REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 24910/2021

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES

19/03/2024 _____
DATE SIGNATURE

In the matter between:

JUDITH FREDA VAN SCHALKWYK APPLICANT

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT FIRST RESPONDENT

THE MAGISTRATE COMMISSION SECOND RESPONDENT

ANAND MAHARAJ N.O THIRD RESPONDENT

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA FOURTH RESPONDENT

JUDGMENT

TWALA J

Introduction:

[1] A magistrate is a person of integrity and as such, is expected to conduct himself in a manner befitting his/her office. As a judicial officer, a magistrate is required to maintain high standards of conduct in both his/her professional and personal capacities. However, failure to meet those standards will not of itself justify removal of the magistrate from office. A magistrate should never be removed from office without good cause. Put in another way, it should be established beyond doubt that his/her misbehaviour warrants removal from the office of magistracy.

[2] In *Freedom Under Law v Judicial Service Commission and Another*[1] the Supreme Court of Appeal dealing with the standard of behaviour expected from a judge quoted from the judgment of Lord Phillips in *Chief Justice of Gibraltar*[2] where the following was stated:

> "[30] A summary of the standard of behaviour to be expected from a judge was given by Gonthier J when delivering the judgment of the Supreme Court of Cananda in Canada in *Therrien v Canada (Ministry of Justice) and Another* [2001] 2 SCR 3:
>
> > 'The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.'

[1] [2023] ZASCA 103; [2023] (3) ALL SA 631 (SCA).
[2] [2009] UKPC 43.

> [31] While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function. As Gontheir J put it at paragraph 147 of the same case:
>
> > '…before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of the individuals appearing before the judge, of the public in its justice system, would be undermined, rendering the incapable of performing the duties of his office.'"

[3] The applicant, Ms Van Schalkwyk, is a former Magistrate who was appointed in terms of the Magistrate Act[3] *("the Act")* in June 1993. She became a Chief Magistrate of the Kempton Park Magistrates Court in 2005. She was removed from the magistracy by resolution of the fourth respondent based on the report and recommendations tabled by the Minister of Justice and Constitutional Development on 8 June 2022.

[4] The applicant initiated these review proceedings to set aside the decisions of the second, third and first respondents that recommended her removal in the magistracy by the multi-stage process provided for in section 13 and Regulation 26 of the Act. The applicant was charged with 24 counts of misconduct but was found guilty on 13 counts and a sanction of her removal from the magistracy was recommended by the presiding officer.

[5] The first respondent is the Minister of Justice and Constitutional Development *("the Minister")*, the Cabinet and National Executive member in the Republic of South Africa in charge of the Department of Justice. The first respondent is specifically responsible for the appointment of magistrates and is empowered by section 13 of the Act to report any misconduct issues relating to the magistrates to Parliament.

[3] 90 of 1993.

[6] The second respondent is The Magistrate Commission *("the Commission")*, a statutory body established in terms of section 2 of the Act with the powers and duties to investigate complaints of misconduct against magistrates and make recommendations to the Minister of Justice and Constitutional Development to suspend or remove a magistrate if found guilty of misconduct.

[7] The third respondent is Anand Maharaj *("the presiding officer")*, an adult male person who is cited in these proceedings in his official capacity as the Presiding Officer in the disciplinary hearing which found the applicant guilty of misconduct and imposed a sanction that recommended her removal from the magistracy.

[8] The fourth respondent is the Parliament of the Republic of South Africa *("Parliament").* Parliament has been joined in these proceedings for its role in terms of section 13 of the Act of receiving and considering a report from the Minister recommending the removal of the applicant from the magistracy and passing a resolution adopting the report of the Minister and the recommended sanction.

Preliminary Issues

[9] It is noteworthy that the fourth respondent launched an application for condonation for the late filing of its answering affidavit which application was not opposed by the parties. It is trite that the court has a discretion in allowing the late filing of an affidavit after considering all the facts placed before it. Given that the fourth respondent was joined late in the proceedings and the fact that no prejudice will be suffered by any of the parties, and that it is in the interest of justice that all issues be ventilated in these proceedings, it is my respectful view that condonation for the late filing of the answering affidavit should and be granted.

[10] Furthermore, it is apparent from the founding papers that the first and third respondents are not participating in these proceedings since it's only the second and fourth respondents who filed their opposing papers. The second and fourth respondents conceded in their papers that they do not oppose the review and setting aside of the findings of guilt and sanction in respect of counts 2; 7; 9; 10;

11;12;14 and 16. Essentially, the respondents are opposed to the review and setting aside of counts 3; 4; 17 and 20.

[11] At the start of oral argument, the applicant conceded that its review is directed at the decisions of the first, second and third respondents and that a finding in its favour in any one of these grounds would automatically have an effect on the decision of the fourth respondent.

The Charges

[12] To put matters in the right context, it is at this stage appropriate to mention the charges the applicant was convicted of which are contentious between the parties and are as follows:

1. Charge 3 – being rude to, humiliating and belittling and threatening other judicial officers.

2. Charge 4 – Applicant sending a disrespectful e-mail to her senior, Chief Magistrate Jonker and the Chief Justice.

3. Charge 17 – Applicant asked an attorney to pay for her personal travel to Washington DC, and/or used Da Silva to collect cash from him.

