CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 21/01

HERMANUS FREDERICK VAN ROOYEN	First Applicant
ADRIAAN CHRISTIAAN BEKKER	Second Applicant
THE ASSOCIATION OF REGIONAL MAGISTRATES OF SOUTH AFRICA	Third Applicant

versus

THE STATE	First Respondent
GEORGE BIBI TSHABALALA	Second Respondent
G N TRAVERS N.O.	Third Respondent
THE MINISTER OF JUSTICE	Fourth Respondent
THE ATTORNEY-GENERAL, TRANSVAAL	Fifth Respondent
VASSILIS THEMELAROS	Sixth Respondent
B BOOYSEN N.O.	Seventh Respondent

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA	Intervener

Heard on : 10 and 11 September 2001

Decided on : 11 June 2002

JUDGMENT

CHASKALSON CJ:

Introduction

1 The first applicant (Van Rooyen) was convicted in the Pretoria Regional Court on various counts of theft and the unlawful possession of a firearm and ammunition. He was sentenced to imprisonment for periods amounting in all to six years. The presiding magistrate in his case was the third respondent (Travers). Van Rooyen noted an appeal to the High Court in Pretoria (the High Court) against his conviction and sentence in which he disputed the findings that Travers made on the merits, and also challenged the legality of the proceedings in the Regional Court, contending that the court lacks the institutional independence and required by the Constitution. He subsequently sought to supplement his appeal by review proceedings in which similar issues pertaining to the lack of institutional independence of the Regional Court were raised.

2 The second respondent (Tshabalala) was charged in the Pretoria Regional Court with murder and malicious injury to property. He also appeared before Travers and applied for bail which was refused. He noted an appeal to the High Court against that order which failed. He subsequently instituted review proceedings in which he sought to set aside the proceedings on various grounds, including that the Regional Court lacked the institutional independence that the Constitution requires. In the meantime the sixth respondent (Themalaros) was called upon to face charges of fraud in the Regional Court at Pretoria. He entered a plea to the effect that the court had no jurisdiction to try him because it was not an independent court as contemplated in section 165(2) of the Constitution. His case was heard by the seventh respondent (Booysen) who upheld the plea and referred the matter to the High Court. The fifth respondent, now known as

the Director of Public Prosecutions,[1] then applied to the High Court to review and set Booysen's decision aside.

3 These three matters were subsequently consolidated for the purpose of the hearing of the appeals and reviews in the High Court. They raised important issues concerning the constitutionality of provisions of the Magistrates' Courts Act,[2] the Magistrates Act,[3] and

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1 In terms of section 43(1)(a) of the National Prosecuting Authority Act 32 of 1998 anyone holding office as Attorney-General was deemed to have been appointed as Director of Public Prosecutions under that Act. This change occurred after the institution of the proceedings, but before judgment had been given by the High Court.

2 Act 32 of 1944.

3 Act 90 of 1993.

regulations made in terms of the Magistrates Act.[4] The third applicant – the Association of Regional Magistrates of South Africa (ARMSA) – and the second applicant (Bekker) who is a regional magistrate, were given leave to intervene in the proceedings and did so.

[4] Regulations for Judicial Officers in the Lower Courts, 1993 promulgated in Government Gazette 15524 GN R361, 11 March 1994 (as amended) and Complaints Procedure Regulations promulgated in Government Gazette 19309 GN R1240, 1 October 1998.

4 The matter, involving these various parties with different interests, came before a court of two judges of the High Court. The papers were voluminous and complex. After argument had been heard on the various issues that had been raised but before judgment could be given, one of the judges who had sat in the matter died. A judgment was subsequently delivered by the remaining judge.[5] All the parties had previously reached agreement in writing to accept the decision of the remaining judge as the decision of the Court.[6] It was not disputed that he had the

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5 The judgment has been reported as *Van Rooyen and Others v The State and Others* 2001 (4) SA 396 (T); 2001 (9) BCLR 915 (T). References in this judgment will be to the report in the South African Law Reports.

6 Id at 416I.

power to do so in terms of section 17(2) of the Supreme Court Act.[7]

5 The judge upheld the application of the Director of Public Prosecutions to review the judgment in the Themalaros case, and dismissed the applications by Van Rooyen and Tshabalala to review the decisions given in their cases. He also dismissed Van Rooyen's appeal against the convictions and sentences imposed on him. He concluded, however, that various provisions of the legislation and regulations which had been challenged were indeed inconsistent with the Constitution and accordingly invalid. To avoid any disruption in the functioning of the courts consequent upon such a finding, he directed that the operation of the order made by him be suspended for 9 months to enable the executive and legislature to remedy the deficiencies in the

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[7] Section 17(2) of Act 59 of 1959 provides:

> "If at any stage during the hearing of any matter by a full court, any judge of such court dies or retires or is otherwise incapable of acting or is absent, the hearing shall, if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges, and if such remaining judges do not constitute such a majority, or if only one judge remains, the hearing shall be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of such remaining judges or of such one remaining judge as the decision of the court."

legislation. I deal later with the details of the provisions that were declared to be inconsistent with the Constitution.

6 In terms of section 172(2) of the Constitution the order of invalidity, insofar as it pertains to the provisions of the two Acts, is of no force or effect unless confirmed by this Court. The judge accordingly directed the registrar of the High Court to refer the order made by him to this Court to consider whether or not the declarations of invalidity made in respect of the two Acts should be confirmed. This is a requirement of the Constitutional Court Complementary Act,[8] and rule 15 of the rules of this Court.[9]

7 Van Rooyen, Bekker and ARMSA then applied to this Court for the order to be confirmed. The state, the Minister of Justice and the Director of Public Prosecutions opposed the confirmation of the order and also noted an appeal to this Court against the order made by the

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8 Section 8(1)(a) of Act 13 of 1995.

9 Rule 15(1) provides:

> "The registrar of a court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the registrar of the Court a copy of such order."

High Court. Their appeal was noted in terms of section 172(2)(d) of the Constitution which provides:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary any order of constitutional invalidity by a court in terms of this subsection."

8 Section 172(2)(d) governs appeals against orders of invalidity made concerning an Act of Parliament, a Provincial Act or any conduct of the President. It has no application to declarations of invalidity made in respect of other legislation or conduct.[10] As far as such matters are concerned, an appeal may be brought only with the leave of this Court and in accordance with the requirements of its rules.[11] The relevant rule is rule 18 which requires an aggrieved litigant to apply to the High Court concerned for a certificate that the constitutional matter is one of substance on which a ruling by this Court is desirable, that there is sufficient evidence on record to enable this Court to dispose of the matter and that there is a reasonable prospect that this Court will reverse or materially alter the judgment if leave to appeal is given.

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10 *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)(cc); 2000 (8) BCLR 837 (CC) at para 11; *Booysen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC) at para 1; *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33; 2001 (11) BCLR 1168 (CC) at para 9.

11 Section 167(6) of the Constitution provides:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interest of justice and with leave of the Constitutional Court –
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> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

Section 16(2) of the Constitutional Court Complementary Act 13 of 1995 provides that:

> "The rules [of the Constitutional Court] shall, when it is in the interests of justice and with leave of the Court, allow a person –
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> (a) to bring a matter directly to the Court; or
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> (b) to appeal directly to the Court from any other court."

The litigant must then apply to this Court which, after considering the certificate, (which may be in negative or positive terms) decides whether or not to grant leave to appeal.

9 It follows that the first and fourth respondents were entitled to appeal as of right to this Court in respect of the declarations of invalidity made concerning certain provisions of the Magistrates Act and the Magistrates' Courts Act.

10 The first and fourth respondents noted an appeal against the whole of the judgment including the orders pertaining to the regulations, without first applying for a certificate in terms of rule 18, or seeking leave from this Court to appeal against such orders. At the hearing of the matter, Mr Fabricius who appeared for the first and fourth respondents, applied formally for leave to appeal against that part of the order made by the High Court relating to the regulations.

11 Rule 15 makes provision for an appeal as of right to this Court against an order for constitutional invalidity contemplated in section 172(2)(d) of the Constitution. The appeal by the State and the Minister in the present case was noted in terms of this rule. Their notice of appeal sought to appeal against all the declarations of invalidity made by the High Court, including those made concerning the regulations. The declarations of invalidity made concerning the regulations are not subject to confirmation by this Court and, standing on their own, are not within the purview of section 172(2)(d) of the Constitution. They are, however, incidental to the findings of constitutional invalidity made by the High Court that are the subject of the appeal noted in terms of section 172(2)(d). No good purpose would be served in the present case by requiring appeals concerning these regulations to be separated from appeals concerning

provisions of the Act. We heard no argument on the question whether a right to appeal in terms of rule 15 includes a right to appeal against orders of constitutional invalidity that are incidental to issues that are the subject matter of an appeal properly noted in terms of rule 15. I therefore refrain from expressing any opinion on that issue.

12 The regulations deal with important issues on which it is desirable that there should be certainty. These issues have been dealt with fully in the judgment of the High Court, and were canvassed in the arguments addressed to this Court on appeal. They are incidental to the orders of constitutional invalidity in respect of which there is an appeal as of right. In these circumstances and because of the compelling need to have certainty concerning the validity of conditions of service under which magistrates function, I consider it to be desirable to deal with all of the orders made by the High Court in that regard. In so far as it may be necessary,[12] the failure to comply with rule 18(2) is condoned, and the first and fourth respondents are given leave to appeal against the orders of invalidity made by the High Court concerning regulations made under the Magistrates Act.

13 Themalaros died before the judgment was given. Van Rooyen and Tshabalala disputed the correctness of the orders made by the judge dismissing their application to have the judgments against them reviewed and set aside, and Van Rooyen also disputed the order dismissing his appeal. They applied to this Court for leave to appeal directly to it against the dismissal of these orders.

14 The application for confirmation of the orders of invalidity, the appeal by the state, the Minister of Justice and the Director of Public Prosecutions and the application by Van Rooyen and Tshabalala for leave to appeal directly to this Court, were set down for hearing together.

15 The registrar was requested by the President of this Court to bring the orders to the attention of the General Council of the Bar of South Africa and the Law Society of South Africa to enable them to make representations to the Court should they wish to do so. Both these associations initially intimated that they would wish to make representations to the Court but, in the end, only the General Council of the Bar did so. The General Council of the Bar was represented by Advocates M. Wallace SC, A. Gabriel and M. Du Plessis. The Court is indebted to them for their helpful argument.

The Constitution

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[12] Rule 18(2) would only be applicable if the appeal noted is not within the purview of rule 15.

16 When dealing with the appointment of judicial officers, the Constitution distinguishes between judges and other judicial officers. Judges are appointed through procedures involving the Judicial Service Commission.[13] Other judicial officers (and these include magistrates)

> "must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice."[14]

17 Other provisions of the Constitution that are relevant to these proceedings are sections 165(2), (3) and (4). Section 165(2) provides that

> "[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

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13 Section 174(6) of the Constitution. The composition of the Judicial Service Commission is set out in section 178 of the Constitution. The provisions of this section are recorded in n 48 below and are discussed in paras 40-2.

14 Section 174(7).

Judicial independence and impartiality are also implicit in the rule of law which is foundational to the Constitution,[15] and in the separation of powers demanded by the Constitution.[16] This requirement is buttressed by the provisions of sections 165(3) and (4) of the Constitution. Section 165(3) states that

> "[n]o person or organ of state may interfere with the functioning of the courts"

and section 165(4) requires that

> "[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

18 The Constitution thus not only recognises that courts are independent and impartial, but also provides important institutional protection for courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates' courts and magistrates. These provisions bind the judiciary and the government and are enforceable by the superior courts, including this Court. It is within this context that the issues raised in the present matter must be decided.

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15 Section 1(c) of the Constitution.

16 *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); 2001(1) BCLR 77 (CC) at para 31; *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 123.

An independent and impartial court

19 In *De Lange v Smuts NO and Others*,[17] Ackermann J referred to the views of the Canadian Supreme Court in *The Queen in Right of Canada v Beauregard*,[18] *Valente v The Queen*[19] and *R v Généreux*[20] on the question of what constitutes an independent and impartial court, describing them as being "instructive." In this context, he mentioned the following summary of the essence of judicial independence given by Dickson CJC in *Beauregard*'s case:

> "Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them; no outsider ! be it government, pressure group, individual or even another judge: should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence."[21]

This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at an institutional level it requires structures to protect courts and judicial officers against external interference.[22]

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17 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 69.

18 (1986) 30 DLR (4th) 481 (SCC).

19 (1986) 24 DLR (4th) 161 (SCC).

20 (1992) 88 DLR (4th) 110 (SCC).

21 Above n 18 at 491.

22 In para 71 of *De Lange v Smuts*, above n 17, Ackermann J referred to a passage from the judgment of Le Dain J at page 169-170 of *Valente* which captures this distinction between individual and institutional independence. According to Le Dain J, judicial independence

> "connotes not merely a state of mind or attitude in the actual exercise of judicial

functions, but a status or relationship to others, particularly to the Executive Branch of government, that rests on objective conditions or guarantees.

See also the passage at page 171 of *Valente* cited by O'Regan J at para 159 of *De Lange v Smuts*:

> "It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government ._._._. The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal."

20 Ackermann J also referred to the fact that in *Valente* it had been said that,

> "[i]t would not be feasible, however, to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(*d*) of the Charter, which may have to be applied to a variety of tribunals. The legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence exhibit a great range and variety. The essential conditions of judicial independence for purposes of S. (11*d*) [sic] must bear some relationship to that variety."[23]

He went on to say that what *Valente* required was that

> "'the essence of the security afforded by the essential conditions of judicial independence' must be provided or guaranteed, although this need not be done by 'any particular legislative or constitutional formula'."[24]

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23 Id at para 72.

24 Id.

21 Counsel for ARMSA and Bekker submitted that the South African Constitution, unlike the Canadian Constitution, guarantees independence to all courts. He contended that in the circumstances all courts should be treated in the same way. This, however, is contrary to Ackermann J's approval of the relevant passages in *Valente* in *De Lange v Smuts.* As I discuss below,[25] it also takes no account of the fact that the Constitution itself differentiates between the different courts and between the procedures for the appointment of different judicial officers.

[25] Para 28 below.

22 The constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required. Section 165(2) of the Constitution pointedly states that "[t]he courts *are* independent".[26] Implicit in this is recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent. This does not mean that particular provisions of legislation governing the structure and functioning of the courts are immune from constitutional scrutiny. Nor does it mean that lower courts have, or are entitled to have their independence protected in the same way as the higher courts. The Constitution and the existing legislation kept in force by the Constitution treat higher courts differently to lower courts. Whilst particular provisions of existing legislation dealing with magistrates' courts can be examined for consistency with the Constitution, the mere fact that they are different to the provisions of the Constitution that protect the independence of judges is not in itself a reason for holding them to be unconstitutional.

23 In deciding whether a particular court lacks the institutional protection that it requires to function independently and impartially, it is relevant to have regard to the core protection given to all courts by our Constitution, to the particular functions that such court performs and to its place in the court hierarchy. Lower courts are, for instance, entitled to protection by the higher courts should any threat be made to their independence. The greater the protection given to the higher courts, the greater is the protection that all courts have.

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[26] Emphasis added.

24 Counsel for Bekker and ARMSA pointed out that regional magistrates have extensive penal jurisdiction, both in relation to the subject matter of cases which can be tried, and the penalties that can be imposed. That is correct. But magistrates' courts are courts of first instance and their judgments are subject to appeal and review. Thus the higher courts have the ability not only to protect the lower courts against interference with their independence, but also to supervise the manner in which they discharge their functions. These are objective controls that are relevant to the institutional independence of the lower courts.

25 Another relevant factor is that district and regional magistrates' courts do not have jurisdiction to deal with administrative reviews or constitutional matters where the legislation or conduct of the government is disputed. These are the most sensitive areas of tension between the legislature, the executive and the judiciary. Measures considered appropriate and necessary to protect the institutional independence of courts dealing with such matters, are not necessarily essential to protect the independence of courts that do not perform such functions.

26 It was also contended that the dictum pertaining to possible differences in standards of protection should be understood in the context of *Valente*'s case, which was concerned with the right to a fair trial. It is, however, clear from *Valente's* case that the principle of judicial independence was considered to be an "unwritten" principle of the Canadian Constitution applicable to all courts. Section 11(d) of the Charter of Rights which makes provision for criminal trials to be heard by "an independent and impartial tribunal" is merely an illustration of this overriding requirement.

27 I am therefore not persuaded that any reason exists to qualify the approval given to the passages from *Valente* by Ackermann J in *De Lange v Smuts*. Judicial independence can be achieved in a variety of ways; the "most rigorous and elaborate conditions of judicial independence" need not be applied to all courts, and it is permissible for the essential conditions for independence to bear some relationship to the variety of courts that exist within the judicial system.

28 This seems to me to be implicit in the Constitution itself. The jurisdiction of the magistrates' courts is less extensive than that of the higher courts. Unlike higher courts they have no inherent power, their jurisdiction is determined by legislation and they have less extensive constitutional jurisdiction.[27] The Constitution also distinguishes between the way judges are to be appointed and the way magistrates are to be appointed. Judges are appointed on the advice of the Judicial Service Commission;[28] their salaries, allowances and benefits may not be reduced;[29] and the circumstances in which they may be removed from office are prescribed.[30] In the case of magistrates, there are no comparable provisions in the Constitution itself, nor is

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27 Section 170.

28 Section 174(6).

29 Section 176(3).

30 Section 177.

there any requirement that an independent commission be appointed to mediate actions taken in regard to such matters. That said, magistrates are entitled to the protection necessary for judicial independence, even if not in the same form as higher courts.

29 Ackermann J also drew attention to other key aspects of judicial independence mentioned in *Valente's* case.[31] They are, in particular, the requirement that judicial officers have security of tenure, a basic degree of financial security, and institutional independence concerning matters that relate directly to the exercise of the judicial function, as well as judicial control over administrative decisions "that bear directly and immediately on the exercise of the judicial function."

30 The judgment of the High Court holds that magistrates' courts lack the institutional independence that the Constitution requires; that impediments to independence exist in the method of appointment, promotion, and disciplining of magistrates, and in the control that the executive has over the day-to-day functioning of these courts. I will deal with that later, but first it is necessary to consider the appropriate test for assessing whether a court has the institutional independence required by the Constitution.

Assessment of independence

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31 Above n 17 at para 70.

31 Judicial officers must act independently and impartially in the discharge of their duties. In addition, as O' Regan J points out in *De Lange v Smuts,*[32] the courts in which they hold office must exhibit institutional independence. That involves an independence in the relationship between the courts and other arms of government. It is that relationship, as laid down in the Magistrates Act[33] and the Magistrates' Courts Act[34] that the High Court held to be inconsistent with the Constitution.

32 In dealing with this, the High Court adopted the test used in *R v Généreux*, which is whether the court or tribunal "from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence."[35] That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen* where Le Dain J held that:

> "Both independence and impartiality are fundamental not only to the capacity to do

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32 Id at para 160.

33 Above n 3.

34 Above n 2.

35 Above n 5 at 433E-G.

justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."[36]

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36 Above n 19 at 172.

The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts.[37]

33 When considering the issue of appearances or perceptions, attention must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack of impartiality

> "the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal . . . that test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.'"[38]

This test was approved by the Court in *Valente* as being appropriate for independence as well as impartiality.[39] It is also similar to the test adopted by this Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[40] for determining whether there are grounds for recusal:

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37 *Findlay v United Kingdom* (1997) 24 EHRR 221 at para 73.

38 *Committee for Justice and Liberty et al v National Energy Board* (1976) 68 DLR (3d) 716 at 735.

39 Above n 19 at 172.

40 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 48.

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel."

34 The High Court adopted this test.[41] I agree that an objective test properly contextualised is an appropriate test for the determination of the issues raised in the present case. The perception that is relevant for such purposes is, however, a perception based on a balanced view of all the material information. As a United States court has said,

> "we ask how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person."[42]

Bearing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts. Professor

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41 Above n 5 at 433E-G. A similar approach had been adopted by the Cape High Court in *Freedom of Expression Institute and Others v President, Ordinary Court Martial & Others* 1999 (2) SA 471 (C); 1999 (3) BCLR 261 (C) at 483F-G.

42 *US v Jordan* 49 F.3d 152 (5th Cir. 1995) at 156. See also *In Re Mason* 916 F.2d 384 (7th Cir. 1990) at 386.

Tribe's comment on the separation of powers, already cited with approval by this Court,[43] seems especially relevant in this regard:

[43] *S v Dodo* 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 17.

> "What counts is not any abstract theory of separation of powers, but the actual separation of powers 'operationally defined by the Constitution.' Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favor of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure."[44]

This comment seems to be particularly appropriate when considering what the objective observer might conclude about the independence of the magistracy.

