



MINISTER
JUSTICE AND CORRECTIONAL SERVICES
REPUBLIC OF SOUTH AFRICA

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Ms N Mapisa-Nqakula, MP
The Honourable Speaker of the National Assembly
Parliament of the Republic of South Africa
PO Box 15
CAPE TOWN
8000

Dear Honourable Speaker

**REPORT TO BE TABLED IN PARLIAMENT IN TERMS OF SECTION 13(4)(b) OF THE
MAGISTRATES ACT, 90 OF 1993 REGARDING THE CONFIRMATION OF
SUSPENSION/REMOVAL FROM OFFICE ON THE GROUND OF MISCONDUCT: MR MD HINXA,
CHIEF MAGISTRATE FOR BLOEMFONTEIN**

I have in terms of section 13(4)(a)(i) of the Magistrates Act, 1993 (Act 90 of 1993), confirmed the suspension from office of Mr MD Hinxa, Chief Magistrate, Bloemfontein pending Parliament's decision to restore or not to restore him the Office of Magistrate following the recommendation by the Magistrates Commission that he be removed from office.

It is also important to inform the NA that when Mr Hinxa was informed of the above, he instituted proceedings in the Free State Division of the High Court under case number 6766/2023, in which he sought interdictory relief, against the Magistrates Commission and the Minister for Justice and Correctional Services, amongst others, from implementing the decision and findings of the 2nd Respondent (Ms Greyvensteyn, the Presiding Officer of the Misconduct Proceedings.) Mr Hinxa also sought to interdict the 4th Respondent (The Speaker of the NA) from considering, deliberating and recommending to the 3rd Respondent (The Minister for Justice and Correctional Services) that his provisional suspension be confirmed. Although the Speaker of the National Assembly was cited as the 4th Respondent, the Chairperson of the National Council of Provinces was not cited as a Respondent. On 20 December 2023, the High Court struck the above application from the roll due to a lack of urgency and Mr Hinxa was ordered to pay the costs of the application. A copy of the order of the High Court is attached.

Mr Hinxa also instituted Review Proceedings in the Free State Division of the High Court, under case number 6795/2023, on or about December 2023 to review and set aside the decision of the 1st Respondent (The Magistrates Commission) and the 2nd Respondent (Ms Greyvensteyn, the Presiding Officer of the Misconduct Proceedings). He also seeks condonation for the late filing of his application. No relief is sought against the 3rd Respondent (the Minister for Justice and Correctional Services) and the 4th Respondent (the Speaker of the NA). The Chairperson of the NCOP was also not cited as a Respondent in the Review Proceedings.



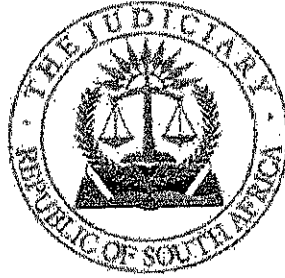
I hereby submit the attached report of the Magistrates Commission for tabling in terms of section 13(4)(b) of the Act.

Yours respectfully

A handwritten signature in black ink, appearing to be 'Ro Lamola', written over a horizontal line.

MR RO LAMOLA, MP
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

Date: 02/02/2024



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 6766/2023

Before the Honourable Judge I VAN RHYN

On the 20th day of DECEMBER 2023

In the matter between:

MZIWONKE DAVID HINXA

Applicant

and

THE MAGISTRATES COMMISSION M. GREYVENSTEYN N.O. 1st Respondent

CHAIRPERSON OF THE DISCIPLINARY HEARING 2nd Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 3rd Respondent

**THE SPEAKER OF THE NATIONAL ASSEMBLY OF THE
PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA** 4th Respondent

Having considered the documents filed of record and having heard the legal practitioners,

IT IS ORDERED THAT:

1. The application is struck from the roll for lack of urgency.
2. The applicant shall pay the costs of the application.

BY ORDER OF THIS COURT

COURT REGISTRAR

**MACHINI MOTLOUNG ATTORNEYS
STATE ATTORNEY**

2023-12-20

FSD-BFT-009



REPORT IN TERMS OF SECTION 13(4)(b) OF THE MAGISTRATES ACT, 90 OF 1993: CONFIRMATION OF SUSPENSION/REMOVAL FROM OFFICE ON THE GROUND OF MISCONDUCT: MR MD HINXA, CHIEF MAGISTRATE, BLOEMFONTEIN

1. PURPOSE

The purpose of this report is to inform Parliament of the confirmation of the suspension from office of Mr MD Hinxa, Chief Magistrate, Bloemfontein, pending consideration by Parliament of a recommendation by the Magistrates Commission for his removal from office as a Magistrate on the ground of misconduct in terms of section 13(4)(a)(i) of the Magistrates Act, 90 of 1993 (hereinafter the Act).

2. BACKGROUND

2.1 The complainant in the matter was, at the time of the complaint, a 42 year old woman from Botshabelo. On 29 July 2016 she lodged a complaint with the Minister alleging that she was raped by Mr Hinxa in his flat in Bloemfontein after he made false pretences to her. The complainant had reported the matter on several occasions to different police stations. They all refused to open a case. Hence her letter to the Minister.

2.2 The complaint was submitted to the Department and on 02 November 2016 referred to the Commission for attention.

2.3 Based on the evidence gathered during the preliminary investigation, the Commission charged Mr Hinxa with two(2) counts of misconduct in that he contravened regulation 25(c) of the Regulations for Judicial Officers in the Lower Courts, 1994 read with the Code of Conduct for Magistrates and the Bill of Rights as contained in the Constitution, in that he on two different occasions during 2010 and 2011, unlawfully and wrongfully compelled the complainant without her consent to commit an act of sexual intercourse with her which act wrongfully infringed her interest in her bodily integrity and

constitutional right to have her inherent dignity respected. The charge sheet, dated 24 November 2017 was sent to Mr Hinxa's attorney electronically.

2.4 The Minister, on advice of the Magistrates Commission, provisionally suspended Mr Hinxa from office with effect from 29 November 2017, which decision was confirmed by Parliament. Mr Hinxa thereafter instituted review proceedings in the Gauteng Division of the High Court on 23 January 2018 applying for an order to review and set aside the Minister's decision to provisionally suspend him from office; reviewing and setting aside the Commission's decision to institute a disciplinary/misconduct inquiry against him; and declaring the disciplinary inquiry on the misconduct charges against him to be invalid and unlawful. This application was opposed. Mr Hinxa however failed to promote his application any further.

2.5 In the absence of a court order barring the Commission to proceed with the disciplinary hearing/misconduct inquiry against Mr Hinxa, the Commission on 21 May 2018 duly appointed a Regional Magistrate to preside (hereinafter the Presiding Officer or PO), at the misconduct / disciplinary inquiry and two Regional Magistrates as Persons to lead the evidence (hereinafter the PLE's) at the inquiry.

3. DISCUSSION

3.1 Having duly notified Mr Hinxa, via his attorney, of the date, time and venue, the misconduct inquiry commenced on 30 October 2018. Since then, the evidence from a number of witnesses, testifying on behalf of the Commission, was placed on record. The Commission closed its case on 26 November 2020.

3.2 Mr Hinxa elected not to testify or call any witnesses in his defence and closed his case. This concluded the leading of evidence at the inquiry. The matter was postponed to 14 and 29 January 2021 for the respective parties to present their Heads of Argument on the merits and in respect of judgment and had the opportunity to orally address the PO in this regard. The PLE's further had the opportunity to respond to Mr Hinxa's Heads where after the PO postponed the inquiry to deliver her judgment on 07 June 2021. The inquiry did not proceed in this day due to Covid-related problems and was by mutual agreement between the parties postponed to 08 July 2021 for judgment.

3.3 The Presiding Officer on 08 July 2021 found Mr Hinxha guilty on both charges of misconduct. Mr Hinxha requested a two-month postponement to obtain legal and medical advice and to enable him to prepare any mitigating factors. The PO granted Mr Hinxha's the postponement and postponed the inquiry to 09 and 10 September 2021 for both parties to address her on any mitigating and aggravating factors for purpose of the imposition of a sanction. **(Judgment)**

3.4 At the 11th hour on 07 September 2021, Mr Hinxha advised that he was not feeling well, that he would be going for a Covid-19 test and examination and that he would keep the PO and the PLE's posted in this regard. No further communication was received. When he was not in attendance on 09 September 2021, the PLE's phoned him just to be advised that he was booked off sick. Mr Hinxha was requested to provide a medical certificate and was asked whether he perhaps had the results of the Covid-19 test. He on 09 September 2021, per email, submitted a medical certificate from a medical practitioner at a clinic in Bloemfontein, who recommended sick leave from 07 to 17 September 2021. The medical certificate indicated that Mr Hinxha was under investigation for Covid-19 and that he suffered from stress and anxiety.

3.5 The PO postponed the inquiry to 22 and 23 September 2021 to give Mr Hinxha the opportunity to present evidence on any mitigating factors that he wished to place on record before her, before she would continue to impose a sanction. The PO in addition ordered that Mr Hinxha be formally informed of the postponement dates and that it be brought to his attention that she would not be able to postpone the matter on a future date, unless there is a substantive application for a postponement with the necessary medical certificates or evidence that would entitle Mr Hinxha to postpone the inquiry again. He was immediately informed accordingly. Except for asking to be provided with a copy of the transcribed proceedings held on 09 September 2021, he did not mention, or refer to his ill-health or that he may not attend the proceedings on 22 September 2021.

