THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
CASE NO: 350/2001

COMMISSION
APPELLANT

AND

THE GENERAL COUNCIL OF THE
BAR SOUTH AFRICA **1ST**
RESPONDENT

THE SOCIETY OF ADVOCATES
(WITWATERSRAND LOCAL DIVISION) **2ND**
RESPONDENT

THE PRETORIA SOCIETY OF ADVOCATES **3RD RESPONDENT**

THE CAPE BAR
4TH RESPONDENT

THE SOCIETY OF ADVOCATES OF KWAZULU-NATAL **5TH RESPONDENT**

THE SOCIETY OF ADVOCATES, FREE STATE **6TH RESPONDENT**

THE EASTERN CAPE SOCIETY OF ADVOCATES **7TH RESPONDENT**

SOCIETY OF ADVOCATES TRANSKEI **8TH**
RESPONDENT

BISHO SOCIETY OF ADVOCATES **9TH**
RESPONDENT

NORTH-WEST BAR ASSOCIATION **10TH**
RESPONDENT

NORTHERN CAPE SOCIETY OF ADVOCATES **11TH RESPONDENT**

CORAM: ***HEFER AP, HOWIE, HARMS, SCOTT, MPATI JJA***

SUMMARY: ***Administrative Law – setting aside of administrative decision – remittal to administrative authority – Competition Act 89 of 1998 - exemption***

HEARD: ***15 August 2002***

DELIVERED: ***6 September 2002***

JUDGMENT

HEFER

AP

HEFER AP:

[1] Each of the second to eleventh respondents is an association of advocates practising in one of the Divisions of the High Court. Representatives of these associations constitute the first respondent, the General Council of the Bar of South Africa (the "GCB"). The GCB maintains a code of conduct which was intended to regulate the professional conduct of the members of all the associations after adoption by the latter. But, because every association has not adopted every rule in the same form, each association still operates under its own rules.

[2] Suspecting towards the end of 1999 that some of their rules might offend against s 4 of the Competition Act 89 of 1998, the respondents submitted a joint application to the Competition Commission for exemption from the application of Part A of Chapter 2 of the Act.[1] For reasons which will soon emerge they were not satisfied with the Commission's decision sent to them about a year later and they promptly brought review proceedings on notice of motion in the Transvaal High Court. In the answering affidavit it was conceded on behalf of the Commission that the decision had to be set aside for lack of compliance with the *audi alteram partem* principle. This left the question whether the matter ought to be remitted to the Commission as the main bone of contention. Eventually Roos J decided against a remittal and made an order exempting some of the rules. [2] The Commission's appeal is against this order. The

1 Sec 4(1)(b)(i) prohibited restrictive horizontal practices directly or indirectly fixing trade conditions but, until it was deleted by Act 39 of 2000, s 3(1)(c) expressly provided that the Act would not apply to the rules of professional associations to the extent that they were exempted by the Commission under Schedule 1.These rules may still be exempted under Schedule 1 despite the deletion of s 3(1)(c) but counsel were in agreement that the appeal has to be decided in terms of the unamended version of the Act.

2 The vast majority of the rules had no bearing on competition. Roos J considered only

respondents, in turn, cross-appeal against Roos J's refusal to exempt some of the rules.

[3] In support of the Court *a quo*'s judgment, the respondents contend that the Commission had manifested such a lack of competence, candour, objectivity and good faith that it would have been unfair to require them to submit to its jurisdiction again. I will first deal with the facts on which the contention is based and then proceed to examine its validity.

[4] The Commission 's decision was conveyed to the respondents by way of a letter dated 8 November 2000 and addressed to the chairman of the GCB. It read as follows:

> "Dear Adv Gauntlett,
>
> **APPLICATION FOR AN EXEMPTION IN TERMS OF SCHEDULE 1 OF THE COMPETITION ACT 1998.**
>
> I refer to your application for an exemption and attach hereto an Exemption Certificate [Notice CC 10(2)] as well as the conditions on which the exemption is granted ...
>
> In accordance with the provisions of Schedule 1 of the Competition Act, 1998 a notice regarding the exemption that has been granted will be published in the Gazette on Friday 17 November 2000.
>
> Yours Sincerely
>
> for adv A Burger
> Manager: Enforcement and Exemptions."