35 Accepting, as I do, that a properly contextualised objective test is the test to be applied in the present case, I turn now to a consideration of the issues raised in the appeal. In dealing with these issues it must be kept in mind that judicial impartiality and the application without fear, favour or prejudice by the courts of the Constitution and all law, as postulated by section 165(2) of the Constitution,[45] are inherent in an accused's right to a fair trial under section 35(3) of the Constitution. One of the main *goals* of institutional judicial independence is to safeguard such rights. However, institutional judicial independence itself is a constitutional principle and norm that goes beyond and lies outside the Bill of Rights. The provisions of section 36 of the Constitution dealing with the limitation to rights entrenched in the Bill of Rights are accordingly

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44 Tribe *American Constitutional Law* Vol 1, 3 ed (Foundation Press, New York 2000) at 127 (citation omitted).

45 Which provides:

> "The courts are independent and subject only to the Constitution and the law, which they

not applicable to it. Judicial independence is not subject to limitation.

The Magistrates Commission

36 The High Court held that the Magistrates Commission is an executive structure that is not independent. This provided the basis for the conclusion reached by the High Court that magistrates' courts lack the institutional independence required by the Constitution. The crucial findings of the High Court are as follows:

> "The perception of the objective, reasonable and informed person will be that the executive authority is in effective control of the Magistrates Commission and can use it for its own purposes. To all intents and purposes the Magistrates Commission is an organ of State . . . . It is obviously no longer the autonomous body it was intended to be.
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> . . . .
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> Insofar as the Magistrates Commission has any role to play in taking decisions, making its views known to the Minister or making recommendations to the Minister, either in terms of the Act or the regulations, it is unlikely to take any decisions, express any views or make recommendations which do not find favour with the Minister. As a member of the Magistrates Commission the Minister will probably play a decisive role when the Magistrates Commission takes a decision on any contentious issue.
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> . . . .

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must apply impartially and without fear, favour or prejudice."

> The Magistrates Commission as presently constituted will be perceived by the objective, reasonable and informed person to be in conflict with or undermining of the independence of the magistracy. The section is therefore inconsistent with the requirement that the magistrates' courts be independent. It is also inconsistent with s174(7) of the Constitution. As presently constituted the Magistrates Commission cannot ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates take place without favour or prejudice."[46]

37 Any power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute.[47]

38 The findings made by the High Court concerning the Magistrates Commission are premised on the assumption that a body consisting of judicial officers, legal practitioners, members of Parliament and nominees of the executive, charged with the important duty of protecting the independence of magistrates, will either be, or objectively be perceived to be, a sham, concerned more with pleasing the Minister of Justice than with discharging its responsibilities. I should say immediately that there is in my view no basis for such an assumption, nor for the conclusion reached by the High Court to that effect. However, the

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46 Above n 5 at 453G-455J (citations omitted).

47 The same point has been made by this Court, albeit in a different context, in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 52.

findings lie at the heart of the judgment of the High Court and it is therefore necessary to deal with them in some detail.

The composition of the Magistrates Commission

39 The Magistrates Commission is established in terms of the Magistrates Act. Section 3 of this Act deals with the composition of the Commission which is as follows:

> "(i) a judge of the [High Court] of South Africa, as chairperson, designated by the President in consultation with the Chief Justice;
> (ii) the Minister or his or her nominee, who must be an officer of the Department of Justice;
> (iii) two regional magistrates, one to be designated by the respective regional magistrates and the other by the President after consultation with the respective regional magistrates;
> (iv) two magistrates with the rank of chief magistrate, one to be designated by the respective chief magistrates and the other by the President after consultation with the respective chief magistrates;
> (v) two magistrates who do not hold the rank of regional magistrate or chief magistrate, one to be designated by the magistrates' profession and the other by the President after consultation with the magistrates' profession;
> (vi) two practising advocates designated by the Minister after consultation with the advocates' profession;
> (vii) two practising attorneys designated by the Minister after consultation with the attorneys' profession;
> (viii) one teacher of law designated by the Minister after consultation with the teachers of law at South African universities;
> (ix) the Head: Justice College;
> (x) four persons designated by the National Assembly from among its members, at least two of whom must be members of opposition parties represented in the Assembly;
> (xi) four permanent delegates to the National Council of Provinces and their

alternates designated together by the Council with a supporting vote of at least six provinces; and

(xii) five fit and proper persons appointed by the President in consultation with the Cabinet, at least of two whom shall not be involved in the administration of justice or the practice of law in the ordinary course of their business."

40 The Commission thus consists of a judge, six magistrates, four legal practitioners, a teacher of law, eight members of Parliament and five nominees of the executive. In addition, the Minister and the head of Justice College are members of the Commission. On its face this is a diverse body of persons, nearly half of whom consist of members of the judiciary and the legal profession. The rest are nominees of Parliament and the executive. To some extent this is similar to the composition of the Judicial Service Commission which has a central role in the appointment of judges and the composition of which is dealt with in the Constitution itself.[48]

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48 In terms of s 178(1) of the Constitution, the Judicial Service Commission consists of:

"a) the Chief Justice, who presides at meetings of the Commission.

b) the President of the Constitutional Court;

c) one Judge President designated by the Judges President;
d) the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
e) two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
f) two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
g) one teacher of law designated by the teachers of law at South African universities;
h) six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
i) four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;

41 The Judicial Service Commission includes eight members from the legal profession and judiciary and fifteen members nominated by Parliament and the executive. Where appointments to the High Court are concerned, these numbers become nine and sixteen respectively.

42 If a comparison is made between the composition of the two commissions it will be seen that the legal profession and judiciary have a stronger representation in the Magistrates Commission than in the Judicial Service Commission. Apart from that, the process to be followed in appointing members to the two Commissions is similar. Where Parliament is involved, provision is made for opposition parties to have equal say with the governing party for nomination from the National Assembly, and for a special two thirds majority in the case of nominations from the National Council of Provinces. Where the judiciary and the professions are concerned the nominations come from within the structure to be represented.

The history of the legislation dealing with the Magistrates Commission

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j) four persons designated by the President as head of the national executive after consulting the leaders of all the parties in the National Assembly; and

k) when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier of the province concerned, or an alternate designated by each of them."

43 In reaching the conclusion that it did, the High Court attached considerable weight to the changes in the composition of the Magistrates Commission introduced by the 1996 amendment to the Magistrates Act.

44 The Magistrates Commission as originally constituted by the 1993 Act, was made up as follows:[49]

> "(i) a judge of the Supreme Court of South Africa, as chairman, designated by the Chief Justice;
> (ii) an officer of the Department of Justice designated by the Minister;
> (iii) two regional court presidents designated by the regional court presidents of the respective regional divisions established under section 2 of the Magistrates' Courts Act;
> (iv) two magistrates with the rank of chief magistrate designated by the respective magistrates with that rank;
> (v) the Chief Director: Justice College;
> (vi) one magistrate designated by the Magistrates' Association of South Africa;
> (vii) one advocate and one attorney designated by the General Council of the Bar of South Africa and the Association of Law Societies of the Republic of South Africa, respectively; and
> (viii) one legal academic designated by the Society of University Teachers of Law."

45 There were thus ten and not 27 members of the Commission, as is now the case. Of those ten, all but two were designated by judicial officers or the legal profession. The only members

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[49] In terms of section 3(1)(a).

who were not in this category, were the officer of the Department of Justice designated by the Minister, and the Chief Director of Justice College. The changes introduced in 1996 made provision for 13 members to be designated by the National Assembly, the National Council of Provinces and the Cabinet; for six magistrates, not five; for two advocates, not one; and for two attorneys, not one. The 1996 amendment also changed the basis of designation, vesting the power of appointment in respect of three of the magistrates, and all of the representatives of the legal profession and teachers of law, in the executive after consultation with the professions concerned.

46 Referring to these changes, the High Court held that

> "[t]he objective, reasonable and informed person would conclude that the composition of the Magistrates Commission was altered . . . for the purpose of giving the Executive and the Legislature control of the Magistrates Commission and through it the magistracy."[50]

I cannot agree with this, nor with the view expressed in the High Court judgment that it is "inescapable" that the magistracy has become the "personal fiefdom" of the Minister of Justice.[51]

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50 Above n 5 at 454D-E.

51 Id at 455F.

47 The language in which these conclusions of the High Court are expressed is unfortunate. The findings imply that Parliament changed the composition of the Magistrates Commission to give the legislature and executive control over the Magistrates Commission so as to enable the Minister to manipulate the Commission and the magistracy. Implicit in these findings is also the unjustifiable innuendo that the persons appointed to the Commission pursuant to this scheme would be seen to be willing to do the bidding of the Minister. This is a recurring theme of the judgment which is ill-considered and not sustainable on a proper analysis of all the relevant circumstances. In expressing these intemperate views, which in effect attribute improper motives to the legislature and the executive, the High Court also failed to have regard to the changes in the constitutional and legal order that occurred between 1993 and 1996, to relevant provisions of the interim Constitution and the 1996 Constitution, and to our history of racial and gender discrimination which had to be addressed after the adoption of the interim Constitution. These were all matters relevant to the decisions taken by Parliament concerning the composition of the Magistrates Commission.

48 In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the judiciary, in its comments about the other arms of the state, show respect and courtesy, in the same way that these other arms are obliged to show respect for and courtesy to the judiciary and one another. They should avoid gratuitous reflections on the integrity of one another. Regrettably the High Court in its judgment did not consistently fulfil this obligation.

The changes to the constitutional and legal order between 1993 and 1996

49 The 1993 Act was passed prior to the adoption of the interim Constitution and at a time when the great majority of the population of this country had no representation in Parliament. The power to appoint judges and magistrates was then vested in the executive. There was no constitutional or statutory protection of the independence of the judiciary. The 1993 Act gave the Magistrates Commission an advisory function in the appointment of magistrates, but there was no obligation on the executive to consult any person or institution in respect of the appointment of judges. The Magistrates Commission was not a representative body and all but two of its members were designated by bodies controlled by white judicial officers and lawyers.[52]

50 The interim Constitution which came into force in 1994 changed the constitutional and legal order within the country. The preamble to that Constitution referred to the

> "need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races".

The Constitution itself was to be the

> "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans

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52 In fact, all but one of the eleven members were white men.

irrespective of colour, race, class, belief or sex".[53]

[53] The resolution on National Unity and Reconciliation which forms part of the interim Constitution read with section 232(4) of the interim Constitution.

This Court has on more than one occasion stressed the transformative purpose of the interim Constitution and the 1996 Constitution.[54] This transformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 where largely under the control of whites and, in particular, white men. The Magistrates Commission, constituted as it was in 1993, could not be expected to escape this process.

51 Section 96 of the interim Constitution provided that:

> "(1) . . . .
> (2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.
> (3) No person and no organ of state shall interfere with judicial officers in the performance of their functions."

52 A Judicial Service Commission was also established. The interim Constitution prescribed how it was to be composed, and vested in it the effective control over the appointment

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54 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262; *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 157; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

and impeachment of judges. This Commission had a diverse membership that did not consist predominately of representatives of the white legal profession and judiciary.

53 As far as magistrates were concerned, the interim Constitution provided that:

> "There shall be a Magistrates Commission established by law to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against magistrates, take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and properly, and to ensure that no victimization or improper influencing of magistrates occurs."[55]

It did not, however, prescribe how that Commission should be composed. That was left to be determined by the legislation establishing the Magistrates Commission.

54 Through these provisions the interim Constitution strengthened the position of the courts, including the magistrates' courts, providing them with institutional protection which they previously lacked, by entrenching as part of the Constitution the core values of judicial independence.

55 In 1996, a new constitutional text was adopted by a Constitutional Assembly to replace the interim Constitution. The new constitutional text increased the size of the Judicial Service

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55 Section 109.

Commission, making provision for six members of the National Assembly as well as four members of the National Council of Provinces to be members of the Commission. Three of the six National Assembly members had to be chosen from opposition parties. The new text also provided that:

> "If the number of persons nominated from within the advocates' or attorneys' profession . . . equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the numbers of vacancies to be filled, the President, after consulting the relevant profession, must appoint sufficient of the nominees to fill the vacancies, taking into account the need to ensure that those appointed represent the profession as a whole."[56]

The new Constitution, with these provisions concerning the composition of the Judicial Service Commission, came into force on 4 February 1997.

The 1996 changes to the composition of the Magistrates Commission

56 The amendment to the Magistrates Act changing the composition of the Magistrates Commission was assented to on 27 June 1996. This was approximately seven weeks after the new constitutional text changing the composition of the Judicial Service Commission had been adopted by the Constitutional Assembly. Section 10 of the amending Act provided that the amendments would come into operation on a date fixed by the President by proclamation in the Gazette, which in the result was 1 October 1998. This was more than a year after the 1996 Constitution came into force.

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[56] This is now s 178(2) of the 1996 Constitution.

57 The change in the composition of the Magistrates Commission effected by the 1996 amendment brought the composition of that Commission closer to that of the Judicial Service Commission, which the Constitution itself recognises as a body appropriately constituted for the purpose of matters concerned with the appointment and impeachment of judges.

58 The High Court attached no weight to these similarities, holding that "the composition of the Judicial Service Commission was a political choice made by the Constitutional Assembly within the framework of the constitutional principles",[57] and that the Magistrates Commission had to be evaluated independently in the context of the other requirements of the Constitution. This fails to have regard to the fact that the Constitutional Principles required the Constitution to make provision for an independent and impartial judiciary,[58] and the Constitution containing these provisions concerning the appointment of judges was certified by this Court as complying

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57 Above n 5 at 451H.

58 CP VII required that:

> "The judiciary shall be appropriately qualified, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the Constitution and all fundamental rights."

with the Constitutional Principles. The High Court thus erred by refusing to consider the constitutional template provided by the constitution, in the form of the Judicial Service Commission.

59 In the *First Certification Judgment*[59] this Court held that the appointment of judges by the executive or a combination of the executive and Parliament was not inconsistent with the requirement that the judiciary be impartial and independent.[60] There was accordingly no need to establish an independent body to make such appointments. It was in this context that it was said that the establishment of such a body and its composition was a "political choice".

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59 Above n 16. The 1996 Constitution adopted by the Constitutional Assembly had to comply with certain Constitutional Principles which had been agreed upon and were incorporated into the interim Constitution. This Court had to determine whether or not the Constitution complied with the Constitutional Principles. The purpose served by the Constitutional Principles and their relevance to the Constitution adopted in 1996 are explained in the Court's judgment at paras 32-43.

60 Id at para 124.

60 I am unable to agree with the High Court that the provisions of the Constitution dealing with the Judicial Service Commission are of no relevance to the issues in the present case. The Constitution makes provision for the manner in which judges are to be appointed and impeached. What it sets as a standard for such matters in the case of the higher judiciary is clearly relevant to the standards required for the lower judiciary. Whilst the conditions of judicial independence for all courts may not have to be "the most rigorous", it could hardly be suggested that the Constitution contemplates that the legislation that regulates the appointment and impeachment of magistrates will be more rigorous than comparable provisions of the Constitution dealing with the higher judiciary. On the contrary, as I have indicated above,[61] there are powerful considerations that point in the opposite direction.

61 The changes made in 1996 are consistent with and reflect the change that has taken place in our country since 1993 – a transformation required by the Constitution itself. The Magistrates Commission is now more broadly representative of South African society as a whole. This was important particularly at this stage of our history. The overwhelming majority of the population is black and at least half the population is female. Yet the great majority of the legal profession and senior judicial officers are still white and male. In the light of our history and the commitment made in the Constitution to transform our society, these racial and gender disparities cannot be ignored. The recomposition of the Magistrates Commission viewed thus by an objective observer, could not fairly be seen as an attempt to exert executive control over the magistracy. There was a pressing need for the racial and gender disparities within the Commission to be changed, and for the Commission to be re-composed so as to become more

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61 Para 28 above.

representative of South African society. The changes made facilitated this, and that would have been understood by an objective observer taking a balanced view of all the relevant circumstances.

62 Whether the changes that have been made affect the independence of the Commission is a matter to which I now turn. In doing so it is necessary to have regard to the constitutional requirements pertaining to the composition of the Judicial Service Commission, bearing in mind the distinction made in the Constitution between the appointment of judges and the appointment of other judicial officers.

The Magistrates Commission in comparison with the Judicial Service Commission

63 Although there are similarities between the Judicial Service Commission and the Magistrates Commission, there are also differences. Magistrates are represented on the Magistrates Commission whereas they have no representation on the Judicial Service Commission. There can be no objection to this. Magistrates are judicial officers and are required to be independent and impartial in the discharge of their duties. This is a quality that they share with the judges that are members of the Judicial Service Commission, and a quality that they must bring to their functions as members of the Magistrates Commission. They are closer to the day to day functioning of magistrates' courts than judges are, and are probably better placed than judges to know the stresses and demands that candidates will face if appointed as magistrates. The head of Justice College sits on the Magistrates Commission but not on the Judicial Service Commission. This, too, is not open to objection. Justice College has an important role in the judicial education and training of magistrates and the head of Justice

College is well placed to assess issues that might arise in relation to the enquiry demanded by the Constitution that judicial officers be "appropriately qualified".

64 There are four members of the National Assembly on the Magistrates Commission and not six, and five executive appointments and not four, as is the case with the Judicial Service Commission. These differences are of no significance. As mentioned previously, judicial officers and the legal profession have greater representation on the Magistrates Commission than they do on the Judicial Service Commission. They are, however, selected by a different procedure.

65 What is emphasised in the judgment of the High Court is that eight of the persons coming from the legal profession and the magistracy are appointed by the executive after consultation with interested bodies from whose ranks the appointments are to be made. In addition, the Minister is a member of the Commission, the executive appoints five persons, the governing party in Parliament appoints two persons and the head of Justice College (an executive appointment) is also a member of the Commission. Thus the governing party controls the appointment of seventeen of the twenty seven members of the Commission. It also has an important say in the appointment of the judge who is to chair the Commission, and the four members to be appointed by the National Council of Provinces. It is only in the case of the three representatives of the various magistrates and the two members from opposition parties, that it has no say at all.

66 The judgment of the High Court referring to this describes the Magistrates Commission

as no longer being "the autonomous body it was intended to be". The Constitutional Principles did not, however, require a Magistrates Commission,[62] let alone an autonomous one. An objection that the Constitution was inconsistent with the Constitutional Principles because it failed to make provision for a Magistrates Commission, as the interim Constitution had done, was rejected by this Court in the *First Certification Judgment*. The Court held that as far as magistrates' courts were concerned, the guarantee of independence accorded to all courts by section 165 of the Constitution and the provisions of section 174(7) dealing specifically with magistrates, was sufficient guarantee of independence. The Court also held that the legislation governing the appointment of magistrates and functioning of magistrates' courts would be subject to constitutional control.[63] I will deal later with the question whether the relevant legislation meets the requirements of section 174(7) of the Constitution.

67 The High Court judgment refers to the fact that it is no longer necessary for the President or the Minister to consult with the organised professions, or any other clearly defined professional organisations or peer groups.

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62 *First Certification Judgment* above n 16 at paras 135-6.

63 Id.

> "How or with whom the President and the Minister now consult is a mystery. It is now possible for the President and the Minister to decide who they will consult. The persons consulted may or may not be representatives of the designating authority".[64]

68 The "organised professions" or "clearly identified professional organisations" are not however given a privileged position in appointments to the Judicial Service Commission. Sections 178(1)(e) and (g) of the Constitution refer to nominations from within the "advocates' profession" and the "attorneys' profession" and to the designation by "teachers of law". Section 178(2) provides that when there are more than two nominations from within each of the "professions", the President "after consulting the relevant profession" has the power to determine which of the nominees should be appointed.

69 The language of the Magistrates Act is similar to this. It requires that the Minister consult the advocates' profession and the attorneys' profession on such matters. How that consultation is to be undertaken is not prescribed; but it is also not prescribed by the Constitution in the case of appointments to the Judicial Service Commission. Although the Minister determines how the consultation is to take place, the question whether there has been adequate consultation is subject to constitutional control. If he chooses a method which is not appropriate for ascertaining the views of the two professions, his decision would be invalid. The same applies to the appointments to be made by the President from the ranks of regional magistrates

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64 Above n 5 at 454C.

and chief magistrates.

Conclusion on the Magistrates Commission

70 Section 4 of the Magistrates Act deals with the objects of the Commission. The first two objects specified are:

> "(a) to ensure that the appointment, promotion, transfer or discharge of, or 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;
>
> (b) to ensure that no influencing or victimization of judicial officers in the lower courts takes place".

71 The fact that the executive has a strong influence in the appointment of the members of the Magistrates Commission does not mean that magistrates' courts lack institutional independence. Nor does it follow from this that the Commission "is unlikely to take any decisions, express any views or make recommendations which do not find favour with the Minister".[65]

72 The chairman of the Commission is a judge. The two regional magistrates and the two chief magistrates are senior judicial officers. All the magistrates are required to exercise

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65 Id at 454E-F.

impartiality and independence in the discharge of their duties, and take an oath of office requiring them to do so. The practising advocates and practising attorneys are officers of the court. The other members of the Commission are also responsible members of the community, including members of opposition political parties. There is no reason to believe that the members of the Commission will not discharge these and their other duties with integrity, or that viewed objectively there is any reason to fear that they will not do so.