3.6 On 20 September 2021, the PLE's again on short notice, received a communication from Mr Hinxha indicating that depression related elements are taking a toll on his health and that he would clarify the issue regarding the Covid-test results on record, once his

health normalises. He submitted a medical certificate from another medical practitioner, certifying that he was seen on 20 September 2021 for depressive disorder and further psychiatric evaluation.

3.7 As to not delay the conclusion of the inquiry any further, the PLE's requested the PO to allow them to place any aggravating factors on record. This was done where after the PO postponed the proceedings to 29 and 30 November 2021. She further ruled that Mr Hinxa be provided with a copy of the transcribed record of the proceedings held on 09 and 22 September 2021. This was done on 05 October 2021. Mr Hinxa was once again given the opportunity to furnish the PO and the PLE's with any mitigating factors by 05 November 2021. The PO further ordered that Mr Hinxa be advised to be present on 29 and 30 November 2021 to present his mitigating factors and to place any supporting evidence on record in this regard. Although the PLE's duly informed Mr Hinxa accordingly, the PO also sent him an email on 13 October 2021 in this regard.

3.8 Mr Hinxa forwarded his written submission on any mitigating factors to the PO on 04 November 2021.

3.9 Although the PO again on 15 November 2021 urged Mr Hinxa to attend the hearing and to make use of the opportunity to address her and call witnesses in mitigation, if he wished to do so, Mr Hinxa on 24 November 2021 advised the PO that he would "*only attend the sanction pronouncement session on 30 November 2021*".

3.10 The PLE's on 25 November 2021 also advised Mr Hinxa to be present and to present any mitigating evidence before the hearing. It was again brought under his attention that if he required the proceedings to be postponed, he should bring a substantive application on 29 November 2022 in support thereof.

3.11 Mr Hinxa responded on 29 November 2021, indicating that he "*has nothing to say*" and that he "*waives his right to attend the sanction session*". He only requested to be favoured with a copy of the record, reflecting the sanction imposed and the reasons therefore. He did not attend the proceedings on 29 and 30 November 2021.

3.12 Having considered Mr Hinxa's written representations in mitigation of sanction and the PLE's address on any aggravating factors, the PO, in terms of regulation 26(17)(b)

of the Regulations, recommended that Mr Hinxha be removed from office as contemplated in section 13(4)(a)(i) of the Act. The PO provided the Commission with the relevant documents in compliance with regulation 26(19) of the Regulations.

(Sanction)

3.13 On 24 December 2021, Mr Hinxha forwarded his representations on the imposed sanction to the PO and the Commission. Although he asked the PO not to impose the “*death penalty*” by recommending that he should be removed from office, he did not present anything else, except for making further representations on his guilty finding. He already had the opportunity to address the PO in this regard, which he did.

(Representations)

3.14 The PO on 27 January 2022 indicated that she had nothing to add to her reasons for sanction.

3.15 Having considered all the relevant documentation, as is required in terms of regulation 26(19) of the Regulations, including Mr Hinxha's representations, the Commission at its meeting held on 13 October 2023, resolved to endorse the recommendation of the PO and to recommend that Mr Hinxha be removed from office on the ground of misconduct as contemplated in section 13(4)(a)(i) of the Act. The Commission holds the view that Mr Hinxha's conduct, as set out in the charge sheet of which he was found guilty is so serious that it renders him unfit to hold the office of Magistrate any longer and that his removal from that office justifies.

4. AUTHORITY TO SUSPEND

4.1 In terms of section 13(4)(a) of the Act, the Minister of Justice and Correctional Services, if the Magistrates Commission would recommend that a magistrate be removed from office on *inter alia* the basis of misconduct, must suspend that magistrate from office or if the magistrate has been provisionally suspended from office, confirm the suspension.

4.2 A report in which such suspension and the reasons therefore are made known, must, in terms of section 13(4)(b) of the Act, be tabled in Parliament by the Minister

within fourteen (14) days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within fourteen (14) days after the commencement of its next ensuing session.

4.3 Parliament must then as soon as is reasonably possible, pass a resolution as to whether or not the restoration of his/her office of the Magistrate so suspended is recommended.

4.4 After a resolution has been passed by Parliament as contemplated in paragraph 4.3, the Minister shall restore the Magistrate concerned to his/her office or remove him/her from office, as the case may be.

4.5 Given the above, I have confirmed the suspension from office of Mr Hinxia in terms of section 13(4)(a)(i) of the Act.

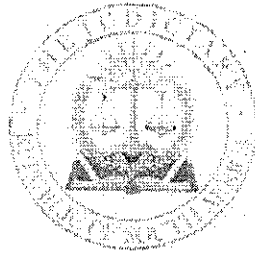
5. CONCLUSION

This report, as required by section 13(4)(b) of the Magistrates Act, 1993 is submitted for Parliament's consideration.

Given under my hand at.....on this.....day of.....2024


MR R LAMOLA, MP

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES



**MAGISTRATES COMMISSION
FOR THE
REPUBLIC OF SOUTH AFRICA**

PO Box 9096, PRETORIA, 0001 • Centre Walk Building, c/o Pretorius and Thabo Sehume Streets, PRETORIA • Tel (012) 325 3951, Fax (012) 325 3957

The Honourable Mr R Lamola, MP
The Minister of justice and Correctional Services
Private Bag X 276
PRETORIA
0001

Enquiries: J Finger
Ref No: 6/5/52 - 20/2016
Date: 01 November 2023

Dear Minister

REMOVAL FROM OFFICE OF MR MD HINXA, CHIEF MAGISTRATE, BLOEMFONTEIN

1. The Minister is referred to our evenly numbered letter dated 19 June 2023, a copy of which is attached for ease of reference.
2. The Magistrate Commission ("the Commission") informed you that it was at the time, indecisive on whether it had the authority or not to interfere with the Presiding Officer's finding of guilt made at Mr Hinxa's misconduct inquiry and her recommended sanction that Mr Hinxa be removed from office on the ground of misconduct.
3. The Commission held the view that, despite the different views of its members, the matter should still be referred to you for your decision.
4. However, having duly considered and deliberated the content of a legal opinion, referred to the Commission on the issues raised in paragraphs 12 and 13 of our aforementioned letter, the Commission at its meeting held on 13 October 2023 noted the State Law Advisors' view that regulation 26(22) of the Regulations for Judicial Officers in the Lower Courts, 1993 ("the Regulations") does not give the Commission any power to make a finding on, or against the findings made by the Presiding Officer on the merits on the matter and that regulations

26(22) only permits of the Commission to make a recommendation to the sanction, and only if the Presiding Officer recommends that the magistrate be removed from office. We refer to paragraphs 36 to 39, 41 and 42 of the legal opinion, a copy of which is attached for the Minister's assistance.

(Legal Opinion dated 21 September 2023)

5. In light hereof, the Commission reconsidered its previous stance on these issues and resolved to recommend that Mr Hinxa be removed from office on the ground of misconduct. The issues Mr Hinxa raised in his representation to the Commission relating to the recommended sanction, are merely based on finding fault with the Presiding Officer's guilty findings and not why he should not be removed from office.
6. Having regard to the nature and the seriousness of the misconduct charges of which he has been found guilty, the Commission is in agreement with the Presiding Officer's recommendation that the only appropriate sanction would be that Mr Hinxa be removed from office as contemplated in section 13(4)(a)(i) of the Magistrate Act, 90 of 1933. His conduct puts his integrity as a judicial officer in serious doubt and renders him unfit to hold the office of Magistrate any longer.
7. If the Magistrates Commission in terms of section 13(4)(a) of the Act, recommends that a magistrate be removed from office on *inter alia* the basis of misconduct, the Minister for Justice and Correctional Services must suspend that magistrate from office, or, if the magistrate is provisionally suspended from office, confirm the suspension and in terms section 13(4)(b) of the Act, table a report in Parliament within fourteen (14) days of such suspension.
8. In the circumstances, it is recommended that you:
 - 8.1 confirm the provisional suspension of Mr MD Hinxa, Chief Magistrate at Bloemfontein from office in terms of section 13(4)(a) of the Magistrates Act, No 90 of 1993 with immediate effect, and
 - 8.2 table a report in Parliament within fourteen (14) days of such suspension in terms of section 13(4)(b) of the Act.
9. A copy of the required documentation in terms of regulation 26(22), including Mr Hinxa's representations are once again attached for your assistance.

(Judgment, Sanction and Representations)

10. A draft report for Parliament is attached for your assistance.

(Draft Report)

Yours sincerely



JUDGE AP LEDWABA

CHAIRPERSON: MAGISTRATES COMMISSION



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
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Date: 21 September 2023

Adv. Doc Mashabane
Director-General
Department of Justice and Constitutional Development
Private Bag X81
PRETORIA
0001

Dear Adv. Mashabane

Attention: Mrs Reesha Ramnarain (ReRamnarain@justice.gov.za)

**LEGAL OPINION: OUTCOME OF THE MISCONDUCT INQUIRY OF MR M D HINXA,
CHIEF MAGISTRATE, BLOEMFONTEIN: YOUR E-MAIL DATED 23 AUGUST 2023**

INTRODUCTION

1. The Department of Justice and Constitutional Development ("the Department") has requested us to provide it with a legal opinion in respect of the matter of the Chief Magistrate, Bloemfontein, Mr M D Hinxa (the "Chief Magistrate").

