THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 388/2020

In the matter between:

THE MAGISTRATES COMMISSION	**FIRST APPELLANT**
ZOLA MBALO N.O. **(Chairperson of the Appointments Committee of the Magistrates Commission)**	**SECOND APPELLANT**
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**THIRD APPELLANT**
CORNELIUS MOKGOBO N.O. **(Acting Chief Magistrate Bloemfontein Cluster "A")**	**FOURTH APPELLANT**

and

RICHARD JOHN LAWRENCE	**RESPONDENT**

and

THE HELEN SUZMAN FOUNDATION	**AMICUS CURIAE**

Neutral citation: *The Magistrates Commission and Others v Richard John Lawrence* (Case no 388/2020) [2021] ZASCA 165 (2 December 2021)

Coram: PONNAN, SALDULKER, VAN DER MERWE and MOLEMELA JJA and POTTERILL AJA

Heard: 01 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 2 December 2021.

Summary: Constitutional law – review of a decision of the Appointments Committee of the Magistrates Commission not to shortlist a candidate for appointment as magistrate – rigid exclusion of candidate solely on account of being a white male – recommendation of Appointments Committee reviewed and set aside.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Daffue ADJP and Molitsoane J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Potterill AJA (Ponnan, Saldulker and Van der Merwe JJA concurring)

[1] At the heart of the appeal is the legality and constitutionality of the shortlisting process of the Magistrates Commission and its decision to overlook the respondent. The respondent, Mr Richard John Lawrence (Mr Lawrence), an acting magistrate, applied for the position of a permanent magistrate in response to advertisements for such positions in the magisterial districts of Bloemfontein, Botshabelo and Petrusburg. He was not shortlisted for any of these posts. Aggrieved, he approached the Free State Division of the High Court, Bloemfontein (high court) for relief. The Magistrates Commission (the Commission), Mr Zola Mbalo NO, the Chairperson of the Appointments Committee of the Magistrates Commission (the Chairperson), the Minister of Justice and Correctional Services (the Minister) and Cornelius Mokgobo NO, the Acting Chief Magistrate Bloemfontein Cluster "A", were cited as the first to fourth respondents respectively. The Helen Suzman Foundation was admitted to the proceedings as an amicus curiae.

[2] The application succeeded before Daffue ADJP (Molitsoane J, concurring), who issued the following order:

'1. It is declared that the shortlisting proceedings chaired by second respondent for the vacancies of magistrates for the Free State relating to the districts of Bloemfontein, Botshabelo and Petrusburg were unlawful and unconstitutional.
2. The aforesaid shortlisting proceedings and consequently also the recommendations of the Appointments Committee of first respondent and the appointment by third respondent of magistrates for the districts of Bloemfontein, Botshabelo and Petrusburg are reviewed and set aside.
3. First and third respondents shall pay applicant's costs of the application jointly and severally, the one paying the other to be absolved.
4. The amicus curiae, the Helen Suzman Foundation, shall be responsible for its own costs.'

The appeal, with the leave of that court, is against the whole of the judgment and order of the high court.

[3] Before turning to the substantive merits of the dispute, two ancillary issues require consideration. First, it was contended on behalf of the respondent that in terms of s 5(2), read with s 6(7), of the Magistrates Act 90 of 1993 (the Act) the Appointments Committee (the Committee) was not quorate when candidates were shortlisted for appointment to Bloemfontein. Second, the appellants contended, *in limine*, that, as all of the other shortlisted candidates had a direct and substantial interest in the outcome of the proceedings, the respondent's failure to join them precluded the court from granting the relief sought by the respondent until they had been joined as parties to the proceedings.

Was the Bloemfontein shortlisting committee quorate?

[4] The high court upheld the point *that* the Committee was not quorate in respect of the Bloemfontein shortlisting process. The Committee comprised 10 members. In terms of s 5(2) of the Act the 'majority of the members of the Commission shall constitute a quorum for a meeting of the Commission'. During the shortlisting only five members were present. The Chairperson, who had commented that the Committee needed six members to be quorate, appeared to

be alive to the fact that the number present fell below the required number to constitute a quorum. However, the Chairperson sought to rely on s 5(4), read with s 6(7), of the Act as permitting the continuation of the meeting.

[5] Section 5(4) provides:

'The person presiding at a meeting of the Commission may regulate the proceedings and procedure thereat, including the quorum for a decision of the Commission, and shall cause minutes to be kept of the proceedings.'

And, in terms of s 6(7) the 'provisions of section 5 shall *mutatis mutandis* apply to a meeting of a committee'.

[6] The argument advanced on behalf of the appellants was that on a plain grammatical reading of s 5(4) of the Act, the Chairperson was empowered to regulate the proceedings and procedure at a meeting, including to proceed with the meeting despite the fact that the number present was less than that envisaged in s 5(2). The problem with this argument is that it simply ignores the mandatory provisions of s 5(2) as well as the word 'decision' in 5(4) of the Act. Such interpretation renders the section nugatory. Before any validly binding decision can be taken at a meeting, the meeting itself must be quorate in terms of s 5(2). Thus, before the chairperson can regulate the proceedings and procedure at a meeting in terms of s 5(4), the meeting must be properly constituted. In other words, absent a proper quorum in terms of s 5(2), there was no valid meeting and s 5(4) could therefore not be invoked. Section 5(4) in context deals with the determination of a quorum for a decision at a quorate meeting. In other words, by way of example, the Chairperson could direct that a decision would have to be unanimous or require a two-thirds or a simple majority.

[7] Requiring a majority in terms of s 5(2) is consistent with the purpose of the Act. The function of the Committee is to shortlist candidates for possible

appointment. Judicial officers in the district and regional courts play a vital role in the administration of justice.[1] The appointment of judicial officers is an important exercise of public power to ensure the independence of the judicial branch of government.[2] The Committee meeting is vital to that purpose. A quorum is consistent with the principle that a majority of members would better serve the purpose for which the Committee was established.[3]

[8] As it was pointed out in *Amos v Minister of Justice and Others* [2019] ZAWCHC 130 para 43:

'The appointment of judicial officers is a delicate matter which the public has a right to expect will be carried out carefully and with due and scrupulous regard for the legal prescripts concerned. It is fundamentally embarrassing when those who are involved with the process get it wrong, because of a basic failure to attend to the fundamentals, particularly when they, of all persons, would surely be expected to know what the law requires of them. As a constitutional state we cannot allow the process of the appointment of magistrates, who are the backbone of our legal system, to be dealt with in a haphazard or lackadaisical fashion.'

[9] To sum up, as the meeting was not quorate, the decisions taken at that meeting, including the shortlisting of candidates for Bloemfontein, cannot stand and accordingly falls to be set aside.

Non-joinder of the shortlisted candidates

[10] The high court dismissed this point on the basis that all the shortlisted candidates knew of the application and could have opposed same if they so wished.

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[1] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* [2013] ZACC 13; 2013 (7) BCLR 762 (CC) para 63.
[2] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC) para 67.
[3] *De Vries and Others v Eden District Municipality and others* [2009] ZAWCHC 94 para 38; *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) para 20.

[11] At the hearing of the appeal counsel for the appellants conceded that all the shortlisted candidates for the posts at Botshabelo and Petrusburg provided written or telephonic confirmation that they would abide the decision of the court. The point was accordingly abandoned in respect of those two districts.

[12] With regards to the Bloemfontein post: it was conceded that if the meeting relating to the shortlisting of candidates for Bloemfontein was not quorate, as I have found, then the issue of non-joinder would be rendered academic and need not detain us.

Legal Framework

[13] Turning to the merits: A useful starting point is ss 174(1) and 174(2) of the Constitution, which provides:

'(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.

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

[14] In addition, s 174(7) provides:

'(7) 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 legislation envisaged in s 174(7) is the Act. Section 10 of the Act provides:

'(10) The Minister shall, after consultation with the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts 30 Act.'

[15] Regulations[4] have been published under the Act for the appointment of magistrates in 1994. Regulation 3 sets out the requirements for appointment as a

[4] Regulations for Judicial Officers in Lower Courts, 1994 GN R361, *GG* 15524, 11 March 1994.

magistrate. It states that a person may not be appointed as a magistrate or additional magistrate of a district court, or as a magistrate of a regional court, unless that person is appropriately qualified; a fit and proper person; and a South African citizen. Regulation 5 provides:

'In the appointment or promotion of a magistrate, only the qualifications, level of education, relative merits, efficiency and competency for the office of persons who qualify for the relevant appointment or promotion shall be taken into account.'

[16] The Commission on 7 April 2011 approved the appointments procedure (AP) of the Committee.

[17] The AP identifies various criteria for shortlisting purposes, namely:

'Section 174(2) of the Constitution-

The racial and gender demographics at a specific office, within an administrative region / regional division and on a national level on a specific rank are to be considered in order to inform the application of section 174(2). Section 174(2) seeks to address imbalances created in respect of previously disadvantaged groupings.

