as it relates to circuit equipment and intermediaries".

30.4 "4 RECOMMENDATIONS:

4.1 TO JUDGE PRESIDENT:

It is the recommendation of the stakeholders that we await the outcome of the representation to the Magistrates Commission and upon receipts of the outcome, the Judge President provide us with further directives.

We are painfully aware that, in the event the Magistrates Commission refuses the request to have Mr Hole's return to finish his partly-heards, the Court may certainly proceed to have the matters set aside particularly seen in the light that the court will not be entertaining an application for the review of Mr Hole's suspension by the Minister."

30.5 "4.2 TO MAGISTRATES COMMISSION:

It is our request that the Magistrates Commission, in the interest of justice, consider the submission by the interested parties for Mr Hole to return and finalize his partly-heards.

The Director of Public Prosecutions and the Justice Centre Executive, Legal Aid SA, will be available to meet with the Chairperson as and when the Chairperson may want to meet with us to hear us further on our submissions".

[31] The representations and recommendation by the DPP and Legal Aid SA carry with them a lot that is consonant with what Childline seeks to achieve. In fact it is evident that the Commission, the Minister and Parliament heeded the gravamen of their submissions. In my view the right of the

accused to a fair trial without undue delay has been underemphasised if not underplayed by all those involved except Legal Aid SA and the Deputy DPP in their joint-memorandum in paras (viii) and (ix) at para 20.3 of this judgment. See also s35(3)(d) of the Constitution.

- [32] Mr Budlander urged upon us to ignore the confirmation of the “Upliftment of the provisional suspension of Magistrate PS Hole” by the National Assembly and to grant an order in the terms prayed for by Childline. I agree only partly with his submission. However, an upliftment, is an upliftment is an upliftment. It signifies that insofar as the upliftment of the suspension is concerned Childline and Parliament are *ad idem*. In that main regard there is no *lis* or dispute between them to be adjudicated upon. This is so because the decision by the National Assembly has legal consequences. In **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004(6) SA 222 (SCA) at paras 26 the Court held:
- “(T)he Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal*

consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

The Constitutional Court in **Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others** 2011(4) SA 113 (CC) at paras 81 -85 approved the above **Oudekraal Estates** decision. See also **Steenkamp NO v Provincial Tender Board, Eastern Cape** 2007(3) SA (CC) paras 29 and 30.

[33] Undeterred, Mr Budlander submitted that if we declare unlawful and review and set aside the recommendations by the Commission to the Minister to provisionally suspend Mr Hole from office; and then do the same to the decision of the Minister who actually suspended Mr Hole provisionally effective from 29 September 2011; and further declare unlawful and set aside the decision of the Commission and its Chairperson not to accede to the request to uplift Mr Hole's suspension to allow him to finalize the partheard matters pending before him; then the substratum would dissipate from underneath the feet of the National Assembly as its decision would be rendered nugatory or irrelevant. As a result no reference at all need be made to the decision of the National Assembly.

[34] If the blanket order advocated for by Childline is acceded to by us it would mean that the *status quo ante* Mr Hole's

provisional suspension obtains. In my view such an order would amount to an overkill and offend against the following principles, factors, circumstances and considerations:

34.1 The criminal special review proceedings were initiated by the Regional President in terms of s304(4) of the Criminal Procedure Act, 51 of 1977, and were *ex lege* confined only to the partheard cases;

34.2 The review of the proceedings by Childline do not have as their purpose to protect Mr Hole's rights but, in Childline's own words in para 5 of its deponent's affidavit:

"In addition to the applicant's specific interest in children, I submit that the issues that arise in this application as well as those that [fall] for determination by this Court, concerning as they do the rights of arrested, detained and accused persons as well as the rights of the victims of crime and members of the public in general, are of considerable public interest".

34.3 The Deputy DPP, The Director Legal Aid SA and the four legal representatives representing several of the accused in the joint-memorandum stated that "the memorandum also serves to request the Magistrates Commission to review the reasons for its decision to suspending Mr Hole provisionally and to allow him **to come back to furnish his partheard matters.**" The Commission, the Minister and Parliament proceeded on this narrow and defined compass to undo the provisional suspension.

