

IN THE LABOUR COURT OF KWA-ZULU NATAL
HELD AT DURBAN

REPORTABLE

CASE NO: D532/2002

In the matter between:

MR FANO ALPHEUS KHANYILE

Applicant

And

THE COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION

1st Respondent

MR M SITHOLE

2nd Respondent

MINISTER OF JUSTICE

3rd Respondent

JUDGEMENT

MURPHY, AJ

1. The applicant has filed a notice of motion in terms of section 145 of the Labour Relations Act of 1995 ("LRA") seeking to review and set aside an arbitration award handed down by the second respondent acting under auspices of the first respondent dated 9 March 2001 in terms of which he found that the third respondent has not committed an unfair labour practice by failing to promote the applicant to the rank of senior magistrate at Madadeni, Kwa-Zulu Natal. For reasons that will become apparent presently it is unnecessary to canvass the facts in any detail, other than to say that the applicant has many years experience as a magistrate and has served as an acting senior magistrate. However, the Minister, presumably acting on the advice of the Magistrates Commission, chose not to promote him to the vacant senior position at Madadeni.
2. The matter came before me on 28 October 2004 on the opposed motion roll pursuant to the third respondent's application for condonation for the late filing of its opposing affidavit in the

application for review made in terms of section 145.

3. At the hearing, Mr Govender, who appeared on behalf of the third respondent, raised two points *in limine* contending that the court lacked jurisdiction to deal with the application. The first point *in limine* related to the failure of the applicant to file his review in terms of section 145 timeously. However, given the view I have taken in relation to the second point *in limine*, it is unnecessary to deal with this point.
4. The second point *in limine* is to the effect that this court lacks jurisdiction by virtue of the fact that the applicant is not an “employee” in terms of the LRA because he is a magistrate appointed in terms of the Constitution and the Magistrates Act of 1993 and hence a “judicial officer”. The point being that judicial office cannot be equated with an ordinary contract of employment and that for sound constitutional reasons the relationship between magistrates and the Minister of Justice cannot and should not be regarded as one of employment.
5. As I have said, the applicant’s cause of action is that the Minister’s refusal to appoint him constitutes an unfair labour practice. Section 185 of the Labour Relations Act grants every “employee” the right not to be unfairly dismissed and subjected to unfair labour practices. Section 186(2) defines an unfair labour practice to mean:

Any unfair act of omission that arises between an employer and an employee involving –

- a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
- b) The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
- c) A failure or refusal by an employer to reinstate or reemploy a former employee in terms of any agreement; and
- d) An occupational detriment, other than dismissal, in contravention of the Protected

Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

6. An employee is defined in section 213 as:

- a) Any person, excluding an independent contractor, who works for another person or for the state and who received, or is entitled to receive, any remuneration; and
- b) Any other person who in any manner assists in carrying on or conducting the business of an employer.

7. The applicant, on the assumption that he was an employee, referred a dispute regarding his promotion to the CCMA alleging that the third respondent had committed an unfair labour practice. At the time of his referral, in 2001, the current provisions of the Act set out above did not apply and the reference was made in terms of item 2(1)(b) of schedule 7 of the Labour Relations Act of 1995. For practical purposes, there is not much difference between the two provisions as they apply to the applicant's dispute. Item 2(1)(b) basically allowed for the submission to the CCMA of a dispute regarding any unfair act or omission that arises between an employer and an employee involving the unfair conduct of the employer in relation to the promotion of an employee. It follows that under both provisions, it is necessary for the applicant to establish that he is indeed an "employee" before he is entitled to resort to the remedies provided for in the LRA. In terms of section 193(4) of the LRA, as amended by Act 12 of 2002, an arbitrator may resolve any unfair labour practice dispute on terms that he or she deems reasonable, which may include ordering reinstatement, re-employment or compensation. Item 4 of schedule 7 under the previous legislative dispensation provided that the arbitrator had the power to determine any unfair labour practice dispute on reasonable terms. Hence in terms of both provisions it would be possible for an arbitrator to remedy any alleged unfair labour practice relating to a promotion dispute by means of an order effecting a promotion or by ordering protective promotion.