Relevant experience-

The minimum required relevant legal experience in respect of entry-level posts is 5 years and the minimum required relevant legal experience in respect of regional court posts is 7 years. Consideration should not only be given to the total number years of experience but also to the nature, diversity, quality and relevance of such experience.

Qualifications-

Appropriately legally qualified persons should be considered.

. . .

Appropriate managerial experience or managerial skills-

Consideration is given to the fact that each judicial officer has to manage his/her own court environment as well as the fact they have to manage the case flow in their own courts. In respect of posts where a magistrate will have other magistrates that will report to him/her, albeit on the same rank, consideration is given to practical managerial experience or managerial skills that an applicant may possess.'

[18] The AP stipulated that the listed criteria are not to be 'applied in any fixed order or sequence of preference or prioritisation'.

Mr Lawrence's candidature

[19] Mr Lawrence commenced acting as a magistrate in the Bloemfontein Cluster 'A' group on 2 January 2015. He did so for four years and at the time of the shortlisting process his acting appointments, each for three months at a time, had been renewed for the 48th time. When the proceedings were instituted Mr Lawrence had been acting as the Head of the Petrusburg office for two years. But, he was also assisting in Bloemfontein and various other courts.

[20] The competence and experience of Mr Lawrence was not in dispute. His acting appointments were renewed for a period of four years in accordance with the Deputy Minister of Justice's letters to the Chair of the Chief Magistrates' Forum wherein it was stressed that acting appointments should not be extended for a period of longer than two years and that when acting appointments were extended for longer than two years it had to be strongly motivated and convincing. The motivations from the acting senior magistrate, Mr Mokgoba, and the acting chief magistrate, Mr Matshaya, for the 48 extensions were strong. In the progress report of September 2018, Mr Matshaya recorded that the statistics revealed that under Mr Lawrence, the Petrusburg court was elevated to the second best performing court in the cluster and the fifteenth best performing court in the country. He remarked: 'This result was extremely pleasing since Mr Lawrence had, during this period, also materially contributed to the statistics for Jagersfontein court which came 1st in the cluster and 9th overall in the country'. In the later statistics, the Petrusburg office was elevated to the eight best performing court in the country. Petrusburg, still under the guidance of Mr Lawrence, then went to the fifth best performing court in the country and by

November 2018 Petrusburg was ranked the best performing court in the Free State and in the country.

[21] He managed the office well and held meetings with stakeholders in the community to identify issues and took remedial action to improve the service delivery of the office. His productivity in finalising matters was outstanding with him clearing backed-up court rolls. His judgments were sound and well-reasoned. He was praised for his contribution to peer support and the empowerment of colleagues through the training he provided.

[22] Mr Lawrence met all of the requirements of regulation 3 in that he was appropriately qualified, a fit and proper person and a South African citizen. He had the level of education and competency for the posts he applied for (regulation 5). His application also complied with all of the advertised requirements for the posts. Having met all of the prescribed requirements, Mr Lawrence's application fell to be considered alongside those of the other candidates, who likewise met those requirements.

[23] The record reflects that although Mr Lawrence's name was mentioned three times during the shortlisting process, he was simply excluded from consideration for any of the posts. I find it necessary to quote from the record for the post advertised at Petrusburg to highlight the committee's approach to Mr Lawrence's application:

'MS NALIA: This position was previously occupied initially by as I remember Mr Mchaiya and then he was – came through to Bloemfontein and acting magistrate Mr Lawrence has been there, but as I indicated earlier our cluster establishment, we are sitting with 11 white males at presently.

CHAIRPERSON: No, we are not looking for white males in your cluster at all.

MS NALIA: All right

CHAIRPERSON: And even females, how are your white females?

MS NALIA: We have only got six, so we can – I looked at the demographics, we can may be look at one or two white females, but other than that we have to place, for us we have to place emphasis also on the coloured and the Indian females.

UNIDENTIFIED PERSON: In your head of court positions, what do you have, white males mostly?

MS NALIA: No not really, not head of court positions.

. . .

MS NALIA: . . . It is a predominantly Afrikaans speaking community that we have there. I looked at the community, it is a huge farming community in Petrusburg. Definitely as Ms van Zyl said, there is a need for a female magistrate as a head of court there.

UNIDENTIFIED PERSON: Yes.

MS NALIA: Because I do not believe that there ever had a female magistrate in that as a head in that court house.

UNIDENTIFIED PERSON: I think Mr Mchaiya was the first person of colour there.

MS NALIA: Yes, that is correct.

CHAIRPERSON: Not white. Just female, but not white.

MS NALIA: In that position?

CHAIRPERSON: Yes.

MS NALIA: Then we are looking definitely at – but then I was looking at – but as you said we have got to be very careful about the interpreter. So I am going to take that into account.

UNIDENTIFIED PERSON: Take away the white

. . .

MS NALIA: . . . I looked at the Afrikaans community. It is – but when I say Afrikaans, it is the Sothos and Tswanas that speak, they speak Afrikaans and the court setup etcetera, that is what I looked at.

CHAIRPERSON: We are also looking for experience ma'am.

MS NALIA: We are also looking for experience. Acting experience and managerial experience. So are we out of white positions?

. . .

CHAIRPERSON: Experience yes, because one person station and head office. So we cannot take. . . (intervention).'

[24] ‘Take away the whites’ suggests the application of a rigid exclusionary criterion base on race. The record reflects the same position taken and practice applied by the Committee pertaining to the other two posts; a targeted exclusion of white candidates. It is manifest from the transcript that the Committee was not prepared to consider any of the other criteria in relation to Mr Lawrence. There ought to have been no fixed order or sequence of prioritisation of the listed criteria, but rather a consideration of all of the relevant criteria and, where necessary a balancing of the one against the other. There is always the question of the weight to be allocated to the different factors in any given situation. Depending on the circumstances, certain factors may have to assume greater significance than the others, but the Committee cannot adopt a blanket approach that prioritises one factor to the exclusion of all the other factors. In adopting a blanket exclusion, as happened here, the Committee impermissibly fettered its own discretion.

[25] The ‘circumstances of the post’ was that of Head of the Office of a one-person station. As the answering affidavit made clear, the needs of such office were that ‘the short-listed candidate will have to have experience in civil, criminal and family law and the intricacies of the community that is served by the office e.g. local beliefs and traditions’. The Committee recognised that the candidate would need acting and managerial experience. They knew that due to the predominance of the Afrikaans language spoken in Petrusburg, an interpreter would be required if a non-Afrikaans speaking candidate was appointed. The Committee disregarded the fact that Mr Lawrence had acted and managed the Petrusburg office. Mr Lawrence had criminal, civil and family law experience. The Committee did not balance the relevant experience, qualifications, needs of that office and the appropriate managerial skills, instead it used race as a guillotine to exclude from consideration candidates who were white.

[26] Reliance was sought to be placed on *Solidarity and Others v the Department of Correctional Services and Others*[5] (*Solidarity*). It was there stated: 'The targets in the 2010 EE Plan should not be viewed in isolation as does the second judgment. The correct approach is to look at the 2010 EE Plan holistically including the provisions relating to deviations'. However, the appellants' reliance on *Solidarity* is misplaced.

[27] *Solidarity* is not support for the approach adopted by the Committee. In *Solidarity* para 51, the matter of *Barnard*[6] was relied on as follows: 'In *Barnard* this Court, although not defining a quota exhaustively, held that one of the distinctions between a quota and a numerical target is that a quota is rigid whereas a numerical target is flexible. Therefore, for the applicants to show that the numerical targets constituted quotas, they need to first show that they were rigid'. In both *Barnard* and *Solidarity* the Constitutional Court eschewed rigidity. *Barnard* (at para 30) pointed out that: 'our quest to achieve equality must occur within the discipline of our Constitution'. In *Solidarity* (para 78), the Constitutional Court emphasised that: 'It is of fundamental importance that the basis used in setting numerical goals or targets be the one authorised by the statute. A wrong basis will lead to wrong targets.'

[28] As the written reasons for the decision made clear, Mr Lawrence was not shortlisted on the basis that he did not 'meet the section 174(2) of the Constitution-criteria in any of those offices'. The Commission therefore firmly located the reason for his exclusion in his race and gender. What is clear from the record is that the Commission was fixated on excluding candidates from a

[5] *Solidarity and Others v Department of Correctional Services and Others* [2016] ZACC 18; 2016 (5) SA 594 (CC) para 57.
[6] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC).

particular group and no flexibility or deviation from that targeted group would under any circumstances even have been considered.

[29] It is not denied that the Committee had adopted exactly the same approach pertaining to the Botshabelo and Bloemfontein posts. Mr Lawrence was never mentioned when the Bloemfontein post was considered. For the Botshabelo post his name was mentioned, but immediately rejected because he was a white male. The fixed resolve to exclude any and all white candidates on account of their race is clear. The record makes plain that what happened here was the targeted exclusion of white candidates.

