



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

APPEAL CASE NO: A2024-112579

COURT A QUO CASE NO: 2021-24910

DATE: 11 AUGUST 2026

In the matter between:

JUDITH FREDA VAN SCHALKWYK

Appellant

and

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

First Respondent

THE MAGISTRATES COMMISSION

Second Respondent

ANAND MAHARAJ N O

Third Respondent

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

Fourth Respondent

Neutral Citation: *Van Schalkwyk v The Minister of Justice & Constitutional Development and Others (A2024-112579) [2026] ZAGPJHC*
--- (11 August 2026)

Coram: Mali et Adams JJ et Van Nieuwenhuizen AJ

Heard: 29 April 2026

Delivered: 11 August 2026 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being

uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 11 August 2026.

Summary: Constitutional and administrative law – s 172 of the Constitution – review in terms of s 6(2)(a)(iii), 6(2)(b), 6(2)(c), 6(2)(e)(ii), 6(2)(e)(iii) and 6(2)(f)(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – the administrator was biased – the action was procedurally unfair – the action was taken for an ulterior purpose or motive – irrelevant considerations were taken into account or relevant considerations were not considered – arbitrarily or capriciously – the action itself was not rational – the exercise of the power or the performance of the function so unreasonable that no reasonable person could have so exercised the power or performed the function – review application also based on the doctrine of legality – appeal against the dismissal of judicial review application –

Appellant (a Chief Magistrate) – found guilty by the third respondent (judicial presiding officer in a misconduct hearing) of thirteen counts of misconduct – he also recommended, in terms of s 26(17)(b) of the Regulations for Judicial Officers in Lower Courts, 1994, that the appellant be removed from office as a Magistrate as contemplated in s 13 of the Magistrates Act –

Appellant was found guilty by the presiding officer of thirteen counts of misconduct – the guilty finding in respect of nine of those charges was set aside on review –

Held by the Appeal Court that it follows that the sanction should also either fall away or at the very least be reconsidered by the Magistrates Commission –

Substitution as a remedy in a judicial review application – to be granted in an exceptional case – held that no such case made out in the court *a quo* –

Held that, as for the merits of the review application, the main enquiry before the court is whether the presiding officer's decision is so unreasonable that no reasonable person could have reached it – no such case made out –

Appeal upheld in part – sanction reviewed, set aside and remitted to the Commission.

ORDER

On appeal from: The Gauteng Division of the High Court, Johannesburg
(Twala J sitting as Court of first instance):

- (1) The appellant's appeal against paragraph (2) of the order of the court *a quo* dated 19 March 2024 is upheld, with costs.
- (2) Paragraph (1) of the order of the court *a quo* dated 19 March 2024 is confirmed.
- (3) Paragraph (2) of the order of the court *a quo* dated 19 March 2024 is reviewed, set aside and replaced with an order in the following terms: -
 - '(2) The application to have reviewed and set aside the finding by the third respondent dated 1 October 2020, that the applicant is guilty of misconduct as per charges 3, 4, 17 and 20, is dismissed.
 - (3) The decision / finding by the third respondent dated 2 October 2020 to recommend to the Magistrates Commission that the applicant be removed from office as contemplated in section 13 of the Magistrates Act, is hereby reviewed, set aside and remitted back to the Magistrates Commission for reconsideration.
 - (4) The decision / finding by the second respondent to recommend to the first respondent that the applicant be removed from office as contemplated in section 13 of the Magistrates Act, is hereby reviewed, set aside and remitted back to the Magistrates Commission for reconsideration.
 - (5) The decision / finding by the first respondent to recommend to Parliament that the applicant be removed from office as contemplated in section 13 of the Magistrates Act, is hereby reviewed, set aside and remitted back to the Magistrates Commission for reconsideration.
 - (6) The decision by the fourth respondent (Parliament) dated 8 June 2022, removing the applicant from office as contemplated in section 13 of the Magistrates Act, is hereby reviewed, set aside and remitted back to the Magistrates Commission for reconsideration.
 - (7) All other decisions made subsequent to the decision by the third respondent on sanction, made pursuant to the decision to convict the applicant in respect of thirteen misconduct charges, is reviewed and set aside.

- (8) Each party shall bear her / his / its own costs of the applicant's opposed review application.'
- (4) The first, second, third and fourth respondents, jointly and severally, the one paying the other to be absolved, shall pay the appellant's costs of the appeal, including the costs of the application for leave to appeal to the court *a quo* and the costs of the application for leave to appeal to the Supreme Court of Appeal, all such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the tariff referred to in Uniform Rule of Court 67A(3), read with rule 69

JUDGMENT

Adams J (Mali J et Van Nieuwenhuizen AJ concurring):

[1] This matter arises from a written ruling – styled 'judgment' – dated 1 October 2020 by the third respondent, *qua* judicial presiding officer in a misconduct hearing by the second respondent (Magistrates Commission) against the appellant, in which she, as Chief Magistrate in Kempton Park, was charged with and accused of misconduct in terms of Regulation 25 of the Regulations for Judicial Officers in Lower Courts, 1994¹. After hearing the evidence and the arguments at the said hearing, the third respondent concluded and made a finding that the appellant was guilty of thirteen of the twenty-four charges preferred against her. And in his 'Sanction Judgment' dated 2 October 2020, the third respondent made a finding that it should be recommended to the Magistrates Commission that the appellant be removed from office as contemplated by s 13 of the Magistrates Act 90 of 1993 (Magistrates Act).

