

SOUTH AFRICA / JUDGMENT

Singh v Minister of Justice and Constitutional Development and Others (57331/2011) [2013] ZAEQC 1; 2013 (3) SA 66 (EqC); (2013) 34 ILJ 2807 (EqC) (23 January 2013)

[2013] ZAEQC 1

COURT

Equality Court

BEFORE

A P Ledwaba

CASE / FILE NUMBER

57331/2011

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REPORTABLE

IN

THE NORTH GAUTENG HIGH COURT

C

AS1 NO: 57331.2011

DATE:23/01/2013

In

the matter between:

PARVATHI

SINGH

Complainant

and

THE

MINISTER OF JUSTICE AND

CONSTITUTIONAL

DEVELOPMENT.....First

Respondent

THE

DIRECTOR GENERAL FOR

THE

DEPARTMENT OF JUSTICE &

CONSTITUTIONAL

DEVELOPMENT.....Second

Respondent

MAGISTRATES

COMMISSION.....Third

Respondent

JUDGMENT

Ledwaba J:

[1] On the 13th of January 2012 I made the following order:

“[1] The previous interim order that the respondents should not continue with the interview and or appoint any shortlisted candidate as entry level Magistrate lapses and is substituted with the following final order

1.1 The respondent may immediately continue with the process to interview and/or appoint suitable short-listed candidate(s) as Magistrates in respect of the +- 51 posts at the following places George (2 posts). Laingsburg (Head of office). Paarl (1 post). Giyane (1 post), Naphuno (1post), Thabazimbi (Head of office), Vuwam (1 post). Mokopane (1 post), Bochum (1 post). Upington (1post). Mmabatho (1 post). Mogwase (1 post). Rustenburg (2 posts). Bloemhof (Head of office). Atamelang (1 post). Madikwe (Head of office). Odi (1post). Middelburg (1 post), Lydenburg (Head of office). White River (Head of office), Belfast (Head of office). Eerstehoek (Head of office). Madademi (1 post). Howick (1 post). Hlanganani (1 post). Glencoe (1post), Hammersdale (Head of office), Camperdown (1 post). Richmond (Head of office). Tembisa (1 post). Brakpan (1 post). Pretoria (3 post), Bulfontein (Head of office), Warden (Head of office). Hoopstad (Head of office). Virginia (Head of office). Zastron (Head of office). Selosesha (2 posts). Port St Johns (Head of office). Port St

Johns (1 post), Libode (1 post). Tsomo (Head of office). Mount Pierre (1post), Queenstown (2 post) and Port Bedford (Head of office).

[1] The criteria used by the 3rd Respondent in short listing candidates for posts as entry level Magistrates and the application thereof at the following places: Mitchels Plain, East London. Stellenbosch, Strand. Benoni, Pretoria North, Johannesburg, Germiston, and Krugersdorp was unfairly discriminatory in that the applicant's (complainant) gender and/or disability was not appropriately

considered when the short-listing was done by the 3rd Respondent.

[2] The respondents are directed to reconsider the short-listing of the candidates shortlisted in respect of the aforesaid twenty three (23) posts mentioned in the 11 places, in order 2 above, and to reconsider the application of the applicant in respect of the aforesaid posts fairly having regard to her gender disability and other relevant factors. Respondents should specifically and seriously have regard to the provisions of section 174 and section 9 of the Constitution of the Republic of South Africa Act 108 of 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 together with the protocols signed by the Government of the Republic of South Africa dealing with promoting the position of disabled

people.

[3] The reconsideration and short-listing of candidates for entry level Magistrates in respect of the twenty three (23) posts at the 11 places

mentioned in order 2 above is to be finalized by the 3rd Respondent within 30 days from the date of this order and thereafter the Respondents should continue with the process of interview and/or appointments in respect of the said posts,

[5] The respondents are further directed to revise their criteria used for short-listing and appointments of Magistrates so that it should clearly reflect that the provisions of section 174 (2) read with section 9 of the Constitution will be taken into consideration in the short-listing and appointment processes further more, in the application form for position as Magistrate the disclosure of whether a person is disabled or not is to be clearly enquired as it is done with gender and race.

[6] The respondents are directed, within ten (10) months of the date of this order to make a formal and comprehensive statement of policies and criteria to be used and/or applied in short-listing, evaluation and appointment for positions as Magistrates which policies and criteria must clearly mention that the provisions of section 174 (2) and section 9 of the Constitution will be taken into consideration in the short-listing and the filling of the posts.