The attached exemption certificate informed the respondents that:

> "You applied to the Competition Commission on 7/4/2000 for an exemption from Schedule 1 of the Competition Act.
>
> After reviewing the information you provided, the Competition Commission grants an exemption in terms of section 10(2)(b) of the Act for the rules of your professional association. This exemption is subject to:
>
> no conditions
>
> the conditions listed on the attached sheet."

eight rules and exempted three of them.

Despite these express statements that the application had been granted conditionally, it could be gathered from the body of the sheet bearing the heading "**CONDITIONS ATTACHED TO THE EXEMPTION GRANTED IN TERMS OF SCHEDULE 1 OF THE COMPETITION ACT 1998 TO THE GENERAL COUNCIL OF THE BAR (GCB) OF SOUTH AFRICA AND ITS CONSTITUENT ASSOCIATIONS"** that the so-called Aconditions@ were not conditions at all, but the Commission's refusal to exempt several important rules coupled with an expression of its willingness to negotiate with the respondents for the exemption of some of the others provided they were amended to the Commission's satisfaction.

[5] At about the time of the receipt of these documents the respondents procured from the Ministry for Justice and Constitutional Development a copy of a document which had not been revealed to them by the Commission. It was addressed to an official employed by the Commission under the heading "**DRAFT RESPONSE TO THE COMPETITION COMMISSION"** and contained adverse comments on the application for exemption. It was commonly known at the time that a so-called policy unit operated within the Ministry and was in the process of preparing legislation to regulate the entire legal profession. For various reasons the document led the respondents to believe that the comments emanated from the policy unit and did not reflect the views of the Minister.

[6] The respondents then proceeded to prepare and file their application to the Court *a quo* for the review and setting aside of the Commission's decision. Apart from relying on the fact that the "draft response" had not been revealed to them before the decision was taken, they alleged that the Minister (who had to be consulted in terms of item 2(c) of Schedule 1 to the Act) had not been consulted; that the Commission had wrongly considered the application for exemption under s 10 of the Act[3]; and that conditions had been attached to the exemption granted which were not authorized in Schedule 1. On these grounds they claimed an order

> "2.1. Declaring the conditions attached to the exemption granted to the

3 Sec 10 dealt with exemptions generally whilst Schedule 1 dealt specifically with the exemption of the rules of professional associations. The criteria laid down in s 10 differed from those prescribed in Schedule 1.

applicants by the first respondent in terms of Schedule 1 of the Competition Act (No 89 of 1998 -@The Act@) to be *ultra vires* and of no force and effect.

Alternatively to prayer 2.1:

2.2. Declaring that the rules of the applicants are exempted in terms of Schedule 1 of the Act and that the Act does not apply to the rules of the applicants in terms of section 3(1)(c) of the Act.

Alternatively to prayer 2 above:

3. Reviewing and setting aside the decision of the first respondent .."

[7] Upon receipt of the exemption certificate the respondents called for the Commission's reasons but received no response. They procured an order directing the Commission to furnish the reasons and eventually[4] received a document informing them that "these are a summary of reasons. The full reasons are reflected in the report and will be reflected in the answering affidavit." The "report" later turned out to be a document prepared by Mr Wouter Meyer, a consultant engaged by the Commission. I will refer to it as the "Meyer report".

[8] Nothing came of the undertaking to disclose the full reasons in the answering affidavit. That document was deposed to by the Commissioner[5] who claimed that the application for exemption had been considered under Schedule 1 (and not in terms of s 10)[6] and had been refused as far as the rules in dispute are concerned. He also alleged that the Minister had been properly consulted and that the Adraft response@ had in fact been signed by the Minister and contained his official comments. Conceding, however, that the contents of the document had not been revealed to the respondent and that the Commission's decision was impugnable for this reason, he requested the court to remit the application for exemption to the Commission for reconsideration.