4. Charge 20 – Applicant make use of official parking without paying for it.

BACKGROUND

[13] The facts foundational to this case are mostly common cause and are as follows: on 20 March 2013 a complaint was filed against the applicant by the Cluster Head and Chief Magistrate of Johannesburg, Mr Gert Jonker *("Mr Jonker")*. On 23 April 2013 the Commission addressed a letter to the applicant informing her

that it was considering suspending her from office pending the investigation of a complaint against her and invited her to make representations in this regard. On 26 April 2013 the Commission appointed three (3) senior magistrates to investigate the complaint against the applicant. The applicant delivered her representations on 2 May 2013.

[14] On 4 June 2013 the applicant was suspended from office pending the outcome of the investigation. On 24 July 2013 the investigation committee filed its report recommending that the applicant be charged with 24 counts of misconduct. The Commission then sent a letter to the applicant on 1 August 2013 setting out the charges levelled against her and invited her response thereto which response was provided on 23 August 2013. On 30 August 2013 the Commission issued a circular calling upon the applicant to submit herself before a disciplinary hearing (*"the hearing"*). It is apparent that the applicant's attorneys requested further particulars on 14 August 2013 but was only responded to on 27 February 2014.

[15] It is undisputed that on 3 October 2014 the applicant filed its heads of argument in the application to compel further particulars which necessitated the postponement of the hearing, which was scheduled for 6 October 2014, and afforded the Commission an opportunity to file its heads of argument. The application to compel was heard on 28 November 2014 and the disciplinary hearing was postponed to 16 January 2015. The disciplinary hearing did not proceed on 16 January 2015 as scheduled and was postponed to 23 - 25 February 2015 at the instance of the applicant. Again, on 23 – 25 February 2015 the disciplinary hearing *("the hearing")* was not proceeded with - since the applicant's mother had passed on.

[16] On 20 April 2015 the hearing did not proceed since the applicant's counsel was unavailable. On 3 June 2015 the hearing did not proceed due to the change of the evidence leader of the Commission. Once again, on 30 October 2015 the hearing could not be proceeded with and was postponed to the 5 February 2016. The hearing also did not proceed on 5 February 2016 for the presiding officer was of the view that it should await the outcome of the high court challenge launched by the applicant against the validity of the Act and its

Regulations. Having been heard by the High Court in Pretoria on 30 January 2015 and 15 March 2017, the application was dismissed with costs on 1 August 2017.

[17] On 29 August 2017 the applicant launched an application for leave to appeal the judgment of the High Court, which application was dismissed on 10 November 2017. The applicant petitioned the Supreme Court of Appeal on 13 December 2017 and the petition was dismissed on 12 March 2018. Another evidence leader was appointed on 10 May 2018. Then, the applicant filed her heads of argument regarding the point in limine on 29 September 2018 and the point in limine was finally determined on 2 October 2018. The main hearing proceeded with numerous postponements in between until it was finalised on 2 October 2020 when the presiding officer filed his findings that the applicant was guilty of 13 counts of misconduct and recommended that she be removed from the office of magistracy.

[18] Having been presented with the presiding officer's report and the representations made by the applicant on 21 October 2020, on 26 February 2021 the majority of the members of the Commission resolved to support the recommended sanction of the presiding officer. On 12 March 2021 the Commission informed the Minister of its decision to adopt the recommendations of the presiding officer. Under cover of his letter dated 27 July 2021 the Minister tabled the required report in Parliament and the National Council of Provinces recommended the removal of the applicant from the magistracy on 24 November 2021. On 8 June 2022 Parliament passed a resolution for the removal of the applicant from the office of the magistracy.

Legal Framework

[19] Before embarking on a discussion of the issues in this case, it is apposite that the relevant sections of the Act and its Regulations are restated. Further, it is also

necessary to mention certain provisions of the Code of Conduct for Magistrates and Judicial Officers.

[20] Section 2 of the Act provides for the establishment of the Magistrates Commission with the powers and duties conferred upon or assigned to it by or under the Act or any other law. Section 3 provides how the Commission is to be constituted and the period of office of its members. Section 4 provides that the objects of the Commission are, amongst others, to ensure that the disciplinary steps against judicial officers in the lower courts take place without favour or prejudice and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly. Further, it empowers the Commission to compile a code of conduct for the lower courts.

[21] Section 7 of the Act provides the following:

"Functions of Commission

(1) The Commission may, in order to achieve its objects mentioned in section 4 –

(a) Carry out or cause to be carried out any investigation that it deems necessary;

(b) Obtain access to official information or documents;

(c) Hear any person or summon any person to appear before it for questioning, or require from any person a written explanation in respect of any matter falling within the ambit f its objects;

(d) …

(f) Subject to the provisions of subsection (2), report to the Minister for the information of Parliament on any matter it deems fit.

(2) A report regarding a matter contemplated in subsection (1)(f), shall be tabled in Parliament by the Minister within 14 days after it was presented to him, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session."

[22] Section 13 provides as follows:

"Vacation of office and discharge of magistrates

13. (1) A magistrate shall vacate his office on attaining the age of 65 years: Provided that if he attains the said age after the first day of any month, he shall be deemed to attain that age on the first day of the next ensuing month.

(2) A magistrate shall not be suspended or removed from office except in accordance with the provisions of subsections (1), (3), (4) and (5),

(3)(a) The Minister may suspend a magistrate on the recommendation of the Commission and, subject to the provisions of this subsection, remove him from office –

(i) for misconduct;

(ii) …

(4) The Minister shall remove a magistrate from his office if Parliament passes a resolution recommending such removal on the ground of misconduct of the magistrate or on account of his continued ill-health or his incapacity to carry out his duties of office efficiently."

