

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

CASE NO: 594/09

DATE: 2/6/2009

REPORTABLE

IN THE MATTER BETWEEN

JACOBA HENDRINA WESSELS

APPLICANT

AND

MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT

1ST RESPONDENT

A ALBERTS

2ND RESPONDENT

THE MAGISTRATE'S COMMISSION

3RD RESPONDENT

AND

ASSOCIATION OF REGIONAL MAGISTRATES
OF SOUTH AFRICA (ARMSA)

AMICUS CURIAE

JUDGMENT

VAN DER MERWE, J

INTRODUCTION

This matter was enrolled on the opposed motion court roll for the week of 30 March 2009. On 30 March 2009 the first respondent filed a substantive application for

postponement. In opposition to this application for postponement, an opposing answering affidavit was filed on 31 March 2009. The application for postponement was heard on 31 March 2009. It was refused with costs on 1 April 2009. The matter then stood down until 3 April for counsel to obtain instructions from the first respondent.

On 3 April counsel for the first respondent submitted that the appointment of a magistrate, *in casu* a regional court magistrate, is an exercise of an executive power and not an administrative action and is therefore not subject to review. It was also submitted that as the Magistrates' Commission's report to the first respondent constitutes reasons, it was not required of the first respondent to furnish any reasons for his/her decision. The court was also informed that there are conflicting decisions concerning the question of the exercise of an executive power versus the taking of administrative action in circumstances such as these. It was therefore arranged that the deputy judge-president be approached to constitute a full court on a preferential date for the hearing of the application. Once that was agreed, first respondent's counsel undertook to set out his main contentions in writing, which was done on 6 April 2009 as per the letter attached to the applicant's heads of argument.

HISTORICAL BACKGROUND

As a result of advertisements inviting applications for the filling of the vacant position of Regional Court President: Limpopo, the Magistrates' Commission, established in terms of section 2 of the Magistrates' Act, 90 of 1993 ("the Magistrates' Act"),

conducted interviews with candidates. The following candidates were found by the Commission appointable as Regional Court President: Limpopo:

1. the applicant;
2. Mr T A Maumela;
3. the second respondent;
4. Mr D V D Mathebula.

Section 10 of the Magistrates' Act provides that the minister shall, after consultation with the Magistrates' Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts Act, no 32 of 1944.

On 18 September 2008 the first respondent appointed the second respondent to the vacant position.

On 23 September 2008 the applicant faxed a written request for reasons in terms of section 5(1) of the Promotion of Administrative Justice Act, no 3 of 2000 ("PAJA") to first respondent, requesting reasons for the decision to appoint the second respondent. No acknowledgment of receipt of the letter was received. As no reasons were furnished, the applicant's attorney again on 30 October 2008 requested reasons for the first respondent's decision. Again no acknowledgment of receipt of the letter nor any reasons were received.

The present application for the review of the minister's decision was brought on 8 January 2009. The three respondents filed a notice of intention to defend on 30 January 2009. The second and third respondents withdrew their opposition on 4 February 2009. No opposing affidavit was filed by the first respondent which led to the application for postponement referred to above.

THE RELIEF SOUGHT

In terms of the notice of motion the applicant applies for the following relief:

- "1. The review and setting aside of the decision of the first respondent to appoint the second respondent as the Regional Court President for Limpopo province;
2. referring back the matter to the first respondent to enable the first respondent to anew consider the recommendations of the third respondent dated 12 August 2008, with such directions, if any, as the above honourable court deem fit;
3. directing that the costs of this application be paid jointly and severally by those respondents that oppose the relief sought herein."

This relief is sought on two bases ie:

1. on the basis that no reasons were furnished. For this basis the applicant relies on the provisions of section 5(3) of PAJA;
2. on the basis that when one has regard to the merits of the application, the appointment falls to be set aside.

THE FIRST RESPONDENT'S DEFENCE

As stated in the introduction above, first respondent's counsel made certain submissions regarding possible defences against the application. It was set out as follows in para 18 of the founding affidavit for the postponement:

"Furthermore, and on a point of law, it needs be mentioned that the first respondent is of the view that the appointment of magistrates constitutes an executive decision, as opposed to an administrative decision, and that this aspect must also be ventilated in the first respondent's opposing papers should a decision be taken to oppose the relief sought. In this respect there are conflicting decisions and it is likely that a full bench may have to hear this application."

In the letter dated 6 April 2009, also referred to above under the heading "introduction", the first respondent's defences were formulated as follows:

"... it was agreed that the first respondent will in a letter briefly set out the main points that will be argued before the full bench.