73 The changes to the composition of the Commission did have the effect of giving the legislature and executive a greater say in the composition of the Commission. This in itself is not constitutionally objectionable, as discussed above. To hold that the influence of the legislature and the executive in the Magistrates Commission and magistracy undermines the institutional independence and impartiality of courts ignores the constitutional norm set by the Judicial Service Commission. It also overlooks the powerful constitutional and judicial safeguards that are in place and which prevent the executive and legislature from taking "control" of the magistracy.

74 It follows that I am unable to agree with the findings made in the judgment of the High Court concerning the Magistrates Commission. That, however, does not dispose of the matter. Various provisions of the Magistrates Act, the Magistrates' Courts Act and the regulations made by the Minister under those Acts were found by the High Court to be inconsistent with the Constitution. It is necessary now to consider each of the provisions found to be invalid and to decide whether or not it is inconsistent with the Constitution.

Judicial independence as an evolving concept

75 In doing so it must be kept in mind, as Le Dain J said in *Valente*, that judicial independence is an evolving concept.[66] It is relevant therefore to have regard to the legal and constitutional history of magistrates' courts and higher courts in South Africa in order to determine whether magistrates' courts as presently constituted have institutional independence.

66 Above n 19 at 174.

76 Although the use of a landdrost's court can be traced as far back as the late 1600s, magistrates' courts were themselves first introduced in the Cape Colony in 1830[67] and were later established in Natal in 1846.[68] In the Orange Free State and Transvaal, magistrates' courts replaced the landdrost's court as the principal inferior tribunal in 1902.[69] The different magistrates' courts shared two primary characteristics; a relatively limited jurisdiction for both civil and criminal matters and the fact that magistrates were part of the civil service, performing both judicial and administrative functions.

77 The magistrates' courts forming part of the civil service were thus a well established feature of the judicial system by the time of Union in 1910. When, in 1917, the legislature passed the Magistrates' Courts Act[70] to establish a uniform pattern of magistrates' courts for the whole country, it had the effect of significantly increasing the jurisdiction of magistrates' courts

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67 Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (Stevens & Sons, London 1960) at 206.

68 Id at 223.

69 Id at 239 and 247.

70 Act 32 of 1917.

in the Cape and Free State, which had previously had the most limited jurisdiction.[71] In terms of the 1917 Act, the Governor-General was responsible for appointing all magistrates, although the Public Service Commission had some powers of recommendation in line with its general powers with regard to all civil servants. The same appointment procedures applied after the passing of the 1944 Act[72] except that the Act made the Minister of Justice responsible for appointments.

71 Hahlo and Kahn above n 67 at 270.

72 Above n 2.

78 In 1956, the establishment of regional magistrates' courts for criminal matters resulted in a significant expansion of the criminal jurisdiction of magistrates' courts.[73] This was followed, in 1965, by an amendment[74] requiring that any person appointed as a regional magistrate had to hold an LLB degree or have passed the Public Service Senior Law Examination or an equivalent. The 1965 amendment also provided that a Regional Divisions Appointment Advisory Board was to be established that would advise the Minister on suitable candidates for appointment to regional courts. The Board consisted primarily of members of the Department of Justice, together with the Chief Magistrates. The jurisdiction of district and regional magistrates' courts was again significantly increased for criminal cases by the Lower Courts Amendment Act of 1977.[75] Throughout this period the magistrates continued to form part of the civil service.

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73 Magistrates' Courts Amendment Act 40 of 1952.

74 Magistrates' Courts Amendment Act 48 of 1965.

75 Act 91 of 1977.

79 The 1993 Magistrates Act[76] was passed following recommendations by the Hoexter Commission that magistrates should be made independent of the public service and their appointment, discipline and discharge should be governed by recommendations of advisory bodies consisting of judicial officers.[77] In terms of the 1993 Act, the Minister of Justice remained responsible for the appointment of magistrates, but had to consult with the Magistrates Commission before doing so. Provision was also made for a Senior Civil and Family Magistrates Appointments Advisory Board which was to make recommendations to the Minister regarding possible appointments. Section 14(2) of the Act also makes it clear that, as in the past, magistrates can be required to perform at least some administrative functions – these functions being assigned by the Minister through regulations after consultation with the Magistrates Commission.[78] Despite this, however, the 1993 Act constituted a decisive shift from past practice in that it set out mechanisms for the appointment, discipline and removal of magistrates instead of, as was the case previously, regarding magistrates as public servants to whom the Public Service Act applied. Further changes are contemplated in draft legislation introduced into

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76 Above n 3.

77 Commission of Enquiry into the Structure and Functioning of the Courts, part I of the Fifth Report at para 4.4.1.

78 The Minister has not yet made use of his power to issue such regulations under section 14(2). It should be noted, however, that both currently and in the past magistrates have been required to perform functions that are at least partly administrative in nature. These functions have generally been assigned to magistrates by legislation. Examples of such functions are: the administration of estates (regulation 3(1) promulgated under the Black Administration Act 38 of 1927); receiving applications for advances against the security of mortgage (section 23(2) of the Land Bank Act 13 of 1944); issuing temporary liquor licences (section 23 of the Liquor Act 27 of 1989) or licences for the exhibition and training of performing animals (section 2 of the Performing Animals Protection Act 24 of 1935); and reporting to the Director-General of Health on visits to patients detained in private dwellings on grounds of mental health (section 45 of the Mental Health Act 18 of 1973).

Parliament towards the end of last year, but which has not yet been adopted.[79]

80 To complete the picture it should be added that in 1995 the civil jurisdiction of magistrates' courts was significantly increased to amounts of up to R100 000[80] and in 1998 the criminal jurisdiction was also significantly extended with regional courts able to impose sentences of 15 years imprisonment or a fine of R300 000 while other magistrates' courts can impose sentences of 3 years imprisonment and fines of R60 000.[81]

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79 Judicial Officers Amendment Bill 72 of 2001.

80 Government Gazette 16318 GN 459 of 24 March 1995.

81 Government Gazette 19435 GN 1411 of 30 October 1998 and Magistrates Amendment Act 66 of 1998.

81 The superior courts have never been part of the public service. Since the time of Union they have been presided over by judges whose tenure has been protected. Prior to the adoption of the interim Constitution, judges were appointed by the executive and had their salaries determined by Parliament.[82] Judges could be impeached by a resolution of Parliament[83] and their conditions of service were determined by regulations formulated by the Governor-General.[84]

82 Yet in *Minister of the Interior and Another v Harris and Others*,[85] Schreiner JA could refer with confidence to the fact that

> "[t]he Superior Courts of South Africa have at least for many generations had

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82 Section 100 of the South Africa Act, 1909.

83 Section 101 of the South Africa Act, 1909.

84 Section 7 of the Judges' Salaries and Pensions Act 16 of 1912 and section 4 of the Judges' Salaries and Pensions Act 73 of 1959.

85 1952 (4) SA 769 (A) at 789.

> characteristics which, rooted in the world's experience, are calculated to ensure, within the limits of human frailty, the efficient and honest administration of justice according to law. Our Courts are manned by full-time Judges trained in the law, who are outside party politics and have no personal interest in the cases which come before them, whose tenure of office and emoluments are protected by law and whose independence is a major source of the security and well-being of the state."

83 Under our new constitutional order much has changed since then and more changes are foreshadowed in the bill presently before Parliament.[86] As was previously mentioned, judges are now appointed by the President on the recommendation of the Judicial Service Commission.[87] Their salaries and benefits cannot be reduced,[88] and a decision of the Judicial Service Commission supported by a resolution of two thirds of the members of the National Assembly is required for impeachment.[89] Salaries and conditions of service are still fixed by regulation, but the Bill makes provision for an independent commission to make recommendations to government on the remuneration of judges.

84 As this history makes clear, there has always been a distinction between the higher courts and the lower courts. At the time of the *Harris* case magistrates were still part of the public service as they had been since that office was first created in South Africa. Unlike judges who have never had such duties, magistrates had extensive administrative responsibilities particularly

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86 Judicial Officers Amendment Bill above n 79.

87 Section 174(6) of the Constitution.

88 Section 176(3) of the Constitution.

89 Section 177 of the Constitution.

in rural areas where they discharged important functions for the government.[90]

85 During the past decade there has been a greater acceptance of the need to break the links that existed between government and magistrates. The Magistrates Act passed in 1993 removed magistrates from the public service, gave them greater protection against impeachment than they previously had, and established the Magistrates Commission to ensure that appointments, promotions, transfers and disciplinary action were carried out without favour or prejudice. But magistrates continued to perform administrative duties, and had less institutional security than judges did.

90 Hahlo and Kahn above n 67 at 274-5.

86 This was the position that existed when the interim Constitution was adopted and was still the position when the 1996 Constitution came into force. The 1996 Constitution states that "[t]he courts *are* independent".[91] Yet, as has been mentioned previously, it pointedly excluded magistrates from the special protection given to judges by sections 176 and 177 of the Constitution.

The correct approach to constitutional adjudication

87 In dealing with the legislation that was the subject matter of the constitutional challenge, the High Court seems not to have had regard to two important considerations. First, that decisions of the Magistrates Commission and the Minister in giving effect to powers vested in them by the legislation are subject to constitutional control. If they take decisions or conduct themselves in a manner inconsistent with judicial independence, or with the right that everyone (including magistrates) have to just administrative action, such decisions or conduct will be invalid, and liable to be set aside by the higher judiciary. The well-informed, thoughtful and objective observer would pay due regard to this.

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91 Section 165(2). Emphasis added.

88 Secondly, that the legislation must be construed consistently with the Constitution[92] and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in,[93] so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or sub-section be made.

89 It is against this background, and in the light of these comments, that I turn now to

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92 *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 37(a); *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-6; *Bernstein v Bester* above n 47 at para 59; *De Lange v Smuts NO* above n 17 at para 85. See also *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA); 2001 (8) BCLR 779 (SCA) at para 20.

93 *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 64-70; *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at paras 55-7.

consider the findings made concerning specific provisions of the Magistrates Act, the Magistrates' Courts Act and the regulations made in terms of the Magistrates Act.

Section 3(1) of the Magistrates Act

90 Section 3(1) of the Magistrates Act deals with the composition of the Magistrates Commission. The High Court declared this section to be inconsistent with the Constitution. For reasons already given, I am unable to agree with this conclusion. The appeal against that part of the order must therefore be upheld.

Section 3(2) of the Magistrates Act

91 Section 3(2) deals with the term of office of the members of the Commission. That is specified as being for five years, but provides that

> "any such appointment or designation may be withdrawn by the appointing or designating authority, as the case may be, at any time after consultation with the Commission if in his, her or its opinion there are sound reasons for doing so."

92 It is relevant for reasons already given, that the Constitution makes provision for members of the Judicial Service Commission to be replaced by those who designated or nominated them. Section 178(3) of the Constitution provides:

> "Members of the Commission designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs in their number. Other members who were designated or nominated to the Commission serve until they are replaced by those who designated or nominated them."

There is, however, a difference between nominations or designations to the Judicial Service Commission and nominations and designations to the Magistrates Commission. In the case of the Judicial Service Commission, the nominations or designations of members of the legal profession are not made by the executive. They are made by the professions themselves, though the President has the power to make the appointment from among those nominated, if the number of nominees exceeds the number of vacancies to be filled. In the case of the Magistrates Commission the designations are made by the executive after consulting the profession.

93 There is a difference between being nominated by the executive to perform a duty which calls for an independent decision and being chosen by the executive to perform that duty in accordance with its wishes. If the power to recall is subject to objective criteria consistent with the Constitution, that power is not constitutionally objectionable. However, section 3(2) empowers the "appointing or designating authority . . . after consultation with the Commission" to recall a member "*if in his, her or its opinion* there are sound reasons for doing so".[94] This is not an objective test. That is not appropriate, particularly in the case of appointments or designations of magistrates, advocates, attorneys and a teacher of law, who account for 11 of the members of the Commission. To be consistent with independence, objective criteria should be set for this purpose.

94 If objective criteria are set for recall, there would be no objection to that power being

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94 Emphasis added.

vested in the executive. The exercise of the power, subject to constitutional control, would meet the requirements of the Constitution.

95 As section 3(2) presently reads, it is unconstitutional. This can and ought to be remedied by deleting the words "in his, her or its opinion"from section 3(2). This should be done to avoid any perception that the power to recall permits the executive to exercise control over members of the Commission. The order of the High Court declaring the whole of section 3(2) invalid is set aside and replaced by an order deleting the words "in his, her or its opinion" from section 3(2).

Section 6A of the Magistrates Act

96 Section 6A of the Magistrates Act deals with complaints against magistrates. It provides:

> "The Minister shall make regulations –
> (a) creating a structure and prescribing procedures in terms of which members of the public may report to such structure any alleged improper conduct or any conduct which has resulted or might result in any impropriety or prejudice on the part of a magistrate; and
> (b) determining the powers and functioning of such structure."

Section 6B of the Act requires the Commission to establish a committee or committees to deal with complaints pending the establishment of such a committee. Section 6C states that the provisions of these sections

> "[s]hall not be construed as empowering the structure, committee or the Commission to interfere with the judicial independence or the judicial functioning of a magistrate."

This emphasises the requirements of the Constitution that exist independently of section

6C, and would have been applicable to the functioning of the complaints committee and the Commission, even if such provisions had not been enacted in the Magistrates Act.

97 Regulations governing the procedure to be followed in making and dealing with complaints have been made. They are referred to as the Complaints Procedure Regulations[95] and make provision for complaints to be considered by committees established for each cluster[96] and regional division.[97] The complaints committee can either deal with the complaint itself or refer it to the Commission to be dealt with in accordance with regulation 26. It seems to be contemplated that only those complaints that might warrant the imposition of a sanction will be referred to the Commission, to be dealt with under regulation 26. I deal later with this regulation.[98]

98 Section 180 of the Constitution provides that

> "National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including –
> (a) training programmes for judicial officers;
> (b) procedures for dealing with complaints about judicial officers; and
> (c) the participation of people other than judicial officers in court decisions."

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95 Above n 4.

96 A cluster is defined as a "cluster of magistrates' offices as established by the Commission and also an administrative region as established by the Minister after consultation with the Commission".

97 A regional division is defined as "a regional division established in terms of section 2 of the Magistrates' Courts Act, 1944".

98 Paras 193-203 below.

The fact that the Magistrates Act makes provision for a complaints system is therefore not open to objection.

99 The judgment of the High Court, however, holds that the provisions of section 6 and the Complaints Procedure Regulations made in terms of that section, are inconsistent with the Constitution because they give the executive the exclusive power to create a mechanism for dealing with improper conduct of magistrates. According to the judgment

> "Such a system is clearly open to manipulation and would be perceived by the objective, reasonable and informed person to be a method whereby undue influence could be exercised on a magistrate."[99]

100 There is no basis for this finding. It fails to have regard to the fact that section 180(c) of the Constitution makes provision for a complaints system to be determined by national legislation. National legislation is defined in section 239 of the Constitution as including "subordinate legislation made in terms of an Act of Parliament." It fails also to have regard to the fact that the regulations passed by the Minister are subject to constitutional control. If they contain provisions that are inconsistent with the independence of the courts they will be invalid for that reason, not because they were made at the instance of the executive. But if their provisions are consistent with the independence of the courts, they are not open to objection.

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99 Above n 5 at 456C-D.

101 The appeal against the order insofar as it pertains to the declaration of invalidity made in respect of section 6A of the Magistrates Act must therefore be upheld.

Section 10 of the Magistrates Act and section 9 of the Magistrates' Courts Act

102 The High Court held that the provisions of the Magistrates' Courts Act[100] and the Magistrates Act,[101] dealing with the appointment of magistrates are inconsistent with the Constitution. The relevant provisions are section 10 of the Magistrates Act which provides that

> "[t]he Minister shall, after consultation with the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts Act"

and section 9(1) of the Magistrates' Courts Act:

> "(a) Subject to the Magistrates Act, 1993, and the provisions of paragraph (b) of this subsection and of section 10, the Minister may appoint for any district or subdistrict a magistrate, one or more additional magistrates or one or more assistant magistrates and for every regional division a magistrate or magistrates.
>
> (aA) The Minister may, in a particular case or generally and subject to such directions as he or she may deem fit, delegate the power conferred upon him or her by

100 Above n 2.

101 Above n 3.

> paragraph (a) to the Director-General of his or her department or another officer of that department with the rank of director or an equivalent or higher rank or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate."

103 Other provisions of section 9 of the Magistrates' Courts Act deal with the qualifications for appointment as a regional magistrate or a magistrate, and make provision for the appointment of acting or temporary magistrates. It is not necessary to consider these provisions now.[102] The judgment of the High Court correctly points out that the effect of the sections just quoted is that the Minister appoints magistrates after consultation with the Commission, which means that he must consult the Commission before making an appointment, but is not bound by its recommendation.[103]

104 This, and the finding that the Magistrates Commission is an executive structure that is not independent, provided the basis for the conclusion that the appointment procedures do not provide the institutional independence required by the Constitution. This meant that

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102 They are dealt with later in paras 242-249 below.

103 Above n 5 at 443F.

> "[t]he objective, reasonable and informed person would perceive the appointment of magistrates to be open to manipulation in favour of persons well disposed to the Executive and therefore likely to favour the Executive; ie that Magistrates are the instruments of the Executive."[104]

105 I have already dealt with the finding concerning the Magistrates Commission.[105] The judgment of the High Court seems to have proceeded on the assumption that the Constitution requires a strict and complete separation of powers between the executive (the Minister of Justice) and the judiciary (the magistracy). However it was made clear in the *First Certification Judgment* that total separation of powers was neither feasible nor required by the Constitutional Principles or the Constitution itself:

> " . . . in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute . . . . the scheme is always one of partial separation."[106]

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104 Id at 457I.

105 Paras 70-74 above.

106 Above n 16 at paras 108-9. See also *S v Dodo* above n 43 at paras 14-17 for a discussion of the principles involved in developing a "distinctly South African model of separation of powers".

106 In particular, the judgment of the High Court seems to assume that the involvement of members of the executive and the legislature in the appointment of judicial officers contravenes the separation of powers required by the Constitution. The mere fact, however, that the executive and the legislature make or participate in the appointment of judges is not inconsistent with the separation of powers or the judicial independence that the Constitution requires.[107]

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107 Id.

107 This is supported by an examination of the appointment procedures of other countries. A justice of the High Court of Australia is appointed by the Governor General in Executive Council following consultation between the Attorney-General of the Commonwealth and Attorneys-General of the States.[108] Judges of the Supreme Court of the USA are nominated "by and with the advice and consent of the Senate" and appointed by the President.[109] In Canada, judges are appointed by the Governor in Council by letters patent under the Great Seal.[110] In Germany, half of the judges of the Federal Constitutional Court are elected by the Bundestag (House of Representatives) and half by the Bundesrat (The Federal Council of the Provinces[111])[112] and the judges of each of the five Federal Supreme Courts are selected jointly by the appropriate Federal Minister and a selection committee composed of the appropriate Provincial (Land) ministers and an equal number of members elected by the Bundestag.[113] Yet in none of these countries would anyone contend that the highest court is a "personal fiefdom" of the executive or legislature.

108 The emphasis in the judgment of the High Court on the powers of the executive in relation to the appointment of members of the Commission, and thus in its affairs, is reminiscent of the argument specifically rejected by this Court in the *First Certification Judgment*, where

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108 Sections 5 and 6 of the High Court of Australia Act, 1979.

109 Section 2[2] of Article II of the Constitution of the USA.

110 Section 4(2) of the Supreme Court Act R.S.C. 1985.

111 The Länder.

112 Article 94(1) of the German Basic Law (Grundgesetz). The procedures for election by the Bundestag and Bundesrat are laid down in the implementing statute.

113 Article 95(1) and (2) of the Basic Law.

objection was taken on these grounds to the composition of the Judicial Service Commission. In rejecting this contention this Court held,

> "The mere fact . . . that the Executive makes or participates in the appointment of judges is not inconsistent with the doctrine of separation of powers or with the judicial independence required by CP VIII. In many countries in which there is an independent judiciary and a separation of powers, judicial appointments are made either by the Executive or by Parliament or by both. What is crucial to the separation of powers and the independence of the judiciary is that the judiciary should enforce the law impartially and that it should function independently of the legislature and the executive. NT 165 is directed to this end. It vests the judicial authority in the courts and protects the courts against any interference with that authority. Constitutionally, therefore, all judges are independent.
>
> Appointment of judges by the executive or a combination of the executive and parliament would not be inconsistent with the CPs. The JSC contains significant representation from the judiciary, the legal professions and political parties of the opposition. It participates in the appointment of the Chief Justice, the President of the Constitutional Court and the Constitutional Court judges, and it selects the judges of all other courts. As an institution it provides a broadly based selection panel for appointments to the judiciary and provides a check and balance to the power of the executive to make such appointments. In the absence of any obligation to establish such a body, the fact that it could have been constituted differently, with greater representation being given to the legal profession and the judiciary, is irrelevant."[114]

109 It is thus clear that the fact that the Minister is not bound by the recommendations of the Magistrates Commission is not constitutionally objectionable. The *First Certification Judgment* held that the executive could have retained the power to appoint judges (and magistrates) itself

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114 Above n 16 at paras 123-4.

without infringing the institutional independence required by the Constitutional Principles.[115] Thus, the appointment of a Magistrates Commission, presided over by a judge, and drawn from diverse sections of the legal community to advise the executive in relation to the appointment of magistrates is a check on the exercise of executive power, and not a flaw in the appointment process.

