



THE SUPREME COURT OF APPEAL  
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 234/2008

W W GIBBS and 23 OTHERS

APPELLANTS

and

MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT & 5 OTHERS

RESPONDENTS

**Neutral citation:** *Gibbs v Minister of Justice* (234/08) [2009] ZASCA 73 (1 June 2009)

Coram: NAVSA, BRAND JJA, HURT, GRIESEL and BOSIELO AJJA

Heard: 11 May 2009

Delivered: 1 June 2009

Updated:

**Summary:** Principle of legality — Interpretation and application of statutory scheme — Public Service Act 111 of 1984 — Public Service Act 103 of 1994— Magistrate's Act 90 of 1993 — Regulations — whether system of merit awards previously applicable to certain Magistrates, continue to have legal validity — no legal basis for awards which, in any event, militate against judicial independence and constitutional values.

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## ORDER

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**On appeal from:** High Court Pretoria (Botha, Rabie JJ and Fabricius AJ sitting as court of first instance).

The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

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## JUDGMENT

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**NAVSA JA and BOSIELO AJA: (BRAND JA, HURT and GRIESEL AJJA concurring)**

### INTRODUCTION

[1] The question in this appeal is whether senior magistrates and magistrates (including the 24 appellants) are legally entitled to continue to be considered for and receive merit awards as part of their conditions of service.<sup>1</sup> The present appeal is against a decision of a Full Bench of the Pretoria High Court, sitting as a court of first instance, which decided the question against the appellants.

### BACKGROUND

[2] In 1984, by virtue of s 36 of the Public Service Act 111 of 1984 (the PSA), a public service staff code was promulgated,<sup>2</sup> in terms of which categories of public servants could qualify for merit awards. The purpose of merit awards is set out at the commencement of chapter B.XII of the staff code under the heading: 'SPECIAL RECOGNITION FOR SUSTAINED ABOVE-AVERAGE JOB PERFORMANCE, FOR

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<sup>1</sup> The system of merit awards does not apply to Regional Court Presidents, Regional Court Magistrates and Chief Magistrates.

<sup>2</sup> Chapters B.XII/1 and K.II/1/7.17(b) governed the rights and privileges relating to merit awards.

EXCEPTIONAL EFFICIENCY AND FOR AN EXCEPTIONAL ACHIEVEMENT, INVENTION, IMPROVEMENT, ETC.’ The purpose of merit awards is set out as follows:

‘To grant special recognition (within the context of the rank) to officers and employees who have distinguished themselves from their peers through sustained above-average work performance.’

The system was intended to act as an incentive toward above-average performance.

[3] Prior to 1994 magistrates were appointed in terms of the PSA and as such were public servants, in effect derogating from their judicial independence.<sup>3</sup> Senior Magistrates and Magistrates could thus be considered for merit awards. During this period magistrates were responsible for various duties including administration. This involved performing extra-judicial duties of an administrative nature not only for the Department of Justice but for other Government departments, including the collection of revenue, the processing and payment of social benefits, the processing and administration of labour contracts.

[4] In being considered for merit awards magistrates would be evaluated and, depending on their performance, would be classified in either category A or B. Magistrates who fell under category A were entitled to 18% of their annual salary whilst those who fell in category B were entitled to 10% of their annual salary. They would then be paid the cash equivalent of these percentages.

[5] The relevant provisions of the Magistrates Act 90 of 1993 (the MA) came into operation on 11 March 1994.<sup>4</sup> The MA provided for the appointment of magistrates by the Minister after consultation with the Magistrates Commission.<sup>5</sup> It heralded a new era in line with the Constitution to ensure and promote an independent judiciary. Magistrates were no longer required to perform any administrative functions and their duties were confined to judicial and *quasi*-judicial work.

[6] The PSA was repealed by the Public Service Act 103 of 1994 (the 1994 PSA),

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<sup>3</sup> See discussion below. More particularly paras 14 and 23.

<sup>4</sup> Section 17 of the MA amended s 9 of the Magistrates’ Courts Act 32 of 1944 and thereby made provision for the appointment of magistrates for districts or sub-districts.

<sup>5</sup> See ss 10 and 4 of the MA read with s 9 of the Magistrates’ Courts Act 32 of 1944.

which came into operation on 3 June 1994. Section 42 of the 1994 PSA made provision for a public service staff code which was promulgated in terms identical to the one that it replaced. On 1 July 1999 the Deputy Director-General: Public Service and Administration gave notice that the Minister for the Public Service and Administration had, in terms of the provisions of the 1994 PSA, withdrawn the Public Service Staff Code with effect from 1 July 1999, subject to the provisions of Public Service Regulations. The Public Service Regulations were published on 1 July 1999<sup>6</sup> and provided for transitional arrangements. More particularly in respect of the present dispute, it provided that evaluations for merit award purposes would continue until 31 December 2000, unless a state department was ready to implement performance management and development schemes, in which event the merit award system would cease on an earlier date.