[7] The respondents are jointly and severally ordered to pay the complainant (applicant) 75% of her costs including the wasted costs

of the 27th of October 2011 and 14th of December 2011.

[8] No order of costs is made against the respondents, in favour of the amici and vice versa. ”

[2] When I made the order the reasons for my order were to be given later I regret that it took almost a year to give my reasons, however the work load and the need to finalize judgments in other matters that I dealt with during the year contributed to the delay.

[3] The complainant in terms of the amended notice of motion sought the following relief:

"1.1 An order declaring this matter to be urgent and condoning the Complainant's failure to comply with the forms, the periods and service required by the Rules of Court;

1.2 An order interdicting the Respondents from appointing any short-listed candidates as entry level magistrates pending the final

determination of this matter;

1.3 An order directing the Respondents to interview and evaluate the Complainant for the entry level magistrates positions for which she applied on or about 13 December 2010;

1.4 Orders;

1.4.1 granting the Complainant leave to file supplementary affidavits dealing with the record of the Third Respondent's decision in respect of the short-listing of candidates for entry level magistrates positions, on or before Monday, 12 December 2011; and

1.4.2 regulating the further conduct of this matter.

Final Relief

2. The Complainant seeks the following final orders:

2.1 Declaring that the criteria used by the Respondents in short-listing candidates for posts as entry level magistrates, and/or the application of those criteria with regard to the Complainant, are unfairly discriminatory:

2.2 Declaring that the criteria used by the Respondents for appointing candidates as entry level magistrates are unfairly discriminatory:

2.3 Directing the Respondents to revise the criteria used for short-listing and appointing entry level magistrates so as to recognise and take into account the existence of systematic discrimination and inequalities in respect of disability:

2.4 Directing the Respondents to revise the criteria used for the short-listing and appointment of candidates for entry level magistrates posts so that the merits of every application are fairly considered.

2.5 Directing the Respondents to reconsider all pending applications for entry level magistrates posts in light of the revised criteria:

2.6 Directing the Respondents, within six months of the date of this order

to publish a formal and comprehensive statement of the policies and criteria to be applied in short-listing and evaluating candidates for positions as judicial officers in the lower courts:

2.7 Directing the Respondents to pay the costs of this claim, jointly and severally; and

2.8 Granting further and/or alternative relief."

[4] On 27 October 2011, it seems, as it was agreed by the parties Bertelsmann J made an order in the following terms.

"1. The First Respondents undertakes not to appoint any short-listed candidates as entry level magistrates before 31 December 2011

2 The Respondents undertake not to finalise the process of evaluating the candidates for the positions of entry level magistrates until this court has determined whether the claimant is entitled to be interviewed and considered for such a post.

3. The hearing of the Application is postponed to Wednesday 16 November 2011 for hearing in respect of the interim relief.

4. The claimant will file an Amended Notice of Motion and Supplementary Founding Affidavit and a notice advising shortlisted candidates for entry level Magistrate's positions of these proceedings (The Notice) by Tuesday 1 November 2011,
5. The Third Respondent will transmit the Notice and a copy of the Application as amended and Supplemented to the shortlisted candidates by Thursday 3 November 2011.
6. The Respondents are to file answering affidavits by 8 November 2011.
7. The Claimant is to file her Replying Affidavits on or before 11 November 2011.
8. The parties are to file Heads of Argument on or before 15 November
2011. The Third Respondent will file the record of its decisions on the short listing of the candidates for entry level magistrates positions, including the profiles of the shortlisted candidates, by 30 November 2011.
9. it is recorded that the Respondents resent the right to contend that the interim relief sought is not urgent.
10. All questions of costs are reserved."
- [5] On 17 November 2011 the court postponed the application to 14 December 2011 and, inter alia, ordered that:

"4. The Respondents are interdicted from appointing any short-listed candidates as entry level magistrates pending the order and/or judgment of this Court in respect of the final relief sought.
5. The Respondents are directed to pay the wasted costs occasioned as a result of the postponement of the hearing on 16 November 2011. including the costs of the preparation of heads of argument and the Complainant's legal representative and counsel's necessary travelling costs, jointly and severally, the one paying the other to be absolved
6. The Third Respondent is directed to file the records of its decision on the short-listing of candidates for entry level magistrates' positions, including the minutes of the meeting of 29 September 2011, transcripts relating to the deliberations of the Complainant's Application, the complainants profile, the anonymous profiles of the short-listed candidates and the Respondent's reasons for the decisions in respect of the claimant, by Friday. 18 November 2011.
12. Minutes of a pre-trial meeting held between the parties' representatives are to be filed by Friday. 9 December 2011. Parties

to deal with the issues in terms of Rule 37 of the Fligh Court Rules and indicate any point in limine or interim application that each wish to raise and address the question of assessors mentioned in section 22 of Act4 of 2004. A copy of the index to the pleadings to be served on the Respondents at the pre-trial meeting."