110 For these reasons, the provisions of section 10 of the Magistrates Act and section 9(1) of the Magistrates' Courts Act are not inconsistent with the Constitution. The appeal, insofar as it pertains to the order made in respect of these provisions, must therefore be upheld.

Sections 11 and 16(1) of the Magistrates Act

111 Section 11 of the Magistrates Act provides:

> "Subject to the provisions of this Act, the conditions of service of a Magistrate shall be determined in accordance with the regulations under section 16."

Section 16(1) provides that

> "[t]he Minister may, after the Commission has made a recommendation, make regulations regarding the following matters in relation to judicial officers in the lower courts."

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115 Id at para 124.

The subject matter of the power to make regulations is spelt out in 16 subparagraphs dealing with conditions of service of magistrates, and concludes with a general power to make regulations in respect of any matter

> "which is not in conflict with this Act, which is reasonably necessary for the regulation of the conditions of service of judicial officers or any matter in connection with the rights, powers, functions and duties of a judicial officer."[116]

112 In the High Court, sections 11 and 16(1) were held to be inconsistent with the Constitution. Two reasons were given for this conclusion. First, that the vesting of the power in the Minister to make regulations is questionable on the grounds that this is an impermissible delegation of legislative authority. Secondly, that section 16(1) allows the Minister to establish a system for exercising control over magistrates, and in particular, empowers him to prescribe a code of conduct for magistrates and to make regulations dealing with the circumstances under which magistrates can be held to be guilty of misconduct.

113 Although it is not clear from the judgment of the High Court to what extent the finding concerning section 16 is based on an impermissible delegation, the question must be dealt with given the reference to it in the judgment. Also, ARMSA and Bekker rely on an impermissible delegation of legislative power by the National Assembly to the Minister of Justice to support

116 Section 16(1)(o) of the Act.

their challenge to the validity of regulations 16, 19, 25, 26 and 27.

Old order legislation

114 The Magistrates Act is classified under the Constitution as "old order legislation". Schedule 6 of the Constitution defines "old order legislation" as "legislation enacted before the previous Constitution [the interim Constitution] took effect." The Magistrates Act was assented to on 23 June 1993 and its sections came into force on 1 October 1993 and 11 March 1994 – that is before the adoption of the interim Constitution. Likewise, most of the regulations in question are old order legislation.[117]

115 Section 229 of the interim Constitution provided that:

> "Subject to this Constitution, all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority."

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117 The bulk of the challenged regulations formed part of the Regulations for Judicial Officers in the Lower Courts which were promulgated on 11 March 1994 – before interim Constitution had come into force. However, Regulation 54A and Schedule E were promulgated on 27 October 1994 after the interim Constitution had come into force and regulations 16, 17, 19, 26 and Schedule E were subsequently amended after the interim Constitution had come into force. The dates of the relevant amendments were: 17 November 1995 (Regulation 19), 2 August 1996 (Regulation 19), 8 August 1997 (Regulation 26), 7 August 1998 (Regulations 16 and 17) and 17 December 1999 (Schedule E). The Complaints Procedure Regulations were promulgated on 1 October 1998.

Item 2(1)(b) of Schedule 6 of the 1996 Constitution provides that all law in force on 4 February 1997 (when the Constitution took effect) continues in force subject to "consistency with the new Constitution". This includes "old order legislation".

116 The question of the delegation of legislative power prior to the interim Constitution taking effect has already been dealt with by this Court. In *Ynuico Ltd v Minister of Trade and Industry and Others*[118] it was argued that section 2(1)(b) of the Import and Export Control Act[119] constituted an impermissible delegation of legislative power in that it allowed the Minister of Trade and Industry by notice in the Gazette to prescribe a kind or class of goods that should be prohibited from being imported to South Africa. On behalf of a unanimous Court, Didcott J rejected this contention, holding that the interim Constitution operated prospectively and, even if it placed constraints on the power to delegate (and he expressed no opinion on that issue), this would have no application to the exercise of power in terms of the Act that took place before the adoption of the interim Constitution.[120]

117 The decision in *Ynuico* applies to the regulations made in terms of section 16(1) prior to the coming into force of the interim Constitution. It is necessary, however, to consider whether the power to make regulations for the purposes identified in section 16(1) is a legitimate power and, in particular, whether the power to prescribe a code of conduct, is inconsistent with the

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118 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC).

119 Act 45 of 1963.

120 At paras 5-7.

Constitution. It is also necessary to consider whether the provisions of the regulations themselves are inconsistent with the Constitution.

The power to delegate

118 The interim Constitution neither prohibited nor allowed Parliament to delegate authority to legislate – it was silent on the issue. In *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others*[121] this Court recognised that delegating subordinate regulatory authority was not only constitutionally permissible but necessary for effective governance.[122] That was accepted by all the members of the Court. There was, however, a difference of opinion as to the limits of that authority. Whilst the majority accepted that the delegation in issue in that case was impermissible – it empowered the President to amend or repeal Acts of Parliament including the Act from which he derived his power – there were differences within the majority as to whether Parliament can delegate to the executive a power to amend an Act of Parliament. It is not necessary to revisit that issue. Here the delegation does not empower the Minister to repeal or amend an Act of Parliament. It empowers him to prescribe regulations for magistrates. It was not suggested that the regulations made by the Minister were not within the purview of the powers vested in him by section 16(1).

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121 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

122 At para 51.

119 Whether the vesting of such a power in the Minister is consistent with section 174(7) of the Constitution and the independence of the judiciary are issues to which I will turn later. The validity of the regulations depends, however, on those issues. There is nothing in the decision of this Court in *Executive Council, Western Cape* that supports the submission that the power vested in the Minister to make regulations for the purposes prescribed by section 16(1) of the Act is inconsistent with the Constitution. The reliance by the second and third applicants on this decision is misplaced.

Section 174(7) of the Constitution

120 A related argument, relevant not only to this issue but also to other provisions of the Magistrates Act, is directed to the provisions of section 174(7) of the Constitution. The section states:

> "Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice."

The question is whether this precludes delegation and requires all material provisions dealing with such matters to be contained in the Act of Parliament itself. That seems to have been the view of the High Court, and if it is correct, it would be relevant to this issue.

121 What the Constitution requires is that the Act of Parliament must *ensure* that these

important matters take place without favour or prejudice. The Magistrates Act does not contain detailed provisions dealing with all such matters. However, it makes provision for the Magistrates Commission whose principal object is to ensure that this is done.[123] The vesting of this power in the Magistrates Commission was in fact the means specifically chosen in the interim Constitution for ensuring the absence of favour and prejudice in relation to such matters.

122 There are no material differences between the interim Constitution and the 1996 Constitution as far as the independence of courts is concerned. Although the 1996 Constitution does not require the same means to be adopted, as were adopted in the interim Constitution for ensuring the absence of favour or prejudice, this omission does not render unconstitutional the means which passed constitutional muster under the interim Constitution. Establishing an appropriately constituted and empowered body is an effective and suitable means of securing this constitutional objective.

123 The Magistrates Commission has been vested with significant powers to enable it to carry out its mandate. In terms of section 7 of the Magistrates Act, the Commission may:

> "(a) carry out or cause to be carried out any investigation that the Commission deems

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123 Section 4(a) of the Magistrates Act provides as follows:

> "The objects of the Commission shall be to ensure that the appointment, promotion, transfer or discharge of, or 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 . . ."

necessary;

(b) obtain access to official information or documents;

(c) hear any person or summon any person to appear before the Commission for questioning, or require from any person a written explanation in respect of any matter falling within the ambit of the Commission's objects;

(d) advise the Minister with regard to any matter or provide him or her with a recommendation;

(e) make known any finding, point or view or recommendation of the Commission in the manner which and to whom the Commission deems fit."

Furthermore, sections 7(1)(f) and 7(2) provide that the Commission may report to the Minister for the information of Parliament on any matter it deems fit and that such a report shall be tabled in Parliament by the Minister within 14 days after it was presented to him or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

124 This, and the fact that persons who are not dealt with fairly in relation to any of the matters referred to in section 174(7) are entitled to bring their grievances to the attention of the Magistrates Commission, and if they do not get satisfaction there, to apply to the higher courts for relief, is sufficient to meet the requirements of section 174(7) of the Constitution.

Are sections 11 and 16(1) inconsistent with the separation of powers

125 The High Court also held that sections 11 and 16(1) of the Act were inconsistent with the separation of powers. In this regard the judgment focussed on the power to prescribe a code of conduct in terms of section 16(1)(e):

> "the judiciary is a branch of government and is required to be independent of the other two branches, the Legislature and the Executive. Experienced members of the judiciary have all the knowledge and expertise necessary to draw up a code of conduct . . . ."[124]

The judgment goes on to hold that these provisions enable the executive to

> "define what misconduct is and the circumstances under which and the conditions and manner in which a judicial officer may be found guilty of misconduct. [It also] has the power to provisionally suspend the magistrate and thereafter confirm his suspension.
>
> The objective, reasonable and informed person would perceive the provisions of s 16(1)(e) and (j) to impinge on the independence of the magistrates profession because they could be used to influence the way in which magistrates perform their judicial functions."[125]

I am unable to agree with this conclusion.

126 Section 16(1)(e) provides:

> "The Minister may, after the Commission has made a recommendation, make regulations regarding . . . a code of conduct to be complied with by judicial officers."

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124 Above n 5 at 473C.

125 Id at 473D-E.

127 The power to compile a code of conduct for magistrates is vested in the Magistrates Commission.[126] As there cannot be two inconsistent codes of conduct, the Minister will be bound by the decision of the Magistrates Commission as to what the code of conduct should be. The High Court judgment also overlooks the fact that the power to make a code is subject to three constraints. First, regulations may only be made after the Commission has made recommendations regarding such matters. Secondly, the regulations when made are subject to Parliamentary control.[127] They have to be tabled in Parliament and Parliament is given the

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126 Section 4(d) of the Magistrates Act provides that one of the objects of the Commissions shall be "to compile a code of conduct for judicial officers in the lower courts".

127 Section 16(2)(a) of the Magistrates Act provides that:

> "A regulation made under this section shall be in force unless and until Parliament during the session in which the list referred to in section 17 of the Interpretation Act, 1957 (Act No. 33 of 1957), which relates to that regulation, has been laid upon the Table in Parliament, by resolution disapproves the regulation, in which event the regulation shall lapse with effect from a date to be specified in the resolution."

power to disapprove of any regulation by way of resolution. Finally, and most importantly, the regulations are subject to constitutional control by the higher judiciary which is required by the Constitution to declare any legislation inconsistent with the Constitution to be invalid to the extent of such inconsistency.[128]

128 If the Minister acts without having received a recommendation from the Commission, the regulation will not be valid. If, after having received a recommendation, he or she departs from it, that decision would also be invalid. Furthermore, if regulations are made which are inconsistent with judicial independence they will be invalid. Viewed objectively, therefore, the power to make regulations for the conditions of service of magistrates is a limited power, which does not entitle the Minister to impair the independence guaranteed by the Constitution.

129 The code of conduct is contained in Schedule E to the regulations and is introduced by regulation 54A. There was no challenge to any specific provisions of the code of conduct. The only question raised in argument and in the High Court judgment is whether the power to make such a code can only be vested in the judiciary.

130 It is no doubt desirable that any code of conduct for the judiciary should be determined by the judiciary itself. That would be consistent with judicial independence and with the separation of powers. For instance, Parliament regulates how its members are expected to

[128] Section 172(1).

behave, and what their ethical duties are. It would be appropriate for the judiciary to do the same. This, in fact, is the case as far as the higher judiciary is concerned where a code of conduct has been adopted by consensus amongst the judges themselves. The question is, however, whether legislation authorising the Magistrates Commission, or the Minister of Justice (within the constraints mentioned) to prescribe a code of conduct for magistrates is inconsistent with judicial independence.

131 I have come to the conclusion that it is not unconstitutional to vest this power in the Commission. The making of the code is subject to the controls that have been mentioned, and the higher judiciary can ensure that nothing appears in the code that would in any way be inconsistent with judicial independence. Viewed objectively, there is no risk that the code could ever impair judicial independence, and that being so, there is no basis for holding that the section 16(1)(e) is inconsistent with the Constitution. The consequential finding made by the High Court that regulation 54A and Schedule E (the code of conduct) are inconsistent with the Constitution cannot be sustained and the appeal is therefore upheld.

132 Similar considerations apply to section 16(1)(j) which provides:

> "The Minister may, after the Commission has made a recommendation, make regulations regarding . . . the circumstances under which and the conditions and manner in which a judicial officer may be found guilty of misconduct, or to be suffering from continued ill-health, or of incapacity to carry out his or her duties of office efficiently."

133 Regulations can only be made in terms of this power after the Commission has made recommendations. When made they are subject to parliamentary control and ultimately to

constitutional control by the higher courts. If, viewed objectively, the regulations are consistent with the Constitution and the judicial independence required by it, they pose no threat to magistrates. If not, they are not valid.

134 The same applies to other regulations made in terms of section 16(1). Although the Minister has the power to prescribe the framework regulating the conditions of service of magistrates, that framework must be consistent with the Constitution and judicial independence.

135 The provisions of sections 11 and 16(1), seen alone, or in the context of the Act as a whole, do not therefore impinge on the independence of magistrates. The appeal against the High Court's finding to the contrary must therefore be upheld.

Section 12 of the Magistrates Act

136 Section 12 of the Magistrates Act deals with the determination of magistrates' salaries. The relevant provisions are:

> "(1) (a) Subject to the provisions of this section, any person occupying the office of magistrate shall, in respect of that office, be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the Minister by notice in the Gazette in consultation with the Commission and with the concurrence of the Minister of Finance.
>
> (b) Different categories of salaries and salary scales may be so determined in respect of different categories of magistrates.
>
> (2) A notice in terms of subsection (1) or any provision thereof may commence with effect from a date which may not be more than one year before the date of publication thereof.

(3) The first notice in terms of subsection (1) shall be issued as soon as possible after the commencement of this Act, and thereafter such a notice shall be issued if circumstances, including any revision and adjustment of salaries and allowances of public servants since the latest revision and adjustment of salaries of magistrates, so justify.

(4) (a) A notice issued in terms of subsection (1) shall be tabled in Parliament within 14 days after publication thereof, 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.

(b) If Parliament by resolution disapproves such a notice or any provision thereof, that notice or that provision, as the case may be, shall lapse to the extent to which it is so disapproved with effect from the date on which it is so disapproved.

(c) The lapsing of such a notice or provision shall not affect –

(i) the validity of anything done under the notice or provision up to the date on which it so lapsed;

(ii) any right, privilege, obligation or liability acquired, accrued or incurred as at that date under or by virtue of the notice or provision.

(5) The amount of any salary payable in terms of subsection (1), shall be paid from moneys appropriated by Parliament for that purpose.

(6) The salary payable to a magistrate shall not be reduced except by Act of Parliament: Provided that a disapproval contemplated in subsection (4)(b) shall, for the purposes of this subsection, not be deemed to result in a reduction of such salary.

(7) If an officer or employee in the public service is appointed as a magistrate, the period of his or her service as a magistrate shall be reckoned as part of and continuous with his or her service in the public service for the purposes of leave, pension and any other condition of service."

137 The High Court held that in terms of this section the salaries of magistrates are in effect determined by the executive. This, and the fact that there is no guarantee against salaries once

determined being reduced, meant that "they would be perceived to be open to manipulation".[129] That, the Court held, meant that section 12 was inconsistent with the Constitution.

138 The determination of salaries of judicial officers raises difficult questions to which there are no easy solutions. Adequate remuneration is an aspect of judicial independence. If judicial officers lack that security, their ability to act independently is put under strain. Moreover, if salaries are inadequate it would be difficult to attract to the judiciary persons with the skills and integrity necessary for the discharge of the important functions exercised by the judiciary in a democracy. Thus, the requirement mentioned by Ackermann J in *De Lange v Smuts* that judicial officers must have "a basic degree of financial security".[130] But who is to determine what that is? If it is the legislature or the executive this may give rise to the tensions between the judiciary and the other arms of government, and the judiciary itself could then be thrust into the position of having to deal with litigation in which the issue is whether the salaries are consistent with the constitutional requirement of judicial independence. That is obviously undesirable. Although judges could exercise that function in relation to the remuneration of magistrates, it would be invidious to have to be judges in their own cause if their own salaries were in issue.

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129 Above n 5 at 461I.

130 Above n 17 at para 70.

139 Judicial officers ought not to be put in a position of having to do this, or to engage in negotiations with the executive over their salaries. They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such matters, than others who can advance their interest through normal bargaining processes open to them.

140 Parliament and the executive, the other two arms of government, are in a different position. They have control over the public purse and are entitled through legislation and executive action to determine their own remuneration and conditions of service. A mechanism has, however, been put in place to avoid the conflict inherent in such a situation. Sections 219(1) and (2) of the Constitution require an independent commission to be established to make recommendations concerning such remuneration. The Independent Commission for the Remuneration of Public Office Bearers performs that function.[131]

131 Act 92 of 1997.

141 In the High Court, and again in this Court, counsel for ARMSA and Bekker contended that an independent remuneration commission was needed to determine salaries of magistrates and to protect them against pressure that could be brought to bear on them by the government through its power to fix salaries. They relied on the decision of the Supreme Court of Canada in the *Provincial Judges* case[132] where it was held that

> "the imperative of protecting the courts from political interference through economic manipulation requires that an independent body – a judicial compensation commission – be interposed between the judiciary and the other branches of government."[133]

Such an institutional go-between serves two purposes. It avoids bargaining between judges and the executive or the legislature over judicial salaries. It also avoids any perception that through the exercise of the power to determine judicial salaries, the legislature or the executive might be perceived to be interfering with judicial

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132 *Reference re: Public Sector Pay Reduction Act (P.E.I.), s. 10; Attorney General of Canada et al., Interveners; Reference re: Independence of Judges of Provincial Court, Prince Edward Island, Provincial Court Act and Public Sector Pay Reduction Act; Attorney General of Canada et al., Interveners* (1997) 150 DLR (4th) 577.

133 Id at para 147.

independence.

142 In Canada at the time of that case there were commissions established by the various provincial legislatures to advise them on judicial salaries. In some cases, the advice of the commission was binding, in others, the advice was non-binding. The Court held that it was not a requirement of judicial independence in Canada that the advice of the commission be binding on the executive or the legislature. It was sufficient that the commission be required to give advice, that the legislature or the executive be required to consider that advice before taking a decision, and that if it did not follow the advice, that it be required to give reasons for its decision. The reasons need only be rational since the manner in which public funds are spent is a power that resides with the legislature and the executive.

143 The judgment of the majority of the Supreme Court of Canada in the *Provincial Judges* case was delivered by Lamer CJ. It appears from his judgment that he was particularly anxious about the relationship that existed then between the provincial judges on one hand, and the provincial legislatures and executives on the other. That relationship had been the subject of considerable strain which had reached breaking point as a result of salary reductions that had been prescribed for provincial judges in various provinces. Lamer CJC said,

> "[l]itigation, and especially litigation before this Court, is a last resort for parties who cannot agree about their legal rights and responsibilities. It is a very serious business. In these cases, it is even more serious because litigation has ensued between two primary organs of our constitutional system – the executive and the judiciary – which both serve

important and interdependent roles in the administration of justice."[134]

The task of the Court was thus

134 Id at para 7.

> "to explain the proper constitutional relationship between provincial court judges and provincial executives, and thereby assist in removing the strain on the relationship."[135]

The Court did not order that Commissions be established. They already existed. What it did was to explain how the system should function, and set aside salary reductions that had been made. It did so not because reduction was not permissible (it held that there may be circumstances in which salary reductions could be justified)[136] but because the reductions had been made without consulting the Commissions. It is clear from the judgment that what the Court required was some institutional protection to ensure that the power to set judicial salaries was perceived to be subject to safeguards to prevent it from

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135 Id at para 8.

136 At para 133, the Court held that:

> "as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. . . . As I explain below, when governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy."

being abused.