[30] The amicus curiae supported the submissions on behalf of Mr Lawrence and in addition referred us to three Equality Court matters. In the first, *Singh v Minister of Justice and Constitutional Development and Others* 2013 (3) SA 66 (EqC), the Commission was ordered to clearly reflect the provisions of s 174(2), read with s 9, of the Constitution in the criteria used for shortlisting, as well as, whether candidates had a disability or not. The court found in para 27 that: '[t]he specific mention of race and gender in section 174(2) of the Constitution should not be misunderstood to be excluding the other important factors mentioned in section 9(3) of the Constitution which should be considered when short listing magistrates'.

[31] In the second, *Du Preez v Minister of Justice and Constitutional Development and Others* 2006 (5) SA 592 (EqC) para 41, Erasmus J found that the formula applied by the Committee: 'effectively gave automatic and absolute preference to black female applicants who met the minimum job requirements, irrespective of how they compared to the complainant, or for that matter to black male and white female applicants. No regard was had to how the formula affected such other applicants, nor did it have effective regard to the specific needs of the

posts, beyond the minimum qualifications for the positions. The inflexible *modus operandi* of the committee comes foursquare within the situation of absolute inclusion of designated group members to the absolute exclusion of non-designated group members. . .'. The Court found that this absolute exclusion applied by the Committee did amount to unfair discrimination in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

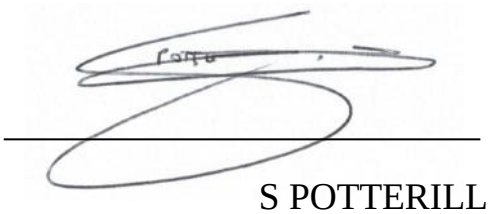
[32] In the third, *Kroukamp and Another v The Minister of Justice and Constitutional Development and Others* [2021] ZAGPPHC 526 para 48, the Court found: 'The position of the Minister in this case, seems to be that no matter how hard the Magistrates Commission tried to explain the suitability of the first complainant to be appointed as Senior Magistrate at Alberton, he was not prepared to appoint a white male to that post. His position seems to be that a white male cannot be recommended for an appointment, given the constitutional injunctions. Nothing in section 174(2) of the Constitution prohibits the recommendation, or appointment, of a white male'.

[33] In each of the three matters the court rejected the rigid approach adopted by the Committee when applying the criteria for appointment as a magistrate, as unfair discrimination. Although those matters fell to be judged in terms of the Equality Act, the elevation of s 174(2) criteria to an upfront disqualifying measure was rejected.

[34] The legislative scheme does not permit a targeted group approach, precisely because no one factor can at the outset override or take precedence over other factors. The starting point of the exercise was therefore fundamentally flawed. The record shows that the process was rigid, inflexible and quota-driven. The blanket exclusion of white persons, no matter how high they may have scored

in respect of the other relevant factors is revealing. Any white candidate, no matter how good, was mechanistically excluded. The result was that Mr Lawrence's application was not considered at all. The approach of the Committee was not consistent with the proper interpretation and application of s 174 of the Constitution, regulation 5 or the AP. Rather than considering race as but one of factors, albeit an important one, the Committee set out to exclude candidates, including the respondent, on the basis of their race. Such an approach does not meet the threshold set by our courts and cannot be countenanced. It is important to emphasise that we are concerned here with the shortlisting process. It is quite untenable that at this early phase of the recruitment process, candidates should be excluded for no other reason but their race.

[35] Consequently, the following order is made:
The appeal is dismissed with costs, including the costs of two counsel.



S POTTERILL
ACTING JUDGE OF APPEAL

Molemela JA

[36] I have read the judgment of my sister, Potterill AJA (the first judgment) and agree with the reasoning and conclusion in relation to the non-joinder issue. As regards the shortlisting process followed by the Appointment Committee (the Committee), my view is that based on the record of the Committee's deliberations pertaining to the Botshabelo post, it cannot be rightly concluded that the

shortlisting process adopted by the Committee in relation to that post was rigid, inflexible and quota-driven. As regards the Petrusburg post, I agree that the Committee's decision be set aside. I, however, also highlight the fact that the Committee irrationally failed to consider shortlisting female candidates, thereby failing to advance gender transformation in the judiciary in relation to that post. Regarding the Bloemfontein post, my view is simply that because the Committee was not quorate when the shortlisting process was undertaken, on that ground alone, the Committee's decision was a nullity and ought to be set aside.

[37] The first judgment correctly points out that a useful starting point in relation to the merits of this matter is ss 174(1) and 174(2) of the Constitution.[7] From my point of view, s 174(2) must be read with s 174(1), as these provisions are two sides of the same coin.[8] However, there is no need to canvass the provisions of s 174(1) in this judgment, as no issue was taken regarding the competence of the candidates who were shortlisted and subsequently appointed, nor their fitness to hold office. The Constitutional Court's rich jurisprudence on transformation, as laid down in a plethora of judgments, is of relevance to the issues raised in this matter. Notably, courts in many jurisdictions have often quoted dicta expressed in a different context in other judgments, to the extent that such dicta are considered to be equally appropriate in the matter under consideration.[9] Some of the passages alluded to in this part of the judgment must be seen in that context.

[7] The text of s 174 of the Constitution is set out in para 13 of the judgment.
[8] Justice Lex Mpati is reported to have stated this at his inaugural lecture at the University of the Free State, and to have elaborated on that statement as follows:
To achieve the objectives of the Constitution we [the judiciary] need to strike a balance — gender and race representivity on the one hand, and competence, integrity and skill on the other.'
[9] Compare *Premier of the Western Cape Provincial Government NO v Lakay* [2011] ZASCA 224; 2012 (2) SA 1 para 17; *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC) para 68.

[38] As stated in a plethora of judgments, 'in law, context is everything'. It is clear from the text of s 174(2) that a full appreciation of substantive equality is required. Substantive equality is not only a core and foundational value embodied in the preamble[10] of the Constitution of South Africa, it is also an enforceable right enshrined in the bill of rights.[11] Whereas s 9(1) of the Constitution guarantees formal equality, s 9(2) requires the state and other role players to take legislative and other measures to protect or advance persons that have been disadvantaged by unfair discrimination.

[39] Interpreting and understanding equality in a substantive manner inevitably requires us to acknowledge the need to redress the previously entrenched inequalities of the past.[12] Acknowledging the uniqueness of the South African Constitution, Chief Justice Margaret H Marshall[13] said: 'the South African Constitution is newer than the American Constitution. It is a product of negotiations between internal divisions rather than a statement of liberation from an external enemy. . . [a]nd in many ways your Constitution is more detailed, more specific about its aims and the processes required to achieve them'.

[40] The following remarks made by Moseneke DCJ in *Minister of Finance v van Heerden* (*van Heerden*)[14] are apposite:

'The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights.

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[10] The preamble recognises 'the injustices of our past' and aims to, inter alia, 'heal the divisions of the past'.
[11] *Minister of Finance v van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) para 22 *(van Heerden)*.
[12] In his book 'Justice, a Personal Account' at 238, Justice Edwin Cameron posits that s 9(2) of the Constitution 'was necessary because . . . it was designed to bring healing and repair to a very un-virgin landscape – one ravaged by a past that for centuries had deliberately and exclusively privileged whites'.
[13] Chief Justice, Supreme Judicial Court, Commonwealth of Massachusetts, as quoted in a paper delivered at a symposium marking former Chief Justice Chaskalson's retirement in South Africa in 2006, published in 'A Delicate Balance', edited by Jonathan Klaaren at 26.
[14] *van Heerden* para 26.

From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact. . . .'

[41] Having emphasised that our Constitution says more about equality than do comparable constitutions in that it inter alia imposes a positive duty on all organs of state to protect and promote the achievement of equality, Moseneke DCJ rightly cautioned as follows at para 29 of that judgment:

'. . . The American jurisprudence has, generally speaking, rendered a particularly limited and formal account of the reach of the equal protection right. The US anti-discrimination approach regards affirmative action measures as a suspect category which must pass strict judicial scrutiny . . . Our equality jurisprudence differs substantively from the US approach to equality. Our respective histories, social context and constitutional design differ markedly. . . .'

[42] In the same judgment, Moseneke DCJ went on to aptly describe the concept of substantive equality as follows:

' . . . [W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.'[15]

[43] Similarly, in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*,[16] the Constitutional Court stated that:

'Restitutionary measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and

[15] *Minister of Finance v van Heerden* para 31.
[16] *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) para 1.

the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order. Hence the Bill of Rights, which is a cornerstone of our democratic order, includes remedial measures.'