[6] On 9 December 2011 the South African National Council for the Blind (SANCB) and League of Friends of the Blind (LOFOB) issued an application seeking an order that they be admitted as amici curiae and that they be granted

3.1 the right to present evidence;

3.2 the right to lodge written submissions in this matter; and

3.3. the right to present oral argument at the hearing of this matter.

The orders sought were granted and the matter was postponed to 16 January 2012.

[7] Initially there was an issue regarding to which centers did the complainant apply. The complainant alleged that she applied for the position at about eleven (11) centers. However, the issue was resolved.

[8] What prompted the complainant to institute this application is that on the 8 of September 2011 when the third respondent, the Magistrate Commission released a shortlist of candidates to be interviewed from 10-28 October 2011 for appointments to vacant Magistrates posts, the complainant was not short-listed for any of the vacant posts.

[9] In the papers and during arguments the complainant alleged that she was unfairly discriminated against in that:

8.1 She was excluded from consideration for appointment as a magistrate as a result of the requirement that applicants must have valid drivers licenses. The requirement unfairly discriminates against people who have disabilities which preclude them from obtaining such licenses;

8.2 The criteria for selection employed by the Commission is rigid and discriminatory in that it exclude candidates from consideration for a range of posts on the basis of inflexible racial and gender based preferences or quotas. The criteria is unfairly discriminatory and it resulted in her application not being considered on its merits; and

8.3 The selection criteria is unfairly discriminatory in that it directly or indirectly, actively or by omission, withholds benefits,

opportunities or advantages from people with disabilities, in that it does not take into account disability in the criteria for

short-listing of candidates.

[10] The complainant's claim for her final relief is based on three grounds viz

9.1 that the respondent discriminated against her on the basis of her disability;

9.2 that the respondents failed to give preference to people with disabilities;

9.3 that the fact that she is an Indian woman constituted a barrier to her short-listing.

[11] I interpose to mention that on the aspect of discrimination on the basis of race because she is an Indian woman, Ms HJ Maharay, one of the short listed candidates filed an affidavit and stated that:

"She applied for a transfer to Kwazulu - Natal and Mmabatho. She was only shortlisted for Mmabatho. She thinks she was not shortlisted for Kwazulu- Natal since the year 2002 because she is an Indian female. She has been told by her cluster Head that there are too many Indian magistrates in Kwazulu- Natal. Her gripe is that at posts where there are many Africans, Africans are still shortlisted. She submits the process of short listing is not transparent and she doubts that it is indeed race that disqualifies her from being shortlisted in Kwazulu- Natal. She thinks she is discriminated against on the basis of race."

[12] The complainant further alleged that she was previously excluded from consideration from the short listing as a magistrate by the Magistrate Commission because she did not have a drivers license. In January 2010 when she enquired why she was not short listed the response from the Secretary of the Provincial Judicial Committee for the Lower Courts Eastern Cape stated the following:

"The reason why Ms Pather was not short listed was that: Her application did not fulfill all the requirements , le (sic) a valid drivers license and" (see p55 of the indexed papers)

[13] However, the issue of the drivers license was not strongly pursued by the complainant's counsel during arguments. As it clearly appears in the court order dated 20 November 2011 the respondents consented to an interdict preventing them from appointing any short-listed candidates as entry level magistrates pending the order and judgment in respect of the trial relief sought, having regard to the 2nd order of Bertelsmann J on 27 October 2011 read with my fourth order granted on 17 November 2011 I proceeded to hear argument on the final relief sought by the complainant, because the interim relief sought had been dealt with.

[14] The complainant submitted that she was unfairly discriminated against in that her application was not considered on its merits and that in the Respondents formula or criteria for short listing candidates, the need to redress the legacy of discriminating against people with disabilities was not properly taken into account.

[15] Section 4 (2) of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 200 (Equality Act) states that in the application of the Equality Act it is necessary to take into account the existence of systematic discrimination and inequalities

‘particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy.’