[23] The Regulations to the Act provide the following:

"Misconduct

25. A magistrate may be accused of misconduct if he –

(a) …

(c) contravenes the Code of Conduct, if there is one;

(g) misappropriates or make improper us of any property of the State."

[24] Regulation 26 provides the following:

"Procedure for preliminary investigation and misconduct hearing

26. (1) If a magistrate is accused of misconduct, the Commission may appoint a magistrate or an appropriately qualified person (hereinafter called the investigating officer) to conduct a preliminary investigation and to obtain evidence in order to determine whether there are any grounds for a charge of misconduct against the magistrate: Provided that, if the Commission is of the opinion that there is prima facie evidence to support the charge, the Commission may charge the magistrate concerned in writing with misconduct without the said preliminary investigation.

(2) …

(17) If the magistrate charged is found guilty or has admitted that he is guilty, and the Minister does not suspend or relieve him from office for misconduct, the Minister may impose one or more of the following sentences:

(a) caution or reprimand him;

(b) withhold his translation to a higher salary scale or promotion to a higher post for a period not exceeding five years;

(c) transfer him to other headquarters;

(d) impose a fine not exceeding R10 000 on him; and

(e) postpone his decision under paragraphs (a) to (d), with or without conditions, for a period of 12 months."

[25] Article 6 of the Code of Conduct for Magistrates and Judicial Officers *("the Code")* provides that a magistrate does not associate with any individual or body to the extent that he/she becomes obligated to such person or body in the execution of his/her duties or creates the semblance thereto and does not use his/her office to

further the interest of any individual or body or permit this to be done. In Article 7 the Code provides that a magistrate does not accept any gift, favour or benefit of whatsoever nature which may possibly unduly influence him/her in the execution of his/her duties or create the impression that this is the case.

The parties' submissions

[26] The case of the applicant to review and set aside the finding of guilty and sanction to remove her from the magistracy is founded on three grounds. The applicant challenges the decision to charge her on the basis that it was founded on ulterior motive. She says there was only one complaint that was placed before the Commission for which it initiated the preliminary investigation. However, so the argument went, the investigation committee submitted a report and recommended that the Commission charge her with twenty-four counts of misconduct. There were no complaints filed for the other twenty-three charges. She continues and say that the investigators went out of their way and acted outside their mandate and conducted interviews which resulted in the other twenty-three charges, and some of them dating back some five years or more, preferred against her.

[27] It was submitted by the applicant that there was a single complaint against her by Mr Jonker and the investigators poked other people to make statements against her and this is impermissible in terms of regulation 26. The charges are underpinned by motive since she was a senior member of the Judicial Officers Association of South Africa *("Joasa").* The applicant submitted that there was a delay in preferring the charges against her since some date back for some years and this prejudiced her. The Commission has therefore, so it was argued, waived or abandoned its right to prosecute her, and it is estopped from doing so. Further, it is Mr Legodi who took the decision to charge the applicant, but it is Mr Meijr who depose to an answering affidavit which is impermissible in law for a person to testify on issues of motive when he is not the one who took the decision.

[28] The applicant argues further that the presiding officer failed to sufficiently consider the evidence before him in that, e.g. on count 7 the witness for the applicant denied having informed the witness for the Commission that the applicant has a gambling problem. The presiding officer only makes a statement that the probabilities suggest that she did gamble. Further, so it was contended, the presiding officer ignored and failed to give sufficient consideration to the evidence in respect of count 20 that the applicant failed to pay for the parking. The evidence was that she was not presented with the circular and she did not confirm the terms and conditions thereof in writing.

[29] Furthermore, and regarding count 20, the presiding officer failed to determine whether it was a legal requirement for the applicant to be presented with the circular and to sign the terms and conditions thereof. Although the applicant did not testify in these proceedings and to dispute the allegation in respect of count 3, it was contended that she called witnesses to testify about her behaviour towards them. However, the presiding officer did not give sufficient consideration to the evidence of these witnesses. This demonstrates that there was an element of bias towards the applicant by the presiding officer since he even admitted inadmissible evidence in the form of the personal bank statements of the applicant.

[30] It was submitted by the applicant that, at the meeting of Commission on the 26 February 2021 when it considered the report of the presiding officer on the findings of guilty and the sanction of removal of the applicant from the magistracy together with the representations made by the applicant, it was resolved that due to the lack of unanimity in the matter, the submissions of all the commissioners together with the presiding officer's report and the representation of the applicant should be placed before the Minister for consideration. However, this was not done, instead on 12 March 2021 the Executive Committee of the Commission recommended the removal of the applicant. The report to the Minister stated that thirteen of the eighteen members of the Commission support the report and the sanction recommended by the presiding officer.

[31] The applicant says that the sanction to remove her from the magistracy based on these trumped-up charges is reviewable moreover that nine of the thirteen counts

she was found guilty of have now been conceded by the respondents to be reviewed and set aside. The presiding officer stated in his judgment that there was no prospect of the applicant being rehabilitated, however, he proffered no reason for such a conclusion. Further, so it was contented, the presiding officer considered the multiple charges the applicant was found guilty of and the seriousness of these charges when he considered the sanction and returned a sanction encompassing all the thirteen counts the applicant was found guilty of. Now that only four counts are at issue, the other nine having been reviewed and set aside, the issue of the sanction should be referred to the presiding officer for reconsideration.