8. However, should the Minister's point *in limine* be on firm ground, the applicant, not being an employee, would not be entitled to invoke the remedies of the LRA.
9. At first glance, the definition of an employee in section 213 of the LRA is extensive and covers any employee party to a contract of *locatio conductio operarum*. Independent contactors are explicitly excluded from the definition of an employee. Moreover, in terms of section 2 of the LRA the Act applies to all employees with the exception of those in the service of the National Defence Force, the National Intelligence Agency and the South African Secret Service.
10. Proceeding from the trite proposition that the intention of the legislature in relation to the scope and application of the LRA should be ascertained from the wording of the applicable sections, or looked at from a purely textual point of view, magistrates *prima facie* fall within the definition of employee, by virtue of being persons who work for other persons or for the state and who receive remuneration. However, given the special constitutional nature of a magistrate's position, it is necessary to construe the definition within a broader constitutional framework.
11. The magistracy is part of the judicial system exercising judicial authority in terms of the Constitution. Section 166 of the Constitution defines the courts to include the magistrates courts. Section 165 vests judicial authority in the courts and insofar as it is relevant reads as follows:
 - (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 functioning of the courts.
 - (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence and impartiality,

dignity, accessibility, and effectiveness of the courts.

12. Section 174 of the Constitution governs the appointment of the judicial officers. Section 174(7) regulates the appointment of judicial officers other than the judges of the High Court, Supreme Court of Appeal and Constitutional Court. It provides:

Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers takes place without favour or prejudice.

13. The constitutional objective set out in section 174(7) of the Constitution has been given effect to by the Magistrates Act of 1993. This statute was subjected to extensive scrutiny by the Constitutional Court in *van Rooyen & Others v S & Others* [2002] (8) BCLR 810 (CC) in which the learned Chief Justice pronounced on various aspects of the legislation and handed down an authoritative account of the status and position of the magistracy within our judicial system.
14. The Constitutional Court's point of departure was to note that the Constitution not only recognizes that the courts are independent and impartial, but also provides important institutional protection for the courts. That said, the constitutional protection in section 175(2) of the Constitution does not mean that the lower courts have, or are entitled to have, their independence protected in the same way as the higher courts. The mere fact that the statutory provisions regulating magistrates are provided for in an Act of Parliament, and hence are different to the constitutional provisions governing the independence of judges, the court found, was not a reason for holding them to be unconstitutional. Moreover, the court noted that the different functions of magistrates (the fact that their decisions can be appealed against and that they exercised no real review functions) might justify a lower standard of independence. However, it is clear from various pronouncements throughout the judgement that magistrates are to be seen as occupying a constitutional position similar in many respects to judges.

15. The Constitution also distinguishes between the way judges are to be appointed and the way magistrates are to be appointed. Judges are appointed on the advice of the Judicial Services Commission and their salary, allowances and benefits may not be reduced (section 176(3)). The circumstances in which judges may be removed from office are also constitutionally prescribed. In the case of magistrates, there are no comparable provisions in the Constitution itself, nor is there any requirement that an independent commission be appointed to mediate action taken in regard to such matters. This does not mean that the magistrates are not entitled to the protection necessary for judicial independence or that they lack it. The Magistrates Act, the court found, largely provides for the key aspects of judicial independence, namely security of tenure and a basic degree of financial security, institutional independence concerning the exercise of the judicial function and some measure of judicial control over the administrative decisions that bear directly and immediately upon the exercise of the judicial function.

16. Section 2 of the Magistrates Act of 1993 establishes the Magistrates Commission which is composed of a judge, six magistrates of different ranking, four members of the legal profession, an academic lawyer, the head of the justice college, eight members of parliament and various other persons. Sections 4(a) and (b) of the Magistrates Act set out the main objects of the Commission and read as follows:

- a) to ensure that the appointment, promotion, transfer or discharge or disciplinary steps against judicial officers in the lower courts take place without favour or prejudice and that the applicable laws and the administrative directions in connection with such action are applied uniformly and correctly; and
- b) to ensure that no influence or victimization of judicial officers in the lower courts takes place.