¹ Regulations promulgated under and in terms of the Magistrates Act 90 of 1993.

[2] Subsequently – on or about 17 March 2021 – the Magistrates Commission, after consideration of the relevant documentation, agreed with the findings of the third respondent and resolved to and in fact did recommend to the fourth respondent (Parliament), *via* the first respondent (Minister of Justice), that the appellant be removed from office as contemplated in s 13 of the Magistrates Act. On 27 July 2021 the Minister referred the matter to Parliament for consideration.

[3] Aggrieved by the findings of the third respondent, as supported by the Magistrates Commission, the appellant on 21 May 2021, launched a judicial review application in this Division of the High Court, Johannesburg (the court *a quo*). In the main, the relief sought by the appellant was for an order reviewing and setting aside the aforesaid findings and the recommendations in terms of which she was found guilty of misconduct and a recommendation was made that she be removed from office. Ancillary relief claimed was *inter alia* for orders: (a) Reviewing and setting aside a resolution adopted by the executive committee of the Magistrates Commission on 12 March 2021 in support of the findings by the third respondent; and (b) Reviewing and setting aside the decision made by Parliament on 8 June 2022, in terms of which it confirmed the removal from office of the appellant.

[4] Importantly, as regards the sanction imposed by the third respondent, the appellant prayed for an order reviewing and setting same aside and substituting the sanction by imposing a lesser one not involving removal from office.

[5] On 8 June 2022, subsequent to the filing by the appellant of the review application, Parliament confirmed the appellant's removal from office as a Magistrate in terms of section 13(4) of the Magistrates Act. In an amended notice of motion dated 16 November 2022, the appellant accordingly also sought an order reviewing and setting aside the said decision by Parliament removing her from office.

[6] The judicial review application was premised in the main on alleged serious misdirections on the part of the third respondent in the evaluation of the

evidence on the merits of the charges, as well as on the basis of irrationality and unreasonableness of the findings and the sanction recommending removal from office. The findings by the third respondent, so it was contended by the appellant, are not findings and recommendations that a reasonable or rational presiding officer would reach. The same applies, so the contention continued, to the endorsement of the sanction by the Magistrates Commission. The review application was accordingly in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and on the basis of the doctrine of legality.

[7] It may be apposite at this juncture to list the charges in respect of which the appellant was found guilty by the third respondent. As I have already indicated, of the twenty-four charges initially preferred against her, the appellant was found guilty only of the following thirteen counts against her: -

- (a) **Count 2** – On 09/02/2007 - Improper use of state vehicle;
- (b) **Count 3** – From 2009 to 04/06/2013 – Being rude, humiliating, belittling and threatening to judicial and other officials;
- (c) **Count 4** – On 20/03/2013 – Being disrespectful to Chief Magistrate Jonker and the Chief Justice of South Africa by disseminating to a number of members of the Magistracy a derogatory email;
- (d) **Count 7** – During 2009 – Gambling during official hours at Emperors Palace, alternatively, absent from work without leave or valid cause;
- (e) **Count 9** – 2009 to 2013 – Asked Magistrate Da Silva to come out of court to do her hair;
- (f) **Count 10** – During 2010 – Arranging a loan application for Magistrate Da Silva without her consent;
- (g) **Count 11** – During October 2010 – Called Magistrate Da Silva out of court to apply for an *Eduloan* for R34 000 to pay for her (the appellant's) son's university fees;
- (h) **Count 12** – During 2011 – Took Magistrate Da Silva out of court for five weeks to do the Mozambican report;
- (i) **Count 14** – During June 2011 – Took Magistrate Da Silva out of court to deal with JOASA matters – to call magistrates, to get support for special AGM and to email them;
- (j) **Count 16** – On 12/2012 to 04.2013 – Took Magistrate Da Silva to assist with IAJ conference and take her to meetings at Emperors Palace, Carnival City and ACSA;

- (k) **Count 17** – On 10/11/2012 – Requested Attorney Moloi to pay for travel expenses to Washington DC or collecting cash from him using Magistrate Da Silva;
- (l) **Count 20** – During 2005 to 04/06/2013 – Made use of official parking at Kempton Park without paying; and
- (m) **Count 22** – On 18/03/2013 – Failing to comply with a lawful order of Chief Magistrate Jonker in submitting daily returns.

[8] The review application in the court *a quo* was opposed by all four of the respondents, namely the Minister, the judicial presiding officer, the Magistrates Commission and Parliament, with the Commission taking the lead in opposing the application. In its answering affidavit in opposition to the appellant's application, the Magistrates Commission did however indicate unequivocally that they do not oppose the application to set aside the findings of guilty in relation to charges 2, 7, 9, 10, 11, 12, 14, 16 and 22. That left remaining and alive the findings of guilty relative to charges **3, 4, 17 and 20 above**. The respondents oppose the review application in relation to the findings of guilty in regard to these four charges.

