# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 2 December 2021

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*The Magistrates Commission and Others v Richard John Lawrence* (Case no 388/2020) [2021] ZASCA 165 (2 December 2021)

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Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs, including the costs of two counsel.

The appeal was about the legality and constitutionality of the shortlisting process of the Magistrates Commission and its decision to overlook the respondent. The respondent, Mr Lawrence, an acting magistrate, applied for the position of a permanent magistrate in Bloemfontein, Botshabelo and Petrusburg. He was not shortlisted for any of these posts. Aggrieved, he approached the Free State Division of the High Court, Bloemfontein (high court) for relief. The Magistrates Commission (the Commission), Mr Zola Mbalo N O, the Chairperson of the Appointments Committee of the Magistrates Commission (the Chairperson), the Minister of Justice and Correctional Services (the Minister) and Cornelius Mokgobo N O, the Acting Chief Magistrate Bloemfontein Cluster "A", were cited as the first to fourth respondents respectively. The Helen Suzman Foundation was admitted to the proceedings as an amicus curiae.

The application succeeded and the appeal was with the leave of that court. The appeal was against the whole judgment and order of the high court. The first judgment in the Supreme Court of Appeal (SCA) by Potterill AJA dealt with, two ancillary issues. First, it was contended on behalf of the respondent that the Appointments Committee (the Committee) was not quorate when candidates were shortlisted for appointment to Bloemfontein. Second, the appellants contended, in limine, that, as all of the other shortlisted candidates had a direct and substantial interest in the outcome of the proceedings, the respondent's failure to join them precluded the court from granting the relief sought by the respondent until they had been joined as parties to the proceedings. The SCA found that as the meeting was not quorate, the decisions taken at that meeting, including the shortlisting of candidates for Bloemfontein, could not stand and, accordingly, fell to be set aside. With regards to the Bloemfontein post the SCA held that the issue of non-joinder was academic because the committee was not quorate.

In terms of the merits, the SCA considered ss 174(1) and 174(2) of the Constitution and the regulations published under the Act for the appointment of magistrates. It was held that the fixed resolve to exclude any and all white candidates on account of their race was clear. The SCA held that the approach of the Committee was not consistent with the proper interpretation and application of s 174 of the Constitution, regulation 5 or the appointments procedure (AP). Rather than considering race as but one of factors, albeit an important one, the Committee set out to exclude candidates, including the respondent, on the basis of their race. Such an approach was said to not meet the threshold set by our courts and could

not be countenanced. Consequently, the SCA ordered that the appeal be dismissed with costs, including the costs of two counsel.

Molemela JA, in her judgment (second judgment), agreed with the reasoning and conclusion in relation to the non-joinder issue. As regards the shortlisting process followed by the Committee, her view was that based on the record of the meeting insofar as the Committee's discussions pertaining to the Botshabelo post were concerned, it could not be rightly concluded that the shortlisting process adopted by the Committee in relation to that post was rigid, inflexible and quota-driven. As regards the Petrusburg post, she agreed that the Committee's decision be set aside, highlighting the fact that the Committee irrationally failed to consider shortlisting female candidates, thereby failing to advance gender transformation in the judiciary in relation to that post. Regarding the Bloemfontein post, her view was simply that because the Committee was not quorate when the shortlisting process was undertaken, on that ground alone, the Committee's decision was a nullity and ought to be set aside. She was of the view that once reliance had been placed on the provisions of s 174(2) of the Constitution (as has happened in this matter), a brief historical background that informed the inclusion of that provision became necessary for purposes of context. She then used statistics and the provisions of s 174(2) to showcase that the race of the candidates had to be understood whenever issues pertaining to transformation of the judiciary needed to be decided.

Ponnan JA was of the view that the second judgment approached evidence in a piecemeal approach and that it called in aid certain statistics that formed no part of either party's case. In that, it strayed beyond the confines of the appeal record. According to Ponnan JA, Mr Lawrence did not seek to impugn the applicable regulations or AP. Rather he challenged the manner in which the Committee and the other appellants interpreted and applied those provisions. The validity of the framework for the appointment of magistrates, being s 174 of the Constitution, regulation 5 of the regulations and the AP was, therefore, not an issue before this Court. It was also found that Mr Lawrence did not seek to advance a case based on gender discrimination. Ponnan JA held that, to the extent that gender was alluded to by him, it was in support of his foundational hypothesis that the resolve to exclude all white candidates was so firm and inflexible, that even white females did not make the cut.

Ponnan JA further held that the blanket exclusion of white candidates, no matter their strengths, was disconcerting. The conclusion was thus inescapable that the Committee plainly used race as a disqualifying criterion. It was held that s 174 of the Constitution employs the phrase 'broadly representative'. Nothing in the legislative scheme permits the targeted exclusion of white candidates from consideration. And, yet this was precisely what happened in this case. The rigidity of the approach (a rigidity that is generally eschewed by our courts) and failure to have regard to any factor other than race was thus both unlawful and unconstitutional.

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