

SOUTH AFRICA / JUDGMENT

Amos v Minister of Justice and Others (9469/17) [2019] ZAWCHC 130 (12 September 2019)

[2019] ZAWCHC 130

COURT

Western Cape High Court, Cape Town

BEFORE

M Sher

CASE / FILE NUMBER

9469/17

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IN

THE HIGH COURT OF SOUTH AFRICA

[WESTERN

CAPE DIVISION, CAPE TOWN]

Case

no. 9469/17

In the matter between:

MAGISTRATE AK AMOS,
STELLENBOSCH
MAGISTRATE'S
COURT Applicant
and
THE
MINISTER OF JUSTICE
First
Respondent
THE
MAGISTRATES'
COMMISSION Second
Respondent
ADDITIONAL MAGISTRATE
M PRAG,
KHAYELITSHA
MAGISTRATE'S
COURT Third
Respondent

JUDGMENT

DELIVERED ON 12 SEPTEMBER 2019

SHER, J:

1. The applicant is an acting senior magistrate who has been serving as head of office of the Stellenbosch magistrate's court since August 2005.
2. In 2016 the Magistrates Commission, a statutory body established in terms of the Magistrates Act,[1] which is responsible for making recommendations to the Minister of Justice in regard to the appointment of magistrates, invited

interested persons who were suitably qualified to apply for a number of vacant magisterial positions throughout the country. One of these was the position of permanent senior magistrate and head of office of the Stellenbosch magistrate's court.

3. For the purpose of interviewing candidates who had been shortlisted, and making recommendations to the Commission in regard to suitable appointments, the commission set up an appointments committee which consisted of nine members. Three of these persons: a regional court magistrate (who was a member of the Commission), a member of Parliament and the chief magistrate of Mahikeng (who functioned as the chairperson of the Committee) dealt with interviews for the Stellenbosch position.
4. In addition to these persons, because a number of the positions which were to be filled fell within the jurisdictional areas of either the chief magistrate of Cape Town or the chief magistrate of Wynberg they also participated in the interviews.
5. A total of 5 candidates: 4 black women and one black man, being the applicant, were shortlisted for the position and interviews were held with them on 17 January 2017. After considering the recommendations of the appointments committee, on 8 March 2017 the Commission forwarded the names of 3 female candidates from amongst those who had been interviewed, to the Minister for consideration. On 30 March the Minister proceeded to appoint the third respondent to the position with effect from 1 May 2017. She was the candidate recommended by the appointments committee and the Commission from the group of 3 whose names were forwarded to the Minister.
6. This prompted the applicant to launch the instant application, in which he sought an Order interdicting the respondents from giving effect to the appointment pending a review thereof. The application was opposed by the Commission and the Minister but not by the third respondent, who abides the decision of the Court.
7. After a preliminary skirmish (in the form of an application to compel the production of further documents which were sought and to strike out certain allegedly inadmissible material) was disposed of in March 2018 the applicant proceeded to file his supplementary founding affidavit in October 2018, and on 21 June 2019 the Commission and the Minister

gave notice that they were conceding the review and consenting to an order setting aside both the recommendations of the Commission as well as the appointment of the third respondent. This stance was confirmed in the answering affidavit which was filed on their behalf a few days later.

8. In the circumstances the only issue that remains for determination is whether an Order should be made substituting the applicant in the place of the third respondent or whether the matter should be remitted to the respondents so that the post can be re-advertised and candidates considered afresh. In this regard the applicant contends that he has been the victim of an egregious injury at the hands of the respondents and that it would be just and equitable for the Court to make an Order substituting him in place of the third respondent.