[9] The appellant, as indicated above, also asked for a review of the sanction imposed by the third respondent – this part of the review application took on particular and special importance for the appellant in view of the fact that by the time the judicial review application was heard in the high court, the guilty findings had in effect been reduced from thirteen to four. Axiomatically, so the contention on behalf of the appellant went, the sanction should be reviewed and set aside or at the very least be referred back to the Magistrates Commission for reconsideration.

[10] The contentions by the respondents found favour with the court *a quo* (per Twala J) and those on behalf of the appellant did not. On 19 March 2024, Twala J granted the following order: -

- '(1) The application to review and set aside in respect of counts 2, 7, 9, 10, 11, 12, 14 and 16 is granted.

- (2) The application to the review and set aside counts 3, 4, 17 and 20 is dismissed with costs, including costs for the employment of two counsel.'

[11] There appears to be an error in the aforesaid order in that misconduct charge 22, relating to the appellant's failure to comply with a lawful order of Chief Magistrate Jonker in submitting daily returns, was not dealt with in the order. However, if regard is had to the evidence before the court *a quo*, it can and should, in my view, safely be accepted that that charge was to form part of paragraph (1) of the said order. I will therefore proceed on the assumption that paragraph (1) includes a reference to the aforementioned charge 22.

[12] The appellant sought leave to appeal against prayer (2) of the order of the court *a quo*, which refused leave to appeal. However, on 5 September 2024 the appellant was granted leave to appeal on petition to the Supreme Court of Appeal. In essence, this appeal concerns the rationality and the legality of the findings by the third respondent and whether the court *a quo* in confirming the sanction imposed was correct.

[13] In this Full Court appeal, which came before us on Wednesday, 29 April 2026, the appellant's case is that, despite setting aside nine of the charges preferred against her, the court *a quo* did not review and set aside the sanction imposed on her pursuant to the imposition of those charges, which charges are now deemed to be *void ab initio*. Moreover, so the contention on behalf of the appellant continues, the Judge *a quo* did not set aside the consequent decision of Parliament, which confirmed the proposed sanction, being the appellant's removal from office as a magistrate. This is so, so the argument on this point is concluded, despite these decisions being subsequent legal acts which depend on the existence of the antecedent findings of guilt for their validity. Thus, on established Supreme Court of Appeal authority, these antecedent decisions ought axiomatically to have been set aside.

[14] I find myself in agreement with these contentions on behalf of the appellant. It is, in my view, a matter of logic that, if a person is sanctioned on the

basis of a finding that she is guilty of misconduct on thirteen charges and the finding of guilty in respect of nine of those charges are set aside, the sanction ought at the very least to be remitted to the decision-maker for reconsideration if it is not reduced. And, in my view, it matters not that there may or may not be one charge in respect of which a finding of guilty remains, which is serious enough to in itself possibly warrant the sanction which had been imposed in respect of the guilty finding relative to thirteen charges of misconduct.

[15] In that regard, in the misconduct enquiry the third respondent dealt with the issue of sanction as follows: -

[27] The *multiple convictions on thirteen counts* is reflective that rehabilitation is slim for the respondent. *All these transgressions* occurred while she was a high-ranking magistrate achieving the status of Chief Magistrate.

... ..

[32] In my view, given *the multiple charges that the respondent has been found guilty of*, the seriousness of these charges and the need for the sanction to reflect the gravity of these charges and to engender respect from those whom we serve and to emphasize the point that no person is above the law or that any Chief Magistrate can consider their court house as their fiefdom, and whose conduct impinges upon the integrity of the judiciary as a whole, it is my considered view, having considered the aforesaid factors, which pains me as a brother judicial officer, is to find that the only appropriate sanction is to recommend to the Magistrates Commission that you be removed from office as contemplated in section 13(4)(a)(i) of the Magistrates Act 90 of 1993, read with regulation 26 (17) (b).' (My emphasis).

[16] The import of this extract from the written findings of the third respondent is that, in his assessment of the sanction to be imposed, he clearly attached considerable weight to the fact that the appellant had been found guilty of 'multiple charges'. Nowhere does he give any indication that any of the charges of which the appellant had been convicted on its own is, in his view, serious enough to warrant the sanction imposed by him. The simple point, which bears emphasis and which is illustrated by this extract, is that the sanction followed the finding that the appellant was found guilty of thirteen counts of misconduct. If the finding of guilty on the thirteen charges falls away or a substantial portion thereof

is set aside, then it follows that the sanction should also either fall away or at the very least be reconsidered.

[17] This was not the approach adopted by the court *a quo*, who dealt with the issue of the sanction at paras 70 and 71 as follows: -

‘[70] I am cognisant of the fact that the presiding officer took all the convictions and the seriousness of the misconduct together and collectively when considering the sanction and returned a sanction of removal of the applicant from the magistracy. The applicant argues that at the time when the sanction was imposed, she had been convicted on thirteen counts of misconduct. Now that nine thereof have been conceded by the respondent to be reviewed and set aside, it cannot be correct that the sanction should not be reviewed and remitted back to the presiding officer for redetermination.

[71] I disagree. Having regard to the gravity and seriousness of the remaining four charges of misconduct the applicant is convicted of, whether taken individually or cumulatively, there is no doubt in my mind that they warrant the removal of the applicant from the magistracy. It is my considered view therefore that no purpose will be served by referring the issue of sanction back to the presiding officer for reconsideration when, inevitably, will bring the same results. This matter has now been dragging for almost eleven years and the principle of finality of litigation between the parties should now prevail. Moreover, it has not been shown that the presiding officer has not exercised his discretion judicially or that the sanction is disproportionate to the misconduct or induces a sense of shock and is not in accordance with justice to warrant it to be reviewed and set aside.’