144 Conditions in South Africa are not the same as conditions in Canada. Although the Constitution affords special protection to judges, it does not deal with the manner in which their salaries are to be determined. It provides only that their salaries, allowances and benefits "may not be reduced"[137] and requires that national legislation establish a framework for determining the salaries, allowances and benefits of judges.[138] However, such a framework has not been established. Their salaries and benefits are still dealt with under the pre-constitutional legislation, the Judges Remuneration and Conditions of Employment Act.[139] In terms of this Act the remuneration is determined by the President by proclamation in the Gazette.[140] No provision is made for the President to consult or to act on the advice of any person or body. The proclamation must, however, be tabled in Parliament within 14 days of having been made, and Parliament has the power to reject its provisions. The Act also regulates the pension rights of judges, and provides that other conditions of service are to be determined by regulations made by

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137 Section 176(3).

138 Section 219(5).

139 Act 88 of 1989.

140 Section 2(1).

the President after consulting the Minister, the Chief Justice, the President of the Supreme Court of Appeal and the Judges President of the various divisions of the High Court, and courts of equal status. These conditions include matters such as leave, provision of transport facilities, and other related matters.[141]

145 There is thus no remuneration commission to advise the government on salaries of judges and magistrates. The Magistrates Commission, however, plays an important role in the determination of magistrate's salaries. As stated previously, it is a diverse body consisting of representatives of the legislature, the executive, magistrates, and persons from the legal profession and is presided over by a judge. Although the majority of the members of the Commission are nominees of the legislature and the executive, I do not think that in itself, this undermines the role of the Commission as an independent intermediary in the determination of magistrates' salaries.

141 Section 12.

146 Unlike the magistrates, there is no filter between the judges and the executive to mediate the determination of their remuneration. Recognising this, the Minister has submitted a Bill to Parliament[142] to vest the Independent Commission for the Remuneration of Public Office Bearers with the power also to make recommendations on the salaries of judges and magistrates. This is part of the evolving process of judicial independence in South Africa.

147 Although magistrates do not have the same protection as judges do concerning the reduction of their salaries – they can be reduced but only by Parliament – the Minister has to consult the Magistrates Commission and the Minister of Finance before determining their salaries. Adjustments have to be made if circumstances, including "any revision and adjustment of salaries and allowances of public servants"[143] justify this.

142 Judicial Officers Amendment Bill above n 79.

143 Section 12(3) of the Magistrates Act.

148 This means that, by law, magistrates' salaries must be brought under revision at regular intervals. When this happens, the Magistrates Commission has an important role in determining what the salaries will be. If agreement cannot be reached between the Commission and the Minister on such matters, the Commission would be obliged to make known that such difference exists, and the Minister would have to be able to justify his refusal to agree with the Commission's recommendations. The Minister of Finance also has to be consulted. The Commission and the Minister must act in accordance with section 165 of the Constitution to ensure that the salaries are consistent with the independence of magistrates. Only Parliament is empowered to reduce salaries. A resolution to reduce the salaries of magistrates must be justifiable, and if this cannot be done, the decision can be set aside by the higher judiciary as being inconsistent with judicial independence; so too a decision not to adjust salaries in circumstances that call for an adjustment to be made.[144] Moreover, a decision of the Magistrates Commission on salaries would itself be subject to constitutional control by the higher judiciary. These are significant guarantees against the power to set salaries being used as a means of exerting pressure on magistrates.

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144 See the statement of the *Provincial Judges* case recorded above n 136. There, the Canadian Supreme Court suggested that it may at times be necessary to reduce the salaries of provincial court judges as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds.

149 If regard is had to the safeguards that exist to protect magistrates against the possible abuse of the power to determine their salaries and the position of magistrates in the court hierarchy, I am not persuaded that section 12 of the Magistrates Act is inconsistent with judicial independence as it is evolving in South Africa. The appeal, insofar as it pertains to section 12, must therefore be upheld.

The retirement of magistrates: sections 13(1) and 13(5)(a) of the Magistrates Act

150 Section 13(1) of the Magistrates Act provides that the retiring age for magistrates is 65. Section 13(1)(a) contains a proviso to section 13(1) which states that:

> "the Minister may, after consultation with the Commission, allow a magistrate
> (i) who, on attaining the age of 65 years wishes to continue to serve in such office; and
> (ii) whose mental and physical health enables him or her to do so,
> to continue to hold such office for the period that the Minister may determine".

151 This requires the extension of tenure to be for a "period" to be determined by the Minister. The consultation contemplated by the proviso includes not only whether tenure should be extended, but also the period of the extension should that be allowed. A magistrate holds office under such an arrangement for a fixed and predetermined period and not at the discretion of the executive.[145] The terms of the extended tenure are thus not inconsistent with judicial independence, and this was not questioned by the High Court.

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145 An appointment at the discretion of the executive, as pointed out in *Valente* n 19 above at 183, would be inconsistent with judicial independence.

152 The High Court held, however, that the proviso is inconsistent with the Constitution for a different reason. It enables the executive to allow a magistrate to continue in office after reaching retiring age, and to determine the period for which the magistrate may do so. It regarded the requirement that there be consultation with the Magistrates Commission as providing no safeguard against possible executive abuse, and concluded that there might be a perception

> "that the prospect of continuing in office would induce the magistrate to tailor his judgments with that object in mind: i.e. to win the favour of the executive."[146]

153 The same approach was taken by the High Court in dealing with section 13(5)(a). This section provides:

> "The Minister may, at the request of a magistrate, allow such magistrate to vacate his or her office –
> (i) on account of continued ill-health; or
> (iA) in order to effect a transfer and appointment as contemplated in section 15(1) of the Public Service Act, 1994 (Proclamation No. R. 103 of 1994); or
> (ii) for any other reason which the Minister deems sufficient."

154 The High Court held that

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146 Above n 5 at 464C.

> "The Minister is not required to consult with any independent body or to act on the recommendation of any independent body. A magistrate who wishes to be permitted to vacate office on account of continued ill-health is accordingly completely dependent upon the discretion of the Minister. Such a mechanism will be perceived by the reasonable and informed person to be open to manipulation. The regulation is inconsistent with the requirement of independence of the magistrates' courts and with the requirements of s 174(7) of the Constitution."[147]

155 Where permission is given to a magistrate to retire early, this has the effect of protecting pension rights that would otherwise be prejudiced by early retirement without such permission. To that extent the Minister's consent is to the benefit of the magistrates concerned. So too is permission to remain in office after reaching the normal retiring age. I cannot accept, however, that viewed objectively this impairs the institutional independence of magistrates. In *Valente*'s case the Supreme Court of Canada had to deal with a similar contention raised in that case concerning the control exercised by the executive over certain discretionary benefits or advantages. These included post retirement re-appointment or continuation in office to enable a provincial judge to complete service entitling her or him to a pension. Le Dain J said in that case,

> "it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in her or his adjudication."[148]

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147 Id at 475H-J.

148 Above n 19 at 192.

I agree, and that applies equally to magistrates in South Africa.

156 The judgment of the High Court does not deal specifically with section 13(5)(a)(iA) or 13(5)(a)(ii).[149] In the text of the judgment, the High Court declared the whole of section 13(5) to be inconsistent with the Constitution.[150] In its order, it only refers to sections 13(5)(a) and (c). The reasoning applicable to the declaration of invalidity made concerning retirement on the grounds of ill-health was presumably considered to be applicable to the early vacation of office for any of the reasons mentioned in section 13(5)(a).

157 Section 13(5)(a)(iA) enables a magistrate to be transferred to the public service. The High Court did not consider whether this link with the public service is inconsistent with judicial independence, nor was any argument addressed to us in that regard. No evidence was directed to the reasons for such a provision, or its implications. In the circumstances it would not be appropriate to express any opinion on this. This judgment is confined to the grounds on which the constitutionality of section 13(5)(a) was held by the High Court to be inconsistent with the

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149 Section 13(5)(a) provides:

> "The Minister may, at the request of a magistrate, allow such magistrate to vacate his or her office—
> (i) on account of continued ill-health; or
> (iA) in order to effect a transfer and appointment as contemplated in section 15_(1) of the Public Service Act, 1994 (Proclamation No. R. 103 of 1994); or
> (ii) for any other reason which the Minister deems sufficient."

150 Above n 5 at 469I.

Constitution. In my view the finding of unconstitutionality on those grounds cannot be sustained.

158 It follows that the appeal against the finding of unconstitutionality made in regard to sections 13(1) and 13(5) must be upheld.

159 Regulation 30, which deals with the procedure to be followed by a magistrate seeking early retirement on the grounds of ill-health, was declared to be inconsistent with the Constitution because of the finding made by the High Court in respect of section 13(5)(a)(i). In view of the contrary conclusion to which I have come concerning that section, the appeal against the finding of the High Court that regulation 30 is inconsistent with the Constitution must also be upheld.

The impeachment of magistrates: sections 13(2), (3) and (4) of the Magistrates Act

160 Section 13(2) of the Magistrates Act provides that a magistrate may not be suspended or removed from office otherwise than in accordance with the provisions of the Act. Sections 13(3) and (4) of the Act deal with the grounds on which magistrates may be removed from office, and the procedure to be followed in such cases. They provide as follows:

> "(3) (a) The Commission may provisionally suspend a magistrate from office pending an investigation by the Commission into such magistrate's fitness to hold office.
>
> (aA) The Minister may confirm such suspension if the Commission recommends that such magistrate be removed from office—
>
> (i) on the ground of misconduct;

(ii) on account of continued ill-health; or

(iii) on account of incapacity to carry out the duties of his or her office efficiently.

(b) A magistrate so suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the Minister on the recommendation of the Commission.

(c) A report in which the suspension in terms of paragraph (aA) of a magistrate and the reason therefor are made known, shall be tabled in Parliament by the Minister within 14 days of such suspension, 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.

(d) Parliament shall, within 30 days after the report referred to in paragraph (c) has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended.

(e) After a resolution has been passed by Parliament as contemplated in paragraph (d), the Minister shall restore the magistrate concerned to his or her office or remove him or her from office, as the case may be.

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

I deal first with the grounds for removal and then with the procedure prescribed by the Act and the regulations for the removal of a magistrate from office.

The grounds for removing magistrates from office

161 Protection against removal from office lies at the heart of judicial independence. The fact that members of the higher judiciary have greater protection than members of the lower judiciary, does not mean that the protection given to the lower judiciary is inconsistent with

judicial independence. That question depends upon the nature of the protection given to members of the lower judiciary viewed in the context of the functions that they are required to perform.

162 The grounds for removal of the lower judiciary prescribed by the Act – "misconduct, continued ill-health or incapacity" – are not materially different to grounds on which judges may be removed in countries such as Australia,[151] Canada,[152] New Zealand[153] and the United Kingdom.[154] The grounds are also similar to the grounds on which the Public Protector, the Auditor-General or a member of the South African Human Rights Commission, the Commission on Gender Equality and the Electoral Commission may be removed from office. In their case the

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151 Section 72(ii) of the Australian Constitution provides that judges may be removed on grounds of "proved misbehaviour or incapacity".

152 Section 99(1) of the Canadian Constitution Act provides that "Judges of the Superior Courts shall hold office during good behaviour".

153 Section 23 of the New Zealand New Constitution Act of 1986 provides that judges may be removed "only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office."

154 Section 11(3) of the Supreme Court Act, 1981 provides that judges hold office during good behaviour.

standard prescribed by the Constitution is "misconduct, incapacity, or incompetence".[155]

163 All these institutions are entitled under the Constitution to similar protection to that given to courts and their independence is also guaranteed. This is dealt with in section 181 of the Constitution which applies to all these institutions. In language tracking that used in sections 165(2), (3) and (4), it provides:

> "(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
>
> (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
>
> (4) No person or organ of state may interfere with the functioning of these institutions."

164 The protection that these functionaries have against removal from office is entrenched in the Constitution. They are entitled to at least the same protection of their independence as magistrates are. Indeed, in the case of the Auditor-General and the Public Protector, whose functions involve matters of great sensitivity in which there could well be confrontation between the functionaries concerned and members of the legislature and the executive, a higher level of protection would certainly not be inappropriate.

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155 Section 194(1)(a) of the Constitution.

165 In the circumstances I am not persuaded that the provisions of the Magistrates Act dealing with the grounds upon which magistrates may be removed from office are inconsistent with their judicial independence.

The procedure to be followed

166 Sections 13(2), (3) and (4) of the Act prescribe the procedure that has to be followed in order to remove a magistrate from office. An initial enquiry must be undertaken by the Commission, which is empowered provisionally to suspend a magistrate pending its investigation.[156] If, in the light of its investigation, the Commission recommends that the magistrate be removed from office, section 13(3)(aA) of the Act provides that "[t]he Minister may confirm such suspension".

167 Parliament, however, has the final say. If the Minister confirms the suspension, a report dealing with the suspension and the reasons therefor must be tabled in Parliament by the Minister within 14 days of the suspension. Within 30 days of the report, "or as soon thereafter as is reasonably possible" Parliament must resolve whether or not the magistrate concerned should be restored to office.[157] The Minister is obliged to act in accordance with that resolution, and either

156 Section 13(3)(a).

157 Section 13(3)(d).

restore or remove the magistrate from office, as the case may be.[158]

168 The High Court held that this procedure does not "safeguard magistrates against removal in a discretionary or arbitrary manner". Various reasons are given for this conclusion:

158 Section 13(3)(e).

> "The decision to suspend the magistrate provisionally in terms of s 13(3) is taken by the Magistrates Commission, which is an extension of the Executive. Such suspension takes place before an inquiry has been held into the magistrate's fitness to hold office. The decision to confirm the suspension is taken by the Minister, a member of the Executive, on the recommendation of the Magistrates Commission, also before an inquiry has been held. During such suspension the magistrate shall receive no salary or such salary as may be determined by the Minister on the recommendation of the Commission. On considering a report from the Minister, Parliament may decide to recommend that the magistrate be restored to office or removed from office. The Minister is obliged to give effect to such resolution."[159]

169 The Constitution deals with the impeachment of judges but not magistrates. It makes provision for a two-stage process to be followed where impeachment of a judge is under consideration. Section 177(1) requires an initial investigation to be carried out by the Judicial Service Commission. If the Commission finds that grounds exist for the removal of the judge from office, that finding is subject to confirmation by the National Assembly by a resolution supported by at least two thirds of its members. Section 177(3) of the Constitution provides that "[t]he President, on the advice of the Judicial Service Commission, may suspend a judge" whose capacity to remain in office is being considered by the Judicial Service Commission. These provisions provide an indication of how the Constitution seeks to make provision for the removal of judges from office in a manner consistent with judicial independence.

Suspension of magistrates pending investigation

159 Above n 5 at 465G-I.

170 Since the Constitution makes provision for a judge to be suspended on the advice of the Judicial Service Commission pending its investigation, there can be no constitutional objection to a similar power being vested in the Magistrates Commission, pending an investigation by it into whether or not a particular magistrate is fit to remain in office.

171 The fact that such a suspension takes place before the impeachment enquiry is held, is not necessarily open to objection. The nature of the allegation against the magistrate may, in itself, be so serious as to make it inappropriate for the person concerned to continue to sit as a magistrate while the allegation is being investigated. The Commission would have to have reliable evidence before it to warrant such action and it would have to conduct its affairs in a manner consistent with natural justice. If in the particular circumstances of the case its decision cannot be justified or if it has failed to comply with the requirements of natural justice, its decision would be liable to be set aside on review by the higher courts. That constitutes adequate protection against any possible abuse of this power.

172 It follows that section 13(3)(a) is not inconsistent with judicial independence and that the appeal relating to this section must be upheld.

173 Section 13(3)(b) of the Act provides that a magistrate "so suspended" from office,

> "shall receive, for the duration of such suspension, no salary or such salary as may be determined by the Minister on the recommendation of the Commission".

It is not clear whether this refers to a provisional suspension under section 13(3)(a) as

well as a confirmed suspension under section 13(3)(aA), or only to a confirmed suspension under section 13(3)(aA). In the view I take of the matter it is not necessary to decide this question in this judgment.

174 The High Court held that the provisions of section 13(3) "do not safeguard the salary of magistrates from being reduced in a discretionary or arbitrary manner".[160]

175 Suspension is, however, only competent where there is an investigation into the "fitness" of a magistrate to hold office. The decision to investigate has to be taken by the Commission and that will be competent only when the allegations, if established, are sufficiently serious to warrant removal from office. Such allegations are likely to be made only rarely. If they are, and if good reason exists for suspension, a withholding of salary during suspension is not necessarily disproportionate. That is so even if the withholding of suspension can take place from the time of a provisional suspension. There is no reason why a magistrate who is not fit to hold office, and is removed from office for that reason, should be paid for the period during which she or he is under suspension prior to removal. If the magistrate is not removed from office the salary withheld has to be paid.

160 Above n 5 at 468B.

176 The conclusion of the High Court that there is no safeguard against the salary being reduced in a "discretionary or arbitrary manner" ignores the fact that the Commission must discharge its functions consistently with judicial independence and the right that every person has under the Constitution to just administrative action.[161]

177 Section 13(3)(b) leaves it to the Minister to determine the payability of salary on the recommendation of the Commission. For the reasons that follow immediately, this is not appropriate. The Minister should not have the power to depart from decisions of the Commission on such matters. That can be remedied by deleting from section 13(3)(b) the words "the Minister on the recommendation of". The order of the High Court declaring the whole of section 13(3)(b) invalid is set aside and replaced with an order deleting from the section the words "the Minister on the recommendation of".

The Minister's role in the proceedings

161 Section 33.

178 In terms of section 13(3)(aA) the Minister "may" confirm the recommendation. If this means that the Minister has a discretion to confirm a recommendation by the Commission that a magistrate be suspended, Parliament will be engaged only if such confirmation is given. The regulations that supplement the Act contemplate that the Act does give the Minister a discretion to confirm the suspension, or to decline to do so and instead to impose lesser penalties on the magistrate concerned. I deal more fully with this later.[162] For the moment it is sufficient to say that the vesting of such powers in the Minister would not be consistent with judicial independence.

179 The Minister, a member of the government, should not have the power to exercise discipline over judicial officers and to punish them for misconduct. That would place the judicial officers concerned in a subordinate position in relation to the government which is inconsistent with judicial independence.

180 The first question to consider is whether it is possible to read the Act and the regulations in a way that would be consistent with judicial independence, and if not, whether it is possible to remedy such constitutional invalidity by means of severance, notional severance or reading in.

181 As far as the Act is concerned, if "may" in section 13(3)(aA) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the

162 Para 187 below.

Commission's recommendation to Parliament, and deny him any discretion not to do so. In that event the reference in section 13(3)(c) to a report on the reasons for the suspension would be construed as referring to the Commission's reasons for its decision.

182 In my view this is the constitutional construction to be given to section 13(3)(aA).[163] On this construction, the procedure prescribed by section 13(3) of the Act for the removal of a magistrate from office is not inconsistent with judicial independence. It would be similar to the process prescribed by the Constitution for the removal of judges. The proceedings would be initiated by the Magistrates Commission and a recommendation that the magistrate be removed would have to be referred to Parliament. Removal could only take place if Parliament resolves that this should happen. This is the same as the procedure for removing a judge, save that the investigation is by the Magistrates Commission and not the Judicial Service Commission and the confirmation required is a resolution of Parliament and not a resolution of two thirds of the National Assembly.

183 Though the special majority of the National Assembly required in the case of judges gives them added protection, this in itself does not make the procedure for the removal of

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163 Consistent with what is said in para 88 above, this is the interpretation of section 13(3)(aA) that should be adopted. That such an interpretation is permissible has been made clear by a number of decisions. See for example, *Weissglass NO v Savonnerie Establishment* 1992 (3) SA 928 (A) at 937, *Commissioner for Inland Revenue v I H B King; Commissioner for Inland Revenue v A H King* 1947 (2) SA 196 (A) at 209-210 and *South African Railways and Harbours v New Silverton Estate, Ltd* 1946 AD 830 at 842.

The point is also made by Wade and Forsyth in *Administrative Law* (eighth ed, Oxford University Press, Oxford 2000) at 239:

> "The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case."

magistrates inconsistent with judicial independence. Impeachment on the basis of an independent investigation subject to confirmation by Parliament is generally recognised as a high degree of protection against executive power, consistent with judicial independence.[164] The fact that it differs from the protection given to judges is an incident of the Constitution itself which does not prescribe the same degree of protection for magistrates as it does for judges.

184 The appeal, insofar as it pertains to section 13(3)(aA) must therefore be upheld.

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164 A simple majority in Parliament is needed to remove judges in the United Kingdom (section 11(3) of the Supreme Court Act, 1981), Ireland (Clause 4 of Article 35 of the Constitution of Ireland) and Australia (Section 72(1)(ii) of the Constitution of Australia). Likewise only a simple majority is required to remove judges of superior courts in Canada (Section 99(1) of the Canadian Constitution Act, 1867). In *Valente* above n 19 at 176 the Canadian Supreme Court commented that this requirement was generally regarded as representing "the highest degree of constitutional guarantee of security of tenure" and held that it was not necessary that provincial judges received the same degree of protection.