[9] Presumably as a result of the information in the answering affidavit and the Meyer report (which the respondents did not have when they prepared their application for review), there is no longer a dispute about the status of the

4 After they had already filed the review application.

5 The Commission then consisted, so we were told, of a Commissioner and one Deputy Commissioner.

6 The reference to s 10 in the exemption certificate, he said, was an error.

Adraft response@ and the appeal was argued on the basis that it contains the Minister's official comments. In addition the respondents did not try to persuade us that the Commission had in fact considered and decided the application in terms of s 10, or that the result in fact was that the application had been granted subject to unauthorised conditions as alleged in the founding affidavit[7]. However, as will be seen later, their contention is that the confusion about the nature of the decision and the provision of the Act in terms of which it was taken, still has a bearing on the question we have to decide.

[10] Because it figured prominently in the argument on both sides I intend to deal at some length with the Meyer report but, in order to follow the reasoning, it is appropriate to examine Schedule 1 to the Act first.

At the relevant time items 1 and 2 of Part A of the Schedule read as follows:

"1. A professional association may apply in the prescribed manner to the Competition Commission to have all or part of its rules exempted from the provisions of Part A of Chapter 2 of this Act, provided -

(a) the rules do not contain any restriction that has the effect of substantially preventing or lessening competition in a market; or

(b) if the rules do contain a restriction contemplated in paragraph (a), that restriction, having regard to internationally applied norms, is reasonably required to maintain -

(i) professional standards; or

(ii) the ordinary function of the profession.

2. Upon receipt of an application in terms of item 1, the Competition Commission may exempt the rules concerned after it has -

(a) given notice of the application in the Gazette;

(b) allowed interested parties 30 days from the date of that notice to make representations concerning the application; and

(c) consulted the responsible Minister, or member of the Executive Council."

Read together, items 1(a) and (b) plainly required a two-stage enquiry: first the Commission had to determine the category into which a particular

7 The Meyer report demonstrates that this is not what had happened.

application for exemption fell. This depended on whether the rule or rules in question contained a restriction of the kind mentioned in item 1(a). If the enquiry produced a positive result, ie if the application was found to be of the (b) category, the remaining question was whether, having regard to internationally applied norms, the restriction was reasonably required to maintain professional standards or the ordinary function of the profession[8].

[11] In his report Mr Meyer dealt in detail with competition matters like the market in which advocates practise their profession, the supply and demand sides of the market and international and South African anti-trust experience relating to the legal profession, and came to the conclusion that some of the respondents' rules contained restrictions substantially preventing or lessening competition in the legal services market. The enquiry should then have been whether, having regard to internationally accepted norms, the restrictions were reasonably required for the maintenance of professional standards or the ordinary function of the profession. But, although Mr Meyer repeatedly stated that the application had to be considered and decided under Schedule 1, there is no indication in the report that he ever conducted the enquiry envisaged in item 1(b). He evaluated each rule separately by describing, first, the rule in question, then the respondents' comments thereon, and then the comments from the Minister, followed by the Commission's own comments and finding, with no mention whatsoever of the requirements of item 1(b). The point is illustrated

8 Internationally applied norms had to be taken into account but were obviously not definitive.

by the way in which he dealt with the so-called referral rule[9]. After quoting some of the Minister's comments he proceeded to say (under the heading "The Competition Commissioner's comments"):

> "The Commission is not swayed by the arguments put forward by the GCB in support of this restriction. The point of view of the Minister responsible for the profession that voluntary, non-collusive, specialization would be more appropriate is supported. Moreover, it stands to reason that extra costs must be incurred if a client has to proceed through an attorney. The Minister has in fact pointed out that the practice does increase costs. It is noted that the GCB does not concur."

Not a single reason for refusing to exempt the referral rule was added.

This deficiency in the report becomes all the more apparent when one looks at the way in which Mr Meyer dealt with international norms. Under the heading "Grounds on which an application may be based" he said that the respondents' rules for the most part conform to those norms that are of international application in jurisdictions where there is a divided profession. Elsewhere, however, (under the heading "reasonably required, having regard to internationally applied norms") he said:

> AThe applicants in an application for exemption under this Schedule would be well able to show international precedent to support the restrictions in their rules ... However, the Commission is obliged to consider very carefully not only the development in recent years regarding the professions in this country from a competition law perspective, but also the anti-trust developments in other countries in this regard. Thus, the mere fact that professional associations in other countries apply certain norms need not deter the

9 The rule differs from association to association but is generally to the effect that, with certain exceptions, an advocate may accept briefs from attorneys only.