[44] I agree with the sentiments expressed in the passages quoted from the two seminal judgments quoted above and consider them equally apposite in relation to the constitutional injunction embodied in s 174(2) of the Constitution. As I see it, s 174(2), envisioning as it does a judiciary that reflects the race and gender demographics, is aimed at achieving substantive equality, for the measures taken in terms of ss 174(2) are equally integral to the reach of our equality protection and transformation of the judiciary. This inevitably entails redressing the injustices of the past.[17]

[45] In his oral submissions, counsel for the amicus inter alia referred this Court to the judgment of the Equality Court in *Singh v Minister of Justice and Constitutional Development and Others* (*Singh*)[18] on the basis that it is apposite to the interpretation of s 174(2) of the Constitution. In that matter, the Equality Court correctly acknowledged the need to consider substantive equality when making judicial appointments as follows:

'The injunction to consider race and gender, in terms of section 174(2) of the Constitution, when making judicial appointments is clearly fair and constitutional having regard to the history of South Africa. . . .'

I agree.

[17] In her article titled 'Women as a Sign of the New? Appointments to South Africa's Constitutional Court since 1994', published online by Cambridge University Press, Rachel E. Johnson posits that given the composition of the judiciary prior to the advent of democracy (it is common cause that it was dominated by white males) the stipulation in s 174(2) that the judiciary should reflect broadly the racial and gender composition was intended push for a more diverse judiciary was shaped by a number of overlapping and contesting agendas, which included the need for a renewal of judicial legitimacy and authority. The provisions of s 174(2) was thus aimed at ensuring that the courts could be considered to be inclusive.

[18] *Singh v Minister of Justice and Constitutional Development and Others* 2013 (3) SA 66 (EqC); (2013) 34 ILJ 2807 (EqC) para 25.

[46] I am of the view that once reliance has been placed on the provisions of s 174(2) of the Constitution (as has happened in this matter), a brief historical background that informed the inclusion of that provision becomes necessary for purposes of context. Former Chief Justice Langa lamented about the unfortunate history of South Africa as follows:

'Justice in the past had a white unwelcoming face with black victims at the receiving end of unjust laws administered by courts alien and generally hostile to them. The language of the courts was not that of the majority. Nor was the culture and social practices of the judicial officers that of the racial majority.'[19]

[47] The following statistics of the demographic composition of the judiciary as at 27 April 1994, the dawn of democracy, attest to the veracity of the former Chief Justice's remarks:[20]

High Court and Supreme Court of Appeal

Black females: 0

Black males: 3

White females: 2

White males: 160

Magistracy

The available statistics in respect of the Magistracy were recorded in 1998 and were, as at that date as follows:[21]

[19] 'Judging in a democracy: the challenge of change', quoted from a speech delivered by Langa DCJ in Johannesburg on 20 March 2004 (prior to his appointment as the second Chief Justice of South Africa), as quoted by S Mothupi *Codicillus* Volume 47 No 2 2006 ISSN 0010-020X © Unisa Press at 1-14.

[20] These statistics are included for purposes of giving context to the court's allusion to 'the history of South Africa' as quoted in paragraph 25 of *Singh*. It must be noted, however, that the appellants asserted that as at the time of the impugned shortlisting process, '[w]hite males [were] by far the most "over-represented" group (25 years after the dawn of [South Africa's] democracy)'.

[21] Despite a diligent search, the statistics in relation to the demographic composition in the Magistracy as at 27 April 1994 could not be found.

Black females: 86
Black males: 481
White females: 198
White males: 750

The historic imbalance that needed to be redressed since the advent of democracy is self-evident.

[48] It is against the background of these statistics and the provisions of s 174(2) that the allusion to the race of the candidates has to be understood whenever issues pertaining to transformation of the judiciary need to be decided. The appellants asserted that it was in the context of paying consideration to the afore-mentioned imbalance that the Committee took into account that the race profile was such that the proportion of white male magistrates constituted 26.5 percent of the total complement of the 'Free State Cluster A lower court judiciary' and was thus disproportionate to the population demographics in that area. The deponent to the appellants' affidavit averred that '[w]hite males [were] by far the most "over-represented" group (25 years after the dawn of [South Africa's] democracy)'. The appellants contended that Mr Lawrence's candidature was duly considered, but he was not shortlisted due to the over-representation of white males in that cluster. According to the appellants, the Committee was entitled to prioritise gender or race transformation when same was shown to be the most pressing need. It was thus submitted that the Committee's actions were justifiable, rational and fair having regard to the provisions of the AP.

[49] Purporting to rely on the judgment of the Constitutional Court in *South African Police v Solidarity obo Barnard* (*Barnard*),[22] the appellants asserted that

[22] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC).

the Committee's approach was flexible and did not amount to a quota system, considering that the Committee had shortlisted white males in other districts. It could not be argued that by invoking the requirements of s 174(2) the Committee acted arbitrarily or displayed naked preference, so it was contended. The appellants stressed that the conduct of the Committee should be viewed holistically, having regard to the fact that in Cluster A there was a pressing need for transformation. They contended that the court a quo had not taken this aspect into account.

[50] The deponent to the appellants' supplementary affidavit asserted that during the shortlisting meeting, the information relating to (i) the 'target' group and (ii) candidates who had acted as magistrates 'irrespective of their race and gender', was displayed on a screen. It bears mentioning that the appellants' version that the candidates' information as gleaned from their resumes was condensed and embodied in a database that was displayed on a screen, is borne out by the transcribed record of the meeting of the Committee. Furthermore, the appellants' version that Mr Lawrence's name was included in that database on the basis of having acted as a magistrate, is also borne out by the same record.

[51] The following stipulations of the AP, which were embodied in the advertisement for the respective posts, bear repeating:

'Section 174(2) of the Constitution-

The racial and gender demographics at a specific office, within an administrative region / regional division and on a national level on a specific rank are to be considered in order to inform the application of section 174(2). Section 174(2) seeks to address imbalances created in respect of previously disadvantaged groupings.'

Significantly, none of the parties have attacked the shortlisting and appointment policies set out in the AP.

[52] I am of the view that, given the history of our country, the stipulations of s 174(2) of the Constitution and the provisions of the AP, the mere allusion to the demographic composition of a specific office and the race of the respective applicants should not be considered to be a taboo topic. Having said that, I must hasten to caution that it bears being mindful that 'the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity'.[23] In *du Preez v Minister of Justice and Constitutional Development and Others*,[24] the court found that there is patent disproportionality in a selection policy based on race and gender to the absolute exclusion of all the other qualities required for a position of a regional magistrate. This dictum was approved by the Constitutional Court in *Barnard*. It is therefore crucial to bear in mind that even though the Constitution requires those selecting judges and magistrates to consider the need for the judiciary to reflect broadly the racial and gender composition of South Africa, it does not prescribe a rigid approach. The discretion of the Committee members would be fettered and the objective of broad racial and gender transformation thwarted if a mechanical approach were to be followed when considering candidates' suitability for appointment to the bench. It is thus abundantly clear from all the authorities alluded to, above, that candidates cannot be excluded from consideration solely on account of their race. I turn now to consider the issues raised in this appeal.

[53] The respondent made much about of the fact that the AP expressly provides that the listed criteria are not to be 'applied in any fixed order or sequence of preference or prioritisation'. From my point of view, this specific stipulation does not, in any way, detract from the provisions of s 174(2) of the Constitution. It is

[23] *Minister of Finance v van Heerden* para 44.
[24] *Du Preez v Minister of Justice and Constitutional Development and Others* 2006 (5) SA 592 (E) para 30.

for that reason that I agree with the first judgment's finding[25] that, depending on the circumstances, certain factors may assume greater significance than others when the suitability of candidates is considered. This is a clear recognition that the Committee had a discretion to decide which candidate to shortlist for the respective posts among those who met the requirements set out in the advertisement of the vacancies.

[54] Under the heading '[c]riteria for short-listing purposes' and the sub-heading '[n]eeds of the specific office', the AP provides that '[c]consideration is inter alia given to the type of post to be filled, e.g. Head of Court or an additional magistrate, whether the office is located in a rural or urban area, what types of matters are predominantly adjudicated upon in that office, whether the post to be filled needs specific skills such as vast civil experience, the needs of the community, etc'. The exercise of the Committee's discretion therefore inevitably entails considering the needs of the respective offices in respect of which vacancies have been advertised, among other things. This means that, as a matter of logic, it is quite conceivable that a candidate who was not deemed suitable for a post in a particular area could be considered suitable for a similar post in another area. Bringing it to the facts of this case, the fact that Mr Lawrence might not be considered a suitable candidate for a specific post would not ineluctably lead to the result that he could not be shortlisted for any other post.

[55] The appellants submitted that the fact that forty-five white candidates (of whom 16 were white males) were shortlisted by the same Committee, nationally, serves to show that race was not used as a blanket exclusion of white applicants. Indeed, the national statistics pertaining to the judicial officers appointed over the years in the magistracy and the superior courts serve to dispel

[25] Para 24 of the judgment.

the idea of a blanket exclusion on account of race, as white candidates have continued to not only be shortlisted but also appointed in various courts since the advent of democracy. That, however, does not necessarily mean that the shortlisting processes should not be scrutinised in appropriate circumstances.