2. The legal questions in respect of which our opinion is sought are framed in the Department's e-mail to us as follows:

"3. Specific questions that require answers are:

- (i) May the Commission overrule the findings imposed by the PO?
- (ii) Whether the decision of the PO is final and whether it can be challenged;
- (iii) Whether the Commission can overrule the decision of the PO on sanction;
- (iv) Whether the decision of the PO on the verdict and sanction are final;

- (v) *In respect of a sanction that the magistrate be removed from office, may the Commission overrule the sanction?*
- (vi) *Whether the view of the Commission or the majority of its members, on the findings and/or the sanction, is binding on the Minister;*
- (vii) *Whether the view of the Commission or the majority of its members on the finding of guilt, can be overruled by the Minister and whether the Minister can make his own finding on the PO's findings, having read the record of the proceedings; and*
- (viii) *Whether the view or recommendation of the Commission or the majority of its members can be overruled by the Minister after having considered the record and the views of the members of the Commission."*

3. We comment of these questions later on herein below. At this juncture, we believe that it is convenient that we deal with the relevant factual background for the purpose of context and to put the matter into perspective.

FACTUAL BACKGROUND

4. As far as it can be ascertained from the Department's submission, the following are the salient facts regarding the matter:

4.1 In 2016, a member of the public (the "complainant") lodged a complaint with the Minister of Justice and Correctional Services against the Chief Magistrate following some unpleasant treatment she was apparently subjected to by the Chief Magistrate, namely— that on two separate occasions the Chief Magistrate compelled the complainant to commit an act of sexual intercourse with him against her will and without her consent. The first incident is alleged to have occurred during December 2010 whereas the second is alleged to have occurred during either June or July 2011.

4.2 The essence of the allegations against the Chief Magistrate by the complainant is that the Chief Magistrate "raped" the complainant.

4.3 The complainant was aggrieved and felt violated by the Chief Magistrate's treatment of her and as such sought to lay criminal charges against the Chief Magistrate so that she could get justice. To this effect, the complainant approached the South African Police Services where, instead of being assisted, she was met with ridicule. Other institutions that the complainant approached for assistance are the National Prosecuting Authority and the Office of the Public Protector.

4.4 However, nothing became of the complainant's matter in terms of being fully

investigated and prosecuted.

4.5 The complainant then, ostensibly out of desperation and as a last resort, lodged a complaint with the Minister of Justice and Correctional Services (the "Minister") against the Chief Magistrate. The complainant's complaint was then referred to the Magistrates Commission (the "Commission") for its attention:

4.6 Following a preliminary investigation into the matter, the Commission formulated and brought charges of misconduct against the Chief Magistrate in terms of regulation 25(c) of the Regulations for Judicial Officers in Lower Courts, 1994 (the "Regulations")¹ read with regulation 26(17) of the Regulations, section 18 of the Magistrates Act, 1993 (Act No. 90 of 1993) (the "Magistrates Act") and paragraphs 1, 4, 5 and 16 of the Code of Conduct for Magistrates (the "Code of Conduct").²

4.7 The Commission appointed a judicial presiding officer (the "presiding officer") to preside at the misconduct hearing (the "hearing") constituted by the Commission for the hearing of the misconduct charges against the Chief Magistrate. The Commission also appointed evidence leaders to lead evidence at the hearing.

4.8 During the hearing, the complainant, as well as several other witnesses testified and were cross-examined by the Chief Magistrate's counsel. However, the Chief Magistrate neither testified nor called any witness to testify in his defence.

4.9 The presiding officer found the Chief Magistrate guilty in respect of all the misconduct charges brought against him and recommended to the Commission in terms of regulation 26(17)(b) of the Regulations that the Chief Magistrate be removed from office.³

4.10 The Chief Magistrate lodged representations with the Commission in terms of regulation 26(20)(a) of the Regulations. The Commission referred the matter to its Ethics Committee for a recommendation (the "Ethics Committee").⁴

4.11 However, the Ethics Committee is divided on the matter. In its letter to the

¹ Published under GN R361 in GG 15524 of 11 March 1994.

² The Code of is contained in Schedule E to the Regulations.

³ Para [141] and [142] of the presiding officer's judgment.

⁴ See para 11 of the Commission's letter to the Minister dated 19 June 2023.

Minister, the Commission states the following in this regard:

"16. Half (6) of the Commission's 12 members who had to decide on the aforementioned issues disagree with the guilty finding of the Presiding Officer, 4 are in agreement with the Presiding Officer's findings and 2 members remain indecisive. A relative majority of the Commissioners, therefore, disagree with the finding of the Presiding Officer that Mr Hinxa is guilty of misconduct. The Commission, therefore, request the Honourable Minister to decide on the matter."

4.12 In consequence of the above, the Commission has referred the matter to the Minister for a decision. In this regard, the Chairperson of the Commission states the following in the letter to the Minister:

"1. In this matter the Magistrates Commission was not *ad idem* and could not unanimously agree on a recommendation to be made to you. My view is that despite different views and recommendation of the members of the Commission, the matter should still be referred to you for your decision in terms of section 13(4)(a)(i) of the Magistrates Act ..."

5. It emerges from the two paragraphs cited above that the Commission has no specific recommendation to make since it is divided on the matter. It, therefore, requires the Minister to decide on the matter in terms of section 13(4)(a)(i) of the Magistrates Act.

RELEVANT LEGISLATIVE FRAMEWORK

6. It is apparent that the charges of misconduct brought against the Chief Magistrate were investigated and prosecuted in terms of and in accordance with the provisions of the Regulations.

7. Regulation 26 of the Regulations deals with the procedure for preliminary investigation and misconduct hearing and provides as follows:

"Procedure for preliminary investigation and misconduct hearing

26. (1)

(15) After the conclusion of the evidence and the arguments or address at a misconduct hearing, the judicial presiding officer shall on a balance of probabilities make a finding as to whether the magistrate charged is guilty or not guilty of the misconduct as charged.

(16) (a) A judicial presiding officer shall provide his or her reasons for any finding.

(b) The judicial presiding officer shall give the magistrate charged and the magistrate or person who led the evidence at a misconduct hearing an opportunity to present any aggravating or mitigating factors.

(17) The judicial presiding officer at a misconduct hearing may if a finding of guilty has been made—

- (a) impose one of the following sanctions or any combination thereof on the magistrate charged:
 - (i) Caution or reprimand the magistrate;
 - (ii) specify the manner in which he or she should be cautioned or reprimanded;
 - (iii) direct the magistrate to tender an apology in a manner specified by the judicial presiding officer; or
 - (iv) postpone the imposition of a sanction for a period not exceeding 12 months with or without conditions which may include counselling, treatment or attendance of a training programme, or

(b) recommend to the Commission that the magistrate concerned be removed from office as contemplated in section 13 of the Act.

(18) After the conclusion of a misconduct hearing the judicial presiding officer shall inform or notify the magistrate concerned of his or her right to lodge representations in terms of subregulation (20).

(19) After the conclusion of a misconduct hearing the judicial presiding officer shall—

- (a) inform or notify the Commission and the magistrate concerned of—
 - (i) his or her finding in relation to the charge and the reasons therefor;
 - (ii) his or her finding in relation to the aggravating or mitigating factors presented at the hearing;
 - (iii) the sanction imposed and the reasons therefor or his or her recommendation in terms of subregulation (17)(b) and the reasons therefor, and

(b) furnish the Commission with a copy of the record of proceedings.

(20) (a) If a recommendation is made in terms of subregulation (17)(b), the magistrate concerned may lodge representations with the Commission.

(b) The representations contemplated in paragraph

- (a) must—
 - (i) be in writing;
 - (ii) be lodged with the Commission within 21 working days after the findings of the judicial presiding officer has come to the notice of the magistrate concerned; and
 - (iii) set out the grounds for his or her representations.
- (c) The magistrate concerned shall forward a copy of the notice of the representations, together with the grounds for his or her representations to the judicial presiding officer.

(21) Within 21 working days after receipt of the notice of representations contemplated in subregulation (20), the judicial presiding officer may forward any additional reasons for his or her recommendation to the Commission and the magistrate concerned.

(22) After consideration of the relevant documents referred to in subregulation (19), the Commission may—

- (a) recommend to Parliament that the magistrate concerned be removed from office as contemplated in section 13 of the Act in which case the Commission shall submit to Parliament all the relevant documents with

regard to that misconduct hearing: Provided that if the magistrate charged lodges representations in terms of subregulation (20) any recommendation or documentation shall not be submitted to Parliament until the Commission has made a finding regarding the representations:

or

(b) If the Commission is of the opinion that the magistrate concerned should not be removed from office, impose any of the sanctions contemplated in subregulation (17)(a).

(23) A person summoned as a witness to appear before an investigating officer or a judicial presiding officer for the purposes of a preliminary investigation, or a misconduct hearing shall receive allowances in accordance with the tariff of allowances prescribed under section 191 of the Criminal Procedure Act, 1977 (Act 51 of 1977), by notice in the *Gazette*.

(24) A summons in respect of a preliminary investigation or a misconduct hearing shall be issued on a form prescribed by the Commission and shall be served in a manner determined by the Commission.

(25) A misconduct hearing shall be in public unless the judicial presiding officer determines otherwise.