Accordingly we hereby briefly set out the main points:

1. The first respondent's decision to appoint a candidate, in terms of the recommendations of the chairperson of the Magistrates' Commission, is not an 'administrative action' as contemplated in the Promotion of Administrative Justice Act, 3 of 2000.
2. The first respondent's decision in appointing a candidate is an exercise of executive power and is not subject to review.
3. The first respondent only appoints nominees recommended by the chairperson of the Magistrates' Commission. The reasons for each such recommendation appear in the proceedings of the Appointments Committee of the Magistrates' Commission.

In the absence of any attack on the selection proceedings followed by the Magistrates' Commission, the first respondent is not expected to give reasons and even in the absence of reasons from the first respondent, the decision is not reviewable in law."

In the first respondent's heads of argument under the heading "The minister's grounds for opposition" the following is said in para 25 thereof:

"25. The minister opposes the application on the following bases:

25.1 first, the impugned decision does not constitute 'administrative action' for the purposes of PAJA;

25.2 second and in any event, the applicant's case effectively amounts to an appeal, and not a review;

25.3 third, and even if the decision were 'administrative action' for the purposes of PAJA, the grounds of review relied upon by Wessels have not been established."

The alleged obligation of the first respondent to furnish reasons referred to in the first respondent's attorney's letter of 6 April 2009 for her decision is not addressed in the quoted paragraph or elsewhere in the heads of argument. I will deal with this aspect and the other defences raised in the first respondent's heads of argument later in this judgment.

AMICUS CURIAE

As far as I am aware neither the applicant nor the first respondent notified the Registrar in terms of rule 16A of the Uniform Rules of Court that a constitutional point is being raised by anyone of them. Nonetheless the Association of Regional Magistrates of South Africa ("ARMSA") sought the consent of both the applicant and the first respondent to be admitted to these proceedings as *amicus curiae*. The request was motivated as follows:

"5. ... ARMSA is acutely concerned that the legal issues raised in the State Attorney's letter of 6 April 2009:

5.1 are incorrect as a matter of law; and

5.2 if accepted, would have the effect of undermining judicial independence.

6. ARMSA accordingly seeks the consent of the parties to its admission as an *amicus curiae*, in terms of Rule 16A of the High Court rules in order to advance written and oral submissions on the following contentions:

6.1 The decision to appoint a Regional Court President is administrative action in terms of section 33 of the Constitution and section 1 of the Promotion of Administrative Justice Act 3 of 2000.

6.2 Irrespective of whether the first respondent's decision is '*an exercise of executive power*', it does remain '*subject to review*', at least pursuant to the legal constraints applicable to the exercise of all public power, including the principle of legality.

6.3 Whatever the nature of the decision concerned, the first respondent is required, upon request, to provide reasons for his decision."

The necessary consent was given and ARMSA filed heads of argument and also appeared before us.

In my judgment the applicant and first respondent correctly consented to ARMSA being admitted as *amicus curiae*. The outcome of this application may very well have affected the judicial independence of at least the regional court magistracy.

DOES THE DECISION OF THE FIRST RESPONDENT TO APPOINT SECOND
RESPONDENT AS REGIONAL COURT PRESIDENT: LIMPOPO CONSTITUTE
ADMINISTRATIVE ACTION?

Section 33 of the Constitution of the Republic of South Africa Act, 108 of 1996 ("the Constitution") deals with "just administrative action". It reads as follows:

"33. Just administrative action. – (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

The national legislation envisaged by section 33 of the Constitution is PAJA. Because PAJA specifically deals with administrative action it is necessary to consider its provisions in some detail.

Part of the Preamble of PAJA reads as follows:

"WHEREAS section 33(1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons; AND WHEREAS section 33(3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to-

- * provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- * impose a duty on the state to give effect to those rights; and
- * promote an efficient administration;"

In terms of section 1 of PAJA "administrative action" is defined as follows:

"administrative action" means any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution of a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

- (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
- (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
- (cc) the executive powers or functions of a municipal council;
- (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
- (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
- (ff) a decision to institute or continue a prosecution;
- (gg) a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial official or any other person, by the Judicial Service Commission in terms of any law;

- (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
- (ii) any decision taken, or failure to take a decision, in terms of section 4(1);"

"Decision" in turn is defined as follows in section 1 of PAJA:

"**decision**' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;"

In argument before us Mr Duminy SC submitted that no right of the applicant was adversely affected by the minister's decision to appoint the second respondent as

Regional Court President: Limpopo. The minister's decision therefore did not amount to administrative action with the consequential result that the decision is not reviewable.