[56] In relation to the impugned shortlisting processes, the appellants averred that before the shortlisting meetings were held, cluster heads were required to submit information pertaining to the race and composition of the cluster, as well as that of each office in relation to which a post had been advertised. Thereafter, the Committee would, during the shortlisting process, 'look closely' at the race and gender composition of both the cluster and the office. According to the appellants, '[a]ll the needs identified [would] determine a target group to shortlist from'. What can be gleaned from the transcript is that the Committee dealt with the different districts in Cluster A of the Free State on a post-by-post basis. In other words, they deliberated about the needs of a particular post and the candidates who had applied for that specific post, then decided on which candidates to shortlist for that particular post. Only thereafter would the Committee members move on to deliberate on the next post. That being the case, I am of the view that the utterances made by some of the Committee members in relation to one post should not, without more, be regarded as a backdrop against which the entire shortlisting process must be assessed.

[57] In *Helen Suzman Foundation v Judicial Services Commission*,[26] the majority judgment observed that '… deliberations are relevant to the decision they precede and to which they relate'. In this matter, the shortlisting process for Botshabelo preceded the one for the Petrusburg post. I am therefore of the view that it is not appropriate to consider the deliberations made in respect of the

[26] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC) para 23.

Petrusburg post as a yardstick to assess the Committee's deliberations in relation to the Botshabelo post. This is all the more so because the record shows that prior to deliberating on the Botshabelo post, the Committee had deliberated on another post within cluster A, namely Ficksburg (Mr Lawrence did not apply for this post). What is clear from the record is that a variety of factors were taken into account and some were considered more significant than others. It is for this reason that I hold the view that any shortcomings that may have been identified in respect of the Petrusburg post should not serve to tarnish the deliberations in respect of the Botshabelo post.

Botshabelo post

[58] As stated before, the deponent to the appellants' answering affidavit maintained that the information pertaining to all the candidates who had acted as magistrates was displayed on a screen during the shortlisting process, regardless of the candidates' race and gender. She averred that Mr Lawrence's information was included in that database and that his candidature was duly considered by the Committee. The record pertaining to the Committee's deliberations in respect of the Botshabelo reveals that during the discussion about Mr Lawrence's candidature, the Committee members seemed to be talking at the same time, as a result of which the transcription note states: 'indistinct, everybody is talking simultaneously'. Nothing is known of what was said when the members were talking simultaneously. It goes without saying that one cannot speculate about what was or was not said, which was not captured by the recording. That being the case, it seems somewhat unfair to conclude that Mr Lawrence's name was merely mentioned but his candidature was not considered 'at all'.

[59] The remaining part of the record of the Committee's meeting in respect of the Botshabelo post reveals that various factors were taken into account when the Committee members were deliberating about this post, including the need for

candidates to have acting and/or managerial experience. It was not disputed that all the candidates whose names were included in the database met the minimum requirement of an appropriate legal qualification and at least seven years' post qualification experience. In relation to acting experience, the following exchange is apposite:

'Ms Nulliah: When looking against our cluster establishments as a whole as well as the office establishment in conjunction with the needs of the community, Botshabelo is the third largest township in South Africa. It is predominantly Sotho speaking and Tswana speaking. The head of office position according to me would require acting experience and preferably acted as a head of office elsewhere and management experience because as head of office you are dealing with complaints. It must be somebody who can interact with the people and the people also can see that there is [representivity]. Again, it is a predominantly African township, Sotho and Tswana speaking and yes, we must have a need for an interpreter in that sense, for someone to translate, so we cannot we want somebody of colour, preferably a black male in that one and against our cluster establishment. . .(intervention).'

Bearing in mind the provisions of s 174(2) and that the same provisions are expressly incorporated in the AP as part of the shortlisting requirements, I am of the view that the factors raised in the passage quoted above are valid considerations.

[60] I find it significant that one of the Committee members sounded the following warning:

'Ms September: . . . We would not want a situation where we are going to have all males or all blacks and so on. . . .

Chairperson: Thank you . . . Ms September, we should also be careful and because now we would end up having to look for a Sotho speaking person in a Sotho area and Xhosa and Zulu and all the others.'

This exchange, in my view, dispels any notion of rigidity in the selection process.

[61] The record also reveals that it was the Chairperson of the Committee who was the first to mention the name of a white female candidate as a person that

could be considered for that post. It seems to me that she only backtracked after the racial composition of that court had been laid bare. This, in my view, does not support the contention that the Committee was dead set on a blanket exclusion of white candidates in relation to the Botshabelo post.

[62] It bears noting that under the heading '[n]otes to short-listing procedure and criteria', the AP provides as follows: '[w]hereas in a situation where gender or race transformation present itself as the most pressing need such a consideration will be given priority accordingly, to the extent that it may be preferred to re-advertise the position if no suitable transformation candidate among any of the formerly disadvantaged groups can be found to fill it. The decision to re-advertise will not be taken lightly and the impact on service delivery at the relevant court will be balanced with the needs pf the specific community.' According to the appellants, preference was given to African males because, as at the time of the shortlisting, the complement of that court comprised two white magistrates, one white male and one white female. The Committee considered that since Botshabelo's population was predominantly African, the ultimate appointment of another white magistrate would thus perpetuate the disproportionate composition of the bench vis-à-vis the area's demographics. In considering the appellants' reasoning on this aspect, the following extra-curial remarks of Former Chief Justice Ngcobo, as quoted in paragraph 28 of *Singh* are, in my view, apposite:

'(Section 174(2)) echoes the preamble of the Constitution which declares that "[w]e the people of South Africa believe that South Africa belongs to all who live in it, united in our diversity". The importance of diversity to public confidence in the judiciary cannot be gainsaid. It underscores the principle that consideration of a broad range of views is the surest path to sound governance and a foundation of democracy. Diversity on the bench promotes confidence in judges in many ways. When a litigant comes before court and sees from time to time people reflective of his or her own background and experience, it engenders confidence that he or she

can get a fair trial. It also promotes confidence because it facilitates the taking into account of different perspectives. In short, "diversity allows justice to see".'

[63] Reverting to the facts of this case, it cannot be said that Mr Lawrence's managerial or acting experience was not taken into account. The record shows that after his name was mentioned, it was pointed out that he had acted as a magistrate. The discussion then moved to the needs of that office as well as the Cluster. It was also mentioned that the two magistrates who were already serving at that court were experienced. The Committee also noted that there were a number of black candidates having adequate acting and/or managerial experience.

[64] The record of the Committee's meeting reveals that, in line with the AP, the Committee had paid due regard to the needs of the office, the practical managerial experience of the candidates, the racial and gender composition of that office and the population demographics of the area in which the court is situated. Viewed in the context of the appellants' explanation pertaining to a pressing need for remedying the skewed demographic representation in the Botshabelo office and in that administrative region, I am not persuaded that there was a 'rigid exclusion' based solely on account of Mr Lawrence being a white person.

[65] Considering the demographic composition of that office, the population demographics of that area, the experience of the candidates, including the fact that a fair number of the candidates had sufficient acting and/or managerial experience were available to address the demographic needs of that office, I am unable to agree with the first judgment's conclusion that the Committee did not balance the relevant experience, qualifications, needs of that office and the appropriate managerial skills, and that it instead 'used race as a guillotine' to

exclude white candidates from consideration. Similarly, I do not agree that the Committee's decision not to shortlist Mr Lawrence for the Botshabelo post was unjustified, unfair or irrational.

Petrusburg post

[66] I turn now to the shortlisting process followed in respect of the Petrusburg post. As a point of departure, I emphasise that an exclusion based *solely* on one's race or gender suggests an inflexible approach which is an affront to the provisions of s 174(2) of the Constitution and the AP.

[67] As mentioned before, the appellants denied that race was used as an absolute bar to exclude white candidates and maintained that the Committee's decision to shortlist candidates was taken after considering the needs of the office in respect of which a post was advertised. The question is whether the Committee has demonstrated this. The exchange between members of the Committee is correctly captured in the passage quoted in paragraph 23 of the judgment and speaks for itself. In my view, the Committee has not shown any justification for excluding Mr Lawrence from the shortlist in respect of the Petrusburg post. Having considered the input of the cluster head insofar as the needs of that office were concerned, I have no hesitation in agreeing that Mr Lawrence's exclusion from the shortlist was irrational. Having said this, it would be remiss of me not to mention an aspect that is equally self-evident from the transcript, and it is this: that gender representivity was not sufficiently taken into account by the Committee despite it being an issue that was raised by the cluster head during the deliberations. The following exchange is of significance:

'MS NALIA: We have only got six, so we can – I looked at the demographics, we can may be look at one or two *white females*, but other than that we have to place, for us we have to place emphasis also on the *coloured and the Indian females*.

. . .