[18] For the reasons mentioned above, I am of the view that in reaching the conclusion he did, the court *a quo* misdirected himself.

[19] In reaching the conclusion he did in relation to the sanction, the court *a quo* exercised the discretion conferred on him by s 172(1)(b) of the constitution, read with s 8(1)(c) of PAJA, which authorises a judicial review court, once it has found conduct to be unlawful, to craft an order that is appropriate to the circumstances. The section provides that, following upon a declaration of constitutional invalidity, a court may make any order that is just and equitable.

[20] As I have already indicated, this constitutional imperative is taken up in s 8 of PAJA, which provides as follows:

‘8 Remedies in proceedings for judicial review

- (1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), *may grant any order that is just and equitable*, including orders-
- (a) directing the administrator-
 - (i) to give reasons; or
 - (ii) to act in the manner the court or tribunal requires;
 - (b) prohibiting the administrator from acting in a particular manner;
 - (c) setting aside the administrative action and –
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) *in exceptional cases –*
 - (aa) *substituting or varying the administrative action or correcting a defect resulting from the administrative action; or*
 - (bb) *directing the administrator or any other party to the proceedings to pay compensation;*
 - (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
 - (e)’. (Emphasis added).

[21] What the court *a quo* did, in confirming the sanction previously imposed by the third respondent, despite having set aside nine of the guilty findings, was in effect to substitute the third respondent’s ruling relative to sanction. In other words, the court was of the view that this is an exceptional case, which requires substitution and on that basis in effect (although the order does not spell it out) granted a remedy to the effect that it be recommended to Parliament that the appellant be removed from office as a Magistrate.

[22] My reading of the judgment *a quo* is that the exceptional case is constituted by the ‘gravity and seriousness of the remaining four charges of misconduct’, whether taken individually or cumulatively. These findings of guilty, so the court *a quo* reasoned, warrant the removal of the appellant from the magistracy. Moreover, so it was concluded by the court *a quo*, no purpose would

be served by referring the issue of sanction back to the presiding officer for reconsideration when, inevitably, the same result would be achieved. The court *a quo* also attached considerable weight to the fact the matter has been dragging on for almost eleven years. The principle of finality of litigation between the parties, so it was concluded, should now prevail. Moreover, according to the court *a quo*, it had not been shown that the presiding officer had not exercised his discretion judicially or that the sanction is disproportionate to the misconduct or induces a sense of shock and is not in accordance with justice to warrant it to be reviewed and set aside.

[23] These are the circumstances, which on my reading of the judgment, constitute, in the court *a quo*'s view, the exceptional case warranting substitution. I am not convinced. I am of the view that, in reaching the said conclusion, the court misdirected itself if for no other reason than its factual finding that the sanction – now that the guilty findings have been reduced to four charges of misconduct as against thirteen, is a foregone conclusion. This, in my view, is not necessarily the case if regard is had to the debates by the members of Magistrates Commission following the tabling of the third respondent's written findings. In other words, in the exercise of its discretion the court *a quo* had regard to incorrect facts.

[24] A summary of the debate between the members of the Magistrates Commission relative to the imposition of the sanction in relation to the appellant is contained in the minutes of a meeting of its Executive Committee on 12 March 2021. The minutes indicate that the meeting was informed that a total number of 13 (70%) out of 18 commissioners had supported the sanction of dismissal. Many of the Commissioners were not too keen to support the findings on the charges that were related to the activities of JOASA. However, in the main, they had indeed supported the overall sanction of dismissal. The Commissioners who did not support the sanction were of the view that the presiding officer did not have the full picture relating to the work of JOASA in relation to the arrangements with the Department of Justice that went back a number of years. These commissioners therefore felt that the presiding officer had been overly harsh with

his finding. One commissioner recommended that the appellant, instead of being removed from office, be demoted in rank.

[25] The minutes furthermore recorded that the majority of the commissioners have aligned themselves with the finding of the presiding officer that she be removed from office as a Magistrate. The majority was therefore of the view that the matter should be referred for the consideration of the Minister of Justice in terms of s 13(4)(a)(i) of the Magistrates Act, 1993. The meeting of the Executive Committee accordingly resolved that, in view of the majority support to impose the sanction, the matter be referred to the Minister to consider removal from office of the appellant. The Minister was also to be informed in summary to reflect the views of the majority support as compared to the views of the minority who did not support the sanctions.

[26] The simple point is this. Now that a substantial portion of the basis of the sanction has been set aside, the decision on the sanction should also be set aside. That, in turn, means that in terms of s 8(1)(c)(i) of PAJA the matter should be referred back to the Magistrates Commission for reconsideration. There was no special case made out before the court *a quo* warranting substitution.

[27] As was held in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*², the factors to be taken into account in deciding if a case was 'exceptional' are: (a) whether the court would be in as good a position as the administrator to make the decision; (b) whether the decision was a foregone conclusion; (c) delay; and (d) bias or incompetence on the part of the administrator. If factor (a) were established, the court had to consider factor (b), and thereafter (c) and (d). In assessing (a), a court had to consider whether the administrator's expertise was required to make the decision, and whether it – the court – had all the information that was pertinent to making the decision. As to (b), there would be a foregone conclusion if there could only

² *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC).

be one proper decision; and in regard to (c), delay caused by litigation had to be considered with caution.