185 In the text of the judgment of the High Court the findings concerning removal from office are summarised.[165] According to this summary, sections 13(3)(d) and (e) "are found to be inconsistent" with the Constitution. No reasons are given, but presumably this was a consequence of the declarations made concerning the other sub-paragraphs of section 13(3). However, the formal order at the conclusion of the judgment does not refer to sections 13(3)(d) and (e). In the light of the conclusions to which I have come concerning section 13(3), sections 13(3)(d) and (e) cannot be said to be inconsistent with the Constitution.

186 If section 13(4) is intended to make clear that the Minister must act on a resolution of Parliament, it adds nothing to section 13(3). The only substantive meaning it can have is to vest a power in Parliament to remove a magistrate from office on the grounds of misconduct, ill-health or incapacity, without a preliminary investigation into such matters by the Magistrates Commission. But that is inconsistent with judicial independence. A parliamentary resolution is required as a safeguard and not as a means of avoiding the consequences of an independent investigation called for by section 13(3). The finding of the High Court that section 13(4) is inconsistent with judicial independence must therefore be confirmed and the appeal in this regard is dismissed.

The regulations on the impeachment of magistrates

187 The regulations deal with the procedures to be followed where impeachment may be in

165 Above n 5 at 469G-J.

issue. The relevant regulations assume that the Act allows the Minister a discretion to confirm a recommendation for suspension or to impose a lesser penalty on the magistrate concerned. That is not consistent with the Act as I have construed it, nor is it consistent with judicial independence. As appears from what follows, some of the regulations will have to be re-drafted to bring them into conformity with the Constitution.

188 In effect what the regulations contemplate is this. If a complaint is received about a particular magistrate, a preliminary investigation may be undertaken to determine whether or not a formal charge should be brought against that person. The Commission determines whether or not to call for this investigation, but may decide to embark upon an enquiry itself if it is satisfied that there is sufficient evidence to warrant that being done. Detailed provisions are then made as to the manner in which the investigation is to be conducted.

Regulation 25

189 Regulation 25 provides:

> "A magistrate may be accused of misconduct if he –
> (a) is found guilty of an offence;
> (b) contravenes any provision of these regulations;
> (c) contravenes the Code of Conduct, if there is one;
> (d) is negligent or indolent in the carrying out of his duties;
> (e) uses intoxicants or stupefying drugs excessively;
> (f) accepts, without the permission of the Minister, or demands in respect of the carrying out of or the failure to carry out his duties any commission, fee or pecuniary or other reward, not being the emoluments payable to him in respect of his duties, or fails to report to the Minister the offer of such a commission, fee or reward;

(g) misappropriates or makes improper use of any property of the State;

(h) absents himself from his office or duty without leave or valid cause;

(i) makes a false or incorrect statement, knowing it to be false or incorrect, with a view to obtaining any privilege or advantage in relation to his official position or his duties or to the prejudice of the administration of justice; or

(j) refuses to execute a lawful order.

190 The judgment of the High Court refers to this definition of misconduct, saying that it is

> "so broad that even a parking offence could lead to disciplinary proceedings, so too every "contravention" of the Code of Conduct".[166]

166 Above n 5 at 468G.

191 Regulation 25 deals with conduct which may give rise to an accusation of misconduct. That accusation can only form the subject matter of a charge of misconduct if as a result of a preliminary investigation conducted in terms of regulation 26, a recommendation is made that such charge be brought, or if a preliminary investigation is considered to be unnecessary because there is "prima facie evidence to support the charge".[167] The Commission must be satisfied that sufficient grounds exist for a charge of misconduct before such a charge can be brought against a magistrate. A trivial offence such as a "parking offence" or a minor contravention of the regulations or the Code of Conduct would not constitute "sufficient grounds" for a charge.

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[167] Regulations 26(1), (2) and (3) provide:

> "(1) If a magistrate is accused of misconduct, the Commission may appoint a magistrate or a 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) After the conclusion of the preliminary investigation referred to in subregulation (1), the investigating officer shall recommend to the Commission whether or not the magistrate concerned should in his opinion be charged, and if so, what in his opinion the contents of the charge concerned should be.
>
> (3) If the Commission is of the opinion that there are sufficient grounds for a charge of misconduct against the magistrate concerned, the Commission may, in writing, charge the magistrate with misconduct.
>
> . . ."

192 What constitutes misconduct by a judicial officer cannot really be defined with any precision. It depends upon the nature of the conduct complained of, and the particular circumstances in which that conduct was committed. Regulation 25 defines the circumstances in which an accusation of misconduct can be made. If the regulation had simply provided that an accusation of misconduct should be the subject of a preliminary investigation in order to determine whether or not there are grounds for bringing a charge of misconduct against a magistrate, there could have been no objection to it. In defining circumstances in which an accusation can be brought, regulation 25 draws attention to conduct which may give rise to a charge. Whether that conduct in fact justifies the charge will depend upon all the circumstances including the nature of the offence, or the respects in which the regulations have been breached or the Code of Conduct has been contravened. Regulation 25 is capable of being construed as indicated above and applied consistently with judicial independence, and in the circumstances I cannot agree with the conclusion of the High Court that the regulation is inconsistent with the Constitution.[168] The appeal is therefore upheld.

Regulation 26

193 Regulation 26 deals in considerable detail with the procedure to be followed in

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168 This conclusion is consistent with the approach of the Canadian Supreme Court in *Valente* above n 19. At 179, Le Dain J dealt with the argument that all judges should enjoy a tenure expressly defined as being "during good behaviour":

> "It may be desirable that the tenure of judges should be expressed as being during good behaviour, which leaves cause for removal to be determined according to the common law meaning of those words . . . rather than have the grounds for removal specified in legislation, but I do not think it is reasonable to require that as an essential condition of judicial independence for purposes of s. 11(d) of the Charter. It is sufficient if a judge may be removed only for cause related to the capacity to perform judicial functions."

preliminary investigations. The terms of the regulation are set out in the schedule to this judgment. The proceedings are initiated by the Commission where an accusation of misconduct has been made against a magistrate. Regulation 26(1) provides:

> "If a magistrate is accused of misconduct, the Commission may appoint a magistrate or a 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."

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.

195 If a charge is brought and there is a need for a formal hearing then the regulations provide that the Commission shall appoint "a magistrate or person" to preside at the enquiry[169] and a

169 Regulation 26(6).

"magistrate or person" to lead the evidence.[170] The presiding officer is required to make a finding as to whether or not the magistrate concerned is guilty of misconduct and if so whether there are any "aggravating or mitigating circumstances".[171] Those findings must then be submitted to the Commission for its consideration.[172] The Commission, in turn, considers the record and the recommendation and makes its own recommendation as to what should be done.[173] Whilst the person leading the evidence need not necessarily be a magistrate, the person charged with the responsibility of making a finding as to whether or not the magistrate concerned has been guilty of misconduct, should be a judicial officer. It is not consistent with judicial independence that a person other than a judicial officer should be charged with this responsibility.

196 Apart from this, the procedure prescribed in the regulations for the conduct of the investigation is consistent with fairness and not open to objection. Moreover, any investigation

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170 Id.

171 Regulations 26(11) and (12).

172 Id.

173 Regulation 26(14).

would also have to be conducted in a manner consistent with natural justice.[174]

197 The flaw in the regulation concerning the status of the presiding officer can be corrected by deleting from regulation 26(6) the words "or person" where they appear for the first time immediately before the words "hereinafter called the presiding officer". Regulation 26(6) would then read as follows:

> "If the magistrate charged in terms of subregulation (1) or (3)–
> (a) denies the charge; or
> (b) fails to comply with the direction referred to in subregulation (4),
> the Commission shall appoint a magistrate (hereinafter called the presiding officer) to preside at the investigation, and a magistrate or person to lead evidence: provided that the Commission may dispense with the appointment of a presiding officer and establish a committee to conduct the investigation, in which case a reference in this regulation to 'presiding officer' shall be deemed to be a reference to such a committee."

198 There is, however, another issue arising from the provisions of regulation 26 that calls for consideration. Regulation 26(17) vests in the Minister a discretion as to the sanction to be imposed. The Minister may "suspend" the magistrate, "relieve" the magistrate from office, or impose a lesser penalty. The penalties which may be imposed are:

1. A caution or reprimand.
2. Directing that the magistrate shall not be promoted to a higher salary scale or a

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174 *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231.

higher position for a period not exceeding five years.

3. Transferring the magistrate to other "headquarters".

4. Imposing a fine not exceeding R10 000

5. Postponing the decision as to the penalty "with or without conditions" for a period of 12 calendar months.

199 The vesting of a power in the Minister to determine an appropriate sanction is inconsistent with judicial independence. Where sanctions are appropriate they must be imposed by an independent body charged with the investigation of the complaint – in this case the Magistrates Commission. Moreover, the vesting of such a power in the Minister is inconsistent with the only construction of section 13(3)(aA) that would be consistent with the Constitution.[175] It follows that regulation 26(17) as presently formulated is inconsistent with judicial independence. That inconsistency cannot be remedied by reading in or actual or notional severance.

200 Before leaving this issue it is necessary to draw attention to the reference in regulation 26(17) to the possible sanctions of a fine or transfer to other headquarters. The regulation does not say to whom the fine prescribed in item 4 is payable. Presumably it is contemplated that the fine will be payable to the Department of Justice. But that implies a relationship that is inconsistent with judicial independence. Judicial officers are not accountable to the government.

175 See para 181 above.

They are accountable to the Constitution and the law and to the courts as independent institutions. If the misconduct attracts criminal sanctions the magistrate concerned will be liable to the penalties prescribed by the criminal law for such misconduct. But the penalty must be imposed by a criminal court in an ordinary prosecution and not as a sanction for a breach of the code of conduct. The payment of a fine to an organ of state for misconduct that does not constitute a criminal offence is not a sanction compatible with judicial independence.

201 A compulsory transfer designed to serve as a penalty is also not a sanction compatible with judicial independence. There may be reasons for transferring a magistrate to another district for operational reasons and not as a penalty where the circumstances of particular complaints found to be justifiable make it desirable that this be done.[176] But if this is not the case, a compulsory transfer is not rationally related to the misconduct. A sanction not rationally related to the misconduct is not consistent with judicial independence.

[176] Regulation 22, which governs the transfer of magistrates, is discussed in paras 221-227 below.

202 If regulation 26(17) is declared to be invalid, and the presiding officer at any enquiry is a magistrate, the remainder of the regulation will serve the legitimate and important purpose of providing a framework for conducting enquiries into serious allegations that might warrant the removal of a magistrate from office. Lesser complaints can be dealt with in terms of the Complaints Procedure Regulations.[177] If it is considered necessary that provision be made for the Commission to have the power to impose appropriate sanctions other than recommending removal from office, that power can be given to the Commission through an amendment to regulation 26. The appropriate order, therefore, is not to declare the whole regulation to be inconsistent with the Constitution, but to sever the offending portions from the regulation.

203 The order of the High Court declaring the whole of regulation 26 invalid is set aside and is replaced by an order deleting the words "or person" where they appear for the first time in regulation 26(6) immediately before the words "hereinafter called the presiding officer" and deleting the whole of regulation 26(17).

Regulations 27, 28 and 29

204 Regulations 27, 28 and 29 deal with the procedure to be followed in respect of an investigation into the alleged incapacity or ill-health of a magistrate that prevent the magistrate concerned from carrying out his or her duties efficiently. The terms of the regulations are set out in the schedule to this judgment. The procedures to be followed are consistent with fairness. They involve a full investigation into the allegations during which the magistrate concerned has the opportunity of making representations and disputing any of the allegations made. The

177 See para 97 above.

investigations would also have to be conducted in a manner consistent with natural justice.

205 Two matters call for consideration. First, the reference to the investigations being carried out in the first instance by "a magistrate or any person". A judicial officer is not the only person qualified to carry out such investigations. For instance, medical practitioners or persons skilled in the field of the particular incapacity alleged to impair the magistrate's ability, would often be suitably qualified persons to carry out the investigation.

206 Secondly, the role of the Minister in the process. For reasons already given, the investigation should not be initiated by the Minister, or conducted by persons designated by the Minister. That role should be vested in the Commission.

207 The only other matter that calls for consideration is whether the final decision to give effect to the recommendation of the Commission after investigations have been completed, can be vested in the Minister. There are two problems in this regard. First, the regulation is formulated in a way which would permit the Minister to dismiss the magistrate, even if the Commission were to find that there are insufficient grounds for the magistrate to be removed from office because of incapacity or continued ill-health. Secondly, it vests the power to make the final decision in the Minister.

208 Section 13(3) of the Magistrates Act contemplates that removal on the grounds of misconduct, ill-health, or incapacity depends upon a resolution passed by Parliament. The discretion vested in the Minister by the regulations, is therefore inconsistent with the Act unless

it is construed as vesting in the Minister only a discretion not to refer the Commission's findings to Parliament. Construed thus, the Act and the Regulation would permit the removal of a magistrate from office by a resolution of Parliament on the grounds of misconduct, incapacity or ill-health on the basis of a finding to that effect made by the Commission.

209 However, the interposition of the Minister into this process is not appropriate. It enables the Minister to intervene between the Commission and Parliament to save a magistrate found by the Commission to be unfit to continue performing his or her duties. Confirmation of a resolution of the Magistrates Commission by Parliament is a safeguard that allows for transparency. The power to withhold a recommendation from Parliament is calculated to frustrate rather than to enhance what is otherwise a transparent procedure.

210 The regulations are accordingly constitutionally invalid as they stand and must be so declared. The appropriate remedy is to delete the words "the Minister or" wherever they appear in regulations 27(1), 27(2), 29(1), 29(2), 29(3), and 29(4), and to delete regulations 28(4) and (5) which contemplate that the Minister may withhold from Parliament a recommendation by the Commission, and regulation 29(9) which vests the final decision in regard to removal on the grounds of ill-health in the Minister. This replaces the portion of the High Court order which declared the whole of regulations 27, 28 and 29 invalid.

211 Interpreting section 13(3)(aA) of the Magistrates Act in the manner set out in paragraph 181 above, reformulating regulation 26, and severing the offending passages from the regulations as set out immediately above, will leave in place an equitable procedure according to which

material decisions are taken by the Commission after a proper investigation by a suitably qualified investigator. If the Commission recommends that the magistrate should be removed from office, that recommendation must be forwarded to Parliament by the Minister, who must then act in accordance with Parliament's decision. That is a proper procedure for the impeachment of a judicial officer.

Promotion of magistrates

212 Regulation 16 dealing with the promotion of magistrates was found by the High Court to be inconsistent with the Constitution. The regulation provides

> "A magistrate with more than five years' appropriate experience may on the recommendation of the Commission be promoted by the Minister to a higher post with a clearly distinguishable higher level of work which is accompanied by the granting of the rank and salary of that higher post, absorption into that post and the performance of the duties attached to that post: Provided that there is a vacancy in a higher post: Provided further that a magistrate who performs certain duties in terms of section 14 of the Act conferred upon him by the Minister in a specific case after consultation with the Commission may be promoted to a higher post without absorption into such higher post."

213 The High Court held that this regulation will be perceived to affect the independence of magistrates, because "[t]he Magistrates Commission cannot prevent manipulation of promotions. . . ."[178] I am unable to agree with this conclusion. The Minister's power, save in respect of cases falling under section 14, is dependent upon the recommendation of the Commission. If the Minister does not give effect to a recommendation, the failure to do so must be justified. The

178 Above n 5 at 474B.

absence of a vacancy in a higher post would be an adequate reason. There may possibly be other adequate reasons, but if there are, they must be capable of proof and able to withstand constitutional scrutiny by a reviewing court in the higher judiciary. This is adequate protection against the possibility of manipulation of promotions.

214 The proviso dealing with the promotion of a magistrate for the purpose of performing duties in terms of section 14 of the Act, are directly related to that section. I deal later with section 14 and hold that the power vested in the Minister by that section to confer duties on a magistrate in a specific case is inconsistent with the Constitution.[179] It follows from that finding that the basis for the words

> "[p]rovided further that a magistrate who performs certain duties in terms of section 14 of the Act conferred upon him by the Minister in a specific case after consultation with the Commission may be promoted to a higher post without absorption into such higher post"

falls away, and those words must be deleted from Regulation 16.

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179 At paras 228-230 below.

215 The High Court also held that matters dealing with promotion should have been dealt with in the Act itself, and not in regulations. For the reasons already given,[180] I am unable to agree with that conclusion.

216 The order of the High Court declaring the whole of regulation 16 invalid is therefore set aside and replaced with an order deleting the words "provided further that a magistrate who performs certain duties in terms of section 14 of the Act conferred upon him by the Minister in a specific case after consultation with the Commission may be promoted to a higher post without absorption into such higher post" from the regulation.

Regulation 17

217 The High Court held that the wording of regulations 17(1) and 17(2) is inconsistent with the Constitution. These regulations provide:

> "(1) For purposes of seniority and salary, the actual date of absorption into the post concerned shall be deemed to be the date of entry to the rank concerned, except in the cases falling under section 14, in which case the date of entry shall be determined by the Minister.
>
> (2) For purposes of seniority the names of the magistrates shall be arranged by the Director-General according to rank (where the post promotion basis applies) and experience on comparable hierarchical levels in sequence of date of entry into those ranks."

180 At paras 120-124 above.

218 The High Court held that the exception made in regulation 17(1) concerning promotions linked to cases falling under section 14(1) was inconsistent with the Constitution. This was a consequence of its finding in respect of section 14(1) which is dealt with later in this judgment. For the reasons given later, I agree that the provisions of section 14 relevant to regulation 17(1) are inconsistent with the Constitution.[181] That flaw can be remedied by severing the offending words from the regulation. The words to be severed are: "except in the cases falling under section 14, in which case the date of entry shall be determined by the Minister".

181 Paras 229 to 230 below.

219 The High Court also considered that the reference in regulation 17(2) to the Director-General preparing seniority lists is inconsistent with the Constitution because it gives "a discretion to arrange the names of magistrates for purposes of seniority".[182] The regulation does not, however, vest any discretion in the Director-General. It requires him to prepare a list recording the dates upon which the particular magistrates entered into particular ranks. That involves an objective enquiry which should not give rise to any dispute. But if it does, the dispute would have to be determined on objective grounds, which will be subject to review by the Higher Courts.

220 It follows that the appeal against the order of the High Court concerning regulation 17(1) must be dismissed, but that the appeal concerning regulation 17(2) must be upheld.

Regulation 22

221 The High Court held that regulation 22 dealing with the transfer of magistrates is inconsistent with the Constitution. The regulation provides:

> "(1) The Director-General may transfer a magistrate from his headquarters to other headquarters when it is expedient.
>
> (2) A magistrate who feels aggrieved because of a transfer may make representations to the Director-General.
>
> (3) If the representations referred to in subregulation (2) are unsuccessful and not dealt with to the satisfaction of the magistrate concerned, the magistrate may make representations to the Commission.

182 Above n 5 at 474G-H.

(4) The Commission makes a final decision regarding the transfer of the magistrate."

222 According to the High Court

> "[t]he relevant regulation provides that the question of transfer is completely in the hands of the director-general who may make a transfer 'when it is expedient'. This is not ameliorated by the fact that the magistrate's recourse is to the Magistrates Commission."[183]

223 I am unable to agree with this conclusion. At the time the affidavits were lodged in the High Court there were 532 Magistrates' Offices in South Africa staffed by 1758 magistrates. The magistrates hold office in courts of various sizes. In the smaller courts (where there may be only a single magistrate in some instances) it is imperative that vacancies that arise because of resignation, ill-health, promotion or other causes be filled promptly. The procedure prescribed by regulation 30 facilitates this. The process is initiated by the Director-General. If the proposal is acceptable to the magistrate there is no need to trouble the Magistrates Commission. If, however, the proposal is not acceptable to the magistrate and the Director-General persists in it, the magistrate can then turn to the Commission, which makes a decision as to whether or not a transfer should be effected.

224 That procedure itself is not open to objection. It is necessary, however, to consider whether it is permissible to vest the Magistrates Commission with the power to effect a transfer

183 Id at 475B-C.

without the consent of the magistrate concerned

225 There is no doubt that a transfer to a post in a place other than that in which the magistrate is then holding office may cause inconvenience, and disrupt important aspects of the personal life of the magistrate concerned. It has a bearing on family life including the schooling of children, is likely to result in the loss of contact with friends that have been made, and has all the other difficulties that go with a relocation. The proper functioning of the system is, however, dependent upon there being an ability to transfer magistrates from one post into another when it is necessary to do so. When magistrates accept appointment they know that transfers are a condition of service, and one that they have to agree to if they wish to pursue a career in the lower judiciary. What is important is that transfers should be made for good reasons and without favour or prejudice. That is one of the responsibilities of the Magistrates Commission, and there is no reason to believe that it will not discharge its functions properly, when that issue comes before it. If it should not, its decision would be subject to review by the higher judiciary. I am therefore unable to agree with the conclusion of the High Court that the provision is inconsistent with the Constitution.[184]

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184 This is in line with the approach of the Supreme Court of India in two decisions concerning the transfer of judges. In *Union of India v Sankalchand* (A.I.R. 1977 S.C. 2328), the constitutional validity of a

notification issued by the President of India, transferring a judge from one High Court to another, was upheld by a majority of Judges of the Supreme Court. At para 112, the Court noted that in order to uphold and protect the independence of the judiciary, it is not necessary to construe the Constitution as meaning that a judge cannot be transferred to another High Court without his consent.