MS NALIA: . . . It is a predominantly Afrikaans speaking community that we have there. I looked at the community, it is a huge farming community in Petrusburg. Definitely as Ms van Zyl said, there is a need for a *female magistrate* as a head of court there.
UNIDENTIFIED PERSON: Yes.
MS NALIA: Because I do not believe that there ever [was] a *female magistrate* as a head in that court house.
UNIDENTIFIED PERSON: I think Mr Mchaiya was the first person of colour there
. . .
Unidentified person: There is [L] from the Eastern Cape.
Chairperson: Eight years experience head of office.
Unidentified person: No, we go … (indistinct), there is nothing.
. . .
Unidentified person: Is there any exception, we can assent to Chair with regards to [M]. . . [T]he problem is that we have short listed her twice already, so we need an exception.
Chairperson: And *if we say we take her then we are going to need persons to compare her with and there are no other females.* So let us just look at males, African, coloured, Indian.'(My emphasis)

The exchange above alludes to two black female applicants and ends with what seems to be an odd suggestion that a female candidate could not be shortlisted alongside male candidates.

[68] I have had the benefit of reading the judgment prepared by my colleague, Ponnan JA (the third judgment). At paragraph 83, the third judgment finds that Mr Lawrence did not seek to advance a case based on gender discrimination and suggests that his allusion to gender 'was in support of his foundational hypothesis that the resolve to exclude all white candidates was so firm and inflexible, that even white females did not make the cut'. An undeniable fact is that a black female was also overlooked, and wrongly so. Mr Lawrence's averments speak for themselves. In his supplementary founding affidavit, he said:

'From the outset (and throughout the proceedings) it is clear as a pikestaff that the Respondent adopted a stance best described as inflexible and rigid in order to effect an absolute exclusion of white male candidates (and to a slightly lesser degree white female candidates) from any

consideration. This absolute exclusion of the Applicant (and other white candidates) who is a member of the excluded designated group affected thereby (white and male) from being shortlisted for any vacancies in Free State cluster "A" (and for that matter it occurred in Free State cluster "B" too) was unconstitutional, unlawful, unfairly discriminatory and amounted to absolute exclusion from consideration from vacancies, within the Free State clusters, of members of the designated group solely on the basis of race (and to a degree gender).'

In his replying affidavit Mr Lawrence acknowledged the exclusion of a black female candidate as follows:

'It is noted that despite the "alleged" resolution … to give preference to females of the generic black group and despite there being suitably qualified and experienced female candidates from such "target" group, the candidate is not shortlisted for Petrusburg on the basis of the Chairpersons corrupted reasoning…'

It is clear from these averments that Mr Lawrence canvassed gender discrimination and, in the replying affidavit, specifically alluded to the exclusion of a black female from consideration. Notably, this is an aspect which the court a quo considered worthy of mention when it remarked: 'this is discrimination in a pure form, but needs no further attention. Fact of the matter is that no white candidates were considered'.

[69] With respect, it is difficult to understand how the consideration of a factually correct statement that a black female candidate was also overlooked during the shortlisting process can be irrelevant in relation to an application for the setting aside of the shortlisting process (and consequent appointments) based on the contention that the failure to appoint a candidate was *solely* because he was 'white and male'. Nothing precludes a court from considering what is self-evident from a transcript that was admitted into evidence. This is all the more so when litigants placed reliance on various passages embodied in a transcript that constituted part of the evidence. As it was aptly stated by the majority judgment in *Helen Suzman Foundation v Judicial Services Commission*[27], 'the content of. .

[27] *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8; 2018 (4) SA 1 (CC) para 19.

. deliberations can often be the clearest indication of what the decision-maker took into account and what it left out of account. . .'. Bearing in mind that the appellant's case was that the presence of a cluster head was to advise on the needs of the post, among other things, it seems irrational that the cluster head's motivation for the post to be filled by a female incumbent was given short shrift, insofar as *all* female candidates were excluded from consideration. As I see it, regardless of how Mr Lawrence's pleaded case is perceived as gleaned from his affidavits, once it is taken into account (as it should) that even an eligible black female candidate whose name was mentioned was also not shortlisted, the suggestion that 'the resolve to exclude all white candidates was so firm and inflexible, that even white females did not make the cut' cannot stand.

[70] Having considered the entire discussions of the Committee as reflected in the record, as well as the exclusion of all female candidates from the shortlist, black and white, I am of the view that to opine that race was 'an absolute exclusion' or that there was 'a naked preference' for a particular race would not be an accurate encapsulation of what ultimately transpired in relation to the Petrusburg post.

[71] From my point of view, lip service was paid to the constitutional imperative of gender transformation notwithstanding that the systemic exclusion of women from the legal profession was one of the historic imbalances that s 174(2) aimed to redress. The failure of the Committee to engage with this important constitutional imperative is one of the aspects that show that the Committee did not sufficiently take the needs of the Petrusburg office into account.

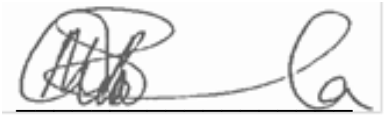
[72] While one must be cautious not to be prescriptive to a selecting Committee, I am of the view that given the weighty consideration of gender representivity there can be no rational reason why female candidates of any race could not have

been included in the pool of shortlisted candidates. Doing so would have been a step in the direction of fulfilling the equally important imperative of gender transformation. This is all the more so because the post in question had previously been occupied by a black male, thus advancing racial transformation.

[73] For all the reasons mentioned above, I am of the view that the approach adopted by the Committee in relation to the Petrusburg post was, on the whole, rigid, and ought to be set aside.

[74] I have already indicated that I agree that the Committee did not form a quorum during the shortlisting process pertaining to the Bloemfontein posts, and that its decision was therefore a nullity. On that basis alone, the shortlisting process in relation to the Bloemfontein posts ought to be set aside.

[75] For all the reasons set out above, I would grant the order proposed in the first judgment, but would not set aside the shortlisting and consequent appointment made in respect of the Botshabelo post.



M B MOLEMELA
JUDGE OF APPEAL

Ponnan JA (Saldulker and Van der Merwe JJA and Potterill AJA concurring)

[76] I have read the judgments prepared by Potterill AJA (the first judgment) and Molemela JA (the second judgment). I feel constrained to write separately in response to the second judgment.

[77] Like the court below, the first judgment upholds Mr Lawrence's claim in relation to all three magisterial districts. The second judgment agrees with the first that because the Committee was not quorate, the Bloemfontein shortlisting process is a nullity and falls to be set aside. However, it appears to part ways in respect of Botshabelo and Petrusburg. As to Botshabelo: the second judgment takes the view that 'it cannot be rightly concluded' (as the first judgment does), that the process adopted was rigid, inflexible and quota driven and would, accordingly, dismiss Mr Lawrence's claim on that score. As far as Petrusburg goes, the second judgment appears to agree with the first that the decision of the Committee to exclude Mr Lawrence cannot stand, because of the apparent failure by the Committee to afford proper recognition to 'the weighty consideration of gender representivity'.

[78] At the outset it may be important to restate certain basic tenets: (i) in exercising the judicial function, judges are themselves constrained by the law; (ii) judgments should be confined to the issues before the court; (iii) courts should avoid deciding matters that are not relevant; (iv) it is not for a court to create new factual issues; and (v) courts must distinguish between allegation, fact and suspicion.[28]

[28] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) paras 15 and 16.

[79] To borrow from Wallis JA in *Fischer and Another v Ramahlele*:

'Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

This last point is of great importance because it calls for judicial restraint. . . .'[29]

[80] As Howie JA pointed out in *Western Cape Education Department v George*:

[29] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) paras 12-15.

'. . . it is desirable that any judgment of this Court be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that are necessary for the decision of the case.'[30]

Equally important, what binds a lower court is only the ratio of the decision of a higher court and not what might be said *en passant*. Schreiner JA put it thus in *Fellner v Minister of the Interior*:

'The decision or judgment, in the sense of the Court's order, by itself only operates, of course, as between the parties; it can only state law in so far as it discloses a rule'.[31]

[81] I have some difficulty with what, I venture, may be described as the piecemeal approach that the second judgment takes to the evidence in the matter. This has resulted in both an acceptance, as also a rejection, of certain parts of each party's case. The second judgment also calls in aid certain statistics that formed no part of either party's case. In that, it strays beyond the confines of the appeal record. Even accepting that we can take judicial notice of those statistics, their relevance, dating back over two decades as they do and, which is directed at a point that does not squarely arise in the appeal, is doubtful.

[82] As best as can be discerned, the resort to the statistics, as also the approach and the reasoning adopted by the second judgment, appears to misconstrue the nature of the case that serves before us on appeal. Mr Lawrence did not seek to impugn the applicable regulations or AP. Rather he challenged the manner in which the Committee and the other appellants interpreted and applied those provisions. The validity of the framework for the appointment of magistrates, being s 174 of the Constitution, Regulation 5 of the regulations and the AP is, therefore, not an issue before this Court.