(26) Evidentiary material obtained during a preliminary investigation which is not disputed by the magistrate concerned may, upon mere production thereof, be admitted at a misconduct hearing. (Our underlining.)

8. Insofar as it is stated in the Commission's letter that the matter has been referred to the Minister for a decision in terms of section 13(4)(a)(i) of the Magistrates Act, that section provides as follows:

"Vacation of office and discharge of magistrates

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

(1A) (a) A magistrate holding office as such may, before attaining the age of 65 years, in written notice to the Commission, indicate his or her intention to continue to serve in such office for such further period specified in the written notice: Provided that a magistrate must vacate his or her office on attaining the age of 70 years: Provided further that if he or she attains the said age after the first day of any month, he or she shall be deemed to attain that age on the first day of the next ensuing month.

(b) A magistrate who intends to continue to serve in such office as contemplated in paragraph (a) must timeously give notice thereof in writing to the Commission before he or she attains the age of 65 years.

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

(3) (a) The Minister, on the advice of the Commission, may provisionally suspend a magistrate from office if—

(i) the Commission, after affording the magistrate a reasonable opportunity to be heard regarding the desirability of such provisional suspension, is satisfied that reliable evidence exists indicating that an allegation against that magistrate is of such a serious nature as to make

- it inappropriate for the magistrate to perform the functions of a magistrate while the allegation is being investigated; and
- (ii) an investigation has been instituted by the Commission into such magistrate's fitness to hold office.

(b) A report in which the provisional suspension in terms of paragraph (a) of a magistrate and the reasons therefor are made known, must be tabled in Parliament by the Minister within seven days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within seven days after the commencement of its next ensuing session.

(c) Parliament must, as soon as is reasonably possible, pass a resolution as to whether or not the provisional suspension of the magistrate is confirmed.

(d) If Parliament passes a resolution as contemplated in paragraph (c) that the provisional suspension is not confirmed, the suspension lapses.

(e) The provisional suspension of a magistrate in terms of paragraph (a) lapses after 60 days from the date of the suspension, unless the Commission, within that period, commences its inquiry into the allegation in question by causing a written notice containing the allegation concerned to be served on the magistrate.

(f) An inquiry referred to in paragraph (e) must be concluded as soon as possible, and the Commission must cause a report on the progress in respect of that inquiry to be submitted to Parliament every three months.

(g) Parliament may, at any stage pending—

- (i) the conclusion of an inquiry referred to in paragraph (e); or
 - (ii) a resolution referred to in subsection (4) (c),
- pass a resolution setting aside the suspension of the magistrate concerned, whereupon the suspension shall lapse forthwith.

(4) (a) If the Commission recommends that a magistrate be removed from office—

- (i) on the ground of misconduct;
- (ii) on account of continued ill-health; or
- (iii) on account of incapacity to carry out the duties of his or her office efficiently,

the Minister must suspend that magistrate from office or, if the magistrate is at that stage provisionally suspended in terms of subsection (1) (a), confirm the suspension.

(b) A report in which the suspension in terms of paragraph (a) of a magistrate and the reason therefor are made known, must be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament must, as soon as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended.

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

(4A) ...". (Our underlining.)

PRESIDING OFFICER'S FINDINGS AND SANCTION

9. It is apparent from regulation 26(15) and (17), of the Regulations that—
- 9.1 after the conclusion of the evidence and the arguments or address at a misconduct hearing, the presiding officer must on a balance of probabilities make a finding as to whether or not the magistrate charged is guilty of the misconduct as charged; and
- 9.2 if the presiding officer makes a finding of guilty, he or she may—
- (a) impose one of the following sanctions or any combination thereof on the magistrate charged:
 - (i) Caution or reprimand the magistrate;
 - (ii) specify the manner in which the magistrate should be cautioned or reprimanded;
 - (iii) direct the magistrate to tender an apology in a manner specified by the judicial presiding officer; or
 - (iv) postpone the imposition of a sanction for a period not exceeding 12 months with or without conditions which may include counselling, treatment or attendance of a training programme, or
 - (b) recommend to the Commission that the magistrate concerned be removed from office as contemplated in section 13 of the Act (the Magistrates Act).

10. As indicated above already, the presiding officer has found the Chief Magistrate guilty of all the charges of misconduct brought against him and recommended to the Commission that he be removed from office.

RIGHT TO LODGE REPRESENTATION AND PURPOSE OF REPRESENTATIONS

11. Regulation 26(18) requires the presiding officer to inform or notify the magistrate concerned after the conclusion of a misconduct hearing of his or her right to lodge representations.

12. In terms of regulation 26(20)(a) a magistrate who has been found guilty and in respect of whom a recommendation for removal from the office has been made in terms of regulation 26(17)(b) by the presiding officer may lodge representations with the Commission.

13. It appears that the right to lodge representations exists only in the event that a recommendation for removal from the office has been made by the presiding officer as

a sanction to be imposed. The right to lodge representation does not, in our view, exist if a sanction stipulated in regulation 26(17)(a) is imposed by the presiding officer,

14. In our view, this, therefore, suggests that—
 - (a) the representations must be in respect of or confined to the recommended sanction, namely removal from office; and
 - (b) the purpose of the representation is to show cause why the removal from the office must not be imposed as a sanction and recommended to Parliament by the Commission. The provisions of regulation 26 do not say this in so many words. It is, however, in our view implied.

15. Therefore, it is our view that the representations cannot seek to assail the findings made by the presiding officer on the merits of the matter. In other words, the representations cannot be used to appeal to the Commission against the findings made by the presiding officer or to have such findings reviewed by the Commission.

CHIEF MAGISTRATE'S REPRESENTATIONS TO THE COMMISSION

16. Having said the above, we believe that it is important that we offer some comment on the representations lodged by the Chief Magistrate with the Commission. The Chief Magistrate's representations are included in the Department's submission and we have had the opportunity to peruse them.

17. Paragraph 1.4 of the representations state that the *"representations are against both conviction and sanction as [they are] inappropriate"*. The Chief Magistrate raises a number of challenges in relation to the conviction and the sanction. The essence of the challenges is captured in the subheadings, for example, *distortion of evidence* (para 2.2), *selective and dismissive approach* (para 2.3) and *misdirection in law* (para 2.4).

18. In paragraph 2.1 of the representations, the Chief Magistrate complains about the *"[d]isregard of [his] Heads of Argument"*. The Chief Magistrate says that *"despite [his Heads of Argument] amounting to more than 100 pages, very little, if any, reference was ever made to them in the judgment even if solely for the purposes of dismissal"*.⁵

⁵ Para 2.1 of the Chief Magistrate's representations lodged with the Commission.

18.1 That the Heads of Argument were disregarded and that very little reference was ever made to them in the judgment, appears to be a statement that is contradictory. In any event, there is, as far as we could ascertain, no legal requirement that the presiding officer must make substantial reference to heads of argument. It is our view that if the heads of argument are of no assistance, the presiding officer is not required to refer to them irrespective of how lengthy such heads of argument are. The Chief Magistrate appears to be expressing unhappiness that has no substance in this regard.

19. At the bottom of paragraph 2.2.1 of the Chief Magistrate's representations the following statement appears in bold: ***"The Chairlady's distortion irregularly and maliciously defeated my very material defence"***⁶

20. While the Chief Magistrate in the statement cited above refers to his so called "material defence", it is apparent that, that "material defence" was never placed before the hearing by the Chief Magistrate through testifying. This appears in the following paragraphs of the presiding officer's judgment (the "judgment") which reads as follows:

[114] **Mr Hinxa elected not to testify or call any witnesses when the Officers Leading Evidence closed their case. In the result, there is no oral evidence of his defence under oath that could be tested by means of cross-examination to establish the veracity thereof.** It is well-established in our law that questions and statements to witnesses do not constitute evidence, unless it has been properly pleaded and/or repeated under oath. It is further trite that oral evidence under oath is subject to scrutiny of cross-examination, and therefore will carry more weight as evidence. the merits and demerits of this evidence is considered with reference to clarity, truthfulness and probability considering the scrutiny of cross-examination.

[115] **Even though Mr Hinxa did not testify under oath, and consequently none of his allegations and assertions could be tested by means of questioning, I must still consider the probability of his alleged *alibi* and the alleged conspiracy against him in the light of the totality of the evidence and lastly his argument regarding the validity of the complaints procedure.**" (Our emphasis.)

21. It appears from the judgment that the Chief Magistrate's "material defence" emanates from some versions that were put to the witnesses during cross examination by the Chief Magistrate's counsel, as well as from some other documents that were

⁶ (Our underlining).

submitted by the Chief Magistrate and admitted during the hearing on the understanding that the Chief Magistrate was going to testify regarding those documents.

22. What the Chief Magistrate seeks to do, in our view, is to challenge the judgment by putting his "material defence" in the representations which he failed to place before the hearing through testifying. The effect of this is that the Commission is now being asked to find fault with the judgment on the basis of the "material defence" that, at the risk of repetition, was never placed before the hearing and tested through cross-examination. It should be borne in mind that the findings made by the presiding officer are in the main based on the evidence of the complainant that was never refuted by the Chief Magistrate through testifying and putting before the hearing his material defence.