This particular argument was not raised in the application for postponement, either in the founding affidavit for the postponement or in oral argument for the postponement. The argument was also not pertinently raised in the first respondent's heads of argument before us. It can only be brought home under the argument that the minister's action amounted to the exercise of an executive power. Be that as it may, it is a legal argument and must be considered and commented on. The fact that this argument was not pertinently raised and addressed, has the result that counsel for the applicant and the *amicus curiae* did not have the opportunity of preparing proper argument on this point before the hearing of the application. To that extent this court is also at a disadvantage.

Mr Duminy referred to the process followed by the Magistrates' Commission by considering all the applications for the vacant post, compiling a short list of candidates, holding interviews with the short listed candidates and recommending the appointment of one candidate from a list of four. Mr Duminy submitted that none of the candidates had a right to be appointed as Regional Court President: Limpopo. He said that they might have had a hope or desire to be so appointed, the aspiration to be a Regional Court President or a spes to be so appointed, but no right. Once an appointment had been made, so the argument continued, the appointed candidate had a right to act as Regional Court President: Limpopo and a right to all the trappings attached to that position.

The submission was therefore that no right of the applicant was adversely affected by the minister's decision. Mr Duminy relied for this submission not only on the provisions of the definition of "administrative action" in PAJA but also on the following *dictum* of NUGENT, JA in *Grey's Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others*, 2005 6 SA 313 (SCA) at p323E-F, para [23] which reads as follows:

"... The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

I do not agree with Mr Duminy's submission or his interpretation of the passage he quoted from the *Grey's Marine* case.

A most helpful discussion of the requirement of "adversely affecting rights" in the definition of "administrative action" in PAJA is contained in chapter 63, volume 4 of the 2nd edition of Constitutional Law of South Africa by *Klaaren et al*, 63-69 to 63-74. At 63-69/70 the following is *inter alia* stated:

"The word 'affects' is capable of two meanings – 'deprived' and 'determined'. If the former definition is to be preferred, PAJA will cover a narrow class of administrative action. If the latter is given precedence, then it will cover a relatively broad class of administrative action. For example, if 'affects' means

'deprived', a person whose licence is prematurely terminated will be protected by the rules of administrative justice but a first-time applicant for a licence will not. This dispute between the determination theory and the deprivation theory of administrative justice is not new to our law and had already generated a considerable amount of debate in relation to the scope of natural justice prior to the finalisation of the Interim Constitution.

While it is possible that the inclusion of the word 'adversely' indicates the deprivation theory, this interpretation would give administrative action such a limited meaning as to render PAJA unconstitutional. To hold that administrative justice only applies to decisions which deprive a person of his or her rights cannot be said to give effect to the constitutional right to just administrative action. Such an interpretation should thus be avoided. Our courts should rather adopt the determination theory in interpreting this requirement of PAJA. Although our courts have not, to date, expressly grappled with the deprivation versus determination theories in this context, the decision by the majority of the Constitutional Court in *Union of Refugee Women* clearly endorses the determination theory in the context of PAJA's definition of administrative action."

In *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 4 SA 395 (CC) referred to in the above quotation, KONDILE AJ, states as follows in para [70], p417 of the judgment:

"[70] The respondents have, in answering affidavits in the High Court, denied that the aforesaid decisions constitute administrative action. The denial is based on the assertion that the decisions do not have a direct external legal effect on the applicants. The assertion is erroneous. The refusal to register an applicant as a private security service provider is an adverse determination of the applicants' rights. The determination has an immediate, final and binding impact on the applicants, who have no connection with the Authority. The decisions therefore do have a direct, external legal effect and constitute administrative action in terms of PAJA."

The authors of chapter 63 of *Constitutional Law of South Africa* further refer to para [23] of the judgment by NUGENT, JA in *Grey's Marine* case *supra* in support of their contention that the determination theory is to be applied to the requirement of adversely affecting rights. As stated above, Mr Duminy relied on a part of para [23] in support of his submission. The entire para [23] reads as follows:

"[23] While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The

qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

The authors state that in their opinion "the capacity to affect legal rights" is a synonym for "determines rights". I agree with this opinion and I am therefore satisfied that Mr Duminy's interpretation of part of para [23] in the *Grey's Marine* case *supra* is incorrect.