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[30] *Western Cape Education Department and Another v George* [1998] 2 All SA 623 (A); 1998 (3) SA 77 (SCA) at 84E.

[31] *Fellner v Minister of the Interior* [1954] 4 All SA 304 (A); 1954 (4) SA 523 (A) at 542D-E.

[83] What is more, Mr Lawrence did not seek to advance a case based on gender discrimination. Nor, being a male candidate, could he have advanced such a case. His case, as I understand it, is that he had been excluded *ante omnia*, so to speak, because he was a white male. To the extent that gender was alluded to by him, it was in support of his foundational hypothesis that the resolve to exclude all white candidates was so firm and inflexible, that even white females did not make the cut.

[84] The official response to Mr Lawrence from the Secretary of the Committee was:

'The Chairperson of the Appointments Committee directed that you be informed that you cannot be included in the short-list for any of the posts you have applied for as you do not meet the section 174(2) of the Constitution-criteria in any of those offices.'

Section 174(2) reads:

'The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.'

[85] The Committee thus relied exclusively on the attainment of race and gender transformation as the justification for having excluded Mr Lawrence from consideration. The second judgment opines that 'lip service was paid to the constitutional imperative of gender transformation'. That must mean that one of the legs relied upon by the appellants in resisting Mr Lawrence's claim cannot be sustained. Moreover, the finding that 'lip service was paid to the constitutional imperative of gender transformation', in and of itself, ought to render the entire shortlisting process constitutionally indefensible.

[86] To my mind, the shortlisting for each magisterial district can and should not be approached as hermetically sealed enquiries. This is because the consideration of candidates for each district was, in truth, part and parcel of one

shortlisting process. As pointed out in the answering affidavit filed on behalf of the appellants:

'Members of the Committee and the Chief Magistrates or Cluster Heads, as they are called, for the 14 Administrative Regions are invited to the meeting. The Cluster Heads have no voting rights. Their purpose at the meeting is to advise the Committee of the needs of the Cluster in general as well as the needs of each individual office where posts were advertised.'

[87] The Committee commenced with its deliberations for the Free State cluster on Friday 18 January 2019. The shortlisting process continued on Monday 21 January 2019, after the intervening weekend. At the commencement of the process, the following is recorded:

'CHAIRPERSON: Thank you. You can take us through your province first Ms Nalia, tell us what you have, how many race break up and then go down to the office that you will be dealing with and what you think would be appropriate, what do you need.'

At the relevant time Ms Nalia was the Chief Magistrate and Cluster Head.

[88] The following from the record shows that the Committee did not itself approach the shortlisting for each magisterial district as discreet enquiries:

'UNIDENTIFIED PERSON: We parked Skosana for the Free State, so we can look at him now.

CHAIRPERSON: Oh yes. We know him?

UNIDENTIFIED PERSON: Yes, he is our Secretary-general, but apparently from Buthatswaba a very highly well regarded in terms of civil experience as well, Skosana.

CHAIRPERSON: Okay.

UNIDENTIFIED PERSON: But I would prefer you to . . . (indistinct) if you will give him the opportunity.

CHAIRPERSON: Let us now place him, because he has already been short listed previously.

MS NALIA: Okay.

CHAIRPERSON: Prieska Mafotlha.

UNIDENTIFIED PERSON: He has been short listed in Mpumalanga.

CHAIRPERSON: Okay, Mafothla?

UNIDENTIFIED PERSON: Short listed in Northern Cape.

UNIDENTIFIED PERSON: Northern Cape. Let me just see how many times.
UNIDENTIFIED PERSON: (Person talking in the background).
CHAIRPERSON: Jan Kempdorp.
UNIDENTIFIED PERSON: Twice as well as acting . . . (intervention).
CHAIRPERSON: Okay, Ghabisi.
UNIDENTIFIED PERSON: It is the same one?
CHAIRPERSON: Yes, just been short listed. Acting in Ficksburg.
UNIDENTIFIED PERSON: He is acting in Ficksburg, but we can . . . (intervention)
CHAIRPERSON: If there is no other acting. Let us just check the actings. Can we just go down Simani? Okay, he has been short listed. Katye has been short listed. I am not sure I have got that surname.
UNIDENTIFIED PERSON: I am checking him now, because I also do not remember him. He was short listed in Limpopo.'

[89] In respect of this particular cluster, the Committee commenced with Ficksburg, before proceeding to a consideration of Botshabelo, Petrusburg and Bloemfontein. Insofar as Ficksburg is concerned, this is how the shortlisting process commenced:

'CHAIRPERSON: We already have two coloured males, why do we not look at coloured female, Indian male and Indian female?
MS NALIA: That works with us.
CHAIRPERSON: Start there and then if we do not get the number, the required number then we fall back to coloured male.
UNIDENTIFIED PERSON: Well, you can go coloured.
CHAIRPERSON: Coloured female and Indian male and Indian female.
UNIDENTIFIED PERSON: Yes okay.'

[90] The Committee's targeted approach to Ficksburg set the tone for what was to follow in respect of Botshabelo, Petrusburg and Bloemfontein. It is indeed so that it was stated in the answering affidavit filed on behalf of the appellants that the 'process is implemented in a nuanced and flexible manner and there is no bar

to shortlisting of white males', but that is not borne out by the record, which is where we need look for the real reasons for the decision.

[91] The fixed resolve to exclude any and all white candidates on account of their race is clear. The refrain, as the following excerpts from the record reveal, was a repeated and persistent one: 'I am of the view that if we have 17 white persons in the province already, that is enough'; 'I think that three [white male magistrates] is enough for now'; 'Ja, No we are not looking for white males in your cluster at all'; 'Anything you need except for white'; 'Not white. Just female, but not white'; '. . . Female whites, are we not accepting? No.'; 'If we can find more of the other two races that are lacking then we do not consider any white person'; 'Take away the white. Take away the white'; and 'No, we are not looking for white males in your cluster at all'.

[92] As a result of this approach Mr Lawrence's application was not considered at all. Instead, his candidacy was dismissed out of hand solely on the basis that he was a white male. The second judgment points to the fact that the information of all of the candidates was condensed and displayed on a screen as support for the proposition that Mr Lawrence's candidature was considered. However, the record shows that when it came to candidates who did not fall within the group targeted for exclusion, the Committee did not merely content itself with the information that was displayed on the screen.

[93] The following from the record is illustrative of the approach taken to those candidates who were targeted for inclusion:

'MS NALIA: Mr Steyn is currently the acting head of court at Moorreesburg which we have advertised, so he will be short listed there. B.Jus LL.B, district court prosecutor four years, Regional Court prosecutor seven months. Relief prosecutor two years and three months. He was then a magistrate for 12 years and nine months. Resigned in 2014. Was an advocate for

three years and ten months. Acted as magistrate for two months and then again for two years and two months. Has been acting as head of court Moorreesburg since 2018.

CHAIRPERSON: Reasons for resignation.

MS NALIA: A22 please?

UNIDENTIFIED PERSON: Madam Chair, this Moorreesburg where is it?

MS NALIA: Western Cape.

UNIDENTIFIED PERSON: Oh, Western Cape.

MS NALIA: It was supposed to be advertised, the one which is acting. He doesn't indicate why, just went to private practise.

CHAIRPERSON: Do we consider him?

MS NALIA: He has got [lots] of experience.

CHAIRPERSON: [Lots] of experience.

MS NALIA: Yes.

CHAIRPERSON: Steyn is in.

MS NALIA: That is our forth one.

CHAIRPERSON: Looking for the fifth one. Cupido has been short listed how many times?'

[94] In contrast, this is what happened when Mr Lawrence's name came to be mentioned in respect of Botshabelo:

'UNIDENTIFIED PERSON: There is a Mr Lawrence from Petrusburg, but I think he must be acting. . . .

MS NALIA: If I may, I do not know if I am allowed to interfere.

CHAIRPERSON: Yes.

MS NALIA: Our cluster has 11 white males. I was also looking at it against the cluster establishment. Given the numbers that we have, the low numbers that we have in terms of coloured males, Indian males in the cluster and given the needs of that community, especially Botshabela.

CHAIRPERSON: Yes?

MS NALIA: We have, there is a need, there is existing – if I may just give you a compliment [complement] of that office.

CHAIRPERSON: Before we go there, we are to consider people who have for instance will not be . . . (indistinct). We just need to know who has applied and then we will see if the person fits.

MS NALIA: Mr Lawrence is . . . .(intervention)
CHAIRPERSON: Not necessarily that the person . . . (indistinct, everybody is talking simultaneously).
MS NALIA: Acting magistrate.
UNIDENTIFIED PERSON: Mr Lawrence is not a magistrate, he is an acting magistrate.
MS NALIA: Acting magistrate.'