23. As regards the Chief Magistrate's attack against the sanction, the Chief Magistrate attacks the sanction recommended by the presiding officer on the basis of what he refers to as "*procedural misdirection*" and "*substantive misdirection*".⁷

24. The substance of the Chief Magistrate's complaint insofar as "*procedural misdirection*" is concerned appears to be that the amount of time that he was afforded to prepare and submit his mitigating factors was insufficient. For example, the Chief Magistrate states the following in paragraphs 3.1(c)(i) and (ii) of his representations:

- "(i) ...It was only around 15 November that I was given two weeks to consult with, organise and coordinate all my witnesses which comprised of General practitioners, psychiatrists and psychologists as indicated in my mitigation....
- (ii) To rub salt into my already painful wound the Chairlady offered me only 1 day...to call my witnesses which to me appeared to be a mere formality...". (Our emphasis.)

25. The Chief Magistrate's claim that he was given only two weeks to prepare and submit his mitigation factors is contradicted by what is reflected in the transcribed record of proceedings regarding sanction (the "transcribed record").⁸

25.1 Page 1 of the transcribed record reflects the following:

"on 09 July 2021 Mr Hinxa was found guilty on two charges of misconduct.

⁷ See paras 3.1 and 3.2 of the Chief Magistrate's representations.

⁸ The transcribed record of proceedings regarding sanction is dated 30 November 2021.

Copies of the written judgment were handed to Mr Hinxa, the Officers Leading Evidence and the representative of the Magistrates Commission. On the same date Mr Hinxa requested two months postponement in order to *inter alia* get medical reports relating to his health and present this evidence albeit as an expert report or reports and/or to call witnesses in mitigation of the sanction". (Our emphasis)

25.2 Pages 2 and 3 of the transcribed record also reflect the following:

"I nevertheless thereafter invited Mr Hinxa to address and submit any mitigating factors to this hearing given that he had taken the initial two months post [the] finding [of guilty] to prepare and obtain medical reports". (Our emphasis)

26. It is clear from the contents of the transcribed record cited above that the Chief Magistrate was given two months, if not more, to prepare and submit his mitigation.

27. Regarding an opportunity to present aggravating or mitigating factors, regulation 26(16)(b) provides as follows:

"(16) (a) A judicial presiding officer shall provide his or her reasons for any finding.

(b) The judicial presiding officer shall give the magistrate charged and the magistrate or person who led the evidence at a misconduct hearing an opportunity to present any aggravating or mitigating factors." (Our emphasis.)

28. It is clear from what is stated above that there was compliance with regulation 26(16)(b). That is, the Chief Magistrate was given ample opportunity to prepare and present his mitigating factors.

29. It is our view that it cannot be said that the opportunity that the Chief Magistrate was given to prepare and submit his mitigation was so insufficient and not meaningful that it renders the hearing unfair.

30. In paragraph 3.2 of the representations, the Chief Magistrate states that "[t]he Chairlady attached no weight whatsoever to the extensive medical documentation tendered which depicted that a sanction of dismissal will be nothing short of death penalty. She did not address the possibility of death penalty despite enormous medical evidence at her disposal".

31. The Chief Magistrate's contention that the presiding officer attached no weight whatsoever to the medical documentation tendered is, in our view, inaccurate and

without substance. The following excerpts herein below (reflected on pages 8, 9, 10 and 12) of the transcribed record clearly demonstrate that the presiding officer comprehensively considered the various mitigating factors submitted by the Chief Magistrate which include the Chief Magistrate's personal circumstances, the Chief Magistrate's unblemished record of service, and the Chief Magistrate's health:

"...Looking at the mitigating factors I take into account the factors presented by Mr Hinxa in his written address and specifically then I take into account those factors from page 8-9 onwards where he refers to his mitigating circumstances. Taking into account as far as his personal circumstances are concerned that he is currently 61 years old, he divorced and remarried and he is presently the father of eight children, five biological children and three stepchildren. The youngest of his children is 16 years old and thus still a minor.

...
I take into account the fact that he has unblemished service record and a number of achievements to the extent that he represented the Judiciary at local and international events and conventions.

As far as his health is concerned, I take into account that his health problems surfaced in 2017 and it is directly related to his notice of possible suspension, the investigation into the misconduct and then later in being charged and found guilty of misconduct... two medical reports [are] included and from this I can readily accept as I do that Mr Hinxa has the following conditions: that he has a stress and anxiety disorder, that he has suffered from depression and hypertension and high blood pressure. I also accept the appeal by Dr Jacobs and the other doctor to consider his poor health and the impact that this misconduct charges and hearing has had on his health over the last couple of years.

...
I have to in this particular matter take into account the Code of Conduct for Magistrates which very specifically states the following, and I am going to only refer to few of the items in the Code of Conduct but to start off with number 1, it states that:

'A magistrate is a person of integrity and acts accordingly, there is no degree of integrity, integrity is absolute'

Later at number 4 it states:

'A magistrate acts at all times (also in his or her private capacity) in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice'.

And [at] number 16:

'A magistrate shall not act to the detriment of the discipline or the efficiency of the administration of justice or allied activities'.

...
Mr Hinxa was preoccupied with self-interest, had no concern for the effect of his actions on the complainant. He made no admissions throughout. He took no responsibility whatsoever and although Mr Hinxa placed a number of factors before me in mitigation of the sanction I must be reminded that Mr Hinxa is not the victim. That his preoccupation with self-interest does not take into account the gravity of the misconduct nor does it propose any appropriate sanction for me to consider.

...
A Judicial Officer or Magistrate made himself guilty of such serious misconduct should not and cannot continue to hold office and in the circumstances of this matter ... I recommend to the Commission that Mr Hinxa **BE REMOVED FROM OFFICE...** (Our emphasis)

32. In the light of the above, it is our view that the issues that the Chief Magistrate raises in his representations as grounds on the basis of which he urges the Commission to find fault with the presiding officer's findings and sanction are without substance.

33. Moreover, the exercise that the Chief Magistrate asks the Commission in his representations to engage in is, in our view, undesirable. The Commission is, in any event, in our view, constrained in this regard. This we demonstrate in what follows herein below.

POWERS OF THE COMMISSION IN RELATION TO SANCTION

34. In terms of regulation 26(22)(a) and (b) the Commission is empowered to do only two things, namely—

- (a) to recommend to Parliament that the magistrate concerned be removed from office as contemplated in section 13 of the Magistrates Act; or
- (b) if the Commission is of the opinion that the magistrate concerned should not be removed from office, to impose any of the sanctions contemplated in regulation 26(17)(a).

35. It should, however, be pointed out that before the Commission can recommend to Parliament that the magistrate concerned be removed from office, the Commission is required to make a finding regarding the representations. This is according to the proviso to regulation 26(22)(a) which reads as follows:

"Provided that if the magistrate charged lodges representations in terms of subregulation (20) any recommendation or documentation shall not be submitted to Parliament until the Commission has made a **finding** regarding the representations". (Our emphasis.)

36. Therefore, in the light of our remarks in paragraphs 13 to 15 above, we are further of the view that the finding that the Commission is required to make in terms of the proviso above is none other than whether or not the magistrate concerned has shown cause why his or her removal from office should not be accepted by the

Commission and recommended further to Parliament. Regulation 26(22) does not, in our view, give the Commission any power to make a **finding** on or against the findings made by the presiding officer on the merits of the matter.

37. It is clear from regulation 26(22)(b) of the Regulations that if the Commission is of the **opinion** that the magistrate concerned should not be removed from office, the Commission is entrusted with the power to impose any of the sanctions contemplated in regulation 26(17)(a). In our view, in order to be able to form the **opinion** contemplated in regulation 26(22)(b), the Commission would have to consider, for example—

- (a) the reasons that a magistrate has put forward in his or her representations as to why the recommendation for removal from office should not be effected;
- (b) the reasons given by the presiding officer in relation to the recommendation for removal from office; and
- (c) the seriousness of the acts of misconduct in respect of which the magistrate has been found guilty.

38. It appears that the only interference that regulation 26(22) permits of the Commission is in relation to the sanction in terms of paragraph (b) of the regulation.

39. In summation, the powers of the Commission in terms of regulation 26(22)(a) and (b) are in our view—

- (a) to make a finding on the representations. That is, to determine whether or not the representations have shown cause why the recommendation for the removal from office must not be imposed;
- (b) to impose any other stipulated sanction. This would be the case if the Commission is of the opinion that the magistrate concerned should not be removed from office; and
- (c) to recommend to Parliament that the magistrate concerned be removed from office.

POWERS OF THE COMMISSION IN RELATION TO THE FINDINGS ON MERITS

40. Regulation 26(22) is silent on whether or not the Commission may alter, review or interfere with the findings of the presiding officer on the merits of the matter. We also could not find any other provision in the Regulations or the Magistrates Act which either explicitly or implicitly provides that the Commission has such powers.

41. Nevertheless, properly construed, regulation 26(22) has the effect of limiting the Commission's powers to the sanction. This means that the Commission may interfere only with the sanction, and not the findings on the merits. It is our view that the Commission may not, in terms of regulation 26(22), assume any power by necessary implication because no power other than the power expressly provided for in that regulation can be inferred.

42. Even though the Commission is not the employer of magistrates, the scheme of the Regulations, insofar as the disciplinary process of magistrates is concerned, places, in our view, the Commission in a position analogous to that of an employer in the context of a disciplinary hearing of an employee. Therefore, the decision of the presiding officer manifests, in our view, the decision of the Commission with the effect that the Commission cannot alter, review or interfere with that decision.