17. Section 10 of the Magistrates Act provides for the appointment of magistrates providing that the Minister shall, after consultation with the Commission, appoint magistrates in respect of

lower courts.

18. A magistrate is defined in the Magistrates Act as “a judicial officer appointed under section 9 of the Magistrates Court Act read with section 10 of this Act”. As such, a magistrate is specifically defined as a judicial officer, which concept must be interpreted consistently with the provisions of section 174 of the Constitution providing for the appointment of judicial officers.

19. The 1993 Magistrates Act was passed following recommendations of the Hoexter Commission that magistrates should be made independent of the public service and their appointment, discipline and discharge should be governed by recommendations of an advisory body consisting of judicial officers. The Magistrates Act of 1993 constituted a decisive shift from past practice in that it set out mechanisms for the appointment, discipline and removal of magistrates instead of, as was the case previously, regarding magistrates as public servants to whom the Public Service Act applied. In the *van Rooyen* case the High Court had held that the Magistrates Commission was not an autonomous body, basically, because it felt the governing party effectively appointed 17 of the 27 members of it. The Constitutional Court strongly rejected this conclusion, stating that the fact that the Executive has a strong influence in the appointment of the Magistrates Commission does not mean that the magistrates courts lack institutional independence. Judicial independence is an evolving concept. The court moreover drew attention to its finding in the *First Certification* judgement where it had held that the Constitutional Principles did not require a Magistrates Commission let alone an autonomous one.

20. Although section 10 bestows the power to appoint magistrates on the Minister, she can only exercise this power after consultation with the Commission, meaning that she must consult before making an appointment, but is not bound by its recommendation. In the *First Certification* judgement the Constitutional Court held that the Executive could have retained the power to appoint judges and magistrates without in any way infringing the institutional independence required by the Constitutional Principles. Looked at from a slightly different

angle, this implies that an appointment by the Minister does not confer the status of an employee upon a judicial officer. Likewise, the Minister's role in regulating magistrates' conditions of service, as provided for in the Magistrates Act, was also held not to constitute an infringement of the institutional requirement of independence.

21. Section 16(1)(a)(i) of the Magistrates Act specifically allows for regulations regarding the requirements for appointment and the appointment, promotion, transfer, discharge and disciplinary steps in respect of magistrates. The Constitutional Court held that this power to make regulations, delegated to the Minister by Parliament, is not an impermissible delegation and hence is consistent with the Constitution. The court accordingly felt that the establishment of the Magistrates Commission to act in concert with the Minister effectively established an appropriately constituted and empowered body as the effective and suitable means of securing the constitutional object in section 174(7).

22. In upholding the overall constitutional and legislative scheme provided by the Constitution and the Magistrates Act in relation to appointments, promotion and the like, the court made the following important observation at paragraph 124 of its judgement.

The fact that the persons who are not dealt with fairly in relation to any of the matters referred to in section 174(7) are entitled to bring their grievances to the attention of the Magistrates Commission, and if they do not get satisfaction there, to apply to the higher courts for relief, is sufficient to meet the requirements of section 174(7) of the Constitution.

23. The observation so made, provides a strong indication and a structural argument that the Constitution mandates that the appointment, remuneration, promotion, discipline and discharge of magistrates are matters for the Magistrates Commission and the higher courts.

24. The court also upheld the legislative arrangements for the setting of remuneration and the removal from office of magistrates. Remuneration is set by the Minister on the

recommendation of the Magistrates Commission. However, because only Parliament is empowered to reduce magistrates' salaries, by means of a resolution, which would have to be justifiable and hence reviewable before higher judicial authority, the court regarded such as constitutional. It felt likewise with regard to the grounds of removal of magistrates from office, holding that such grounds were not inconsistent with judicial independence in that the protection against removal was consistent with international standards for security of tenure.