- [16] I interject to mention that it is interesting to note that in the criteria for short listing and interview a valid drivers license is not mentioned, however in the advertisement it is mentioned as a compulsory requirement.
- [17] The complainant in the covering letter enclosing her application stated that she has a visual impairment that prevents her from obtaining a drivers license but same did not affect her work as an acting magistrate.
- [18] Complainant’s counsel further submitted that the issue raised by the complainant that she applied for all posts and not only 11 posts mentioned is not the stronghold of the complainants application. As far as this issue is concerned, Mrs Nicolette Van Zyl, the Secretary of the Appointments Committee of the Magistrates Commission explained in her affidavit filed on behalf of the Magistrate Commission that the complainant, according to the advertisement must give “a clear indication of the center of each post applied for” and she failed to do so. Mrs Van Zyl’s explanation why the applicant was only considered for 11 posts makes sense and is accepted by this court.
- [19] Mr Abel Daniel Schoeman the Secretary of the Magistrates commission in his affidavit supporting the opposition of the complainant’s

application has set out the criteria considered for short listing purposes as follows:

“1. Section 174 (2) of the Constitution of the Republic of South Africa Act 108 of 1996,

2. experience,
3. qualification,
4. the specific needs of the office and
5. managerial experience where applicable. ”

Mr Schoeman further mentioned the criteria for interviews as follows.

- "1. qualification;
2. legal knowledge;
 3. sec 174 (2) of the Constitution;
 4. leadership and management skills;
 5. language proficiency and communication capabilities;
 6. Vision;

7. commitment to transformation and development;
8. social context sensitivity;
9. interpersonal relationships and
10. integrity. ”

[20] The respondent, in the papers and during arguments, tried to justify their failure to specifically mention disability in their policy and/ or criteria, because section 174(2) of the Constitution is mentioned to in their criteria. It is important to quote Section 174 (2) of the Constitution at this stage:

“(2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed. ” (own underlying)

[21] Further consideration should be given to the fact that in the advertisement, the Magistrates Commission further stated in bold

letters that “The need for the judiciary to reflect broadly the racial and gender composition of South Africa as required by section 174 (2) of the Constitution of South Africa (Act 108 of 1996), will be taken into consideration in filling the vacant posts.” The advert is silent on disability alternatively the advertisement does not specifically mention that disability will be taken into account considered when filling a vacant posts.

[22] The respondent’s counsel argued that that the non mentioning of disability' in the advertisement and in the policy is justified by section 174 (2) of the Constitution.

[23] It is therefore important to consider the provisions of section 174

(2) in the context of the Constitution as a whole to determine

whether the policy and approach of the respondents is proper and fair.

[24] The Constitution promotes a diverse and a legitimate judiciary. Section 9 (2) of the Constitution, read with the Equality Act,

clearly places a complementary duty on the state to take active measures to promote the equality of people with disabilities.

[25] The injunction to consider race and gender, in terms of section 174

(2) of the Constitution, when making judicial appointments is clearly fair and constitutional having regard to the history of South Africa. Importantly, is the need, in terms of the Constitution to advance the position of people with disabilities.

[26] The text or section 174 (2) does not exclude the consideration of disability as a ground to be considered and to be promoted since disability is expressly recognized in section 9 (3) of the Constitution and in the Equality Act.

[27] The specific mention of race and gender in section 174 (2) of the Constitution should not be misunderstood to be excluding the other important factors mentioned in section 9 (3) of the Constitution which should be considered when short listing magistrates.

[28] The rationale behind section 174 (2) of the Constitution has been explained by former Chief Justice Ngcobo in a lecture delivered at the University of Cape Town on 16 November 2010 when he said:

'[Section 174 (2)] echoes the preamble of the Constitution which declares that [w]e, the people of South Africa.. .[b]elieve that South Africa belongs to all who live in it, united in our diversity.' The importance of diversity to public confidence in the judiciary cannot be gainsaid. It underscores the principle that consideration of a broad range of views is the surest path to sound governance and a foundation of democracy. Diversity on the bench promotes confidence in judges in many ways. When a litigant comes before court and sees from time to time people reflective of his or her own background and experience, it engenders confidence that he or she can get a fair trial. It also promotes confidence because it facilitates the taking into account of different perspectives. In short, diversity allows justice to see '" (Own underlying)

[29] In a similar vein, Satchwell J held in *S v Bresier and Another* 2002

(4) SA 524 (C) at 539 B - D.