[32] The second and fourth respondents' *("the respondents")* make common cause in opposing the review and say that the common law ground upon which the decision of the tribunal can be reviewed and set aside, is the failure of the presiding officer to apply his mind to the relevant issues according to the behests of the statute under which he was appointed and the tenets of natural justice. They say the applicant has failed to demonstrate that the presiding officer acted outside the Act or acted arbitrarily, capriciously and in bad faith. Further, so it was contended, the applicant failed to show that a reasonable presiding officer in the position of the presiding officer in this case would not have arrived at the same decision.

[33] The respondents say the Commission was entitled and obliged by the law to charge the applicant within a reasonable time once complaints of misconduct against her came to its knowledge which warrant prosecution. The applicant failed to testify and rebut the direct evidence implicating her in relation to the charges she was facing. She had an opportunity to testify and call witnesses, instead, so the argument went, she preferred to not testify but lead the evidence of witnesses which did not rebut nor attack the truthfulness of the evidence of the witnesses for the Commission. There is no proof of an element of bias in the assessment of the evidence by the presiding officer nor that he ignored any evidence that was placed before him.

[34] It is contended further by the respondents that the applicant admitted the contents of the e-mail that she sent to Mr Jonker and conceded that the tone she used in

the e-mail was inappropriate or ‘was sharp’. Although she says she used such language because of the acrimonious relationship between herself and Mr Jonker, so it was contended, she did not take the stand to rebut the evidence of Mr Jonker who testified that he does not know of any acrimonious relationship between himself and the applicant. The respondents contended that the e-mail was plainly an insult in the context of a subordinate refusing to comply with an instruction from her superior.

[35] n an objective reading of the e-mail, so it was contended, it would be hard to not conclude that the wording of the e-mail in the context in which it was sent, was derogatory, disrespectful, insulting and even threatening to Mr Jonker and the Chief Justice. The applicant’s reliance on her right to freedom of expression is misplaced since she has failed to establish that she was justified to use that language. She failed to establish that such allegations are true and or are fair comment. There was no evidence of gender discrimination by Mr Jonker towards the applicant and therefore the issue of gender discrimination is untrue.

[36] The respondents continue to say that it is crucial that the applicant did not testify in this case. In respect of the charges 3; 4; 17 and 20 the evidence led by the Commission remained unchallenged although the applicant called her witnesses to testify. With regard to charge 3 her witnesses testified about their experiences with the applicant but did not negate that she acted in the manner as alleged by the Commission’s witnesses towards them. The applicant admitted that she received money from the attorney which was an interest free loan which is against the Code. On count 20, she also admitted that she did not pay for parking at the Kempton Park Magistrate Court.

Discussion

[37] It is now settled that, in interpreting statutory provisions, the Court must first have regard to the plain, ordinary, grammatical meaning of the words used in the statute. While maintaining that words should generally be given their

grammatical meaning, it has long been established that a contextual and purposive approach must be applied to statutory interpretation. Section 39 (2) of the Constitution of the Republic of South Africa enjoins the Courts, when interpreting any legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

[38] More recently, in *Independent Institution of Education (Pty) Limited v KwaZulu Natal Law Society and Others*[4] the Constitutional Court again had an opportunity of addressing the issue of interpretation of a statute and stated the following:

> "[1] It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.
>
> [2] The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that "when interpreting any legislation … every court, tribunal, or forum must promote the spirit, purpose and objects of the Bill of Rights". Meaning, every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself."

[39] The Court continued and stated the following:

> "[18] To concretise this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statue ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, "promotes the spirit, purport and objects of the Bill of Rights", then that

[4] [2019] ZACC 47; 2020 (2) SA 325 (CC); 2020 (4) BCLR 495 (CC.

is the meaning to be adopted even if it is at odds with any other meaning in other statutes.

[38] It is a well-established canon of statutory construction that 'every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statue, and with every other unrepealed statute enacted by the Legislature'. Statutes dealing with the same subject matter, or which are in pari material, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

[41] The canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that words should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, "even where the words to be construed are clear and unambiguous".

[42] This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in of the text of the legislation as a whole (internal context). This Court has also recognised that context includes, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this case, other legislation (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in *Shaik.* In Shaik, this Court considered context to be "all-important" in the interpretative exercise. The context to which the Court had regard included the "well-established' rules of criminal procedure and evidence" and, in particular, the provisions of the Criminal Procedure Act."

[40] Sections 4 and 7 of the Act are clear, plain and unambiguous in that the Commission's objects are to ensure that the disciplinary steps take place without favour or prejudice and to achieve this objective, the Commission shall carry out or cause to be carried out any investigation that it deems necessary. Regulation 26(1) provides that the Commission may appoint an investigating officer, if a magistrate is accused of misconduct, to conduct a preliminary investigation. However, there is a proviso that, if in the opinion of the Commission, there is prima facie evidence to support the charge, it may charge the magistrate concerned with misconduct without instituting a preliminary investigation.

[41] In *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)*[5] the Constitutional Court stated the following*:*

> "[194] The procedure to determine whether or not a formal charge should be brought thus involves either a preliminary investigation by an investigator appointed by the Commission to deal with that issue and make recommendations to the Commission as to what should be done, or, if the Commission is of the opinion that there is sufficient evidence to support a charge, a decision by the Commission itself to lay a formal charge. The preliminary investigation, if required, can be undertaken by a 'magistrate or a person'. The preliminary investigation is for the limited purpose of deciding whether or not to bring a formal charge. The investigator has no authority to make any finding against the magistrate and there is thus no need at this stage of the proceedings to require that they be conducted by a judicial officer".