25. When discussing the question of setting remuneration, the court stated that it was obviously undesirable that the judiciary should be thrown into a position of having to deal with litigation in which the issue is whether their salaries are consistent with the constitutional requirements of judicial independence. It stated:

Judicial officers ought not to be put into the position of having to do this, or to engage in negotiations with the executive over their salaries. They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such matters than others who can advance their interests through normal bargaining processes open to them.

26. A similar view of the magistracy informed the courts decision to uphold most of the provisions governing magistrates' security of tenure. The court held that magistrates were essentially protected from removal of office by the requirement of a parliamentary resolution, which was in effect the same procedure as that required for the removal of judges. In regard to the detailed procedures contained in the regulations for the investigation of misconduct against magistrates, the court stated in paragraph 195 of the judgement that the person charged with the responsibility of making a finding as to whether or not a magistrate has been guilty of misconduct should be a judicial officer, concluding that: "It is not consistent with judicial independence that a person other than a judicial officer should be charged with this responsibility."

27. Thus, the findings in paragraph 139 and 195 of the judgement strongly suggest that by virtue of their office magistrates should not be seen as employees entitled to engage the processes

of the Labour Relations Act for the purposes of protecting their rights. As judicial officers they hold constitutional and statutory office and the requirements of judicial independence render it inappropriate for Commissioners of the CCMA, who are not judicial officers, to pronounce on their conduct or suitability for promotion.

28. Added to that, when considering the constitutionality of regulation 16, which deals specifically with the promotion of magistrates, the court identified a particular procedure appropriate for dealing with disputes about promotion. The regulation provides that a magistrate with more than five years appropriate experience may on the recommendation of the Magistrates Commission be promoted by the Minister to a higher post. The High Court had held that regulation 16 was unconstitutional because the Magistrates Commission could not prevent manipulation of promotions by the Minister. The Constitutional Court disagreed with the High Court finding instead that the Minister's power is dependent upon the recommendation of the Commission. Referring to the appropriate safeguards that exist in relation to promotion disputes it stated at paragraph 213 of the judgement:

If the Minister does not give effect to a recommendation, the failure to do so must be justified. The absence of a vacancy in a higher post would be an adequate reason. There may possibly be other adequate reasons, but if there are, they must be capable of proof and able to withstand constitutional scrutiny by a reviewing court in the higher judiciary. This is adequate protection against the possibility of manipulation of promotions.

29. This latter pronouncement is unassailable authority for the proposition that the constitutional structure contemplates disputes about the promotion of magistrates to be matters falling within the exclusive remit of the Magistrates Commission and the Minister subject to judicial review by "the higher judiciary". Such matters therefore do not fall within the province of the Commission for Conciliation Mediation and Arbitration established by the Labour Relations Act.

30. In the premises, I am persuaded that a magistrate is not an employee as defined within the Labour Relations Act, by virtue of the special constitutional position a magistrate holds as a

judicial officer appointed in terms of chapter 8 of the Constitution.

31. My decision in this regard is fortified by the decision of Ngoepe AJ (as he then presided) in *Hannah v Government of the Republic of Namibia* [2000] (4) SA 940 (NmLC) in which he held that a judge in Namibia was not an employee as defined in the Labour Act 6 of 1992 in Namibia. The definition of an employee in that Act is almost identical to the definition in section 213 of the Labour Relations Act in South Africa. In concluding that a judge is not an employee Ngoepe AJ found @945F:

Counsel for the applicant has argued that the definitions of employee and employer are very broad...I do not agree with the contention that a Judge can still be regarded as an employee of the state even though he/she gets no order or instructions from the State. Firstly, as I have already said, it is not only a question of the absence of supervision and control, but also prohibition of any interference with the Judge in the execution of his/her judicial functions; secondly, it would be difficult to reconcile an employee/employer relationship with judicial independence. The confidence of citizens in the judiciary would be seriously undermined, particularly in matters in which the State is one of the litigants – a daily occurrence. It has also been submitted, in support of the applicant's case, that Judges are controlled by the State as to the times when they have to work; as to the place where they have to work; as to when to take vacations; as to (obligatory?) pension and medical contributions; as to deductions for income tax on a PAYE basis etc. I doubt the correctness of some of these assertions. In any event, they are peripheral as opposed to being germane to a Judge's function, the real nature of which I have already described above: they do not go far in helping determine the nature of the relationship between the parties. If they do carry any weight at all, they do not outweigh the factors discussed earlier which militate against the argument that a Judge falls within the definition of an employee. They only serve to indicate that a Judge's position is *sui generis*.