The law

9. The Promotion of Administrative Justice Act[2] provides that when a Court sets aside an administrative decision it may either remit the matter for reconsideration[3] or it may, in exceptional circumstances, substitute it with its own decision.[4]
10. The principles which are applicable in regard to substitution Orders were set out by the Constitutional Court in *Trencon*. [5] It pointed out that the wording of the relevant subsection in the Act makes it clear that substitution is an extraordinary remedy and remittal will therefore almost always be the 'prudent and proper' course to follow.[6]
11. Secondly, given our constitutional framework, when considering whether the circumstances are exceptional the Court is enjoined to show due deference to the administrative entity which took the decision concerned. This entails both a recognition of, and respect for, the separation of powers[7] as well as an appreciation by the Court that it should not venture to tread blindly into policy-laden or 'polycentric' areas over which the entity may have expertise which the Court does not have, and the Court should be sensitive to the interests and functions of the administrative entity.[8]
12. Given these considerations, the Constitutional Court held that before a Court can make an order in substitution of the decision of an administrative entity it must be in as good a position as the entity in regard to taking such a decision, which must be a 'foregone conclusion' on the facts before it. This will be the case where there is only one proper and inevitable outcome and it would be a waste of time to order the administrator to reconsider the matter.[9] In addition, before making such an Order the Court should also have regard for all other relevant factors including the level of

competence of the administrator or any bias on its part, as well as the effects of any delay which has already occurred, or which is still to occur. Where a Court finds that an administrator was biased or grossly incompetent it may be justified in holding that it would be unfair to require the applicant and other parties to resubmit to a reconsideration by the administrator.[10]

The law applied

13. Applicant's counsel points out that the applicant has effectively been occupying the post in question for the last 14 years and there is no question as to his competence to hold the position of senior magistrate and head of office, or his ability to discharge the duties that are associated with it.
14. Neither in their letter of 21 June 2019 nor in the answering affidavit which they subsequently filed, did the respondents provide any reason for why they were conceding the review. In fact, whereas the answering affidavit dealt with the factual background and the circumstances which gave rise to the appointment of the third respondent and the various steps which were taken by the parties in the course of the litigation, and also dealt at some length with the factors relevant to a consideration of whether or not an Order for substitution should be granted, it did not engage at all with the averments in the founding papers pertaining to the various grounds on which the application was brought.
15. In this regard, in his founding affidavit applicant alleged that the appointment of third respondent was invalid in that the appointments committee had not been quorate at the time when the interviews were held. He further alleged that the chief magistrate of Cape Town had improperly participated in the proceedings and had been biased against him, and because of this he had unduly influenced members of the committee to exclude the applicant as a candidate.
16. In his supplementary founding affidavit the applicant further alleged that the applications which were submitted by all of the other

candidates who had been shortlisted had been defective in that, contrary to the requirements of the regulations promulgated in terms of the Act,[11] they had not been accompanied by the requisite certificates of service or properly completed sworn statements which set out their assets and liabilities, and which demonstrated that they were solvent at the time. He accordingly alleged that the other candidates should have been automatically disqualified and should never have been shortlisted, and he contended that he was the only compliant

candidate for the position.

17. Further to this, having been furnished with the transcript of the interviews he adumbrated on his earlier allegations of bias and undue influence on the part of the chief magistrate of Cape Town. He also, albeit obliquely, accused the chairperson of the appointments committee of being ill-disposed towards him and misconstruing a dispute which arose between him and an acting regional magistrate who was appointed to sit at the Stellenbosch court in May 2010.
18. Neither the secretary of the Commission, who deposed to the answering affidavit on behalf of the respondents, nor the deputy Minister of Justice who deposed to the answering affidavit in the interlocutory application, denied that the appointments committee had not been quorate when it sat for the interviews. In the circumstances, one is bound to conclude that the applicant's averments in this regard were merited. In addition, from the contents of

an email which was sent by the secretary of the Commission to the Chair on 4 June 2019 (which the applicant somehow managed to get hold of-a matter which concerns this Court greatly), it appears that the principal reason why the review was conceded was because of the alleged deficiencies in respect of the applications which were submitted by the other candidates. Thus, on at least these 2 grounds the application was bound to succeed.