It is also important to note that NUGENT, JA refers in para [23] of the judgment to section 3(1) of PAJA which reads as follows:

"Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

No doubt NUGENT, JA was aware of the difference between the definition of "administrative action" in section 1 of PAJA and the inclusion of legitimate expectation in section 3 of PAJA which was described by Hoexter *Administrative Law in South Africa* as: "A perverse piece of drafting that gives rise to a mind boggling contradiction between sections 1 and 3." I am of the opinion that because of the inclusion of the concept "legitimate expectation" in section 3 of PAJA, NUGENT, JA referred to administrative action as action that has the capacity to affect legal rights.

In view of the foregoing I am satisfied that *in casu* the applicant's rights were determined when the second respondent was appointed as Regional Court President. Her rights were therefore adversely affected as required by PAJA which may give rise to administrative review.

In the *Grey's Marine* case *supra* NUGENT, JA considered the definition of administrative action quoted above and stated the following at pp322-323, paras [21] and [22]:

"[21] What constitutes administrative action – the exercise of the administrative powers of the State – has always eluded complete definition. The cumbersome definition of that term in PAJA serves not so much to attribute meaning to the term as to limit its meaning by surrounding it within a palisade of qualifications. It is not necessary for present purposes to set out the terms of the definition in full: the following consolidated and abbreviated form of the definition will suffice to convey its principal elements:

'Administrative action means any decision of an administrative nature made ... under an empowering provision [and] taken ... by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a

public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ...'

[22] At the core of the definition of administrative action is the idea of action (a decision) 'of an administrative nature' taken by a public body or functionary. Some pointers to what that encompasses are to be had from the various qualifications that surround the definition but it also falls to be construed consistently, wherever possible, with the meaning that has been attributed to administrative action as the term is used in s 33 of the Constitution (from which PAJA originates) so as to avoid constitutional invalidity."

In order to decide whether the minister's action or decision *in casu* amounts to administrative action or not, it will be necessary to analyse the "cumbersome definition" and more in particular the "palisade of qualifications", or exclusions as the qualifications are also called. It will also be necessary to analyse what actions are included as administrative actions.

In clauses (aa) and (bb) of the definition of "administrative action" most of the executive powers or functions of the National Executive and of the Provincial Executive are excluded from the definition.

In *Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others* 2006 2 SA 311 (CC) CHASKALSON, CJ considered *inter alia*, the question whether the making of regulations by the Minister of Health constituted administrative action under PAJA. In deciding that question the learned chief justice considered certain omissions from the list of exclusions, *inter alia* the omission of the power or function contained in section 85(2)(a) of the Constitution dealing with the authority of the President together with the cabinet to implement national legislation, except where the Constitution or an act of parliament provides otherwise. The learned chief justice concluded that that omission was deliberate as well as the omissions contained in sections 125(2)(a), (b) and (c) of the Constitution dealing with the executive powers of a Premier of a province together with the other members of the executive council.

The power or function of the National Executive relevant for present purposes which is not excluded from the definition of administrative action is that contained in section 84(2)(e) of the Constitution which reads as follows:

"(2) The President is responsible for-

(a) ...

(e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the National Executive;"

A further relevant exclusion in the definition of "administrative action" in PAJA is that contained in section (gg), referred to earlier herein. For purposes of clarity it is quoted again:

"a decision relating to any aspect regarding the nomination, selection, or appointment of a judicial official or any other person, by the Judicial Service Commission in terms of any law;"

In my judgment both the exclusion from and the inclusion in the definition of "administrative action" in PAJA referred to, ie that contained in section (bb) of the definition referring to section 84(2)(e) of the Constitution (the inclusion) and section (gg) of the definition (the exclusion), were deliberate.

I therefore agree with the submission on behalf of the *amicus curiae* that, while a number of presidential powers or functions are excluded from the definition of "administrative action", the power of the President contained in section 84(2)(e) of the Constitution "of making any appointment that the Constitution or legislation requires the President to make, other than as head of the National Executive" is not excluded from the definition and therefore is administrative action.

The question then is: why should the minister's action of the appointment of a Regional Court President in terms of legislation and not in terms of an original constitutional power be regarded as the performance of an executive function rather than the taking of administrative action?

In my judgment the minister's action of appointing the second respondent as Regional Court President: Limpopo, amounted to the taking of administrative action which is reviewable in terms of PAJA.