> Commission from taking a wider perspective on the matter.@

One would have expected that, when he came to evaluate a particular rule, Mr Meyer would state, in the context of the maintenance of standards and the ordinary function of the profession, the reasons why he found the relevant international norms inappropriate in this country. He did nothing of the kind.

The "wider perspective@ which he urged the Commission to adopt was elucidated by a later remark. After stating that

> "[i]t must be emphasized that the Commission retains the discretion to either grant or refuse an exemption. Without limiting the scope of the application and its evaluation, the following factors *inter alia* could be taken into account ..."

he listed eight factors which, he said, the Commission was entitled to take into account. Several of these are highly questionable but I will only deal with the one described as "Government policy as formulated by the Minister of Justice and Constitutional Development." What is important about this part of the report, is the way in which Mr Meyer handled the Minister's comments. As mentioned earlier, his *modus operandi* in evaluating each rule was to contrast the respondents' contention with that of the Minister. Invariably he came down on the latter's side. The report abounds with lengthy quotations from the Minister's comments but what does not appear from the report is an appreciation of the fact that at that very time the Minister was set upon a radical transformation of the entire legal profession. In this regard Mr Meyer said:

"The Minister of Justice has pointed out that his Department is in the process of

drafting a Legal Practice Bill, which will regulate the practice of law in accordance with section 22 of the Constitution of the Republic of South Africa. The premise underlying this legislation is that *regulation of a profession is justified only in so far as it is necessary to protect the public interest.* The Bill does not perpetuate the statutory recognition of the distinction between advocates and attorneys ... In order to deal with the effect of the De Freitas and Van der Spuy decisions, the Bill also provides that ANo legal practitioner shall be barred from taking instructions directly from a member of the public, provided that he or she complies with the provisions of the Act ...” (Emphasis added.)[10]

It appears from this passage and other parts of the Minister’s commentary that he commented on the respondents’ rules in the wider context of the general transformation of the profession and that he did so from the point of view of the public interest, and not by enquiring into the need of any rule for the maintenance of standards or the ordinary function of the profession. This, and the fact that the Commission’s allotted task under item 1(b) of Schedule was quite different, Mr Meyer failed to address. The result was that much was said about the social impact of the rules but nothing concerning the question whether they were reasonably necessary for the prescribed purpose.

[12] For the simple reason that it has adopted the report as the essence of its reasons these flaws in the Meyer report must also affect the proceedings of the Commission. Thus the statement in the answering affidavit that the Commission had applied the test contemplated in Schedule 1 has been shown to be wrong. Like the Minister and like Mr Meyer it, understandably, concerned

10 In *Society of Advocates of Natal v De Freitas and Another* 1997 (4) SA 1134 (N) and *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577(T) the Full Courts in Kwazulu-Natal and Gauteng held the referral rule to be in accordance with the common law of South Africa.

itself with the protection of those who use the services of advocates and with the promotion of the public interest, [11] but failed to enquire whether those objectives were not best served by the respondents' rules. There can be no doubt that, by blandly accepting the Minister's comments, the Commission became embroiled in the wider debate about the transformation of the legal profession and lost sight of the real question it had to resolve under item 1(b).

[13] It was submitted on the respondents' behalf that the Meyer report and the answering affidavit reveal that the Commission lacked understanding of its functions and that this, coupled with other features of the case (like the fact that the Commission did not reveal the Minister's commentary to them, the way in which the Commission treated the judgments in *De Freitas* and *Van der Spuy*[12] and the confusion surrounding the nature of the Commission's decision and the provision of the Act in terms of which it was taken) provided sufficient reason to the Court *a quo* to decline a remittal to the Commission.