19. As far as the allegations of bias and undue influence are concerned, the matter stands on a different footing. Even though an affidavit was never obtained from the chief magistrate of Cape Town refuting the underlying allegations in this regard there is, in my view, good reason for the Court to be cautious of simply accepting the applicant's assertions, without hesitation or question. In this regard it is apparent, even on the applicant's own papers and his version of certain prior incidents which occurred, that he has previously clashed with a number of colleagues, including not only the chief magistrate but also an acting regional magistrate as well as a regional magistrate, who later became the regional court president.
20. In his founding affidavit already the applicant referred to certain events which occurred between him and the chief magistrate, which he claimed gave rise to animosity on his part. In this regard he said that in 2013 he had been asked to mentor a black magistrate. Regrettably, her performance had not been up to scratch and he had consequently written 2 reports in which he had been compelled not to recommend her permanent appointment. In July 2016 the chief magistrate informed him that the magistrate was to be redeployed to Cape Town, and was to be mentored by other magistrates. On 23 November 2016 the chief magistrate reported that according to his assessment there had been a breakdown in the relationship between the applicant and his protege and there was a need to develop the applicant's capacity to mentor, train and guide novice magistrates.
21. By his own admission the applicant did not take kindly to these remarks and on the very same day he responded by way of a caustic letter in which he accused his superior of bad faith in redeploying the magistrate to Cape Town and in commenting about his mentorship, and requested a long and impressive list of 'further particulars' as he put it, from him, and threatened legal action in the event that a reply was not forthcoming within 3 days. From the applicant's own papers it is therefore evident that he has on occasion adopted an officious and somewhat pugilistic attitude towards his superior, and has had difficulty in his interpersonal relationship with him.
22. As I previously pointed out, in his supplementary founding affidavit the applicant also referred to another incident when he clashed with a colleague, in this instance an acting regional magistrate, who would ordinarily fall under the jurisdiction and control of the regional court president and not the applicant, and who was apparently appointed to act temporarily as a regional magistrate at the Stellenbosch court without the applicant being informed thereof, beforehand. Once again, and by his own admission, it appears that the applicant was affronted by this. Instead of dealing with this informally and collegially via the regional court president, he opted to lay a formal complaint in relation to the appointment with the Magistrates Commission. Although he claimed that the issue was resolved the very

same day, between himself and the acting regional magistrate, and it thus seems as if he was suggesting that it had been a relatively trivial matter, according to what the chairperson of the appointments committee was able to establish it had not been a minor incident but a 'very big fight' (sic).

23. Shortly after the commencement of his interview in January 2017 the chief magistrate informed the applicant, quite openly and transparently, that he was unable to support his candidacy at that point in time and the applicant acknowledged that the chief magistrate's views in this regard were no secret and had been communicated to him previously in writing. The chief magistrate also placed on record that he was in the process of formulating a plan to deal with 'areas' which he felt needed to be strengthened, in order to prepare the applicant for the position, a view which had similarly been communicated to him before in writing.
24. During the further exchange which followed the applicant confirmed that the chief magistrate had been required to intervene in an incident which occurred between him and the court manager and a regional magistrate (who later became the regional court president) in relation to a parking issue, as well as in regard to the problems he had with mentoring the magistrate and certain unspecified complaints he had lodged about her. On each occasion when he was confronted with these issues the applicant made full use of the opportunity which was given to him to comment in relation thereto and to provide his side of the story, whereafter the other members of the committee also asked him a number of questions.
25. In my view, and contrary to the applicant's assertions in this regard, from the transcript of the proceedings there is no obvious indication of any animosity, rudeness or bias on the part of either the chief magistrate of Cape Town or any of the other members of the interviewing panel. Similarly, during the private deliberations which took place between them after all the candidates had been interviewed, there is no indication of any bias on the part of the chief magistrate or any of the other members of the Committee.
26. In sharing his views frankly with his colleagues during their deliberations the chief magistrate said that although applicant was a good judicial officer, he was the 'worst manager'. In substantiation of these comments he said he had to shift a magistrate (it is not clear whether this was to or from the Stellenbosch court) and had to go to the court personally in order to intervene in regard to an issue which involved the applicant and the regional court president and the NPA. He said that he did not wish to 'break down' the applicant because they were going to continue working together in the future and he still needed to help him, but as far as he was concerned the applicant was not ready for the position at that point in time. The issues which were raised by the chief magistrate are the kind of issues which one would expect a responsible supervisor to raise, when asked to comment on the suitability for high office, of someone who falls under his authority.