A similar question arose in *S.P. Gupta v Union of India* (1981 Supp. S.C.C 87), where the transfer of the Chief Justice of the Patna High Court was challenged. The Court, by a majority, held that the consent of the Judge concerned is not a pre-condition for a transfer and upheld the transfer stating that if the transfer is in public interest, the personal inconvenience of the judge is to be disregarded. At paras 307-9, however, the Court also cautioned that this power of transfer should not be used by way of punishment for an oblique purpose, for example against a judge who does not give judgments in favour of the government.

226 In the judgment of the High Court it is also suggested that this provision ought to have been dealt with in the Act itself, and not in regulations. For the reasons already given,[185] that is not necessary.

227 The appeal, insofar as it relates to Regulation 22, must therefore be upheld.

Assignment of duties to magistrates: section 14

228 Section 14 of the Act provides:

> "(1) A magistrate shall possess the powers and perform the duties conferred on or assigned to him or her by or under the laws of the Republic, or, in any specific case, by the Minister after consultation with the Commission.
>
> (2) The Minister may, after consultation with the Commission, make regulations conferring on or assigning to magistrates administrative powers and duties which do not affect the judicial independence of magistrates, including regulations empowering the Minister, after consultation with the Commission, to confer or assign administrative powers and duties of a general nature on or to magistrates.
>
> (3) The provisions of section 16(2) shall apply with the necessary changes in respect of any regulation made under subsection (2)."

185 At paras 120-124 above.

229 These provisions were introduced into the Act during 1998 at a time when the Constitution was already in force. The High Court held that the words in section 14(1) "or, in any specific case, by the Minister after consultation with the Commission" are inconsistent with the Constitution because they undermine the independence of magistrates' courts.[186]

230 I agree that magistrates can have only those powers vested in them by law, and that it is not consistent with institutional independence to permit the Minister to assign judicial powers to magistrates in addition to those that are ordinarily vested in them. The appeal against this finding must therefore be dismissed and the words "or, in any specific case, by the Minister after consultation with the Commission" are to be deleted.

231 Section 14(2) makes provision for the assignment of administrative duties and functions to magistrates. Ideally, magistrates should not be required to perform administrative duties unrelated to their functions as judicial officers. To require them to do so may make them answerable to the executive, and if that happens, the separation of powers that should exist between the executive and judiciary would be blurred.[187]

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186 Above n 5 at 470F-G.

187 *South African Association of Personal Injury Lawyers v Heath* above n 16 at para 35.

232 I have previously drawn attention to the fact that there are certain statutes which confer administrative powers and duties on magistrates.[188] In effect, section 14(2) empowers the Minister to make regulations which would add to those administrative powers and duties.

233 This Court has previously had occasion to draw attention to the difficulties confronting government in attempting to carry out its constitutional mandate to transform our society, to the extensive demands made upon it in relation to basic needs such as housing, health, education and social welfare and to the need to make prudent use of scarce resources.[189] There may be reasons why existing legislation that makes provision for administrative functions and duties to be performed by magistrates is necessary, and is not at present inconsistent with the evolving process of securing institutional independence at all levels of the court system.

234 The question whether administrative duties unrelated to their judicial functions can

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188 Above n 78.

189 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC)*;* 1997 (7) BCLR 851 (CC) at para 72; *Soobramoney v Minister of Health, KwaZulu-Natal* above n 54 at paras 11 and 40; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 46.

properly be assigned to magistrates was not the basis on which the constitutionality of section 14(2) was challenged. I accordingly refrain from dealing with that question. The only objection taken to section 14(2) was that the power to make the regulations was vested in the Minister. That power may only be exercised after consultation with the Commission and is subject to the qualification that the functions assigned should not "affect the judicial independence of magistrates". If regulations are made that are inconsistent with judicial independence they will be invalid. Since the regulations themselves will be subject to constitutional control, there is, in my view, adequate protection against any possible abuse of this power. The appeal against the declaration of invalidity made concerning section 14(2) must therefore be upheld. It follows that the appeal against the consequential finding made by the High Court concerning section 14(3) must also be upheld.

Regulations 32 and 33

235 Regulation 31 makes provision for magistrates to lodge complaints concerning "an official act or omission". The procedure prescribed by regulation 31 is for the complaint to be lodged with the magistrate's head of office, or if there is no such person, for the complaint to be lodged with the Magistrates Commission. Where the complaint is lodged with the head of office, and the magistrate concerned disagrees with the decision given, she or he may then refer the complaint to the Magistrates Commission for its decision. The Magistrates Commission is therefore the ultimate authority in respect of such complaints.

236 Regulations 32 and 33 deal with what is to happen after a complaint has been investigated. They provide:

"32. (1) After completion of the investigation with regard to the complaint or grievance referred to in regulation 31 the Commission shall –

(a) take such steps as it may deem fit with regard to the complaint or grievance concerned; and

(b) in writing, inform the Magistrate concerned, accordingly.

(2) If the Magistrate concerned is not satisfied with the steps referred to in subregulation (1) (a), he may within 10 working days after receipt of the notice referred to in subregulation (1) (b), in writing, submit to the Commission the reasons for his dissatisfaction, together with copies of the relevant documentation regarding his complaint or grievance, with the request that it must be submitted to the Minister.

(3) The Commission then forwards the relevant documents to the Minister.

33. The Minister shall –

(a) make a decision regarding the complaint or grievance concerned after consideration of all the relevant documents and if he deems it expedient he may order any further investigation; and

(b) advise the magistrate concerned, in writing, of his decision."

237 The High Court held

"Since the complaint of the magistrate will be directed against the Minister, his department or the Magistrates Commission, these provisions provide no satisfactory remedy for the magistrate concerned. Since the magistrate cannot direct his complaint to any independent body for investigation and action, this provision will have a chilling effect on the independence of the magistrate. These provisions will be perceived as affecting indirectly the independence of magistrates. They are therefore inconsistent with the independence of the magistrates' courts."[190]

190 Above n 5 at 476E-F.

238 Regulations 32 and 33 do not deprive magistrates of any remedies they might have concerning "official acts" that affect them adversely. If the complaint is about matters in respect of which the magistrate concerned has no rights, then it is difficult to understand how the mechanism provided by regulations 32 and 33 can have a "chilling effect" on the independence of the magistrate concerned. If there are complaints against the Minister or the Commission they are likely to relate to issues where the regulations empower the Minister or the Commission to take certain decisions affecting the magistrate. If those decisions are taken properly, the magistrate concerned has no legitimate grievance. If they are not taken properly, the magistrate concerned is not deprived of his or her remedies by regulations 32 and 33, and is entitled to approach the High Court to have the decision of the Minister or the Commission (as the case may be) set aside on review. Where the decisions are not taken by the Minister or the Commission, and relate to grievances concerning the functioning of the department or functionaries within the court structure itself, it is appropriate for the complaint to be considered by the Magistrates Commission. Where the magistrate concerned is dissatisfied with the decision of the Commission, the fact that she or he has the further right to ask the Minister to order that the investigation be re-opened is an additional remedy, and not an infringement of judicial independence.

239 The procedure laid down by regulations 32 and 33 allows avenues for grievances to be aired, and I fail to see how it can be said to detract from the institutional independence of magistrates' courts. The appeal against the High Court's order concerning these regulations must therefore be upheld.

Regulation 55

240 Regulation 55 provides:

> "Any act, measure, arrangement or direction which is applicable to an officer in the Department, shall mutatis mutandis apply to any person who has been appointed in a temporary or acting capacity or as assistant-magistrate as a judicial officer in terms of section 9 of the Magistrates' Courts Act."

241 It is reasonably possible to construe the words "mutatis mutandis" as limiting the application of the regulation to any "act, measure, arrangement or direction" which may appropriately be applied to judicial officers. Thus construed the regulation is not inconsistent with judicial independence. The appeal against the High Court's finding to the contrary must therefore be upheld.

Sections 9(3), (4) and (5) of the Magistrates' Courts Act

242 Sections 9(3), (4) and (5) of the Magistrates' Courts Act deal with the appointment of acting and temporary magistrates. The sections read as follows:

> "(3) Whenever by reason of absence or incapacity a magistrate, additional magistrate or assistant magistrate is unable to carry out the functions of his or her office or whenever such office becomes vacant, the Minister, or an officer in the Department of Justice or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may appoint any other competent person to act in the place of the absent or incapacitated magistrate, additional magistrate or assistant magistrate, as the case may be, during such absence or incapacity or to act in the vacant office until the vacancy is filled: Provided that no person shall be appointed as an acting magistrate of a regional

division unless he or she has satisfied all the requirements for the degree referred to in subsection (1)_(b) or has passed an examination referred to in that subsection: Provided further that when any such vacancy has remained unfilled for a continuous period exceeding three months the fact shall be reported to the Magistrates Commission.

(4) The Minister or an officer in the Department of Justice or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may appoint temporarily any competent person to act either generally or in a particular matter as magistrate of a regional division in addition to any magistrate or acting magistrate of that division or as additional or assistant magistrate for any district or sub-district in addition to the magistrate or any other additional or assistant magistrate.

(5) The Minister may, with the concurrence of the Minister of Finance, determine the remuneration and allowances and the method of calculation of such remuneration and allowances payable to a person appointed under subsection (3) or (4), if such person is not an officer of the public service."

243 The Constitution recognises that it may be necessary to appoint acting judges[191] and there can be no constitutional objection, therefore, to the appointment of acting or temporary magistrates. There are practical reasons that make this necessary. This, the High Court accepted. It held, however, that the provisions dealing with the manner of appointment, the tenure of acting magistrates or temporary magistrates, and their remuneration, were inconsistent

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191 Section 175 of the Constitution provides:

"(1) The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice.

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve."

with the Constitution:

> "These provisions empower the Executive to select and appoint acting and temporary magistrates, to limit their tenure for reasons unrelated to capacity, competence or behaviour and to determine the cases to be heard. These provisions would give rise to a perception on the part of the reasonable, objective and informed person that acting and temporary magistrates are not independent."[192]

192 Above n 5 at 459E-F.

244 In dealing with the method of appointment, the High Court drew attention to the fact that there is no comparable safeguard to that provided in the Constitution for the appointment of acting judges, whose appointments can only be made by the Minister after consultation with the senior judge of the court to which she or he is to be appointed.[193]

245 It does not follow from the fact that the Constitution makes provision for consultation prior to the appointment of an acting judge, that the absence of a comparable provision in the case of the appointment of acting magistrates, is inconsistent with judicial independence. Different requirements may be appropriate for appointments to different courts. Thus, in the case of the Constitutional Court whose powers are greater than those of other courts, an acting appointment can only be made with the *concurrence* of the Chief Justice.[194] In the case of the Supreme Court of Appeal and high courts, the Minister does not require the concurrence of the head of the court to which a judge is appointed as an acting judge; all that is required is consultation with the head of court, which means that the Minister is free to make the final decision. Powers of magistrates are significantly less than those of high court judges. There are also many more magistrates than there are judges. Some magistrates sit in courts where there may be only one or two magistrates, with no ability to manage all the work that has to be done if

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193 Section 175(2) of the Constitution.

194 Section 175(1) of the Constitution. At the time the proceedings were initiated the Chief Justice sat in the Supreme Court of Appeal and the Constitution then required acting appointments to be made with the concurrence of the President of the Constitutional Court and the Chief Justice.

a particular magistrate is absent or incapacitated. In such circumstances there may be a need for urgent decision making, and the provisions of sections 9(3) and (4) enable that to be done.

246 Section 9(3) makes provision for a "competent person" to be appointed to act during the "absence" or "incapacity" of the magistrate whose post is being filled, or in the case of a vacant post, "until the vacancy is filled". These are determinate periods which means that the acting magistrate has security of tenure during the period for which the appointment is made, and does not hold office at the discretion of the Minister. The appeal against the order made concerning section 9(3) must therefore be upheld.

247 Section 9(4) does not require the temporary appointment made in terms of that section to be for a fixed or determinate period. Bekker refers in his affidavit to a form of agreement entered into between the state and temporary magistrates. Clause 7 of what is said to be a standard contract provides as follows:

> "7.1 The STATE may terminate this CONTRACT summarily or after notice of less that [sic] one month as it may deem expedient, in the event of a breach of the terms of this CONTRACT by the ACTING MAGISTRATE. The STATE, before exercising its rights under this clause, has the right to suspend the ACTING MAGISTRATE from his/her office, without payment of salary, for the purpose of making enquiry into any such breach of contract, and nothing herein contained shall debar the STATE, after such enquiry, from declaring this CONTRACT terminated as from the date of such suspension.
>
> 7.2 The STATE shall have the right to terminate this CONTRACT if the ACTING MAGISTRATE does not successfully complete the prescribed course and probationary period or if the ACTING MAGISTRATE is at any time during his period of service prior to appointment found by the Magistrates Commission to

> be unsuitable for appointment as Magistrate."

An appointment to hold office at the discretion of "the state" is clearly inconsistent with security of tenure that is an essential element of judicial independence.

248 Section 9(4) also makes provision for the appointment of a "competent person" to act "generally" or "in a particular matter" in a regional or district court. There may be occasions on which it will be necessary to appoint an acting magistrate to deal with a particular case. For instance where the magistrates of the division concerned are not qualified to hear the case because of a perceived personal interest in the outcome. This happens on occasions where, for that reason, judges from one high court are appointed to hear a particular case in another high court. Section 9(4) does not, however, require that the person to be appointed to deal with a particular case be another magistrate. It requires only that the person appointed be a "competent person". Whilst there can be no objection to appointing a "competent person" as a temporary magistrate to act generally in a particular court, to appoint a person who is not a magistrate and who does not have security of tenure to hear a particular case would, in my view, be inconsistent with judicial independence. The constitutional flaws in section 9(4) cannot readily be resolved through reading in, severance or notional severance, and the section needs to be redrafted. The appeal against the High Court's order must therefore be dismissed and the order of invalidity made concerning this section is confirmed.

249 The principal, though not the only, sources from which appointments to the magistracy are made, are the prosecuting service and the Department of Justice. Where a person employed

in these sectors of the public service is appointed as an acting magistrate for a limited period, this has the undesirable consequence that the person concerned returns to the public service when the acting appointment comes to an end. However, if such persons could not be appointed as acting magistrates, there would be considerable difficulty in filling temporary vacancies in the magistracy that need to be filled. There are accordingly practical reasons at this stage of the evolving process of judicial independence that call for such appointments to be made. Section 9(5) contemplates that if this happens the persons concerned will continue to receive the salary ordinarily payable to them as members of the public service. It is only if persons are appointed from outside of the public service that a salary has to be determined. Because magistrates' salaries are geared to particular grades, a decision has to be made at the time of appointment as to where within those grades the acting magistrate will rank for salary purposes. Section 9(5) empowers the Minister to fix a salary in consultation with the Minister of Finance. The salary has to be paid out of public revenue and this is a practical arrangement. Since the salary has to be fixed before the acting appointment is made, and the acting appointment is only for a limited period, the procedure does not impinge on judicial independence. The appeal against the declaration of invalidity made concerning this section must therefore be upheld.

Section 12(2) of the Magistrates' Courts Act

250 Section 12(2) of the Magistrates' Courts Act provides:

> "An additional magistrate or an assistant magistrate—
> (a) may hold a court;
> (b) shall possess such powers and perform such duties conferred or imposed upon magistrates as he is not expressly prohibited from exercising or performing either by the Minister or by the magistrate of the district."

251 The order made by the High Court declares section 12(2)(b) to be inconsistent with the Constitution. However, no reasons for this order are given in the judgment. Notwithstanding this, I am satisfied that the section is inconsistent with judicial independence. All magistrates whether appointed permanently or temporarily, must have the powers vested in them by law, and it is wholly inconsistent with judicial independence to vest in the Minister or any other person the authority to prohibit any magistrate from exercising or performing such powers. The appeal concerning section 12(2)(b) must therefore be dismissed and the High Court's declaration of invalidity must be confirmed.

Alleged executive interference in the functioning of the magistrates' courts

252 Reference is made in the papers to an enquiry that was conducted into allegations made against a particular magistrate, and to correspondence dealing with the appointment of assessors, to support the contention that the executive is able to interfere with the functioning of magistrates' courts. There is also a dispute as to whether Van Rooyen and Tshabalala can tender evidence concerning allegations of executive interference made by certain magistrates. That issue is the subject of review proceedings which had not been heard when the matter was dealt with by this Court. It was also the subject of an application by Van Rooyen and Tshabalala to supplement the appeal record in the present matter.

253 None of this is relevant to the issues that have to be decided in this case. This case is concerned with institutional independence, and not with the interference by the executive with judicial independence in particular cases. Van Rooyen and Tshabalala do not suggest that there

were any irregularities in their cases, or that the magistrates before whom they appeared acted otherwise than impartially and independently in dealing with them.

254 If in particular cases, members of the executive have acted in a manner inconsistent with judicial independence, or should they ever attempt to do so in the future, that would be inconsistent with the Constitution, and could be challenged by persons affected thereby as being unlawful conduct. There is, however, no substance in the contention that the proceedings taken against Van Rooyen and Tshabalala should be set aside because of alleged irregularities committed on other occasions in cases to which they were not party. The application to supplement the record is therefore refused.

Tshabalala and Van Rooyen's appeals

255 The applications by Tshabalala and Van Rooyen for leave to appeal must now be considered. In Van Rooyen's case the application involves an appeal against the conviction and sentence imposed on him by the Regional Court. Tshabalala's case involves an application to review and set aside the proceedings pending against him in the Magistrates' Court. In the High Court, Van Rooyen's appeal and Tshabalala's review were dismissed and a negative certificate was furnished by the judge in terms of rule 18(2) concerning the prospects of success on appeal.

256 The merits of Van Rooyen's appeal are not in issue. The only question raised on his behalf is whether his right to a fair trial under section 35(3) of the Constitution was infringed. He contended that section 35(3)(c) entitled him "to a public trial before an ordinary court", and that the regional court in which he was convicted was not ordinary court within the meaning of

the Constitution because it lacked the institutional independence that "ordinary courts" must have. As a result, so he contends, the conviction and sentence were nullities.

257 Tshabalala's appeal raises the same issue but in a different form. It is his contention that because of the lack of institutional independence, a regional court is not competent to try him and that the proceedings before that court should be set aside.

258 Magistrates' courts and regional courts handle the great majority of criminal prosecutions. The Constitution protects the independence of these courts and the core values of the independence of the judicial officers presiding in them. Their decisions are subject to appeal and review in the higher courts. This was the system that had existed for many years before the interim Constitution was adopted in 1994. It was the system in place when the interim Constitution came into force in April 1994 and when the 1996 Constitution came into force in February 1997. Both Constitutions guaranteed judicial independence. Both Constitutions recognised the existing magistrates' courts.[195] Section 170 of the 1996 Constitution provides that:

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[195] Section 241(1) of the interim Constitution provides:

> "Every court of law existing immediately before the commencement of this Constitution in an area which forms part of the national territory, shall be deemed to have been duly constituted in terms of this Constitution or the laws in force after such commencement, and shall continue to function as such in accordance with the laws applicable to it until changed by a competent authority . . . ."

Item 16(1) of Schedule 6 of the 1996 Constitution provides:

> "Every court . . . existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to—
>
> (a) any amendment or repeal of that legislation; and
>
> (b) consistency with the new Constitution."

> "Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President."

259 Regional courts have authority to deal with Van Rooyen's case and Tshabalala's case in terms of the Magistrates' Courts Act and in view of the provisions of the Constitution it can hardly be said that they are not "ordinary courts" within the meaning of section 35(3)(c).

260 It was contended, however, that because magistrates lack institutional judicial independence they are not competent to preside at criminal trials. Although the conclusions to which I have come differ from those reached by the High Court, there are provisions of the of the Magistrates' Courts Act, the Magistrates Act and the regulations made in terms of the Magistrates Act that are inconsistent with institutional independence. That does not mean, however, that magistrates' courts must stop functioning, that all decisions taken by magistrates must now be set aside as nullities, and that the persons convicted by magistrates of criminal offences must be released from jail.