[28] No such exceptional case was made out in the court *a quo*.

[29] Accordingly, I am of the view that, at the very least, the court *a quo* ought to have reviewed and set aside the sanction imposed by the third respondent and remitted the matter back to the Magistrates Commission for reconsideration. As was held by the Constitutional Court in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others*³, the emphasis on correction and reversal of invalid administrative action is clearly grounded in s 172(1)(b). Moreover, '[l]ogic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality'.

[30] In the present matter, referring the matter back to the Magistrates Commission would have been the appropriate remedy, which takes into account the interests of the appellant, as well as the interests of the public. I reiterate that there was, in my view, no special case made out for substitution.

[31] There is another reason why the sanction ought to have been set aside and referred back to the Magistrates Commission for reconsideration. That relates to the fact that, as contended by the appellant, the decisions relating the sanction are subsequent legal acts which depend on the existence of the antecedent findings of guilt for their validity. These subsequent decisions ought therefore to have been axiomatically set aside.

[32] In that regard, *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43

³ *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) (2014 (6) BCLR 641; [2014] ZACC 12)

(SCA)⁴, finds application. In that case, the Supreme Court of Appeal held that where an administrative act was invalid, consequent acts had legal effect only for so long as the initial act was not set aside by a competent court. If a first administrative act was set aside, a second act that depended for its validity on the first act had to be invalid as the legal foundation for its performance was non-existent. In that matter, the court accordingly held that since the Premier's decision had already been set aside, the result was that all acts done consequent upon that decision (including the registration of the servitude), and all acts to give effect to it, were of no force or effect.

[33] That, in my view, is the case *in casu* in respect of the decision on sanction. Once the court *a quo* set aside nine of the underlying, antecedent convictions, which convictions formed the basis of the subsequent decision on sanction, it was required, in terms of the Supreme Court of Appeal decision in *Seale*, to set aside the subsequent decision on sanction.

[34] This means that the court *a quo* in not setting aside the sanction committed an error of law, entitling this court to interfere with the exercise of the court *a quo*'s discretion.

[35] Closely related to the foregoing grounds on which the sanction imposed by the third respondent ought to have been set aside, is that relating to the separation of power. In that regard, the appellant contends that the court *a quo* erred in its application of the test to be applied in relation to the judicial review court interfering with the imposition of the sanction. The court *a quo* held at para [67] that 'sentencing is pre-eminently in the domain and discretion of the trial court'. The higher court, so it was held by the court *a quo*, 'will only interfere with the sanction or sentence imposed by the lower court if it induces a sense of shock or is disproportionate to the misconduct or is such that it does not accord with justice, or if the discretion was not exercised judicially'.

⁴ *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA 43 (SCA).

[36] The court *a quo* then goes on and makes the point that the judicial presiding officer in the misconduct hearing was conferred with a wide discretion in the true sense and, in imposing a sanction, had available to him a wide range of equally permissible options. He cannot be faulted, so the court *a quo* reasoned, for choosing the option of removal of the applicant from the magistracy.

[37] Relying on *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*⁵, the court *a quo* concluded that it could not interfere with exercise of the wide discretion by the presiding officer.

[38] The appellant contends that the court *a quo* applied the wrong test, in that it relates to the level of interference that an appeal court is permitted in regard to a discretionary decision of a lower court. It does not deal with the approach that a review court must adopt in dealing with a review of a decision made in terms of a broad discretion in the true sense.

[39] I agree. The test to be applied in assessing the reviewability of an administrative decision, where the administrator had exercised a wide discretion in the true sense, was set out by the SCA in *Maxrae Estates (Pty) Ltd v The Minister of Agriculture, Forestry & Fisheries*⁶, in which it was held as follows: -

[12] The parties were in agreement that in considering the appeal the Minister exercised a wide discretion conferred upon him under s 4(2) of the Act, and that his decision constituted administrative action. The appeal therefore amounted to a rehearing of the matter which could take into account new evidence. It is trite that the exercise of public power by the executive and other public functionaries is subject to the principle of legality. Section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) enjoins the courts to review administrative action where such was taken on the basis of irrelevant considerations and where relevant factors were ignored. An administrative decision must be rationally related to the purpose for which the power was given to the administrator. As to the test on whether the exercise of public authority passes constitutional muster, the Constitutional Court in *Pharmaceutical Manufacturers*

⁵ Footnote 2 above.

⁶ *Maxrae Estates (Pty) Ltd v The Minister of Agriculture, Forestry & Fisheries* 2021 JDR 1115 (SCA).

Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others said:

“The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact rational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle”.