27. The chief magistrate pointed out that a number of senior magistrates who had assisted with the mentorship of the novice magistrate had reported that the applicant had failed in his mentorship and training of her, which had in turn led to the problems which were experienced with her. The chief magistrate also spoke about the unfortunate attitude which he said had been adopted by the applicant towards other colleagues or those in a position of authority, such as the regional court president. He indicated that his views in this regard were informed by the fact that he had been involved in judicial training since 2004 and knew the colleagues concerned. He said that none of the 'stakeholders' at the Stellenbosch office were in favour of the applicant's candidacy. Although there was no indication of who these persons were, one can assume they must have been colleagues, prosecutors and/or staff of the court.
28. Once again, in my view there was nothing improper about these comments and they were entirely germane to the exercise in which the appointments committee was engaged, which was to consider the applicant's suitability for permanent appointment to the position of head of office of the Stellenbosch magistrate's court. It is self-evident that this is a position which carries an immense amount of responsibility and which obviously requires an incumbent who is able to manage and interact successfully with colleagues and staff, as well as members of the police and the public; and the questions which were raised by the chief magistrate spoke directly to these aspects. As the applicant's immediate superior the chief magistrate was well placed to comment on his suitability to serve as head of office and as to whether he had the necessary personal and professional attributes required in order to discharge his duties as optimally as possible, in the interests of the administration of justice. For the record, I note that after expressing these views the chief magistrate did not participate in any way in the decision which was ultimately arrived at by the members of the appointments committee.
29. As I have previously pointed out the position of head of office of a magistrate's court such as Stellenbosch, which services a fairly large area, is one that requires a person who has the necessary managerial skills and personal attributes to manage a number of courts and judicial officers and support staff. The person who occupies such a position will of necessity have to be someone who is not only able to work with and to inspire colleagues of differing abilities and levels of seniority, as well as members of staff and of the NPA, but must also enjoy their respect, failing which the office and the courts which fall under it, will not be able to function properly. As such, the selection of the right person for the job is a delicate matter which involves the careful weighing-up and consideration of a number of factors, not just a candidate's formal qualifications, legal knowledge and experience. A lot more than this is required.
30. I note, from the advertisement that was placed, that management and control of the administration of justice in the office as well as within the area of the court's jurisdiction is the primary objective and the ability to provide guidance to serving magistrates and to evaluate acting magistrates, are also important requirements.