261 The High Court declined to declare that Van Rooyen's trial was a nullity or that magistrates lack the competence to preside over criminal trials, holding

> "that is not competent relief in terms of the Constitution and even if it is, it is not an order which I consider just and equitable. Obviously what is required is a declaration of invalidity in respect of each statutory provision and regulation that is attacked and not a declaration that magistrates' courts are unconstitutional because they lack institutional independence . . . . Van Rooyen, Tshabalala and Thelemaros cannot benefit from a declaration of invalidity in respect of the statutory provisions because the order of this

> Court is subject to confirmation by the Constitutional Court . . . and it is very unlikely that the Constitutional Court itself will order that such declaration of invalidity will have an immediate effect. The dictates of good governance require that the Executive and Legislature be given an opportunity to put these matters right so that there can be no disruption or dislocation in the administration of justice . . . ."[196]

262 I agree that there is no basis for granting to Van Rooyen and Tshabalala the relief that they seek. It is clearly in the interests of justice that the magistrates' courts and the regional courts should continue to function. There is no reason to believe that the magistrates presiding in those courts will not administer justice, as they have done in the past, impartially, independently and in accordance with the law. Their oath of office and the Constitution, by which they are bound, requires no less.

263 If there is any attempt to interfere improperly with the way that a magistrate hearing a particular case conducts or decides the case, an accused person affected adversely has a remedy that can be exercised in that case; there is, however no reason to believe that there will be any occasion for this to be done.

264 There is no reason why Van Rooyen and Tshabalala should be treated differently from other convicted and accused persons. Van Rooyen does not suggest that any improper influence was brought to bear on the magistrate who decided his case and convicted him. He accepts that

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196 Above n 5 at 477E-H.

"subjectively" the Court in which he was tried functioned as an independent and impartial court, but contends that viewed objectively there was an absence of institutional independence which meant that the magistrate was not competent to try him. In effect, he seeks to set aside a conviction imposed on him by a properly appointed judicial officer, whose authority is derived from statute, and who conducted the proceedings themselves fairly, because the conditions of service of all magistrates do not meet to the fullest extent the standards of judicial independence required by the Constitution.

265 That is not "appropriate relief" in respect of the findings that have been made. Although there are provisions of the two Acts and the regulations that fall short of what is required to meet the evolving standard of judicial independence, the core values of judicial independence remain intact. Magistrates, and persons appearing before them, are protected by the specific provisions of section 165 of the Constitution against any attempt to interfere with the way in which magistrates discharge their judicial duties. The Magistrates Commission is charged with the responsibility of ensuring that appointments, promotions, transfers, or discharge of, or disciplinary steps against judicial officers in the lower courts take place without favour or prejudice, and that no improper influencing or victimisation of such judicial officers takes place. It is a properly constituted body that is required to discharge its functions in accordance with the provisions of the Constitution. If it should fail to do so, the law provides safeguards enabling aggrieved persons to secure appropriate relief from the high courts, and if necessary the Supreme Court of Appeal and ultimately this Court.

266 The provisions of the Acts and regulations that have been found to be inconsistent with

the Constitution do not detract from the core values of judicial independence and do not affect the capacity of the overwhelming majority of the judicial officers ordinarily presiding in these courts to conduct fair trials. It is in my view beyond doubt that magistrates' courts and regional courts are "ordinary courts" within the meaning of section 35(3) of the Constitution, and that Travers and the overwhelming majority of magistrates who ordinarily preside in these courts are competent to determine cases within their jurisdiction.

267 I am satisfied, therefore, that there is no prospect that an appeal to this Court by Van Rooyen against the conviction and sentence imposed upon him will succeed. I am also satisfied that there is no prospect that the appeal by Tshabalala against the dismissal of his claim to stay and set aside the proceedings that he faces in the regional court will succeed. In the circumstances the application for leave to appeal by Van Rooyen and Tshabalala must be refused.

Summary

268 A summary of the conclusions reached in this judgment appear from the following table:

Provision	***Conclusion***	***Para***
Magistrates Act 90 of 1993		
Section 3(1)	Appeal upheld.	90
Section 3(2)	The order of the High Court is set aside and replaced with an order deleting the words "in his, her or its opinion" from section 3(2).	95
Section 6A	Appeal upheld.	101
Section 10	Appeal upheld.	110
Section 11	Appeal upheld.	135

Section 12	Appeal upheld.	149
Section 13(1)	Appeal upheld.	158
Section 13(3)(a)	Appeal upheld.	172
Section 13(3)(aA)	Appeal upheld.	184
Section 13(3)(b)	The order of the High Court is set aside and replaced with an order deleting from the section the words "the Minister on the recommendation of".	177
Section 13(3)(d) and (e)	Not inconsistent with the Constitution.	185
Section 13(4)	Appeal dismissed – order of invalidity confirmed.	186
Section 13(5)	Appeal upheld.	158
Section 14(1)	Appeal dismissed – the words "or, in any specific case, by the Minister after consultation with the Commission" are to be deleted from the section.	230
Section 14(2)	Appeal upheld.	234
Section 14(3)	Appeal upheld.	234
Section 16(1)	Appeal upheld.	135
Magistrates' Courts Act 32 of 1944		
Section 9(1)	Appeal upheld.	110
Section 9(3)	Appeal upheld.	246
Section 9(4)	Appeal dismissed – order of invalidity confirmed.	248
Section 9(5)	Appeal upheld.	249
Section 12(2)(b)	Appeal dismissed – order of invalidity confirmed.	251
Regulations for Judicial Officers in the Lower Courts, 1993		
Regulation 16	The order of the High Court is set aside and is replaced with an order deleting the words "provided further that a magistrate who performs certain duties in terms of section 14 of the Act conferred upon him by the Minister in a specific case after consultation with the Commission may be promoted to a higher post without absorption into such higher post" from regulation 16.	216
Regulation 17(1)	Appeal dismissed – the words "except in the case falling under section 14, in which case the date of entry shall be determined by the Minister" to be deleted from regulation 17(1).	218

Regulation 17(2)	Appeal upheld.	220
Regulation 22	Appeal upheld.	227
Regulation 25	Appeal upheld.	192
Regulation 26	The order of the High Court is set aside and is replaced by an order deleting the words "or person" where they appear for the first time in regulation 26(6) immediately before the words "hereinafter called the presiding officer" and deleting the whole of regulation 26(17).	203
Regulation 27	The order of the High Court is set aside and replaced with an order deleting the words "the Minister or" in regulations 27(1) and 27(2).	210
Regulation 28	The order of the High Court is set aside and replaced with an order deleting regulations 28(4) and 28(5).	210
Regulation 29	The order of the High Court is set aside and replaced with an order deleting the words "the Minister or" in regulations 29(1), 29(2), 29(3), and 29(4) and deleting regulation 29(9).	210
Regulation 30	Appeal upheld.	159
Regulation 32	Appeal upheld.	239
Regulation 33	Appeal upheld.	239
Regulation 54A	Appeal upheld.	131
Regulation 55	Appeal upheld.	241
Schedule E (the code of conduct)	Appeal upheld.	131
Other		
The Complaints Procedure Regulations are not inconsistent with the Constitution.		100
The application by Van Rooyen and Tshabalala to supplement the record is refused.		254
The application for leave to appeal by Van Rooyen and Tshabalala is refused.		267

269 In the result there are provisions of the Magistrates Act, the Magistrates' Courts Act and the Regulations for Judicial Officers in the Lower Courts as presently formulated that fall short of what is required to ensure the institutional independence of magistrates' courts. However, in the context of the protection given to magistrates' courts and magistrates at an institutional level

by the Constitution itself and by the other safeguards referred to in this judgment, the legislation viewed as a whole is consistent with the core values of judicial independence.

Costs

270 The applications by Van Rooyen and Tshabalala relate to criminal proceedings in which orders for costs are not ordinarily made.[197] This, however, was not raised in the notice of appeal or in argument. In substance, Van Rooyen, Tshabalala and Themelaros failed to secure the relief they sought, which was to have the criminal proceedings against them set aside. Notwithstanding this, the High Court ordered the Minister of Justice and Director of Public Prosecutions to pay their costs as well as the costs of Bekker and ARMSA. The awarding of costs was a matter within the discretion of the High Court. Van Rooyen, Tshabalala, Bekker and ARMSA have succeeded on some but not all of the constitutional issues raised by them. Although there have been alterations to the orders made by the High Court in favour of Bekker, ARMSA, Van Rooyen and Tshabalala, I do not consider it appropriate in the circumstances of this case to interfere with the way the High Court exercised its discretion as to costs.

271 As far as the appeal and application for leave to appeal are concerned, the constitutional issues are important. In the circumstances, although the appeal succeeded in part and the application for leave to appeal has been dismissed, I consider that this is a case in which it would be appropriate to make no order as to the costs of the appeal and the application for leave to appeal.

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197 *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 44.

Order

272 The orders of constitutional invalidity that must be made, other than the order concerning section 9(4) of the Magistrates' Courts Act, do not affect the structures and functioning of the courts in any material respects and there is accordingly no need to suspend such orders. All that is necessary is to make the orders prospective so that completed matters are not affected. The order concerning section 9(4) should however be suspended to permit temporary magistrates to be appointed when that is necessary pending an appropriate amendment to the section. Suspension for a period of twelve months should be adequate for such purpose.

273 The following order is made:

1. The application by Van Rooyen and Tshabalala to supplement the record is refused.

2. The application for leave to appeal by Van Rooyen and Tshabalala against paragraphs III(1), (2) and (5) of the order made by the High Court is refused.

3. The appeal by the State and the Minister of Justice against paragraphs III(3) and (5), and IV(1) and (3) of the order made by the High Court succeeds. The orders made in those paragraphs are set aside and the following order is substituted for them:

(A) The words "in his, her or its opinion" in section 3(2) of the Magistrates Act 90 of 1993 are declared to be inconsistent with the Constitution and invalid.

(B) The words "the Minister on the recommendation of" in section 13(3)(b) of the Magistrates Act are declared to be inconsistent with the Constitution and invalid.

(C) Section 13(4) of the Magistrates Act is declared to be inconsistent with the Constitution and invalid.

(D) The words "or, in any specific case, by the Minister after consultation with the Commission" in section 14(1) of the Magistrates Act are declared to be inconsistent with the Constitution and invalid.

(E) Sections 9(4) and 12(2)(b) of the Magistrates' Courts Act 32 of 1944 are declared to be inconsistent with the Constitution and invalid.

(F) The words "provided further that a magistrate who performs certain duties in terms of section 14 of the Act conferred upon him by the Minister in a specific case after consultation with the Commission may be promoted to a higher post without absorption into such higher post" in regulation 16 of the Regulations for Judicial Officers in the Lower Courts promulgated in

Government Gazette 15524 GN R361, 11 March 1994 (as amended) are declared to be inconsistent with the Constitution and invalid.

(G) The words "except in the case falling under section 14, in which case the date of entry shall be determined by the Minister" in regulation 17(1) of the Regulations for Judicial Officers in the Lower Courts are declared to be inconsistent with the Constitution and invalid.

(H) The words "or person" where they appear for the first time in regulation 26(6) of the Regulations for Judicial Officers in the Lower Courts immediately before the words "hereinafter called the presiding officer" are declared to be inconsistent with the Constitution and invalid.

(I) The words "the Minister or" in regulations 27(1), 27(2), 29(1), 29(2), 29(3) and 29(4) of the Regulations for Judicial Officers in the Lower Courts are declared to be inconsistent with the Constitution and invalid.

(J) Regulations 26(17), 28(4), 28(5) and 29(9) of the Regulations for Judicial Officers in the Lower Courts are declared to be inconsistent with the Constitution and invalid.

4. The order in paragraph 3(E) concerning section 9(4) of the Magistrates' Courts Act 32 of 1944 is suspended for a period of 12 months from the date of this order.

The other orders in paragraph 3 shall come into force on the date of this order, and shall be prospective only.

5. The orders for costs made in paragraphs III(6) and IV(4) of the High Court order are not set aside and remain in force.

6. No order is made as to the costs of the appeal and the application for leave to appeal.

Langa DCJ, Ackermann J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J, Yacoob J, Du Plessis AJ and Skweyiya AJ concur in the judgment of Chaskalson CJ.

For the first appellant and second respondent:	BH Pieters and WA Smit instructed by Naude Rademeyer & Joubert, Pretoria and Laubscher Attorneys, Pretoria.
For the second and third applicants:	KS Tip SC, GI Hulley and H Maenetje instructed by the Legal Resources Centre, Johannesburg.
For the first and fourth respondents:	HJ Fabricius SC and SM Lebala instructed by the State Attorney, Pretoria.
For the intervener:	MJD Wallis SC, AA Gabriel and M Du Plessis.

Schedule – Regulations 26, 27, 28 and 29

Regulation 26

(1) If a magistrate is accused of misconduct, the Commission may appoint a magistrate or a 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) After the conclusion of the preliminary investigation referred to in subregulation (1), the investigating officer shall recommend to the Commission whether or not the magistrate concerned should in his opinion be charged, and if so, what in his opinion the contents of the charge concerned should be.

(3) If the Commission is of the opinion that there are sufficient grounds for a charge of misconduct against the magistrate concerned, the Commission may, in writing, charge the magistrate with misconduct.

(4) A charge referred to in subregulation (1) or (3) shall contain or shall be accompanied by a direction calling upon the magistrate charged to send or deliver within a reasonable period specified in the direction to a person likewise specified, a written admission or denial of the charge and a written explanation regarding the misconduct with which he is charged.

(5) If the magistrate charged admits that he is guilty of the charge, he shall be deemed to have been found guilty of misconduct as charged.

(6) If the magistrate charged in terms of subregulation (1) or (3) –

(a) denies the charge; or

(b) fails to comply with the direction referred to in subregulation (4),

the Commission shall appoint a magistrate or person (hereinafter called the presiding officer) to preside at the investigation, and a magistrate or person to lead evidence: Provided that the Commission may dispense with the appointment of a presiding officer and establish a committee to conduct the investigation, in which case a reference in this regulation to 'presiding officer' shall be deemed to be a reference to such a committee.

(7) The magistrate or person who leads the evidence contemplated in subregulation (6) may, for the purposes of the investigation –

(a) summon any person, who, in his opinion may be able to give material information concerning the subject of the investigation, or who he suspects or believes has in his possession or custody or under his control any book, document or object which has any

bearing on the subject of the investigation, to appear before the presiding officer at the time and place specified in the summons, to be questioned or to produce such book, document or object;

(b) retain a book, document or object referred to in paragraph (a) for the duration of the investigation;

(c) lead evidence and arguments in support of the charge and cross-examine witnesses; and

(d) call upon and administer an oath to or accept an affirmation from any person present at the investigation who was or might have been summonsed in terms of paragraph (a), and question him and order him to produce any book, document or object in his possession or custody or under his control that he suspects or believes to have a bearing on the subject of the investigation.

(8) The law relating to privilege, as applicable to a witness summonsed to give evidence in a civil trial before a court of law or to produce a book, document or object, shall mutatis mutandis apply in relation to the examination of, or the production of any book, document or object to the presiding officer by, any person called as a witness in terms of this regulation.

(9) At an investigation the magistrate charged shall have the right –

(a) to be personally present, to be assisted or represented by another person, to give evidence and, either personally or through a representative –

(i) to be heard;

(ii) to call witnesses;

(iii) to cross-examine any person called as a witness in support of the charge; and

(iv) to have access to documents produced in evidence;

(b) notwithstanding a denial or failure by him referred to in subregulation (6), to admit at any time that he is guilty of the charge, whereupon he shall be deemed to be guilty of the misconduct as charged; and

(c) if the misconduct with which he is charged amounts to an offence of which he was convicted by a court of law, to show cause why, in his opinion, he is not guilty of misconduct.

(10) At an investigation the presiding officer has, at the commencement of the proceedings or later, the right to require from the magistrate charged a full explanation of his defence on the charge and to question him in clarification about that.

(11) After the conclusion of the investigation, the presiding officer shall notify the Commission and the magistrate charged of his finding and recommendation and supply a copy of the minutes to the Commission.

(12) (a) The recommendation of the presiding officer will be to the effect that the magistrate charged be found guilty or not guilty by the Commission of the misconduct as charged.

(b) If the presiding officer recommends that the magistrate charged be found guilty of the misconduct as charged, or if the magistrate charged admits that he is guilty of the charge, the presiding officer or the magistrate charged, as the case may be, shall state or furnish to the Commission any aggravating or mitigating circumstances, as well as any written comment by the magistrate charged.

(13) The Commission may, for the purposes of the determination of aggravating or mitigating circumstances, request any information from any person or officer in the Public Service.

(14) After consideration of the relevant documents, the Commission shall make a recommendation to the Minister and submit to him, together with its recommendation, all the relevant documents with regard to the investigation, as well as the finding and recommendation of the presiding officer: Provided that if the magistrate charged lodges representations in terms of subregulation (15), any recommendation or documents relating to aggravating or mitigating circumstances shall not be submitted to the Minister until the Commission has made a finding regarding the representations of the magistrate charged.

(15) If the magistrate charged is found guilty of misconduct by the presiding officer, the magistrate charged may, if he feels aggrieved because of the finding of the presiding officer, address his representations to the Commission in writing within 21 working days after conviction, giving his grounds of his representations, and he shall forward a copy of this notice of representation, together with his grounds of representations, to the presiding officer.

(16) Within 21 working days after receipt of the notice of representations referred to in subregulation (15) the presiding officer shall forward his reasons for conviction to the Commission.

(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;

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

(18) A person summonsed as witness to appear before a presiding officer for the purposes of attending

the investigation referred to in subregulation (6) shall receive allowances in accordance with the tariff of allowances prescribed by Government Notice No. R. 2596 of 1 November 1991 as if he was a witness in criminal proceedings.

(19) A summons shall be issued on a form prescribed by the Commission and shall be served in a way determined by the Commission.

(20) The investigation shall take place in camera unless the presiding officer orders otherwise.

(21) Evidence obtained during the preliminary investigation referred to in subregulation (1) which is not disputed by the magistrate may be admitted at the investigation referred to in subregulation (6).

Regulation 27

(1) The Minister or the Commission may order that an investigation be held into the capacity of a magistrate to carry out his duties of office efficiently.

(2) An investigation referred to in subregulation (1) shall be held as soon as possible by a magistrate or any person designated by the Minister or the Commission and such magistrate or person shall have the powers referred to in regulation 26 (7).

(3) The magistrate with regard to whom the investigation referred to in subregulation (1) is to be held –

(a) shall in writing be informed by the person who is to conduct the investigation of the date, time and place of the investigation; and

(b) shall have the right –

(i) to a statement in writing of the grounds upon which it is alleged that he does not have the capacity to carry out his duties of office in an efficient manner;

(ii) to be present at the investigation;

(iii) to be assisted or represented by another person;

(iv) to testify; and

(v) either personally or through a representative, to –

(aa) be heard;

(bb) call witnesses;

(cc) cross-examine any person who is called as a witness in support of the said allegations; and

(dd) have access to documents which were produced as evidence.

(4) The magistrate in respect of whom the investigation is held, shall answer relevant questions of the

person who conducts the investigation.

(5) After completion of the investigation referred to in subregulation (1) the person who conducted the investigation shall make a finding and inform the magistrate concerned and the chairman of the Commission of the finding.

Regulation 28

(1) If the person who conducts the investigation in terms of regulation 27 finds that the magistrate concerned does not have the capacity to carry out his duties of office in an efficient manner –

(a) he shall furnish the magistrate concerned with a statement, in writing, of his finding and the reasons for the finding; and

(b) he shall forward without delay to the chairman of the Commission, the record of the proceedings of the investigation and all documentary evidence or certified copies thereof admitted at the investigation, as well as a written statement of his reasons for the finding and any observations on the case which he may desire to make.

(2) The magistrate concerned may, within 10 working days after the date on which he was notified of the finding, submit to the chairman of the Commission written comment regarding the findings and the reasons therefor.

(3) The chairman of the Commission shall forward to the Minister any documents regarding the investigation, together with the comment of the magistrate referred to in subregulation (2), if any, and the recommendation of the Commission.

(4) The Minister may personally order that a further investigation be conducted into the magistrate's capacity to carry out his duties of office.

(5) The Minister shall without delay inform the chairman of the Commission and the magistrate concerned of his decision.

Regulation 29

(1) The Minister or the Commission may order that an investigation be held regarding the removal of a magistrate from office on account of continued ill-health.

(2) The Minister or Commission shall before the commencement of the investigation referred to in subregulation (1) inform the magistrate of the investigation.

(3) The magistrate in respect of whom the investigation referred to in subregulation (1) is conducted, shall without delay after receipt of the notice of the investigation submit a medical report from a medical practitioner of his own choice to the Minister or the Commission, as the case may be.

(4) The Minister or Commission may order that the magistrate subject himself to a medical

examination by a medical practitioner designated by the Minister or Commission, whereafter the medical practitioner shall submit a medical report to the Commission

(5) The costs of the medical examinations referred to in subregulations (3) and (4) shall be paid by the State.

(6) After considering the medical report, together with any relevant information, the Commission shall make a recommendation to the Minister.

(7) The Commission shall provide to the magistrate concerned a copy of its recommendation referred to in subregulation (6), together with a copy of the medical report referred to in subregulation (4).

(8) The magistrate may within 15 days after receipt of the recommendation and medical report referred to in subregulation (7), submit written comment thereon to the Minister.

(9) The Minister shall consider the medical reports and the recommendation of the Commission and make a final decision.