This conclusion is supported by the contents of section (gg) of the definition of "administrative action" in PAJA. The appointment of a judicial officer (ie a judge) by the Judicial Service Commission is excluded from the definition of "administrative action". The actions of the Magistrates' Commission or the minister in the appointment of magistrates were not so excluded. It therefore also follows that parliament intended the appointment of magistrates to fall under the definition of "administrative action" and therefore to be reviewable action.

This view is further strengthened by the *obiter dictum* of LEWIS, JA in *Minister of Defence and Others v Dunn* 2007 6 52 (SCA), para [4] at p55C-D where the following is said:

"The justification for regarding the appointment of a person to a post as administrative action, even though it cannot be said to adversely affect the 'right' of a person who is non-suited, is to be found, *inter alia*, in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* where Nugent JA said that while PAJA's definition of administrative action refers to decisions that 'adversely affect the *rights* of any person' (my emphasis), the literal meaning cannot have been intended by the Legislature. The qualification, he said, was

'probably intended to convey' that the decision 'has the capacity to affect legal rights'."

SECTION 5 OF PAJA

Section 5 of PAJA deals with the reasons for administrative action. In summary it provides that:

1. a person whose rights have been materially and adversely affected by administrative action may request reasons for the action;
2. adequate reasons must be furnished within ninety days from receipt of the request;
3. if no reasons are furnished it must be presumed, in the absence of proof to the contrary, that the administrative action was taken without good reason;
4. in circumstances referred to in section 5(4) of PAJA, there may be a departure from the requirement to furnish reasons.

The applicant stated that her rights were materially and adversely affected by the administrative action. That was disputed in oral argument. I have already concluded that her rights had been so affected. From the above it is clear that the applicant timeously requested reasons from Ms Mabandla, the then responsible minister. It is also clear from what is stated above that the then minister did not acknowledge receipt of letters, failed to

furnish reasons for her decision, did not explain that failure or contended that it was not necessary to furnish reasons. The minister responsible for the administrative action and her successor failed to file an answering affidavit in opposition to the application without any acceptable reason. Even after the matter had stood down for some time the first respondent's counsel could not tell whether Ms Mabandla would furnish any reasons whatsoever. Only then and clearly in an attempt to justify the responsible minister's failure to furnish reasons, was it submitted that no reasons were required because the appointment of the second respondent amounted to the exercise of executive power. That submission has no basis whatsoever. It was also contended that the question whether the decision amounted to administrative action or not was so contentious because of conflicting judgments, that the applicant ought to be referred to a full bench. No conflicting judgments were referred to and it is clear that none exist. It is merely a question of interpretation of relevant legislation and the application thereof on particular facts.

The only judgment the first respondent is really relying on for the contention that the appointment of a magistrate amounts to the exercise of executive power is *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 5 SA 246 (CC) in particular para [109] at p294 which reads as follows:

"[109] It is thus clear that the fact that the Minister is not bound by the recommendations of the Magistrates Commission is not constitutionally objectionable. The *First Certification Judgment* held that the Executive could have retained the power to appoint Judges (and magistrates) itself

without infringing the institutional independence required by the Constitutional Principles. Thus, the appointment of a Magistrates Commission, presided over by a Judge, and drawn from diverse sections of the legal community to advise the Executive in relation to the appointment of magistrates is a check on the exercise of executive power, and not a flaw in the appointment process."

Reliance is placed by the first respondent on the words "check on the exercise of executive power". On these few words the first respondent *inter alia* bases his argument that the appointment of a magistrate is the exercise of executive power.

Note should, however, also be taken of the contents of para 106, p293 of the *Van Rooyen* judgment which reads as follows:

"[106] In particular, the judgment of the High Court seems to assume that the involvement of members of the Executive and the Legislature in the appointment of judicial officers contravenes the separation of powers required by the Constitution. The mere fact, however, that the Executive and the Legislature make or participate in the appointment of Judges is not inconsistent with the separation of powers or the judicial independence that the Constitution requires."

It is true that the minister is part of the National Executive of the Republic of South Africa. That does not mean that each and every time a minister acts, it amounts to

the exercise of executive power. The constitutional court has repeatedly held that what matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC) at p67 para [141]; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 3 SA 589 (CC) at p623, para [104].

In any event, so it was contended by the *amicus curiae*, the constitutional court was not called upon in the *Van Rooyen* case to decide, and did not decide, whether the appointment of a magistrate was of an administrative or executive nature. I agree with this submission.

In a last attempt to justify the responsible minister's failure to fulfil her duties it was submitted that the Magistrates' Commission's recommendation qualify as reasons for the minister's decision. This submission was not persisted with during argument and is in any event devoid of any substance.