CONSIDERATION OF THE MATTER BY THE COMMISSION'S ETHICS COMMITTEE

43. While there is nothing wrong with the Commission referring the matter to its Ethics Committee for a recommendation, it is our view that the decision or recommendation of the Ethics Committee is not a decision of the Commission. Where a matter has been finalised by the presiding officer, such as in the case under consideration, the decision of the Commission will have to be either of the two things provided for in regulation 26(22)(a) and (b) of the Regulations and nothing less.

EXCLUSION OF COMMISSIONERS WHO ARE MEMBERS OF PARLIAMENT AND THE EXECUTIVE

44. It is apparent from the Commission's letter to the Minister that the matter was considered by the Commission to the exclusion of all the Commissioners who are members of Parliament and the Executive. We believe that this aspect is worth commenting on.

45. We presume that the exclusion of these Commissioners was on the basis of a potential future conflict of interest if and when the matter goes to Parliament or has to be considered by the Executive.

46.1 Article 13 of the Code of Conduct deals with the recusal of a magistrate and

provides as follows:

"Article 13: Recusal

A magistrate must recuse himself or herself from a case if there is a—

- (a) real or reasonably perceived conflict of interest; or
 - (b) reasonable suspicion of bias based upon objective facts,
- and must not recuse himself or herself on insubstantial grounds."

46.2 Despite the provisions of Article 13 above being applicable specifically to magistrates, it is our view that the same principle it enunciates should apply to the recusal of Commissioners.

46.3 It is apparent that the Commission is a body that deals with the matter at first instance. All Commissioners that are available (with the exception of those that are already conflicted at that level) should, in our view, participate in the handling of the matter. This is undoubtedly important for the effective functioning of the Commission. That the matter will or might in future serve before Parliament or the Executive where some of the Commissioners sit, is, in our view, not a sufficient ground for those Commissioners to be excused from participating in the matter at the Commission.

47. If there is no conflict at the level of the Commission at the time the Commission is seized with the matter, all Commissioners that are available should therefore, in our view, participate. It is only in Parliament or at the Executive level where they will have to recuse or excuse themselves from participating in the handling of the matter since they would have done so at the level of the Commission.

MINISTER'S POWERS IN TERMS OF SECTION 13(4) OF THE MAGISTRATES ACT

48. As indicated earlier on above, the matter has been referred to the Minister for a decision in terms of section 13(4)(a)(i) of the Magistrates Act. It is thus important to repeat the provisions of section 13(4)(a) here, which reads as follows:

"(4) (a) If the Commission recommends that a magistrate be removed from office—

- (i) on the ground of misconduct;
- (ii) on account of continued ill-health; or
- (iii) on account of incapacity to carry out the duties of his or her office efficiently;

the Minister must suspend that magistrate from office or, if the magistrate is at that stage provisionally suspended in terms of subsection (1) (a), confirm the

suspension.". (Our underlining)

49. It is apparent that the *sandwich* provision in subsection (4)(a) concerns the Minister's power to suspend a magistrate or to confirm the suspension of a magistrate if the Commission has recommended that the magistrate be removed from office on either of the grounds listed in subparagraphs (i), (ii) and (iii).

50. It is our view that the Minister's exercise of the power to suspend or to confirm the suspension (if the magistrate is already under provisional suspension) must be preceded by a recommendation by the Commission that the magistrate be removed from office. In other words, the Commission's recommendation that the magistrate be removed from office is a "jurisdictional fact" that must exist in order for the Minister to exercise his powers to suspend or confirm the suspension, whatever the case may be.

51. We pause to indicate, for the purposes of clarity, that the suspension contemplated in section 13(4)(a) is different from the suspension contemplated in section 13(3)(a). The suspension contemplated in section 13(3)(a) is a provisional suspension. The Chief Magistrate is currently on provisional suspension in the matter under consideration. So, when section 13(4)(a) states that the Minister must suspend, it refers to a situation where the magistrate was not provisionally suspended and has to now be suspended because of the recommendation for removal from office. When it states that the Minister must confirm the suspension, it refers to the confirmation of the provisional suspension. We believe it is important for this distinction to be made.

52. We, however, wish to point out that when the Commission recommends that a magistrate be removed from office, it does not make the recommendation to the Minister but to Parliament. This is in terms of regulation 26(22)(a) which provides that "*[a]fter consideration of the relevant documents ..., the Commission may—*
(a) recommend to Parliament that the magistrate concerned be removed from office as contemplated in section 13 of the Act ...". (Our emphasis)

53. Then in terms of section 13(4)(c) "*Parliament must, as soon as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended*".

54. The Minister's powers to remove a magistrate from office is provided for in section 13(4)(d) of the Magistrates Act which provides that "*((d) [a]fter a resolution has*

been passed by Parliament ... the Minister shall restore the magistrate concerned to his or her office or remove him or her from office, as the case may be". Therefore, the jurisdictional facts regarding the Minister's exercise of the power to remove a magistrate from office are that—

- (a) the Commission must recommend that the magistrate be removed from office (s13(4)(a)); and
- (b) Parliament must pass a resolution in favour of the removal (s13(4)(d)).

56. It is apparent that the Commission has, in the circumstances, not recommended to Parliament that the Chief Magistrate be removed from office. This is due to the Commission not unanimously agreeing on the matter. Consequently, there is no recommendation on which Parliament can pass a resolution either for the restoration or removal of the Chief Magistrate from office.

57. In the absence of a recommendation by the Commission for the removal of the Chief Magistrate and a resolution passed by Parliament in favour of such recommendation, the Minister cannot exercise the power to remove the Chief Magistrate. The converse is also true. That is, without a resolution passed by Parliament, the Minister cannot restore the Chief Magistrate to his office.

58. This predicament will result in the Chief Magistrate being indefinitely on provisional suspension unless the Chief Magistrate approaches the High Court to get an order for the Commission to decide on the matter in terms of regulation 26(22) of the Regulations. It is our view that the Commission's process is not complete until the Commission decides on the matter in terms of regulation 26(22).

REFERRAL OF THE MATTER BACK TO THE COMMISSION

59. We have indicated above that the Commission has not done what it is required to do in terms of regulation 26(22)(a) and (b) and that the Minister thus has no power to decide on the matter in terms of section 13(4)(a)(i) or (d).

60. It is, therefore, our view that it would be apt for the Minister to refer the matter back to the Commission for proper consideration and decision in terms of regulation 26(22) of the Regulations.

THE QUESTIONS POSED BY THE DEPARTMENT FOR CONSIDERATION

61. We turn now to the questions the Department has posed for our consideration and opinion which are cited in paragraph 2 above.

62. It appears to us that the questions the Department poses are a repetition of the questions contained in the Commission's letter to the Minister.⁹ We do not understand the Commission's letter to the Minister to be saying that it requests the Minister to help it to answer those questions. Rather, the Commission is saying that those are the questions it posed to itself and had to deal with when it was considering the matter.

63. In the light of what we have discussed above and having regard to the purpose for which the matter was referred to the Minister, namely that the Commission has referred the matter to the Minister for a decision in terms of section 13(4)(a)(i), the questions posed by the Department which we have cited in paragraph 2 are, in our view, not pertinent. It is, therefore, not necessary for us to deal with those questions in this legal opinion specifically in the manner in which they have been posed since they will be of no practical assistance to the Minister or the Department in dealing with this matter.

CONCLUSION

64. In consequence of the above, we conclude and are of the opinion that—

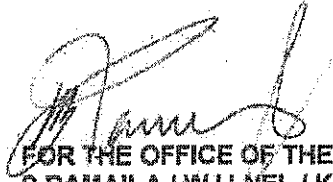
64.1 the Commission has the responsibility to deal with the matter in terms of regulation 26(22) of the Regulations so as to conclude its process before the Minister may be involved in the matter.

64.2 The Minister cannot exercise his powers in terms of section 13(4)(a)(i) or (d) of the Magistrates Act because neither has the Commission made a recommendation in terms of regulation 26(22)(a) or (b) of the Regulations nor has Parliament passed any resolution in that regard.

⁹ See paragraph 13 of the Commission's letter to the Minister.

64.3 The matter should therefore, in our opinion, be referred back to the Commission for reconsideration.

Yours sincerely

A handwritten signature in dark ink, appearing to read 'S Ramaila', is written over the typed name.

FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
S RAMAILA / WJJ NEL / K A SELOKELA

IN THE MISCONDUCT HEARING HELD AT THE BOTSHABELO MAGISTRATES
COURT

CASE REFERENCE NUMBER 6/5/5/2-20/2016

In the matter between

THE MAGISTRATES COMMISSION

and

MZIWONKE DAVID HINXA
MAGISTRATE CHARGED

JUDGMENT DELIVERED ON 8 JULY 2021

Introduction:

[1] In this misconduct hearing the Magistrate charged is Mr. Mziwonke David Hinxa, the Chief Magistrate of the Bloemfontein Magistrates' Court. Two charges of misconduct are levelled against him, wherein it is alleged that he contravened Regulation 25(C), read with Regulation 26(17) of the Regulations for Judicial Officers in the Lower Courts¹, read with Section 16 of the Magistrates Act², and read with paragraphs 1,4,5, and 16 of the Code of Conduct for Magistrates³, and further read with the Bill of Rights contained in the Constitution. The relevant allegations in both charges are that he compelled an adult female, Ms. Lerato Constance France, on two separate occasions, to commit an act of sexual intercourse with him without her consent. In Charge 1 the allegations are that he unlawfully and wrongfully compelled Ms France on or about 10 and 11 December 2010, at or near Bloemfontein, to commit an act of sexual intercourse without her consent. In Charge 2 he is charged with essentially the same act of misconduct, but this time during or about June or July 2011.