[7] The result of the foregoing was that in the public service, excluding the magistracy, the system of merit rewards was replaced by performance management and development schemes.

[8] Alongside this statutory progression, material provisions of the MA must be considered. Section 11, under the heading 'Conditions of service of magistrates, except salary and vacation of office', stipulates:

'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.'

[9] Section 18(3) of the MA provides:

'The conditions of service applicable to a person referred to in subsection (1) immediately before the date of commencement of section 12, shall not be affected to his or her detriment, and no such condition of service shall, after such date, be construed or applied in a manner which is less favourable to the person concerned than the manner in which it was construed or applied immediately before the said date.'

Section 12 came into operation on 11 March 1994. Section 18(3) was clearly intended to be protective of the established legal rights of persons appointed as magistrates prior to that date.<sup>7</sup>

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<sup>6</sup> Government Gazette No 20271 — Notice No 847.

<sup>7</sup> Section 12 came into operation on 11 March 1994. Many of the appellants were appointed subsequent to 1994.

[10] In 1998 the Independent Commission for the Remuneration of Public Office Bearers Act 92 of 1997 came into operation. The Commission was empowered to make recommendations concerning the salaries, allowances and benefits of public office bearers including judges and magistrates. Section 12(1)(a) of the MA provides:

‘Magistrates are entitled to such salaries, allowances or benefits—

- (i) as determined by the President from time to time by notice in the *Gazette*, after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office-bearers established under section 2 of the Independent Commission for the Remuneration of Public Office-bearers Act, 1997 (Act 92 of 1997); and
- (ii) approved by Parliament in terms of subsection (3).<sup>8</sup>

[11] Section 19 of the Judicial Officers (Amendment of Conditions of Service) Act 28 of 2003, which commenced on 1 November 2003, provides:

‘Subject to subsection (2), any remuneration, including any annual salary, salary, allowance or benefit accruing immediately before the commencement of this Act to a magistrate ... is deemed to have been determined in accordance with—

- (a) section 12 of the Magistrates Act, 1993 (Act 90 of 1993)....,
- (b) ...<sup>9</sup>

[12] Notwithstanding (a) the abolition in 1994 of the non-judicial duties of Senior Magistrates and Magistrates; (b) that the public service staff code no longer applied after 31 December 2000; (c) that the President had not in terms of s 12 of the MA made any provision by notice in the *Gazette* for merit awards; and (d) that the regulations contemplated in s 11 of the MA do not provide for merit awards, the Department of Justice continued with a system of evaluations for the purposes of these awards. This is in itself mystifying. There were no longer administrative performances to assess. It would be anathema if what was being evaluated was judicial work. The affidavits filed on behalf of the parties were not enlightening on this aspect.

[13] From 1994 to 1996 the department was involved in ‘evaluations’ for the purpose of merit awards. Since 1997 the department was not involved in such evaluations. From that date magistrates evaluated themselves until 2004 when the problem that gave rise to the present appeal reared its head. The limited information provided by the

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<sup>8</sup> Parts of s 12 have been amended and substituted on a number of occasions over the years.

<sup>9</sup> Provisions relating to judges have been omitted.

parties indicates that evaluations were finally approved by provincial evaluation moderating committees.

[14] During November 2004 the Magistrates Commission resolved that the merit award system for magistrates should be abolished, noting the criticisms that this system had attracted over a long period of time and recording that these awards were inconsistent with judicial office. Furthermore, the Commission, apparently intent to ensure that in effect Senior Magistrates and Magistrates were not financially prejudiced, decided to recommend to the Minister that a motor vehicle financing benefit that had hitherto not being extended to Senior Magistrates and Magistrates should now be afforded to them. It is recorded by the Magistrates Commission that the value of the motor vehicle financing benefit would be 'at least equal to an A category merit award classification'. This decision was communicated to the second respondent, the Director-General of the Department of Justice and Constitutional Development. This led to a flurry of communication, both internally within the department and between magistrates and the department. At one stage the State law advisor was involved.

[15] On 5 November 2004 the President, acting in terms of s 12 of the MA, determined the salary and benefits of magistrates. No provision was made for merit awards neither was provision made for a motor vehicle finance scheme for magistrates and senior magistrates. On 24 November 2005 the President issued a proclamation determining the salaries and benefits of magistrates with effect from 1 April 2005 including the motor vehicle finance scheme. Once again, no provision was made for merit awards.

[16] During 2004/2005 all the appellants and presumably other magistrates of similar rank were 'evaluated' for the purpose of merit awards. In monetary terms a category A evaluation would have yielded a financial benefit in an amount of R46 543.68 whilst a category B evaluation would have yielded an amount of R25 857.60. After the evaluation process numerous enquiries on behalf of the appellants concerning the payment of these benefits came to nought.