34.4 Mr Hole is a sophisticated adult who served as an acting judge and is a Regional Magistrate who must fight his own battles. He cannot piggy-back unobtrusively on the application of Childline. If he intervened and joined Childline as a co-applicant there may have been something to say for him apropos the blanket upliftment of his provisional suspension advocated for by Childline. The remarks by Mlambo JA in

Gordon v Department of Health 2008 (6) SA 522 (SCA) at 529 B-F (para 9) concerning joinder are apposite and very instructive.

Mr Hole chose not to take proactive steps to protect his rights and must live with the consequences of our impending decision.

34.5 The Courts have to give due recognition and pay the requisite deference to the fact that the Magistrates Commission is a constitutionally mandated institution which, in terms of s2 of the Magistrate Act, 90 of 1993, has as its objects to ensure that the appointment, promotion, transfer or discharge of and/or disciplinary steps against judicial officers in lower courts take place without fear, favour or prejudice. We therefore have to ensure that our order does not hamstring any disciplinary process that may still be in progress and spearheaded by the Commission. Allowing Mr Hole to try new cases will have that direct or unintended consequence. In **Albutt v Centre For the Study of Violence and Reconciliation** 2010(3) SA 293 (CC) at para 51 the Court in a different context held:

"The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be

achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution."

[35] On the other hand it seems to me that if the Commission proposes that conditions ought to be imposed they should be specific and defined and recommend them to the Minister. The Minister must in turn transmit those conditions, suitably fashioned, to Parliament to impose them. Parliament may not delegate its powers, open-ended for that matter, to the Commission because the decision-making authority vests in it. In the circumstances, in my view, if the Commission does come up with some conditions the route via the Minister and the Portfolio Committee on Justice back to Parliament will have to be re-enacted, unfortunately. To what end?

[36] I make the point in para 35 above because a party that approaches Court to have a dispute resolved is entitled to a decision without undue delay. This Court cannot delay its decision for the Commission to model conditions, when it does. Besides, Mr Budlander raised a valid point that those conditions would not be binding on the Court on how to conduct its proceedings or exercise its discretion. Be that as it may, as matters currently stand, the decision by Parliament is not before the Court for adjudication and it is beyond the scope of this judgment to review and/or set it aside.

[37] Whilst a judicial officer is seized with a matter, it is impermissible for anyone to interfere with how the court must execute its functions in *facie curiae* because a magistrate is also independent and only subject to the Constitution and the law. Section 165 of the Constitution of the Republic of South Africa states:

"(1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice.

(3) No person or organ of State may interfere with the functions of the courts.

(4) Organs of State, through legislative or other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of State to which it applies."

[38] In **Van Rooyen and Others v State and Others** 2002 (5) SA 246 (CC) at para 23 Chaskalson CJ stated:

*"In deciding whether a particular court lacks the institutional protection that it requires to function independently and impartially, it is relevant to have regard to the core protection given to all courts by our Constitution to the particular functions that such court performs and to its place in the court hierarchy. **Lower courts are, for instance, entitled to protection by the higher Courts should any threat be made to their independence.** The greater the protection given the higher Courts, the greater is the protection that all courts have."* (Emphasis added).

[39] It is my view that far from a re-trial expediting the parheard matters, in the circumstances where the trial Regional Magistrate is competent to do so, it will delay them even further. Most importantly I have not discovered in the papers before us, including the decision by the National Assembly,

which is one of the three pillars of Government in our Constitutional democracy, any valid objection on why Mr Hole cannot dispose of all his partheard cases in terms of the Constitution and the law. The Portfolio Committee stated in their recommendation to Parliament:

"(U)nlike in most cases relating to suspensions where magistrates are facing criminal charges, the complaints against Mr Hole relate to lack of respect and abuse of authority. The Committee agrees, therefore, that the possible prejudice to the victims in these part-heard cases outweighs the reasons for continued suspension."