¹ Regulation 361 of 11 March 1994

² Act No 90 of 1993

³ Issued in terms of Regulation 54A of the Regulations, contained in Schedule E to the Regulations

[2] In essence, Mr Hinxa is charged with having compelled Ms France on two separate occasions, to have sexual intercourse with him against her will and without her consent. The term 'rape' has been used throughout the proceedings, and in simple terms, that is the nub of the complaint of Ms France.

[3] The Magistrates Commission formulated the charges as misconduct, and alleged that Mr Hinxa, by so compelling Ms France to have sexual intercourse without her consent, wrongfully infringed her interest in her bodily integrity and her constitutional right to dignity. Both charges conclude by charging Mr Hinxa that he thereby acted without integrity and/or in a manner which does not uphold and promote the good name, dignity and esteem of the office of Magistrate and the administration of justice and/or does not obey the laws of the land and or acted to the detriment of the discipline and or the efficiency of the administration of justice or allied activities.

[4] It **must** however, from the onset be stressed and emphasized, that Mr Hinxa is not on trial for the criminal offence of contravening Section 3 of Act 32 of 2007 namely rape, nor for contravening Section 2 of the same Act (compelled rape). Mr Hinxa is charged with two charges of misconduct. The details of the alleged misconduct include that he compelled Ms France to have sexual intercourse against her will, thereby, and amongst others, not upholding the good name and esteem of the office he holds and bringing the Magistracy in disrepute.

[5] The ordinary meaning of the word **compel** is to 'force or oblige someone to do something' according to the Oxford Dictionary, and synonyms include verbs such as 'coerce into, intimidate or terrorize into, leave someone no option but to, constrain, demand'. The Merriam-Webster Dictionary defines the verb **compel** as "to drive or urge forcefully or irresistibly, or to cause to do or occur by overwhelming pressure"

[6] The Magistrates Commission, instituted in terms of the Act⁴ has jurisdiction to investigate and charge magistrates with charges of misconduct. The procedure for preliminary investigation when a magistrate is accused of misconduct is prescribed by Regulation 26(1) to 26(3) of the Regulation⁵. In this matter, the Commission appointed two experienced Regional Magistrates, Ms Nomawetu Primrose Smile and Mr Ian Derek Cox, to conduct a preliminary

⁴ Act No 90 of 1993

⁵ See footnote 1

investigation and to obtain evidence in order to determine whether there are any grounds for a charge of misconduct against Mr Hinx, and if so, to recommend to the Commission what the contents of the charge or charges should be. Mr Hinx made written representations to the Ethics Committee of the Commission on 22 February 2017⁶, the Investigators interviewed Mr Hinx on 22 August 2017 and recorded the interview⁷, and Mr Hinx deposed to an affidavit on 23 August 2017⁸.

[7] After the conclusion of the preliminary investigation and as a result of the recommendation made by the Investigators referred to above, the Commission was of the opinion that there are sufficient grounds for charges of misconduct against Mr Hinx and he was so charged⁹.

[8] The charges of misconduct¹⁰ were served on Mr Hinx in November 2017, with the invitation to deliver a written explanation within 10 days after receipt of the charges. This invitation for an explanation regarding the charges of misconduct aims to establish which allegations are admitted and which allegations are disputed¹¹. Mr Hinx did not respond or deliver any such written explanation.

[9] In terms of Regulation 26(6) the Magistrates Commission appointed Ms Smile and Mr Cox as the Officers Leading Evidence (hereinafter I will often refer to them as the OLE)¹². Unfortunate delays in this matter were experienced for a number of reasons, amongst others the Covid-19 pandemic and difficulty in securing dates suitable to Counsel for Mr Hinx, the two OLE and myself since we are sitting Regional Court Magistrates from provinces other than the Free State. The appointments as Presiding Officer and as OLE in essence encompass assuming the huge responsibility of ensuring a fair and just outcome, but it also entails having to travel to the venue for the hearing and working long hours in addition to already overburdened regional court rolls. As such, the daily roll for most regional courts are fully booked at least 3 months in advance (in many instances much longer), and the misconduct hearing continued over a period of almost 3 years. Counsel for Mr Hinx withdrew as legal representative as the OLE concluded leading evidence.

⁶ Annexure to Exhibit ZZ

⁷ Exhibit YY

⁸ Exhibit ZZ

⁹ Regulation 26(4)(a)

¹⁰ Exhibit E

¹¹ Regulation 26(5)

¹² Exhibit B and C respectively.

[10] The misconduct hearing, as contained in Regulation 26, is an autogenous or distinctive process (also called *sui generis*). In regulation 26(11) reference is made to civil proceedings, and in terms of regulation 26(15) the Presiding Officer shall make a finding on **a balance of probabilities** as to whether the magistrate charged is guilty or not guilty of the misconduct as alleged. The burden of proof is therefore the same as in civil proceedings.

The Plea

[11] Mr Hinxa pleaded not guilty to both charges of misconduct, and elected to exercise his right to remain silent. As such, he provided no explanation and he made no admissions.

In terms of civil procedure, he furnished no pleading. Ordinarily, if a defence is contained in a pleading, a party is not only bound to the averments pleaded, but can of course rely on such a pleading when electing not to testify or present evidence.

The Evidence

[12] The following is an attempt to summarize the evidence presented on behalf of the Commission in a chronological manner and to construct the timeline of events, although the evidence was not presented in chronological order.

[13] A total of 12 witnesses testified at the hearing, and 63 documents have been received into evidence. A list of Exhibits is attached to this judgment for ease of reference. This summary aims to provide the reader of this judgment some understanding and insight into the complex narrative that spans over a period 7 years.

[14] **Ms Lerato Constance France** testified that in the year 2010 her (now ex-) husband did not maintain herself and their children adequately. They have since divorced. In 2010 she experienced challenges reporting him, since he was a police officer stationed at her local police station in Botshabelo. She met with a social worker, who referred her to the Chief Magistrate at the Bloemfontein Magistrates Court. She understood him to be in a position to intervene since he is the Judicial Head of amongst others, the Botshabelo Magistrates Court, where she sought assistance to no avail.

[15] She travelled from Botshabelo to the Bloemfontein Magistrates Court, where she met Mr Hinxa for the first time in early December 2010. His female secretary received her, and she was shown to his office. She explained her problem regarding maintenance to him, and he requested her to commit this to writing. Over the course of a few days she continued to travel to Bloemfontein, eager to receive news of his intervention on her behalf. On Friday 10 December 2010 he informed her that he set up an appointment for her with Mr Bheki Cele, the then Police Commissioner. She believed that her problem regarding maintenance with her police officer husband, is now receiving high level attention due to Mr Hinxa's intervention. Mr Hinxa informed her that she must be ready to travel to Pretoria on a late bus from Bloemfontein that Friday night, and that he will put the necessary arrangements in place.

[16] She travelled from Botshabelo to Bloemfontein on the evening of the 10th of December 2010, along with her two-year old baby and a friend, Mr Tsidi. She exchanged telephone numbers with Mr Hinxa earlier, who was waiting for her at the bus station.

[17] Mr Hinxa explained that her male friend could not go along due to the safety threats that magistrates face, and so she got into Mr Hinxa's motor vehicle. He was going to drop her at the bus depot for overnight transport to Pretoria. Driving off, Mr Hinxa told her that he forgot a facsimile at his flat that she is meant to take along. They then drove to his flat in order to go and collect the required documentation she was meant to take along.

[18] Upon arrival at his flat, they went inside. Mr Hinxa locked the front door and demanded sex. He told her that he will call the police and tell them that he caught her stealing money from his flat should she refuse. It became apparent that she was duped into believing that any meeting with Mr Bheki Cele was set up, and after some struggle and attempts to ward him off, Mr Hinxa had sexual intercourse with her without her consent. He did so more than once over the course of the Friday night, whilst her young son was made to sleep on a makeshift bed on the floor. She managed to record some video footage on her cellular phone of the initial events in the bedroom unbeknownst to Mr Hinxa, but she did not record the actual forced sexual intercourse.

[19] The next morning, he unlocked the front door to the flat and accompanied her to the taxi rank, where he gave her money to travel home. Ashamed and

angry, she went to the nearest police station instead of going back to Botshabelo. At three different police stations she was met with apathy and ridicule at wanting to lay a complaint of rape against the Chief Magistrate of Bloemfontein. And so, she testified, began her long, painful and arduous journey to bring Mr Hinx to justice.

[20] Perhaps it is apt, at this point in her narrative, to make some observations about Ms France. She is a plain looking woman now in her mid-forties, largely uneducated and with a very limited command of the English language. She hails from Botshabelo, a poverty stricken former township some 50 kilometers outside Bloemfontein. Her narrative bears testimony of the fact that she is gullible and unable to verbalize her position in simple English, and despite an outward air of confidence, she is (or at least was) completely trusting of information from persons in authority. She displayed a huge amount of anger and resentment towards Mr Hinx and those who betrayed and 'tricked' her.