31. In addition, there are also a number of important, general criteria which must be taken into account by the appointments committee, when considering the appointment of senior magistrates. These include the candidate's 'vision', commitment to transformation and 'development' and their 'social context sensitivity' as well as their integrity and the status of their interpersonal relationships.
32. Given these general criteria and the specific requirements for the position the selection of the right (as opposed to merely a suitably qualified) candidate is not something which can be done mechanistically, after the fact, by this Court. The determination of the measure of a particular candidate's skills, proficiencies and personal attributes, and where these rank in comparison to other candidates is an exercise which can only properly be carried out by a committee of peers, in conjunction with the candidate's immediate supervisor, in this case the chief magistrate to whom the candidate reports and who, having worked with him or her, will have considerable knowledge not only of their work skills and abilities, but also of their personality, judicial character and interpersonal relationships with colleagues and staff. In my view, given these circumstances this Court is not in as good a position as the relevant decision-makers to make a decision in regard to the applicant's suitability for the position, on a permanent basis, and the selection of the right candidate is something that must be done by an appropriately and properly constituted interview panel.
33. Furthermore, given that the appointments committee was not properly constituted, as only 3 of the requisite 5 members thereof were present during the interviews, all of the candidates who were shortlisted and who were interviewed by it were shortchanged, and none of them had a fair and proper opportunity to put forward their best case in relation to why they should be considered for the position. There can be no doubt that with a full complement of interviewers the interview process would have been a more thorough one, and may have resulted in a more reasoned and thus more acceptable outcome, and possibly a different one.
34. The respondents say that, had the deficiencies in the applications which were submitted (in regard to the certificates of service and statements of assets and liabilities) been picked up beforehand, as they should have been, they would not have proceeded with the interviews and the applicant would consequently not have been recommended for the position, which would have been re-advertised. This averment has not been controverted by the applicant. In the circumstances it is abundantly clear that even though applicant's application was the only 'responsive' one it is not a foregone conclusion that he would have been appointed to the position, but for what occurred.
35. Given the general and specific criteria required for the position, I can understand that in the event of 4 of the 5 candidates being non-responsive to the requirements thereof it would have had to be re-advertised, for to proceed with an interview of only one candidate in such circumstances would have been farcical. In my view it would consequently be unfair towards the other candidates if the applicant were to be awarded the position by default rather than by merit, simply because of a failure by the Commission to properly screen

applications and to thereby ensure that candidates duly submitted the documents they were required to submit, in support of their applications. To my mind this is another reason why the dictates of fairness require that the matter should be remitted and why it would not be just and equitable for this Court to simply make an Order substituting the applicant for the third respondent.

36. A further factor which weighs with me in this regard is that when appointing a judicial officer to a senior position such as the one in issue in this matter, one wants to make sure that one chooses the best possible candidate at the time when the appointment is made. In this matter there has been a considerable delay of more than 2 ½ years since the interviews took place. From the papers it is not at all clear whether the specific or general requirements or criteria for the position still hold good, nor is it clear what the applicant's individual position is and how he has discharged his duties in the period since the interviews. Importantly, it is also not clear what the current transformation imperatives may be in relation to the position. This is a very important aspect which will require careful consideration by means of updated demographics pertaining to race and gender. The last statistics which were considered date back to 2016.
37. Finally, I note that even though he did not obtain an interim interdict restraining the respondents from filling the position pending the outcome of the review, the applicant refused to vacate his office in June 2017 in order that third respondent might assume her duties. In the circumstances, and given the correspondence that was exchanged in this regard in which there was a suggestion that locks would be changed and the applicant would be evicted, I imagine that there might have been some lingering dysfunction in regard to the operation of the office as well as in relation to the interaction between the office and that of the chief magistrate. All of these considerations are such that I believe it would be highly inappropriate for this Court to simply venture forth and make an Order at this point in time substituting the applicant for the third respondent.

Conclusion

38. In my view the administration of justice requires that a fresh appraisal of suitable candidates should take place whereby everyone, including the applicant, has a proper opportunity to be evaluated, fairly and impartially. In this regard the respondents have indicated that in the event that an Order is granted reviewing and setting aside the appointment the Commission will re-advertise the position within 3 weeks and interviews will take place in November 2019. The respondents have also given the assurance that the appointments committee will be reconstituted, with new members, and the chief magistrate of Cape Town who the applicant accused of bias will not participate in the interviews or the deliberations of the appointments committee. This does not mean that another so-called head of the cluster, in respect of the area under which the Stellenbosch court falls, cannot participate in the interviews in his stead.