The responsible minister's failure to furnish reasons, seen in the light of the foregoing, cannot be seen other than proof that the administrative action was taken without good reason. It is therefore clear that the responsible minister's decision to appoint the second respondent as Regional Court President: Limpopo, must be reviewed and set aside.

PRINCIPLES OF LEGALITY AND ACCOUNTABILITY

The *amicus curiae* further submitted that the minister's decision is in any event subject to the principles of legality and accountability which require that reasons be given.

Having come to the conclusion that the first respondent's decision must be reviewed and set aside on the grounds as set out hereinbefore, it is not necessary to deal at length with this submission. It is also not necessary to do so because it was not addressed in the applicant's and the first respondent's heads of argument. The submission needs some comment, however.

I agree with the submission that the exercise of a public power is subject to the principle of legality [*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 1 SA 1 (CC) at p70, para [148]] and accountability [*Rail Commuters Action Group and Others v Transnet Ltd t/a Metro Rail and Others* 2005 2 SA 359 (CC) at pp399-401, paras [73] to [78]; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 1 SA 343 (CC) at p380, para [89]].

I also agree with the submission that the principle of legality, which includes rationality and accountability, imposes a duty upon the functionary exercising a public power to provide reasons for its act or decision.

The then responsible minister, Ms Mabandla, failed to furnish any reason whatsoever for her decision and failed to say whether and when she intended furnishing reasons when given the opportunity so to do through her legal advisors and functionaries in the ministry.

APPEAL OR REVIEW

The second basis for opposing the application is that the applicant's case amounts to an appeal and not a review.

In view of the foregoing, there is no merit in this submission and I will therefore not deal with it any further.

GROUND OF REVIEW

The third basis of opposition is that "even if the decision were 'administrative action' for the purposes of PAJA, the grounds of review relied upon by Wessels have not been established".

The applicant relies on various grounds of review in section 6(2)(e), (f) and (h) of PAJA. Had the minister given reasons and/or delivered an answering affidavit, the court would have been in a position to decide for or against the applicant on those grounds. The minister chose not to do so and therefore the presumption that the administrative action was taken without good reason remains undisturbed. "Good reason" is inherent in all of the grounds relied on by the applicant.

On this basis I am satisfied that the applicant is entitled to review. It is true that the applicant refers to the reasons why she maintains that she should have been appointed as Regional Court President for Limpopo instead of the second respondent. The applicant is not asking this court to substitute its decision for that of the minister. She asks that the matter be referred back to the minister. In my judgment it is inadvisable to express any opinion on the merits or demerits of anyone of the applicants for the vacancy of Regional Court President for Limpopo.

DIRECTIONS TO FIRST RESPONDENT

On behalf of the applicant it was submitted that in referring the matter back to the first respondent, this court should issue certain directives. The reasons for the request are that the matter has been dragging on since September 2008 without any reaction from the first respondent and that the first respondent had had enough time to consider the merits and demerits of the applicant and could come to a quick decision.

In my judgment a court should be hesitant to issue directives which may appear to affect the exercise of the minister's discretion.

Sight should also not be lost of the fact that the present minister is the second successor to Ms Mabandla who originally took the decision. I am satisfied that the present minister should, from the foregoing, be aware of the fact that the matter had been dragging on for a considerable period of time to the prejudice not only of the

applicant and the second respondent but also to the regional court magistracy. It should, in the circumstances, be clear to the present minister that the matter requires his urgent attention.

ORDER

The following orders are therefore granted:

1. The first respondent's decision to appoint the second respondent as the Regional Court President for Limpopo province is hereby reviewed and set aside.
2. The matter is referred back to the first respondent to enable him to anew consider the recommendations of the third respondent dated 12 August 2008.
3. The first respondent is ordered to pay the costs of the application.

W J VAN DER MERWE
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree

J B SHONGWE
DEPUTY JUDGE-PRESIDENT OF THE
NORTH GAUTENG HIGH COURT

I agree

A A LOUW
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 26/6/2009

FOR THE APPLICANT: ADV D S FOURIE SC

INSTRUCTED BY: ADELE VD WALT ATTORNEYS, PTA

FOR THE 1ST RESPONDENT: ADV W DUMINY SC WITH ADV K PILLAY

INSTRUCTED BY: STATE ATTORNEY PTA

AMICUS CURIAE: ADV S BUDLENDER SC

INSTRUCTED BY: RUDMAN ATTORNEYS PTA