[95] As the following from the record shows, it did not get any better when Mr Lawrence's name was raised in respect of Petrusburg:

'CHAIRPERSON: . . . Which is the next office?
MS NALIA: Petrusburg.
. . .
CHAIRPERSON: Petrusburg, okay.
MS NALIA: This position was previously occupied initially by as I remember Mr Mchaiya and then he was – came through to Bloemfontein and acting magistrate Mr Lawrence has been there, but as I indicated earlier our cluster establishment, we are sitting with 11 white males at presently.
CHAIRPERSON: No, we are not looking for white males in your cluster at all.
MS NALIA: All right.
CHAIRPERSON: And even females, how are your white females?
MS NALIA: We have only got six, so we can – I looked at the demographics, we can maybe look at one or two white females, but other than that we have to place, for us we have to place emphasis also on the coloured and the Indian females.'

[96] The difference in approach by the Committee when considering the candidacy of someone, on the one hand, like Mr Steyn (who had not been targeted for exclusion) and, on the other, someone like Mr Lawrence (who had been targeted for exclusion), is patent. It calls the lie to the assertion in the answering affidavit that the 'process is implemented in a nuanced and flexible manner and there is no bar to shortlisting of white males'. In argument, counsel for the appellants was invited to point us to anywhere in the record where Mr Lawrence's

candidacy received, even remotely, the same consideration as the candidates who had made the shortlist. He could not.

[97] The record is thus clear enough. It is, accordingly, not necessary to speculate, as the second judgment purports to do, as to what may or may not have been said. When Mr Lawrence launched his application, he did not have to hand the administrative record. After the record had been filed by the appellants, Mr Lawrence filed a comprehensive supplementary affidavit. When an applicant in review proceedings files a supplementary affidavit, after having had sight of the record, he is in effect fully stating his case for the first time.[32] The administrative record is usually necessary for a court to undertake the task of determining the regularity of the administrative action sought to be impugned.[33] It helps shed light on what happened, why it happened and it may undermine *ex post facto* justifications offered by the decision-maker of the decision under review.[34]

[98] The second appellant, the Regional Court President for the Free State, who chaired the Committee, deposed to what was styled an 'answering affidavit to the supplementary founding affidavit'. Neither she, nor any of the other deponents took issue with the accuracy of the record. Mr Lawrence made fairly extensive reference to the record in his supplementary founding affidavit. Those allegations barely elicited an answer. Instead, the second appellant responded with vague, generalised responses. In those circumstances, it hardly seems fair for the second judgment to hold that 'nothing is known of what was said when the members were talking simultaneously'. What was said, would certainly have been known

[32] *City of Cape Town v South African National Roads Authority Limited and Others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA); 2015 (5) BCLR 560 (SCA) paras 35-37.
[33] *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* [2012] ZASCA 15; [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613 (SCA); 2012 (3) SA 486 (SCA) para 37.
[34] *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) para 37.

to the second appellant. No doubt, if favourable to the appellants, that would have been placed before the court. In particular, there was no suggestion by any of the appellants that anything meaningful was, in the words of the second judgment, 'not captured by the recording'.

[99] It bears emphasis that the appellants are no ordinary litigants. This matter calls into question the legitimacy of the appointment process for magistrates, Over and above that, the allegations raised, in the final analysis, are levelled against magistrates; senior ones at that, who may well have a 'higher duty to respect the law'. After all, none of the appellants can be described as '. . . an indigent and bewildered litigant, adrift in a sea of litigious uncertainty, to whom the courts must extend a . . . lifeline. . . .'.[35]

[100] The Committee's emphasis on race to the exclusion of all else is further evinced later in the record in the following exchange when Petrusburg was being considered:

'CHAIRPERSON: Not white. Just female, but not white.

MS NALIA: In that position?

CHAIRPERSON: Yes.

MS NALIA: Then we are looking definitely at - but then I was looking at - but as you said we have got to be very careful about the interpreter. So I am going to take that into account.

UNIDENTIFIED PERSON: Take away the white.

MS NALIA: All right.

UNIDENTIFIED PERSON: Take away white.

MS NALIA: Sorry?

UNIDENTIFIED PERSON: (Person talking in the background).

MS NALIA: The reason I stated white female was because, but you have given me a little bit of insight as to how to proceed. I looked at the Afrikaans community. It is – but when I say

[35] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) para 82.

Afrikaans, it is the Sothos and Tswanas that speak, they speak Afrikaans and the court setup etcetera, that is what I looked at.

CHAIRPERSON: We are also looking for experience ma'am.

MS NALIA: We are also looking for experience. Acting experience and managerial experience. So are we out of white positions?

CHAIRPERSON: And also if there are transfer.

MS NALIA: Female whites, are we not accepting?

UNIDENTIFIED PERSON: No.

MS NALIA: All right.

UNIDENTIFIED PERSON: We have to look at females of colour for your managerial positions.'

[101] The record thus shows that what occurred was indeed 'rigid, inflexible and quota-driven'. The blanket exclusion of white candidates, no matter their strengths, is disconcerting. No white candidate was considered for Bloemfontein either. Regrettably, not even excellence could open the door to the consideration of a white candidate. And, as the following excerpt shows, even when the Committee began to run out of candidates from the group targeted for inclusion, it was unwavering in its commitment:

'CHAIRPERSON: . . . We are running out of – let us go down. May be we might find a . . . (intervention).

UNIDENTIFIED PERSON: Indians and coloureds.

CHAIRPERSON: Anything you need, except for white.

MS NALIA: Thank you, okay.

. . .

UNIDENTIFIED PERSON: No, we go . . . (indistinct), there is nothing.

CHAIRPERSON: So what do we do. You are looking for coloured males, coloured Indian, African males.

UNIDENTIFIED PERSON: Experience. The problem is experience.

CHAIRPERSON: Experience yes, because one person station and head office. So we cannot take . . . (intervention)

MS NALIA: And if I may Chair amongst the women that we saw there, that both may be yourself and myself know of some people that notwithstanding you might be able to still offer them that position because of the knowledge you might have of the relevant persons.
CHAIRPERSON: From Natalie's side we do not know anyone?
MS NALIA: Nothing from that list then. The person that I thought would be a good candidate, but we said it cannot be a white female.
CHAIRPERSON: Yes.'

This exchange demonstrates a fixed resolve on the part of the Committee to exclude all white candidates. Nothing else mattered, even when the cupboard was bare. The conclusion is thus inescapable that the Committee plainly used race as a disqualifying criterion.

[102] In any event, the asserted reliance by the appellants on s '174-criteria', may, in itself, demonstrate the fallacy in the Committee's approach. Unlike the s 174(1) requirements, such as fitness and propriety, which operate as prerequisites, s 174(2) of the Constitution cannot be invoked as a self-standing basis for exclusion. It follows that the starting point of the enquiry did not accord with the overall legislative scheme and consequently the Committee's admitted process was flawed. Section 174 of the Constitution employs the phrase 'broadly representative'. Nothing in the legislative scheme permits the targeted exclusion of white candidates from consideration. And, yet this was precisely what happened in this case.

[103] The Court below took the view that:

'In the process the Committee failed to adhere to its own policy in that it did not consider the candidature of all applicants whose applications were compliant. White people and [Mr Lawrence] in particular was not considered at all.'

It accordingly concluded that:

'Insofar as the Committee acted as a gatekeeper, preventing any whites to be interviewed, it lost the opportunity to duly consider whether [the] applicant was not perhaps such an excellent

candidate that he should be recommended for appointment notwithstanding the obligation to ensure that s 174(2) is diligently applied.'

In that, it cannot be faulted.

[104] In my view, the overall approach of the Committee is not consistent with the proper interpretation and application of s 174 of the Constitution, regulation 5 of the Regulations or the AP. Rather than considering race as but one of the factors to be taken into account, the Committee repeatedly excluded candidates solely on the basis of their race. That rigid and unwavering approach had the effect of eliminating Mr Lawrence from consideration. The rigidity of the approach (a rigidity that is generally eschewed by our courts) and failure to have regard to any factor other than race was thus both unlawful and unconstitutional.

[105] In conclusion, it is perhaps necessary to record that there can be no quarrel with the transformational imperatives enshrined in our Constitution, which most, if not all of us, surely embrace. But, that is not what this case is about. It is about the process employed in pursuit of those laudable aspirational goals, which, as I have endeavoured to demonstrate, does not withstand scrutiny. For, even restitutionary measures, that are vital to our transformative constitutional project, should be approached in a nuanced, flexible and balanced manner.

V M PONNAN

JUDGE OF APPEAL

Appearances:

For appellants:	D J Groenewald
Instructed by:	State Attorney, Pretoria.
	State Attorney, Bloemfontein.
For respondent:	M du Plessis SC with T Palmer and S Mdletshe
Instructed by:	Power Singh Inc, Johannesburg.
	Frank Botha Attorneys, Bloemfontein.
For amicus curiae:	B Winks
Instructed by:	Webber Wentzel Attorneys, Sandton.
	Symington De Kok Attorneys, Bloemfontein.