[40] The SCA then goes on to say the following at para [17], which goes directly to the adjudication of the reviewability of an administrative decision where the administrator, in making the decision, exercised a wide discretion in the true sense: -

‘[17] The high court was clearly alive to the fact that the Minister had to exercise his broad discretion within the boundaries of the law. However, it seems to have misconstrued what, in effect, that principle entailed in this case. The high court reasoned, erroneously, that the court was precluded from examining the propriety of the Minister's decision because of the broad discretion which he exercised and his expressed intention to advance the objectives of the Act. *However, the wide Ministerial discretion essentially entailed the consideration by him of the factors that were relevant to the decision he was required to make. The exercise of a wide discretion was no licence for disregarding those factors and making an arbitrary decision.* And the Minister could not use the doctrine of separation of powers to shield such arbitrary decision from review by the court. Mere mention that the Ministerial discretion has been exercised for the given purpose was not sufficient. The court was constrained to intervene where the decision maker had ignored the relevant factors and taken into account irrelevant considerations.’ (Emphasis added).

[41] *Maxrae* is therefore authority for the principle that *in casu* the court *a quo* was required to decide whether the judicial presiding officer, in imposing a sentence, had considered all of the factors that were relevant to the decision in relation to the sanction. One such consideration would obviously have been the fact that, as opposed to thirteen, the appellant was found guilty only of four charges of misconduct.

[42] On the basis of this authority, I conclude that the court *a quo* misdirected itself, which is another reason why the order confirming the sanction imposed should be upset.

[43] In addition to appealing the order of the court *a quo* confirming the sanction, the appellant also appeals the order dismissing the application for a review and the setting aside of the ruling by the third respondent finding her guilty of misconduct in respect of charges 3, 14, 17 and 20. There are a number of grounds on which the appellant appeals that order and I now turn my attention to those grounds of appeal.

[44] In dealing with these grounds of appeal, I am mindful of and will be guided by *Dumani v Nair and Another*⁷, in which the SCA also dealt with an application for the review of a decision by a judicial presiding officer in a misconduct enquiry, where the salient facts resemble those *in casu*. Importantly, the SCA (per Theron JA) held as follows at para [22]: -

‘[22] The enquiry before the presiding officer was whether, on a balance of probabilities, Dumani was guilty of misconduct, bearing in mind that because such conduct amounted to a criminal offence, it is inherently unlikely that anyone, particularly a magistrate, would have indulged in it. The enquiry before this court is not whether the presiding officer was correct in his conclusion that Dumani was guilty on three of the charges. *The main enquiry before this court is whether the presiding officer's decision is so unreasonable that no reasonable person could have reached it. The further ground of review relied upon by Dumani, namely that the presiding officer acted arbitrarily, is linked to the main enquiry in that the presiding officer would have acted arbitrarily if it were to be found that his finding of guilt on the part of Dumani could not be justified on the acceptable evidence.* I am not persuaded that the review grounds relied upon have been established. I am satisfied that a reasonable person in the position of the presiding officer on the evidence disclosed in the record and applying the correct test in law could have reached the conclusion that Dumani was guilty of the three counts of misconduct of which he was convicted.’ (My emphasis).

⁷ *Dumani v Nair and Another* 2013 (2) SA 274 (SCA).

[45] The first ground of appeal is that the court *a quo* ought to have found that the Magistrates Commission and the judicial presiding officer acted for an ulterior motive. The allegations by her relating to an ulterior motive, so the appellant, avers, were not disputed in the review application. On that basis, the findings of guilty should have been reviewed and set aside.

[46] The allegation by the appellant relating to the ulterior motive is that the Magistrates Commission instituted the disciplinary proceedings against her for reasons other than disciplining her. The real reason for the misconduct inquiry, so the appellant asserts, was to punish her *inter alia* for her involvement with and in the activities of the Judicial Officers Association of South Africa ('JOASA'), a voluntary association.

[47] The court *a quo* found that there is no merit in this ground of review for the simple reason that the appellant failed to demonstrate such. There was nothing untoward, so it was held by the high court, in Mr Meijer, the deponent to the respondents' answering affidavits, deposing to the said affidavits. Mr Meijer describes himself as an adult male, remunerated by the Department of Justice and Constitutional Development for the past 42 years. He 'currently hold[s] the office of Magistrate, Judicial Quality Assurance responsible for the conduct matters of the Ethics Division' of the Magistrates Commission. The court therefore rejected the appellant's contention that Mr Meijer, who was, at the relevant time, 'remunerated' by the Department of Justice and was a part of the Magistrates Commission, did not have the requisite knowledge to answer to the case on behalf of the appellant. The court also was not convinced that Mr Meijer was required to answer on the issue of ulterior motive.

[48] The appellant contends that the court *a quo* erred in accepting Mr Meijer's evidence as admissible and relevant to the issue of ulterior motive. Mr Meijer could not give evidence, so the contention on behalf of the appellant goes, as to the motive of the decisionmaker insofar as the decision to charge the appellant goes. He had no personal knowledge of such motive.

[49] I find myself in agreement with the findings of the court *a quo*.

[50] The very first point to be made about this ground of review is that, as a general rule, the South African legal system of fact finding is governed by the rules of the law of evidence and by a set of legal principles based on the logic of inferential reasoning and probability theory. Motive plays very little, if any part in the adjudication process.

[51] In any event, the appellant is the one alleging ulterior motive and accordingly bears the onus of proving same in the judicial review application. She has failed to do so. In truth, the sum total of the supposed evidence in support of the contention that there is an ulterior motive for the disciplinary proceedings, are suppositions and bald allegations that because she was a JOASA member, the Commission sought to punish her. That should be contrasted with the evidence in support of the accusations against her which emanated from complaints by other Magistrates and officials. That evidence was in the form of the transcript of the misconduct hearing and extracts of the transcripts, which were annexures to the affidavits by Mr Meijer.