[42] There is no merit in the contention that there was only one complaint laid against the applicant and that the other twenty-three charges were trumped up because of a witch hunt since there were no formal complaints lodged with the Commission. There was no need for the investigator not to investigate complaints against the applicant brought to his attention during the cause of the investigation when mandated to investigate misconduct against the applicant. It is disingenuous of the applicant to interpret the Act and its Regulations to mean that the investigators should only investigate what they have been tasked to investigate and if they come across any other complaints of misconduct, they

[5] [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002).

must refer same to the Commission – that would be a narrow approach in interpreting the statute and it would be allowing form to trump substance.

[43] It should be recalled further that regulation 26(1) provides for the Commission to prosecute charges against the magistrate without appointing an investigating team to conduct a preliminary investigation of the misconduct complained of if it is of the opinion that there is prima facie evidence to support the charge. It is absurd that the applicant considers the non-laying of formal complaints so that a preliminary investigation may be instituted as a breach of the provisions of the Act and in particular regulation 26(1). Further, it is equally absurd that the applicant elevated the non-institution of a preliminary investigation of the twenty-three charges to the use of the legislation by the Commission for ulterior purposes or what it was not intended for or as proof of biasness against her for she was a member of Joasa.

[44] There is a presumption that, where an Act of Parliament confers an administrative power and function to a statutory body like the Commission, as is the case with the Magistrates Act, that power will be exercised in a manner which is fair in all the circumstances. The case of bias and ulterior purpose pleaded by the applicant does not go beyond a mere allegation and placing reliance on the delay to institute disciplinary proceeding against her and that she is member holding a senior position in Joasa. The applicant is merely speculating that these are the problems which prompted the Commission to trump charges against her. However, the Commission would be in no position to bring any charges of misconduct against her before such misconduct came to its attention.

[45] In *Affordable Medicine Trust and Another v Minister of Health and Another*[6] the Constitutional Court stated the following regarding the power of functionaries:

> "[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls which the exercise of public power is regulated by the

[6] [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005).

> Constitution. It entails that both the legislature and the executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law." In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."

[46] It is well established that no witness can give factual evidence of the motives of another person. However, I find myself in disagreement with the applicant that the decision to charge her was taken by Mr Legodi and therefore Mr Meijer is unable to testify as to the ulterior purpose and bias for which the charges were brought against her. The decision to discipline the applicant was taken in terms of the Act and its regulations – thus, it was taken by the Commission and Mr Legodi, as the Chairman of the Commission, signed the charge sheet. It is of no moment that Mr Meijer testified in this case for he testified on matters that he has knowledge of and is familiar with.

[47] Counsel for the applicant placed reliance of his argument on the case of *Freedom Under Law v JSC*[7]*.* This case is distinguishable from the present one. Mr Meijer, the deponent to the answering affidavit of the respondents, describe himself as holding the office of a magistrate, Judicial Quality Assurance responsible for conduct matters of the Ethics Division serving the Ethics Committee of the Commission. He stated that he was acquainted with the history and implementation of the disciplinary action against the applicant.

[48] In the present case, the applicant makes a bold allegation not backed by any evidence that the Act was used for ulterior purposes against her because she was a member of Joasa. There is no merit in her contention that charges were brought for ulterior purpose, and she has failed to demonstrate such. Her gripe is that there was one complaint filed against her, but the investigation team went on to secure another twenty-three charges which it did not have complaints about. These are the two issues that she raises regarding the ulterior motive in bringing up the charges against her. However, the Commission did not know about the other complaints of misconduct committed by her before it instituted the investigation on the complaint by Mr Jonker. Therefore, it is my respectful view

[7] Refer to footnote 1 above.

that there is nothing untoward in Mr Meijer testifying in this case for there is no case to answer on the issue of ulterior motive and he did not do so in his answering affidavit.

[49] It should be recalled that an investigation into the complaint of misconduct against the applicant was instituted in April 2013 after Mr Jonker laid the complaint. The investigators filed their report in July 2013 and the applicant was charged in August 2013 and invited to make representations. It is my respectful view that the delay between the time when the complaint was filed with the Commission and when the disciplinary proceedings were instituted is reasonable and the respondents cannot be faltered in this regard. Furthermore, the delay in bringing the disciplinary hearing to its conclusion cannot be placed solely at the door of the respondents considering the circumstances of this case.

[50] Before April 2013, the Commission was not aware of the misconduct being committed by the applicant – hence it only came to the Commission's attention when the investigators appointed to investigate the misconduct as complained of by Mr Jonker, which was between the period April 2013 and July 2013. It is disingenuous of the applicant to expect the Commission to have prosecuted her on charges of misconduct which were not complained of although they occurred some years back before April 2013. These charges were not known to the Commission until the investigators were appointed and whilst busy with their work, came across evidence of some misconduct having been committed by the applicant in the past.

[51] There is no basis for the applicant to allege that the Commission has waived or abandoned its right to discipline her for misconduct by not instituting the proceedings on the counts that date back some years before 2013. The Commission is empowered by legislation to institute a disciplinary hearing if a magistrate is accused of misconduct. However, the Act does not stipulate the time within which the disciplinary steps may be taken but it is presumed to be within a reasonable time. The reasonable period will be dependent on the circumstances of each case and in this case being when the Commission became aware of the misconduct. The Commission is performing a statutory

function - thus has no discretion to waive or abandon its statutory obligation. Once it becomes aware of misconduct, the Commission has a duty to take steps to discipline the magistrate concerned.