Affirmative action is not just about redressing past injustice and creating opportunity for individuals. We live in a difficult society. It is a complex and heterogeneous society. South Africans combine many race groups, ethnic backgrounds, religious affiliations, languages, cultural belief and practices, employment and educational experiences. With that diversity come many difficulties and there is potential for misunderstanding. But there is richness in our differences and we have to learn from and we have to rely on each other. The preamble to our Constitution says 'we are united in our diversity'. It is essential that the magistracy and the Judiciary reflect the diversity and the richness and the challenges of this complex heritage."

[30] Two basic rationales can be distilled in promoting diversity. First, diversity improves legitimacy because it reflects the population it serves. While section 174 (2) refers to race and gender, it is quite clear that it uses them as indicators of diversity. It does not seek to make race and gender an exhaustive list of factors. A restrictive interpretation of section 174(2) which focuses only on race and gender effectively cuts out a significant section of the population served by the judiciary from representation within the judiciary. Disabled people are a clear case in point. They constitute five percent of the population in South Africa. However, according to the Respondents, there are 16 magistrates with disabilities in South Africa. The said number is a drop in the ocean considering the number of magistrates in the Republic of South Africa.

Second, diversity improves the outcomes of judicial decisions by increasing the range of perspectives of judicial officers. It is vital that disabled people are properly represented in the Magistracy so that their unique perspectives can be properly articulated.

- [31] The Constitution obliges that the judiciary should be legitimate and diverse, importantly and also that the categories of people who were previously discriminated against should be advanced. The first obligation does not eclipse the latter but reinforces it and compliments it.
- [32] The documents before me do not, in my view, show that the reason for not short listing complainant was her disability. However, it is abundantly clear that when her application(s) was considered and the profile was prepared, the appointment committees did not take into account her disability and that it had a duty to advance and promote the position of disabled people.
- [33] It is not enough to put a symbol of a wheelchair on the letterhead and to allege that the Magistrate Commissioner is sensitive to the plight of disabled people.
- [34] Furthermore the duty to advance and promote the position of disabled people are clearly mentioned in the Convention on the Rights of Persons with Disabilities (CRPD) which South Africa ratified on 30 November 2007 and the African Charter on Human and Peoples Rights (African Charter).
- [35] The purpose of the (CRPD) according to Article 1 is, to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.
- [36] The preamble to the (CRPD) recognizes the need “to promote and protect the human rights of all persons with disabilities, including those who require more intensive support” and notes concern about:
- "The difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.
- (q) Recognizing that woman and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation...
- [37] Although the respondents are entitled to apply guidelines to assist them in making decisions, they may not be applied rigidly or inflexibly. In the present matter, in my view, the respondents have elevated the broad guideline in section 174 (2) of the Constitution to an immutable rule and thereby fettered their discretion.
- [38] In *Du Preez v Minister of Justice and Constitution Development & Others* 2006 (5) SA 592 EgC the Court considered the application of a similar insurmountable barrier to appointment by the Commission and held that:

'Pretorius, Klinck and Ngwenya describe as the most drastic form of preferential treatment' those employment policies or programs which afford absolute preference to members of designated groups who meet the minimum job requirements. 'The effect of such an approach is', they say, 'that selection is done irrespective of how the preferred designated group candidate compares with competitors from non-designated groups and, sometimes, irrespective of how the decision affects the excluded non-designated group members personally, as well as the specific operational needs of the employer or the special requirements of the job'. The learned authors express the view that such measures would not be compatible with the variety of factors that need to be taken into account for an employment decision to meet the constitutional requirements of fairness and proportionality.' Fairness', as they put it, depends on the cumulative effect of all relevant concerns, including the extent of the impact of the measure on the rights and interests of the complainant'. Proportionality', they say, requires, by definition, the balance of competing interests'. Affording automatic preference for designated group members eliminates the possibility of affirmative action from being tested in respect of its fairness and proportionality and elevates the affirmative action objective to the position of sole requirement for validity."

[39] The court concluded that an absolute barrier to appointment as a Magistrate constitutes unfair discrimination and is irreconcilable

with the Constitutional values of fairness and proportionality.

[40] The (CRPD) accordingly obliges the state to promote the employment of people with disabilities and not merely eliminate active

discrimination against them This is stated explicitly in General Comment No. 5 of the United Nations Committee on Economic, Social and Cultural Rights, dealing with persons with disabilities. Clause 9 of the general comment states.