[17] On 15 February 2005 the second respondent decided, on behalf of the

Department of Justice and Constitutional Development, to terminate the payment of merit awards. It is that decision that led to two applications in the Pretoria High Court for an order, inter alia, declaring the system of merit awards to be lawful and to form part of 'the remuneration' of Senior Magistrates and Magistrates. These were consolidated and were heard before a Full Bench of the Pretoria High Court.

[18] As stated above the application was unsuccessful. The court below rejected the submission on behalf of the appellants that they and other magistrates were entitled to a hearing before the decision to terminate the merit awards was taken. Botha J, writing for the court below, held that merit awards could rightly be considered to have formed part of the conditions of service of Senior Magistrates and Magistrates. Before us that conclusion was not challenged.

[19] The court below concluded that there was no statutory basis for the payment of merit awards. Furthermore, it held that, because of the provision of a motor vehicle finance benefit, the magistrates had not been detrimentally affected. In the view of the court below the failure of the second respondent to provide the magistrates with a hearing did not affect the legality of his decision. The appellant's reliance on the doctrine of legitimate expectation, as referred to in *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 34F-G, was unsuccessful.

[20] The first and second respondents, the Minister of Justice and Constitutional Development and the Director-General, contest the appellants' assertion of a right to continue to be considered for and to receive merit awards, primarily on the basis of the principle of legality.

[21] In my view, this challenge is well-founded. In *Fedsure Life Assurance Ltd v Greater Johannesburg TMC* 1999 (1) SA 374 (CC) at para 56 the following appears:

'[I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law — to the extent at least that it expresses this principle of legality — is

generally understood to be a fundamental principle of constitutional law.<sup>10</sup>

[22] There is no statutory or other legal foundation for merit awards for magistrates. Furthermore, the relevant parts of s 165 of the Constitution are material and they provide as follows:

- '(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs 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.
- (5) ...'

[23] Merit awards in which the Department of Justice was historically involved detract from the judicial independence that the Constitution demands. The criticisms over the years concerning merit awards and how they lend themselves to potential pressure by the executive are justified. Judicial officers should not require incentives to comply with their oath of office and their constitutional obligations. The Magistrates Commission and the respondents cannot be faulted for their decisions to put an end to merit awards. If anything, they should be commended for doing so.

[24] In addition to what is set out in the preceding paragraphs there are further considerations. Awards that historically were awarded in relation to administrative tasks are now sought by the appellants, notwithstanding that those tasks have since been abolished. This militates against the most fundamental constitutional values of accountability, responsiveness and openness. As stated above, there is a paucity of information concerning the basis for the 'evaluations'. We are baffled by what was in fact evaluated. That the magistracy itself was responsible for the evaluations is an added negative feature.

[25] The reliance by the appellants on *Zenzile* is misguided. That case referred to

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<sup>10</sup> Section 1(c) of the Constitution provides:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) ...
- (b) ...
- (c) Supremacy of the constitution and the rule of law.
- (d) ...'



the decision of this court in *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 748G.<sup>11</sup> In the latter case, it was held that when a statute empowers a public body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the individual has a right to be heard before the decision is taken unless the statute expressly or by implication indicates the contrary. This is usually expressed as the doctrine of legitimate expectation which relates to the *audi alteram partem* principle. In *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) at 731J-732A the following was said:

‘According to the traditional approach, it matters not whether the expectation of a procedural benefit is induced by a promise of some procedural benefit itself or by a promise that some substantive benefit will be acquired or retained. The expectation remains a procedural one.’<sup>12</sup>

[26] The appellants relied on *Zenzile* for substantive relief. The notice of motion does not seek an opportunity to make representations or to be heard. The principal problem for the appellants is that a hearing could not have the effect the appellants sought, namely, the payments flowing from the merit awards — because there is no legal basis for such payment. One can only have a legitimate expectation in relation to a right that is legally sustainable and enforceable. It is not insignificant that the Magistrates Commission on which magistrates have representation and a voice debated the issue.<sup>13</sup>

[27] The Magistrates Commission was astute to ensure that magistrates were not worse off financially and therefore recommended that the motor vehicle finance benefit scheme be extended to them. The appellants bore the onus to prove that such benefits as they previously enjoyed had been diminished. This they failed to do. All the indications are that motor vehicle finance benefit scheme had, at the very least, made up for the financial benefits that used to flow from the merit awards that were abolished.

[28] In my view, the reasoning and conclusions of the court below cannot be faulted.

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<sup>11</sup> At 34J-35B.

<sup>12</sup> In this regard *Zenzile* and *Traub* were referred to (at 732A-D).

<sup>13</sup> In terms of s 3 of the MA two magistrates with the rank of chief magistrate, two regional magistrates and two magistrates who do not hold the aforementioned ranks are part of the Magistrates Commission.

For the reasons referred to above, the following order is made:

The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

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M S NAVSA  
JUDGE OF APPEAL

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L O BOSIELO  
ACTING JUDGE OF APPEAL

## APPEARANCES:

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L KELLERMANN

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