[52] It is on record that the applicant mounted a challenge on the validity of the Act and its Regulations which was dismissed by the High Court including the application for leave to appeal and the petition to the Supreme Court of Appeal. Further, it is on record that the applicant has on numerous occasions requested postponement of the disciplinary hearing including when her counsel was not available and due to the passing of her mother. Although the Commission and the presiding officer had occasioned some postponements, I hold the view that those postponements were justified and that the delay in finalising the disciplinary hearing cannot be blamed only on the respondents.

[53] I do not agree with the applicant's contention that her constitutional rights were breached by the Commission when it obtained and used her bank statements from her work computer. Section 7 of the Act empowers the Commission to carry out any investigation and to obtain access to official information or documents. It is on record that the bank statements of the applicant were obtained in her work computer. These bank statements were relevant to the charges the applicant was facing and therefore the Commission and the presiding officer were justified in obtaining and keeping these bank statements.

[54] The applicant's attack on the findings of the presiding officer is misconceived and baseless. It is trite that the test whether a presiding officer has failed to consider evidence placed before him is achieved by asking the question whether a reasonable presiding officer in his position would have come to a different conclusion. It is my respectful view that the applicant has failed to demonstrate that another reasonable presiding officer in the position of the presiding officer and faced with the same evidence would have arrived at a different conclusion.

[55] In *Dumani v Nair and Another*[8] the Supreme Court of Appeal faced with a similar matter, made it plain what the enquiry is before the court when faced with a review and stated the following:

> "[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".

[56] The thrust of the applicant's contention is that the presiding officer failed to and or did not give sufficient consideration to all the evidence before him. It should be recalled that the applicant did not testify in these proceeding, instead she called witnesses to testify on her behalf. There were charges which required the applicant to take the tribunal into her confidence and tell her story of what happened to gainsay the evidence led by the Commission's witnesses. The evidential value of the applicant's witnesses' testimony is minimal, if any, since there is no direct evidence contradicting the evidence led by the Commission. Such evidence does not corroborate and or support the case of the applicant since there is no case placed before the tribunal by the applicant.

[57] In *Dumani*[9], the Court stated the following:

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[8] ZASCA 196; 2013 (2) SA 274 (SCA);
[9] (144/2012) ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 ALL SA 125 (SCA) (30 November 2012).

> "[33] … even if there were a misdirection by the presiding officer in regard to the evidence of Claasen, the convictions would not be reviewable on the ground of material error of fact, nor under the guise of the provisions of s 6(2)(e)(iii) of PAJA, viz 'because irrelevant considerations were taken into account or relevant considerations were not considered'. That leaves the following grounds of review relied upon by the appellant, namely that the presiding officer acted arbitrarily (based on s 6(2)(e)(vi) of PAJA) and that the presiding officer's decision was so unreasonable that no reasonable person could have reached it (based on ss6(2)(f)(ii)(cc) and (h) of PAJA). (The alleged misdirection to which I have referred would be relevant, if established, to the latter ground in considering whether, on the facts before the presiding officer as disclosed in the record, no reasonable person could have found the appellant guilty.)" …"

[58] With regard to charge 3 of being rude, disrespectful, and threatening to harm her colleagues, the evidence that she was discourteous to her colleagues remained uncontroverted. Instead, the applicant called the evidence of her witnesses which in a nutshell was opinion evidence of how they perceive the applicant but did not gainsay the evidence of the Commission's witnesses. The fact that her witnesses took the view or decided not to complain because they knew she would not do such a thing does not mean she was not discourteous to her colleagues and the evidence led by witnesses for the Commission proved that she was discourteous to her colleagues. The conduct of the applicant towards her colleagues is not that which is expected of a reasonable Chief Magistrate and the presiding officer correctly found her guilty of misconduct.

[59] The issue and the contents of the e-mail in charge 4 is undisputed. The applicant admitted having written and sent the e-mail to Mr Jonker and that the language used was inappropriate or 'sharp' as she prefers to call it. Although she agreed that the language was rather sharp, she however contended that it was so because of the acrimonious relationship between herself and Mr Jonker. I am unable to disagree with the respondents that the e-mail was an insult to Mr Jonker in the context of a subordinate refusing to comply with a request by her supervisor or superior. No reasonable presiding officer faced with the facts on this charge would have found otherwise other than a guilty verdict for it is not

expected of a reasonable Chief Magistrate to write an e-mail of this nature and insult her supervisor, including the Chief Justice.

[60] The applicant never gave evidence of the acrimonious relationship between herself and Mr Jonker. In fact, Mr Jonker denied that he has ever harassed the applicant nor that there was acrimony between him and the applicant. Moreover, the issue of the existence of the acrimonious relationship only surfaced when the applicant was cross-examining Mr Jonker. It was not supported by any other evidence for a case put to a witness under cross examination has little or no value if not supported by evidence. The ineluctable conclusion is therefore that the presiding officer cannot be faltered in his evaluation of the evidence presented on this charge. Any reasonable presiding officer in his position would have returned no other verdict except the guilty verdict.

[61] The applicant is discontent with the consideration given to the evidence of Mr Moloi in respect of charge 17. It must be recalled that the applicant does not dispute that in 2012 she received about R34 000 from Mr Moloi, an attorney who is practicing within the jurisdiction of her court. She alleges, which allegation has been supported by the evidence of Mr Moloi, that it was an interest free loan which she ultimately paid. It was a loan for her to travel to Washington DC to attend the International Association of Judges conference. She says that she received this interest free loan from Mr Moloi because the two enjoyed a special friendship. However, Mr Moloi in his testimony said that he is closer to Da Silva because he has in the past assisted her family as a lawyer.