[14] It is not necessary to deal at length with a reviewing court's power to substitute its own decision for that of an administrative authority.[13] Suffice it to say that the remark in *Johannesburg City Council v Administrator, Transvaal and Another* [14] that "the court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes AJA observed in *Livestock and Meat Industries Control Board v Garda*[15]

> " ... the Court has a discretion, to be exercised judicially upon a consideration

11 The Commissioner said eg:

> [The Commission's] concern is to promote the interests of those who use the services offered by "advocates, to maintain and if possible enhance the standards that the profession currently sets, and to protect and promote the interests of the public at large."

12 In the answering affidavit the Commissioner brushed both judgments aside by saying that the cases had not been decided "with reference to any aspect of competition law" and that 'it is arguable that, if the [Commission] ... should decide that [the referral] rule is not required for the maintenance of professional standards for the functioning of the profession, then the common law will be required to bend in order to acknowledge this."

13 Act 3 of 2000 did not apply at the time and in any event takes the matter no further.

14 1969(2) SA 72 (T) at 76D-E.

15 1961 (1) SA 342 (A) at 349G.

> of the facts of each case, and ... although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides."[16]

[15] I do not accept a submission for the respondents to the effect that the Court *a quo* was in as good a position as the Commission to grant or refuse exemption and that, for this reason alone, the matter was rightly not remitted. Admittedly, Baxter[17] lists a case where the court is in as good a position to make the decision as the administrator among those in which it will be justified in correcting the decision by substituting its own. However, the author also says:[18]

> "The mere fact that a court considers itself as qualified to take the decision as the administrator does not of itself justify usurping that administrator's powers ..; sometimes, however, fairness to the applicant may demand that the court should take such a view."

This, in my view, states the position accurately. All that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so. I can find nothing that militates against this view in Jansen JA's judgment in *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere*[19] (referred to by Baxter and relied upon by the respondents). In any event, as will presently be

16 See also *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* 1999 (1) SA 104 (SCA) at 109F-G.
17 *Administrative Law* 682-684
18 At 684
19 1976 (2) SA 1 (A).

seen, I am not convinced of a court's ability to decide the question on the material before it in the present case.

[16] Roos J regarded the Commission's failure to reveal the Minister's unfavourable comments to the respondents and to allow them an opportunity to respond as an indication of bias. I do not agree. A reasonable apprehension of bias on the part of an administrator is, of course, an established ground for refusing a remittal.[20] However, the present is but one of many cases in which an administrative body has failed to observe a principle which lawyers regard as elementary and it will be a sad day if, whenever this occurs, the body can be accused or suspected of bias. It is unfortunately one of the facts of life that administrative bodies perform their functions with varying degrees of competence. Sometimes, depending mostly on the expertise of their members and staff, they meticulously observe the requirements of natural justice; but often they do not, not because they are biased, but because they are not skilled in administrative law or inexperienced and know no better, or because a particular requirement of natural justice is simply overlooked. Thus the mere fact that *audi alteram partem* was not observed does not by itself justify an inference of bias.

[17] But what is indeed a cause of concern is the fact that the Commission has hitherto not demonstrated a proper understanding of its functions under item 1(b), which is the only realistic inference to be drawn from its failure to apply the requirements of the item properly. Moreover, the Commissioner could not be brought to realize that the Commission had erred in this respect. He seems to think that the Commission's only sin thus far has been to deny the respondents an opportunity of responding to the Minister's comments and that all that is required now, is to allow them that opportunity and then to reconsider the application afresh. Unless there is a change of heart on his part the prospects of the matter receiving proper treatment if it were to be remitted are not good.

[18] On the other hand, I have grave doubt about the ability of the Court *a quo* (and of this Court, for that matter) to decide the application for exemption in respect of all the rules of the respondents on the papers. It is all very well to say (as the respondents' counsel said in their written heads of argument) that the GCB's professional standards and the functioning of the profession fall squarely within the purview, knowledge and competence of a court, and that the expertise and experience of a court to understand what is required to maintain legal professional standards and institutional integrity are indeed greater than that of the Commission. I agree that a judge's knowledge and experience of the profession do indeed qualify him or her to form and express views on the

20 Cf *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) paras [35] - [38].

practical necessity of at least some of the rules. In *De Freitas*,[21] for example, Thirion J said that the referral rule

> "reflects an existing practice of long standing and on the strength of which Court procedure has been arranged and on the strength of which the Legislature has made a distinction between the positions of advocate and attorney. This is in itself good reason for sustaining it. The rule is one that is justifiable in the interests of the legal profession and of the public. It is not unreasonable. It should be retained."