"The obligation of State parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take a positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide- range of specially tailored measures will be required." (Own underlining)

[41] Mrs N van Zyl in her affidavit in paragraph 7.1 said the following:

"The appointment committee in reconsidering the flawed decision of the selection committee it used a criteria that did not clearly promote and advance employment of people with disabilities."

[42] The appointment committee in reconsidering the decision of the Selection Committee, used, in my view, a criteria that did not

clearly promote and advance employment of people with disabilities.

[43] There is nothing in the papers to show how the committee promoted the position of the complainant. I need to clearly state that disability does not entitle the applicant to be short listed, however it is an important imperative of the Constitution to be considered in the manner that the Magistrate Commission considers race and gender.

[44] Just as it has been set out in the advertisement that 'the need for the judiciary to reflect broadly the racial and gender composition', disability should, in my view, be included to encourage and promote disabled people to apply.

[45] The Selection Committee and Appointment Committee should have good understanding of the Constitution, Equality Act and conventions

ratified by South Africa and should be seen to be promoting and advancing the position of disabled people so that the Magistrate

Commission can perform its functions properly and in compliance with the Constitution requirements. Race, gender and disability should not be subordinated. Integration of people with disabilities in the magistracy should be encouraged. In *Glenister v President of South Africa & Others* 2011 (3) SA 347 CC Moseneke DCJ and Cameron J discussed the interrelationship between section 39(2) and 7 (2) of the Constitution and said;

"[201] It is possible to determine the content of the obligation s 7(2) imposes on the State without taking international law into account. But s 39(1)(b) makes it constitutionally obligatory that we should. This is not to use the interpretive injunction of that provision...to manufacture or create constitutional obligations. It is to respect the careful way in which the Constitution itself creates concordance and unity between the Republic's external obligations under international law. and their domestic legal impact.

[202] A further provision of the Constitution that integrates international law into our law reinforces this conclusion. It is s233. which, as we have already noted, demands any reasonable interpretation that is consistent with international law when legislation is being interpreted. There is thus no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty."

[46] The policy of the Magistrates Commission is just too silent as far as people with disabilities are concerned. Hence the selection Committee did not notice or give any weight to the disability of the complainant even though it was mentioned in the application form. Interestingly on the 3rd of October 2011 the legal administration office of the department responded to the complainant's

attorney stating that the reason that the complainant was not short listed was because "there is an over representation of Indian females". No mention is made that her disability was also considered.

[47] Knowing about the disability without understanding how the Constitution and conventions expect how such people should be promoted and be advanced is a serious injustice and contrary to the spirit of the Equality Act. Disabled people deserve to have a special

status for the magistracy to be transformed. On this aspect Ngcobo J (as he then was in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 CC said the following:

"Transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution."

[48] In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 CC where Ackerman J, (again writing for the majority of the Court) noted that in South Africa certain categories of people have suffered considerable unfair discrimination in the past. It follows that it is insufficient for the Constitution merely to eliminate statutory provisions which have caused such unfair discrimination.

"Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."

[49] Ackerman J explicitly endorsed the notion of substantive, as opposed to formal, equality, stating:

"Substantive equality is envisaged when s 9(2) unequivocally asserts that equality includes 'the full and equal enjoyment of all rights and freedoms'. The State is further obliged 'to promote the achievement of such equality' by legislative and other measures designated to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination', which envisages remedial equality. "

[50] There is a need for a clear policy on the promotion and advancement of disabled people to attract to the Magistracy and be provided with facilities that can enhance their potential.

[51] According to the statistics about 5% of the population of South Africa is disabled. The issue of over representation of race should not be overemphasized when a person who applies is disabled.

- [52] I do not know what ultimately happened to the application of the complainant after my order dated 13 January 2013 but hope my reasons of the order will assist in the policy to be prepared by the Magistrate Commission.
- [53] In conclusion Magistracy will not be diverse nor legitimate if it only represents the racial and composition of the country without proper and proportionate representation of people with disability.

A P LEDWABA

JUDGE OF THE HIGH COURT

HEARD ON: 27 October 2011

FOR THE COMPLAINANT: Adv P Hathorn SC

INSTRUCTED BY: T Brivik Attorneys, Cape Town

FOR THE FIRST, SECOND AND THIRD RESPONDENTS: Adv JA Motepe and Adv MB Matlejoane

INSTRUCTED BY: The State Attorney, Pretoria

FOR THE AMICI CURIAE: Adv T Ngcukaitobi

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