[62] The uncontroverted evidence in this charge is that the applicant received money from an attorney who practices within the jurisdiction of her court. It is labelled as an interest free loan. This is contrary to the provisions of article 7 of the Code of Conduct for Magistrates which prohibits a magistrate from accepting any gift, favour or benefit of whatsoever nature which may possibly unduly influence him or her in the execution of his or her official duties or create the impression that this is the case. It is immaterial that she paid back the loan. The loan is said to be interest free, which by any objective interpretation, it was a favour and benefit to the applicant. Undoubtedly, this interest free loan which is given by an attorney

who is practicing within the jurisdiction of her court, creates an impression that she may possibly be unduly influenced in the execution of her official duties.

[63] Furthermore, although Mr Moloi says he was of the view that the trip was beneficial to the judiciary, it should be remembered that the office of the Chief Justice disapproved the applicant attending the Washington DC conference on the basis that it was not beneficial to the magistracy. However, since the applicant has no respect for authority, her colleagues including her superiors and the Chief Justice, she persisted with this trip – hence she asked for favours from her local attorney friend. The evidence of Mr Moloi was not ignored by the presiding officer, as contended by the applicant, but was considered as it corroborated the allegation that the applicant has breached the code of conduct. The unavoidable conclusion is therefore that the evidence of the breach of the code was overwhelming, and no reasonable presiding officer would have come to a different conclusion when faced with such evidence.

[64] As Chief Magistrate of the Kempton Park Magistrates' Court, the applicant was expected to maintain and protect the integrity of that court. The applicant was expected to act honourable and protect from abuse, the infrastructure and assets of the department of justice. Regarding charge 20, the applicant refused to pay for the parking as required on the basis that she is expecting a single judiciary and therefore since judges are not paying for parking, she is not going to pay for hers too. Abandoning that argument at the hearing, the applicant says the circulars required her to sign that she was accepting the terms and conditions before she can start paying for the parking and she was not presented with the forms so that she could sign the acceptance.

[65] It should be recalled that the circulars from the Department of Justice are undisputed. These circulars were issued by the Department of Finance and their legal status being that they are binding on magistrates because they are mandated by the Department of Justice Financial Instructions provided for in the Public Finance Management Act[10], and the Public Service Act[11], Furthermore,

[10] 29 of 1999.
[11] 103 of 1994.

regulation 25(g) of the Act provides that a magistrate may be accused of misconduct if he/she misappropriates or make improper use of any property of the State. By failing or refusing to pay for the parking at the Kempton Park Magistrates Court, the applicant is in breach of the provisions of regulation 25(g) of the Act and the circulars. She is thus guilty of misconduct.

[66] It was further contended that the presiding officer failed to consider whether the signing of the terms and conditions was a legal matter or not – therefore he did not give sufficient consideration to the evidence before him. I do not agree. The applicant was the head of the Kempton Park Magistrates Court and all the officials in that court reported to her. She was responsible for the running of the court and to protect its integrity. She knew that she was liable to pay for parking but flatly refused to do so knowing that, as head of the court, the officials were powerless and would not be able to challenge her authority. It is disingenuous for the applicant to now blame the officials for not presenting her with the correct documents to sign and accept the terms and conditions for the parking. It is my considered view that no reasonable presiding officer would have concluded otherwise on this charge faced with the flagrant disregard of the law by a judicial officer.

[67] It has been decided in numerous decisions that sentencing is pre-eminently in the domain and discretion of the trial court. The higher court 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 the discretion was not exercised judicially.

[68] In *Trencon Construction v Industrial Development Corporation of South Africa Limited and Another*[12] the Constitutional Court, dealing with the exercise of a discretion by a lower court, stated the following:

> "[85] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this Court in many instances, including matters of costs, damages

[12] [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015).

and in the award of a remedy in terms of section 35 of their Restitution of Land Rights Act. It is “true” in that the lower court has an election of which option it will apply, and any option can never be said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in Knox, a discretion in the loose sense-

> ‘means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.’

[87] This court has, on many occasions, accepted and applied the principles enunciated in Knox and Media Workers Association. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining that matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court’s power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.”

[69] Regulation 26(17) provides that, if the magistrate charged is found guilty or has admitted that he is guilty, and the Minister does not suspend or relieve him from office for misconduct, the Minister may impose one or more of the sentences as listed in paragraph 17 above. The regulation provides the presiding officer with a discretion in the true sense. In this case the presiding officer had a wide range of equally permissible options and cannot be faltered for choosing the option of removal of the applicant from the magistracy.

[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.

[72] I do not understand the applicant to be challenging the procedure that was followed as prescribe by the Act and the Regulations in the conduct of the hearing. The presiding officer, as mandated by the Act, filed his judgment/report, and recommended sanction with the Commission. The applicant has discomfort in that, on receipt of the presiding officer's report and the representations of the applicant, the Commission could not unanimously agree to the recommended sanction – hence the commissioners passed a resolution to furnish the Minister with the report together with each individual commissioner's recommendation on the sanction. However, this did not happen, instead, at a following meeting of the Commission, thirteen of the eighteen Commissioners voted in favour of and accepted the recommended sanction and proceeded to file the report and advised the Minister of the recommendation of the Commission in relation to sanction.