But, in the context of the Competition Act, this type of reasoning cannot be taken too far and cannot in all cases provide the final answer in an enquiry under item 1(b). In the normal course it is for the Commission to judge the reasonableness of the need for the restriction under consideration; and, in doing so, it may take account of a range of economic and social factors. In effect it has to weigh the benefits derived from the restriction against the harm it may cause, not only to members of the profession, but to others as well. If a court of law were to assume the task, factors may well have to be considered which are no longer within the ambit of its experience and expertise; and in that case exemption cannot be granted unless the available evidence justifies such a step.

In saying this I have not lost sight of the respondents' submission that the enquiry under item 1(b) is not a competition debate. The premise on which the submission is based is that "in [the enquiry under item 1(b)] the effect of the professional rule upon competition is a given". This is so, but it does not follow that the effect of the rule upon competition becomes irrelevant to the enquiry into the question whether it is reasonably required for the maintenance of

21 *Supra at 1171B-C.*

professional standards or the ordinary function of the profession. On the contrary, as I have shown, a balancing exercise is required to determine whether its benefits outweigh its anti-competition effect. This does not mean, however, that the court must shirk its responsibility where it is indeed in a position to do such an exercise.

[19] In the present case Roos J exempted the referral rule and two others from the application of the Act.[22] I have no doubt that his decision relating to the referral rule was correct. The judgment in *De Freitas* was confirmed on appeal[23] and the effect of the judgment of this Court is that our law recognizes a divided profession coupled with a referral system. This is the law of the land and the Commission was not entitled to "bend" it[24] by refusing exemption. After all, the power to develop the common law vests in the courts – not in the Commission – and any attempt by the latter to do so would be *ultra vires* . It was not contended for the Commission that the common law in this regard should be developed by this Court as envisaged in s 39 (2) of the Constitution and no case for development of that kind was made out on the papers. The law must be applied as it stands.

But the same cannot be said of the other two rules which Roos J exempted. Both of them plainly serve a measure of good but I know too little of their economic and other effects to be able to say that either of them is

22 The first of these precludes members of the Associations from accepting briefs with non-members. The other one in effect precludes them from accepting briefs on a contingency basis without the consent of the Bar Council.

23 In a judgment reported in 2001(3) SA 750 (SCA).

24 As suggested by the Commissioner.

reasonably required to maintain professional standards or the ordinary function of the profession. In my judgment Roos J erred in exempting them. The same reasoning applies to the rules which he refused to exempt and now form the subject of the cross-appeal. I cannot say that Roos J erred in refusing to exempt them.

[20] The result is that the appeal will have to be upheld in part and that the cross-appeal will have to be dismissed. The question of costs remains. First, there are the costs of the appeal. It is quite clear that the main dispute between the parties is the exemption of the referral rule and in this regard the respondents have been successful. I have considered granting them all the costs of the appeal but have come to the conclusion that it will be fairer to order each party to pay its own costs, including the costs of the cross-appeal. The respondents are however entitled to all their costs in the Court *a quo*.

[21] I make the following order:

(1) The appeal is upheld in part. Each party is directed to pay its own costs.

(2) The cross-appeal is dismissed. Each party is to pay its own costs relating thereto.

(3) The order of the Court *a quo* is set aside and replaced with the following order:

> "(a) The first respondent's decision in the applicants' application for exemption is set aside.

(b) The rules of the applicants prohibiting their members, subject to certain exceptions, from accepting briefs from persons other than an attorneys are exempted from the application of Part A of Chapter 2 of the Competition Act 89 of 1998.

(3) (c) Subject to paragraph (b) hereof the applicants' application for exemption is remitted to the first respondent for reconsideration.

(d) The first respondent is ordered to pay the applicants' costs including the costs of two counsel."

(4)

(5)

Concur
Howie JA
Harms JA
Scott JA
Mpati JA

(6)

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JJF HEFER
Acting President