39. In the circumstances there can be no suggestion of any real further prejudice to the applicant were the court to decline to grant an Order substituting him for the third respondent. He has continued to occupy the position with full benefits pending the outcome of the review, and all that will happen is that the matter will be further delayed for a few months, during which time he will no doubt continue to occupy the position. Whilst doing so he will have another opportunity to prepare to put himself forward as a suitable and appropriate candidate for the position.
40. In relation to costs, I note that immediately after consultations with their legal representatives were held with a view to filing answering papers, the respondents quite properly gave notice that they were no longer opposing the review. The position which they adopted is to be commended inasmuch as it limited the issues which the Court had to deal with. When they conceded the review the respondents requested the applicant to abandon his quest for a substitution order and threatened that in the event that he did not do so an order for costs would be sought against him in respect of attendances from 21 June 2019 onwards, in the event that the court were to refuse to grant a substitution.
41. Given the lengthy delay which had already taken place from the time when the application was launched and given what was at stake for the applicant in my view he cannot be blamed for persisting in his attempt to obtain an Order for substitution, and the circumstances do not justify him being mulcted in costs in respect of attendances after 21 June 2019. What should have happened is that the respondents should already have conceded the review at the time when the application was launched in May 2017 and should have offered to immediately re-advertise the post and conduct interviews before a reconstituted appointments committee. Instead, they delayed for 2 years before doing so, by which time the applicant had incurred considerable costs. I note that when the respondents ultimately did concede the review they made a tender in respect of the applicant's party and party costs to date thereof.
42. In the circumstances and given that the proceedings of the appointments committee were fundamentally defective right from the outset, as the committee was not quorate and it shortlisted and interviewed candidates whose applications were not compliant, and the interviews should therefore never have taken place and the position should have been re-advertized instead, all of the candidates who were subjected to the process were treated unfairly, particularly the applicant and the third respondent, who have been in limbo since January 2017. Through no fault of theirs they have lost two years in the progression of their careers and will now have to re-subject themselves to the stressful process of selection and interviews anew.
43. The appointment of judicial officers is a delicate matter which the public has a right to expect will be carried out carefully and with due and scrupulous regard for the legal precepts concerned. It is fundamentally embarrassing when those who are involved with the process get it wrong, because of a basic failure to attend to the fundamentals, particularly when they, of all persons, would surely be expected to know what the law

requires of them. As a constitutional state we cannot allow the process of the appointment of magistrates, who are the backbone of our legal system, to be dealt with in a haphazard or lackadaisical fashion. That the body which is tasked with the selection and interview of candidates for judicial office must be quorate is something which has been apparent at least since the judgment of the Supreme Court of Appeal in *Acting Chairperson: JSC & Ors v Premier of the Western Cape*[12] and it is distressing to note that at least in respect of the appointment in question in this matter in 2017, this was not the

case.

44. One would have expected that in the circumstances the Commission would have done the right thing in 2017 already by conceding that the process was invalid and that it should be set aside. In the result I am of the view that this is an instance where the applicant should not be out of pocket in respect of any of the costs which he has had to bear, which must be considerable, and as a mark of the Court's displeasure a costs order on the attorney-client scale is warranted.

45. In the result I make the following Order:

45.1 The recommendation by the second respondent, dated 8 March 2017, that third respondent be appointed to the position of senior magistrate and head of office at the Stellenbosch magistrates court, is reviewed and set aside.

45.2 The decision by the first respondent on or about 30 March 2017 to appoint third respondent to the position of senior magistrate and head of office, at the Stellenbosch magistrates court, is reviewed and set aside.

45.3 Second respondent shall be liable for applicant's costs, on the scale as between attorney and client.

M SHER

Judge of the High Court

Attendances:

Date heard: 12 September 2019

Applicant's counsel: N De Jager

Applicant's attorneys: Cluver Markotter (Stellenbosch)

Respondents' counsel: Adv R Jaga SC and Adv R Matsala

Respondents' attorneys: State attorney (Cape Town).

[1] Act 90 of 1993.

[2] Act 3 of 2000.

- [3] S 8(1)(c)(i).
- [4] S 8(1)(c)(ii)(aa).
- [5] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd & Ano* 2015 (5) SA 245 (CC).
- [6] At para [42].
- [7] *Id*, at paras [45]-[46].
- [8] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Ors* 2004 (4) SA 290 (CC).
- [9] *Trencon* n 5, para [49].
- [10] *Id*, para [48].
- [11] In particular Regulation 4.
- [12] 2011 (3) SA 538 (SCA) at paras [9]-[18].
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