[52] The simple point is this. On the evidence and the probabilities, the appellant was accused and charged of misconduct because she had in fact made herself guilty of misconduct and not because of her association with a voluntary organisation. Importantly, as averred by Mr Meijer in the answering affidavit and as accepted by the court *a quo*, the decision to discipline and charge the appellant was taken by the Magistrates Commission in terms of the Magistrates Act. This is evidenced by the charges brought against the appellant in terms of specific contraventions of the Code of Conduct of Magistrates.

[53] In that regard, the appellant's reliance on *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security and Others*⁸ is, as contended on behalf of the respondents, completely misplaced. In that matter the

⁸ *Sex Worker Education and Advocacy Task Force v Minister of Safety and Security and Others* 2009 (6) SA 513 (WCC).

court held that ulterior purpose though in existence during the arrest of a person is not unlawful if it culminates in the prosecution of the person who acted unlawfully and where the intention was to cause such person to stop their illegal action. The judgment also establishes that where arresting officers arrest sex workers knowing of the high probability that no prosecution of the sex workers will result, they do so unlawfully (i.e. their ulterior purpose so proved was not to bring the sex worker to prosecution towards ending illegal activity but merely to harass them).

[54] The point made in *Sex Worker Education* is that an ulterior motive is not unlawful if it culminates in the prosecution of a person. In this matter, as already stated above, the appellant was indeed accused of and charged with misconduct in terms of the Magistrates Act and the Regulations. Therefore, applying the foregoing principle, it cannot be said with any conviction that the Magistrates Commission acted for an ulterior motive.

[55] I am bolstered in the foregoing conclusion by *Freedom Under Law (RF) NPC v Judicial Service Commission and Another*⁹, in which the SCA (per Ponnan JA) held as follows: -

'[34] ... much like a public prosecution, the public interest in the effective disciplining of a judge and the maintenance of judicial independence demands that the focus of the enquiry should be on the merits of the complaint, not its provenance. *In this context, this Court has held that even an ulterior purpose should not vitiate a prosecution that was well founded on the merits.* The JSC resorted to 'accusing the accuser', instead of considering and engaging with the allegations of wrongdoing. Courts should be slow to countenance such a strategy. As this Court held in *Nkabinde and Another v Judicial Service Commission and Others (Nkabinde)*, where the applicant had applied to set aside the referral of the complaint based on procedural unfairness, '[i]nvalidating the complaint would infringe upon the rights of the complainants ... and impact negatively on the image of the judiciary'. (Emphasis added).

⁹ *Freedom Under Law (RF) NPC v Judicial Service Commission and Another* 2023 JDR 2189 (SCA).

[56] For all of these reasons, I conclude that the appellant has not proven ulterior purpose by the Magistrates Commission. In any event, as was held in *Freedom Under Law* (supra), even if there was an ulterior purpose *in casu*, it should not vitiate the prosecution of the appellant as it was well founded on the merits – she was after all found guilty of four of the charges of misconduct. This ground of appeal is without merit and should therefore be dismissed.

[57] The same applies to the next ground of review relating to bias on the part of the Magistrates Commission and the presiding officer. That ground is not supported by any evidence, except for the say so of the appellant and certain suppositions she made based on the way in which the presiding officer supposedly treated discrepancies in the evidence of witnesses against her. As the appellant puts it, the constant preferential treatment of evidence against the appellant, combined with the constant disregard for evidence in her favour, leads to the objective view that the presiding officer was biased against her and sought to cherry-pick evidence which proves her guilt.

[58] There is no merit in this ground of appeal based on the bias ground of review.

[59] There are other grounds of appeal, which, in my view, lack merit and it is not necessary for me to deal in detail with those.

[60] So, for example, the appellant complains about the fact that the Minister of Justice, when deciding to refer the matter to Parliament laboured under the misapprehension that the Magistrates Commission had made a recommendation to support the findings by the presiding officer, when in truth and in fact no such recommendation was made. In support of this assertion, the appellant points out that on 26 February 2021 the Magistrates Commission convened a meeting, where it was decided that due to a lack of unanimity between its members, the submissions of each of the commissioners would be put before the Minister of Justice for his consideration. From the record, it appears that the inputs of the various commissioners are recorded in a summary prepared by a Commission

official. Thereafter, on 12 March 2021, the executive committee of the Magistrates Commission conducted a virtual meeting, where thirteen out of the eighteen commissioners supported the sanction of removal. The meeting concluded with the adoption of this majority view. The meeting therefore resolved to impose the sanction and to refer the matter to the Minister of Justice for his consideration in terms of s 13(4)(a)(i) of the Magistrates Act.

[61] The court *a quo* in finding that the Magistrates Commission had decided to recommend to the Minister the sanction of removal, so the appellant contends, therefore erred. The court, so the contention continues, should have had regard to the fact that the Magistrates Commission did not in fact resolve to support the sanction and to make the removal recommendation to the Minister, but in fact decided to put all of the submissions before the Minister for his consideration.