[73] The nub of the applicant's contention is that there was a resolution passed by the Commission which was later not followed nor was it revoked and set aside. The commissioners were obliged to follow that resolution or pass a resolution cancelling it. I do not agree. Although the commissioners passed a resolution to

inform the Minister that they could not obtain a unanimous agreement amongst themselves regarding the recommended sanction and to submit individual reports or recommendations of the commissioners, the resolution was an internal matter of the Commission and did not reach any third parties.

[74] Furthermore, although it was not formerly set aside by the Commission, nothing prevented the full members of the Commission, which is eighteen, to revisit the matter and deliberate on it until an outcome of the majority of thirteen out of eighteen members voting in favour of and accepting the recommended sanction. It cannot be said that anybody suffered any prejudice by the Commission not first setting aside a resolution which was not even known to any outsider except the Commission before it proceeded to vote and concluded on the majority accepting the presiding officer's recommended sanction.

[75] There is no merit in the applicant's contention that regulation 26(17) should be declared unconstitutional for it prescribes what sanctions to be imposed for misconduct. In essence, it does not give the presiding officer a discretion. I do not agree. As indicated above in the *Trencon,* the presiding officer has a discretion in the true sense in terms of regulation 26(17) and has a significant number of options in imposing a sanction against the magistrate who is found guilty of misconduct.

[76] In the case of the applicant with the citation of *Van Schalkwyk and Others v Minister of Justice and Constitutional Development and Others*[13] wherein she challenged the validity of the procedure that was followed in the promulgation of the Regulations and the Code of Conduct by the Minister, the Court in dismissing the application of the applicant, stated the following:

> "[28] On my examination of the facts above, I cannot but conclude otherwise that indeed the Magistrates Commission provided the Minister with the necessary recommendation prior to the promulgation of the Regulations with the Code of Conduct proposed on 23 May 1994 and duly promulgated on 27 October 1994 which is contained in Schedule E of the Regulations.

[13] 2017 JDR 1270 (GP).

> [31] From the determination made supra it is evident, in my view, that the decision taken by the Minister was lawfully made and thus I need not address the just and equitable remedy debate. Neither is there a reason to deal with the issue of whether or not section 172(1) of the Constitution is applicable in these circumstances."

[77] It is my respectful view that the misconduct for which the applicant was convicted is sufficiently serious to have the potential to undermine the administration of justice and the rule of law. The inescapable conclusion therefore is that the sanction to remove the applicant from the magistracy is justified under the circumstances. The Minister cannot be faltered for accepting and following the recommendation of the Commission and to present to Parliament a report recommending the removal of the applicant from the magistracy.

Costs

[78] The applicant contended that, if the court does not find its favour, then it should not be punished with an adverse cost order. This is so, so it was contended, because the applicant is involved in this litigation to vindicate its constitutional right. The alleged constitutional rights of the applicant are the use of her bank statements which were obtained without her consent in the disciplinary hearing and that regulation 26(17) is unconstitutional if it is deemed to be exhaustive of the sanctions a presiding officer may impose.

[79] I disagree. Firstly, nowhere in his judgment does the presiding officer place reliance on the bank statements of the applicant. Secondly, the applicant was found not guilty on the charge to which the bank statements relate. There is no merit on the issues raised in relation to regulation 26(17). The applicant mounted a challenge on the Act and its Regulations, and her application was dismissed by the high court as it appears above. She was also unsuccessful with her leave to appeal the decision including her petition to the Supreme Court of Appeal. It is

therefore disingenuous of the applicant to launch an attack once again on the Act and its Regulations. No constitutional right of the applicant needed vindication in this instance. Section 26(17) gives the presiding officer a discretion in the true sense in imposing a sanction and the list is not exhaustive of the sanction that can be imposed.

[80] I therefore conclude that the principle enunciated in *Biowatch Trust v Registrar Genetic Resources and Others*[14] as argued by counsel for the applicant does not find application in this case. The general proposition of the Biowatch principle is that in litigation between the State and private individuals who seek to assert a fundamental right, the State should ordinarily pay the costs even if the individual loses the case. As indicated above, there was no right to be vindicated by the applicant since the constitutional challenge to the Act and its Regulations was long settled by the Constitutional Court in *S and Others* v *Van Rooyen and Others* quoted above.

[81] In the circumstances, the following order is made:

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.

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TWALA M L

JUDGE OF THE HIGH COURT,

SOUTH AFRICA

GAUTENG LOCAL DIVISION

[14] 2009 (6) SA 232 (CC)

Date of Hearing:	5 – 7 February 2024
Date of Judgment:	19 March 2024

Appearances

For the Applicant:	Advocate Feroze Boda SC Advocate Suhail Mohammed
Instructed by:	**Dockrat inc. Attorneys** **Tel: 011 618 2247** **Email: yusuf@dockrat.co.za**
For the First,second And third Respondents:	Advocate Timothy Bruinders SC Advocate Nadia Badat
Instructed by:	**The State Attorney** **Tel: 011 330 7787** **Email: Charles.thamaga@gmail.com** **mmthamaga@justice.gov.za**
For the Fourth Respondent:	**Advocate Lizzie Baloyi-Mere SC**
Instructed by:	**The State Attorney** **Tel: 021 441 9277** **Email: nhendricks2@justice.gov.za** **alschreuder@justice.gov.za**

This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the order is deemed to be the 19th of March 2024.