[40] This judgment must not be understood that Parliament may not uplift a provisional suspension on specified and defined conditions. What the Courts would take issue with are conditions which improperly and unconstitutionally limit or impede or remove the powers of a magistrate to perform his or her judicial functions. In conditions (10)(a), (c) and (d) which were approved by Parliament I can discern nothing objectionable. On the contrary, in my estimation Parliament was eminently entitled to impose them. They are:

"10(a) Mr Hole is assigned only [his] part-heard matters. Any decision regarding the allocation of new matters is to be informed by the outcome of inquiry into his fitness to hold office currently underway;

(b) ----- . [See para 41 below]

(c) Mr Hole must not conduct himself in a manner that compromises the integrity of the judiciary and brings the administration of justice into disrepute; and

(d) The Magistrates Commission provide regular reports to the National Assembly on whether Mr Hole is abiding by the

conditions of the upliftment and the progress of the cases before Mr Hole, as well as the status of the disciplinary hearing against him.”

[41] As adverted to hereinbefore condition 10(b) by Parliament is impermissible and objectionable. It reads:

“10(b) The Magistrates Commission consider starting those parheard matters afresh where this is necessary and desirable having regard to possible prejudice to the children, women or other person who has already testified.”

This condition cannot and has not received our imprimatur, if any was required.

[42] We have been assured by the Deputy DPP, Mr Tshweu, that his office will structure the cases in such a way that no bottlenecks or undue delays will ensue. He advised that only three prosecutors were involved in the parheard matters and that a senior state counsel from his office will co-ordinate the prosecutions.

[43] I have deliberately refrained from expressing any firm views on the conduct of Magistrate Hole as it would be undesirable to do so in view of the inchoate disciplinary process. However, lest the impression be gained that we overlooked or condoned certain utterances ascribed to him, sourced from some trial records, and directed at a witness in his court, who happened to be the Regional Court President, the diction was extremely unfortunate. No witness at all, irrespective of his/her standing in society, must be subjected to treatment that may tend to affront by a judicial officer in a court of law.

[44] In the circumstances we cannot turn a blind eye against the frosty relationship that has been amply demonstrated throughout the pages of the record before us between Regional Magistrate Hole and Regional President Nqadala. For this reason, and additionally because the Regional President is also the complainant and Mr Hole a respondent in this matter, it would be prudent that Mr Hole deal with the most senior Regional Magistrate after the Regional President for the duration of hearing the unterminated cases, to avoid any accusations or counter-accusations or further unpleasantness.

[45] **I make the following order:**

1. As Parliament has already uplifted the provisional suspension of Regional Magistrate, Mr Pumelela Sibusiso Hole, on 20 June 2013 it would be incompetent to grant an order to the same effect as it would amount to a *brutum fulmen*.
2. It is declared that the said Mr PS Hole is entitled to resume his duties with immediate effect in order to resolve or dispose of all his parheard or unterminated criminal cases only, and to do so unconditionally and subject only to the Constitution and the Law.
3. It is ordered that for the duration during which Mr P S Hole completes his parheard or unterminated cases he should deal with Mr Danie Schneider, being the most senior Regional Court Magistrate after the Regional Court President or, in his absence, the next in seniority.
4. There shall be no order as to costs.

F DIALE KGOMO

JUDGE PRESIDENT

Northern Cape High Court, Kimberley

I concur

M C MAMOSEBO

ACTING JUDGE

Northern Cape High Court, Kimberley

On behalf of the Applicant:

Adv S. Budlender

Adv. N Mayosi (Ms)

Instructed by:

Duncan & Rothman Attorneys

On behalf of the 1st to 4th Respondents:

Ms N. Gcilitshana (State Attorney)

On behalf of the 5th Respondent:

Adv. M. P Tshweu (DPP)

On behalf of the 6th Respondent:

Adv. V. Mayisela (Legal Aid)

On behalf of the 7th Respondent (Mr P S Hole):

No Appearance

On behalf of the 8th and 9th Respondents:

No Appearance