[62] These inaccurate and incomplete representation by the Magistrates Commission to the Minister, so the appellant avers, caused Parliament to confirm the sanction. This and the fact that the Minister made a decision based on erroneous facts, in themselves, so the appellant contends, constitute a proper ground of review.

[63] This ground of appeal falls to be dismissed on the basis simply that the appellant is clearly mistaken in her assertion that the Magistrates Commission never recommended the removal of the appellant from office. This is simply incorrect. By all accounts the Commission, by a thirteen out of eighteen-majority vote, had decided to support the sanction of removal from office. In any event, in the words of *Freedom Under Law* (supra), a charge of misconduct on the part of a Magistrate should never be invalidated on the basis of procedural unfairness. Because to do so, would infringe upon the rights of the complainants and impact negatively on the image of the judiciary'

[64] As for the ground of appeal in relation to the *Biowatch* principle, it is not necessary for me to deal with this ground in light of my finding relating to the costs of the review application. In that regard, whilst I am in agreement that the said

principle does not find application in the judicial review application, I am of the view that each party should have been ordered to pay his/her/its own costs of the application. Such an order is in my view warranted by the fact that in the review application, after this appeal judgment, the appellant would have had a measure of success in that she would have succeeded in having set aside nine of the thirteen charges of misconduct against her. Additionally, the appellant succeeded in having the sanction decision reviewed and set aside. Conversely, the respondents have been successful to a degree in that they were able to successfully resist the appellant's claim to have set aside the guilty findings in relation to four of the misconduct charges.

[65] It is for these reasons that I would grant the costs order I proposed above.

Conclusion and Costs of Appeal

[66] For all of these reasons the appeal must succeed and the order of the court *a quo* should be replaced with one in terms of which the sanction imposed by the third respondent, being the recommendation to remove the appellant from office as a Magistrate, and all subsequent and antecedent decisions, are reviewed, set aside and remitted for reconsideration.

[67] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*¹⁰. There are no grounds in this case to depart from the ordinary rule that costs should follow the result. I therefore intend granting costs in favour of the appellant against the first, second, third and fourth respondents. The complexity of the matter does, in my view, warrant costs to include the costs of two counsel, with one being Senior Counsel (where so employed).

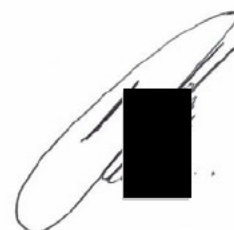
¹⁰ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

Order

[68] In the result, the following order is made: -

- (1) The appellant's appeal against paragraph (2) of the order of the court *a quo* dated 19 March 2024 is upheld, with costs.
- (2) Paragraph (1) of the order of the court *a quo* dated 19 March 2024 is confirmed.
- (3) Paragraph (2) of the order of the court *a quo* dated 19 March 2024 is reviewed, set aside and replaced with an order in the following terms: -
 - '(2) The application to have reviewed and set aside the finding by the third respondent dated 1 October 2020, that the applicant is guilty of misconduct as per charges 3, 4, 17 and 20, is dismissed.
 - (3) The decision / finding by the third respondent dated 2 October 2020 to recommend to the Magistrates Commission that the applicant be removed from office as contemplated in section 13 of the Magistrates Act, is hereby reviewed, set aside and remitted back to the Magistrates Commission for reconsideration.
 - (4) The decision / finding by the second respondent to recommend to the first respondent that the applicant be removed from office as contemplated in section 13 of the Magistrates Act, is hereby reviewed, set aside and remitted back to the Magistrates Commission for reconsideration.
 - (5) The decision / finding by the first respondent to recommend to Parliament that the applicant be removed from office as contemplated in section 13 of the Magistrates Act, is hereby reviewed, set aside and remitted back to the Magistrates Commission for reconsideration.
 - (6) The decision by the fourth respondent (Parliament) dated 8 June 2022, removing the applicant from office as contemplated in section 13 of the Magistrates Act, is hereby reviewed, set aside and remitted back to the Magistrates Commission for reconsideration.
 - (7) All other decisions made subsequent to the decision by the third respondent on sanction, made pursuant to the decision to convict the applicant in respect of thirteen misconduct charges, is reviewed and set aside.
 - (8) Each party shall bear her / his / its own costs of the applicant's opposed review application.'

- (5) The first, second, third and fourth respondents, jointly and severally, the one paying the other to be absolved, shall pay the appellant's costs of the appeal, including the costs of the application for leave to appeal to the court *a quo* and the costs of the application for leave to appeal to the Supreme Court of Appeal, all such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel (where so employed), on scale 'C' of the tariff referred to in Uniform Rule of Court 67A(3), read with rule 69.

A handwritten signature in black ink, appearing to be 'L R ADAMS', is written over a black rectangular redaction box.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	29 April 2026
JUDGMENT DATE:	11 August 2026 – judgment handed down electronically
FOR THE APPELLANT:	Feroze Boda SC and Suhail Mohammed
INSTRUCTED BY:	Dockrat Incorporated Attorneys, Illovo, Johannesburg
FOR THE FIRST TO THE THIRD RESPONDENTS:	T J Machaba SC and Nadia Badat
INSTRUCTED BY:	The State Attorney, Johannesburg
FOR THE FOURTH RESPONDENT:	Mpilo Sikhakhane
INSTRUCTED BY:	The State Attorney, Cape Town