32. In reaching his decision, the learned judge was much influenced by a finding of the Indian Supreme Court in *Union of India v Pratibha Bonnerjea* [1996] AIR SC 690 where the question

to be considered was whether under the Indian Constitution there was strictly speaking a relationship of master and servant between the government and a High Court Judge. That court concluded (@696):

A Judge of the High Court, therefore, occupies a unique position under the Constitution. He would not be able to discharge his duty without fear or favour, affection or ill-will, unless he was totally independent of the Executive, which he would not be if he is regarded as a government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he is not a government servant and does not take orders from anyone.....That is because the Constitution-makers were conscious that the notion of judicial independence must not be diluted. If the relationship between the government and the High Court Judge is of master and servant it would run counter to the constitutional creed of independence for the obvious reason that the servant would have to carry out the directives of the master. Since a High Court Judge has to decide cases brought by or against the government day in and day out, he would not be able to function without fear or favour if he has to carry out the instructions or directives of his master. The whole concept of judicial independence and separation of Judiciary from the Executive would crumble to the ground if such a relationship is conceded, High Court Judges would not be true to their oath if such a relationship is accepted.

33. Given the evolving concept of judicial independence in respect of the magistracy in South Africa, as identified by the Constitutional Court in the van Rooyen judgement, there is no reason why these considerations cannot be seen as applying equally to magistrates.
34. Moreover, as Mr. Govender correctly pointed out, the Labour Relations Act of 1995 which specifically provides for the establishment of bargaining councils for the public service, limits the definition of the public service to the national departments, provincial administrations of provincial departments and the organizational components contemplated in section 7 of the Public Service Act, which clearly excludes the courts.

35. In the premises, as I have already stated, the only appropriate finding in this matter is that the applicant is a judicial officer and not an employee in terms of the Labour Relations Act or an officer employed in terms of the Public Service Act and hence is subject to chapter 8 of the Constitution, the Magistrates Act of 1993, the regulations for judicial officers on the lower courts and the jurisdiction of the Magistrates Commission as established by section 2 of the Magistrates Act of 1993. It follows that neither the Commission for Conciliation Mediation and Arbitration nor this court has jurisdiction regarding disputes about promotion involving a magistrate in his capacity as a judicial officer. The consequence of such a finding is that the arbitration award handed down by the second respondent on 9 March 2002, although in favour of the third respondent, is defective in that the Commission for Conciliation Mediation and Arbitration did not have jurisdiction to entertain the dispute in the first place and hence must be set aside.

36. This matter has raised an issue of considerable importance and has proceeded from a premise which although mistaken is understandable. Accordingly, I am inclined not to make a costs award.

37. In the premises, I make the following order:

37.1. The applicant's application in terms of section 145 of the Labour Relations Act to review and set aside the award of the second respondent under case number KN5369-01 dated 9 March 2002 is dismissed.

37.2. The arbitration award of the second respondent under case number KN5369-01 is hereby reviewed and set aside.

37.3. There is no order as to costs.

A Judge of the High Court, therefore, occupies a unique position under the Constitution. He

would not be able to discharge his duty without fear or favour, affection or ill-will, unless he was totally independent of the Executive, which he would not be if he is regarded as a government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he

MURPHY AJ

DATE OF HEARING: 28 October 2004

DATE OF JUDGEMENT: 26 November 2004

APPLICANT'S REPRESENTATIVE: Applicant appeared in person

RESPONDENT'S REPRESENTATIVE: Adv S M Govender instructed by the State Attorney