[21] Once back at home in Botshabelo, Ms France soon realized that the members of the SAPS are wholly uninterested in her rape complaint. It appears that at this juncture, even those close to her had reservations about the probability that a Chief Magistrate would want to rape her. She attended the private practice of one Dr Morake, who examined her and sent her to obtain the J88 medical-legal examination form, that is standard when a victim of alleged rape is examined. She was turned away at the police station and unable to obtain same, but Dr Morake nevertheless made file entries.

[22] In the months following the December 2010 incident, Ms France told a number of people about the rape. She met a prosecutor Nomsa¹³ at the Botshabelo Magistrates Court in the process. Over the course of the next few months they met a few times, at the Botshabelo Court. Nomsa gained her trust and they spoke about the rape incident often. From her evidence, it is not entirely clear whether Nomsa wanted to assist her to get Mr Hinx to pay some sort of compensation for violating her, whether she wanted to mediate and appease both or whether she was trying to protect Mr Hinx.

[23] Ms France testified that Nomsa spoke to her and also phoned Mr Hinx in her presence, and later appealed to her not to take any further action against Mr Hinx. On this occasion Nomsa told her that Mr Hinx is a black person like herself, and that white people will rejoice at Mr Hinx's fall from grace and

¹³ Nomsa Ngwata, the Presiding Magistrate in Exhibit W2, author of the withdrawal statement according to the handwriting analysis

take his position. Once the phone in Nomsa's office was handed to Ms France and Mr Hinxha told her that: 1. People will laugh at her allegations, 2. She is a married woman whilst he is a magistrate, and 3. If she persists to tell lies about him, she will be arrested.

June 2011 incident

[24] Sometime in June of 2011 she was phoned by Nomsa, who told her that she is wanted at an office in Bloemfontein in connection with the Hinxha issue. She met with Nomsa the next day and travelled to Bloemfontein, where they took a car. Mr Hinxha followed them in his car. At some point, both cars stopped on the side of the freeway. She was told to get into Mr Hinxha's vehicle, since the two of them must go to a specific office to resolve her allegations of rape.

[25] Once inside Mr Hinxha's car, he drove off, only to turn off to a deserted spot. Here Mr Hinxha raped her a second time. In the struggle she landed on the ground next to the car. Afterwards he got back in the driver's seat and drove off, leaving her in a state of undress in an unfamiliar place. She is hazy about how exactly she managed to get back home, but remembers confronting Nomsa soon after, to confront her about leaving her alone with Mr Hinxha. Nomsa laughed this off.

[26] If her evidence is to be believed, at this point, in my view, she must've felt utterly defeated and humiliated. She was duped and misled a second time, but this time with the cunning assistance of yet another public official.

[27] She testified at length about the various steps she took to bring Mr Hinxha to justice. For many years Ms France continued to pursue charges being brought against Mr Hinxha, and at almost every corner she met obstacles. She was referred from one person to the next, some met her with disbelief and even ridicule, others attempted to help, but passed the buck to other institutions, and then some - who pretended to be on her side but betrayed her for their own selfish gain.

[28] Independent and objective proof of her efforts to bring Mr Hinxha to justice includes the following:

[28.1] On 16 November 2011 Mr M M Mashinini, an investigator attached to the office of the Public Protector wrote to Colonel Morabe of the SAPS in Bloemfontein.¹⁴ This letter is headed: **“Request for assistance: alleged rape offence committed against Mrs L C France”**. In paragraph 2 of this letter he wrote: “Please be advised that on 27 October 2011 and 16 November 2011 this office consulted with Mrs L C France (Complainant) of 1868 Section H2, Botshabelo, 082 041 9867. She alleges that she was raped on two occasions by a high ranking official of the government...”

[28.2] It is therefore a fact that Ms France already made the allegations of rape on two occasions by a high ranking official (my emphasis) as early as October 2011 to the Public Protector. The fact that she approached the Office of the Public Protector must bear testament to her evidence that she was turned away by various police stations in the months immediately after the alleged rapes. It effectively removes any suspicion that she fabricated the allegations much later, and that she was dishonest about not getting assistance at local police stations. It must be obvious that she would not have sought assistance at the Office of the Public Protector if members of the SAPS, the first port of call, at least investigated her complaint. No such early records by the SAPS ever surfaced, and therefore it is entirely probable that she was shunned and turned away as she testified.

[28.3] Mr Mashinini referred in his letter of 16 November 2011 to the 5 paged statement that the Complainant made. This Statement¹⁵ (in the original handwritten format) was made in Sotho, and written more as a letter. It is dated 27 October 2011. It was translated into English¹⁶. The translated statement is the first documented narrative of the alleged events by the complainant. It is in simple terms and speaks of her desperation to get help, and that she feels alone and overwhelmed by what has happened. The resemblance of this account and her account at the hearing is telling. Small peripheral details have been omitted when she testified, but the essence of what she had been complaining about for almost a decade remains unchanged. It is probable that an account of events will not be exactly the same as it was shortly after it happened, especially in the face of disbelief and ridicule time and again. However, she maintained in 2011 and to this day, that Mr Hinxa misled her on two separate occasions in order to create

¹⁴ Exhibit MM, letter dated 16 November 2011

¹⁵ Exhibit OO

¹⁶ Exhibit OO1

circumstances in which he compelled her to have sexual intercourse against her will.

[28.4] In another letter by the Investigator of the Public Protector¹⁷, this time to Ms France herself, Mr Mashinini wrote: "A finding was made that the matter relates to allegations of Criminal offence (rape) committed against yourself **on or about 10/11 December 2010 and 8 June 2011**...A referral letter to SAPS was forwarded to SAPS and a further consultation was arranged for you with Col. Morabe of the SAPS on 16 November 2011."

[28.5] It is important to note that the fact that Ms France made these allegations in 2011 is in no way corroboration for the alleged rapes, but her previous statements shows consistency in her version that she was raped twice, first in December 2010 and then in June 2011.

[28.6] It is not clear what exactly Colonel Morabe and his team at FCS, Bloemfontein did to investigate Ms France's complaint, but it is evident that nothing came of it. According to Ms France Colonel Morabe questioned why a magistrate would rape an illiterate and ugly woman such as her, and dismissed her with this stinging insult.

[28.7] Somewhere between the latter part of 2011 and the first quarter of 2012 Ms France approached the Crime Intelligence Collection division of the SAPS at the Mangaung Branch. **Captain Setsumi Abel Nduna**¹⁸, who held the rank of Inspector at the time, testified that he answered the bell and met a lady by the name of Lerato. She told him that she wants to report a rape case. He first told her that such cases have to be reported at a police station, but since she told him that she had been denied any assistance at the Botshabelo and Park Road Police Station, his Commander told him to hear her out. She told him that she had been raped by a magistrate in a flat, after this magistrate undertook to help her with issues she had with her husband. He asked her whether she has anything that can support her allegation, where after she told him that she recorded part of the incident on her cellular phone without the magistrate being aware. She told him that the phone with the video is at her home in Botshabelo.

[28.8] Captain Nduna testified that he was busy working on a big case at the time, and Lerato's case was handed to female **Constable Nasiwe Flora Cholo**,

¹⁷ Exhibit NN, letter dated 13 December 2011

¹⁸ Exhibit VV

also known as '**Matsetshaba**'. He cannot attest to what Constable Cholo did to investigate the case, save to say that Lerato contacted him not very long after to report that Constable Cholo herself was involved in illegal activities at the traffic department in Botshabelo.

[28.9] Ms France testified that she handed her Blackberry phone to Matsetshaba (Constable Cholo) for retrieval of the video as part of her investigation into the alleged rapes, and she accompanied Matsetshaba to Dr Moroka's rooms. Matsetshaba went in alone and collected a file, presumably her medical file record. She testified that Matsetshaba let her down and seemingly did little, if anything, by way of investigation.

[28.10] Constable Nasiwe Flora Cholo passed away on 1 July 2012¹⁹, and with this, the investigation into the alleged rape. It is not known what she did with the phone of Ms France, and as such, Ms France could no longer rely on the alleged video material. The medical file went missing. Ms France was yet again back to square one, with no case of rape being investigated against Mr Hinxa, but perhaps even worse off now, in the absence of some pieces of tangible proof.

[28.11] The case of Ms France seems to have turned cold from around July 2012 to around early 2016. It is however common cause that Ms France was arrested for fraud. In terms of the timeline of the events, this must have been prior to 29 August 2012.²⁰

[28.12] Bizarrely, in a twist of fate or for more sinister reasons, such as by design, Nomsa was the prosecutor in her fraud case and as the accused, Ms France was denied bail. In transit from the Botshabelo courthouse to the Kroonstad Correctional Facility, she was tragically raped by a police officer on 29 August 2012 in the back of the police van, whilst the police officer who drove did nothing to assist. Here, despite gossip in the corridors of the Botshabelo Magistrate's court²¹ that this too may have been fabricated, she was vindicated when the 2 police officers were charged and 1 conviction upheld on appeal. The driver's appeal was upheld. The DNA results may have been instrumental, and she was awarded damages in a civil claim in 2014 with the help of Moroka Attorneys.²² The same firm of attorneys assisted her during her divorce from Mr France.

¹⁹ Copy of Death Certificate Annexure A to Exhibit WW

²⁰ Common cause that the rape of Ms France by the police officer took place on 29 August 2012.

²¹²² Uncontested evidence of Mr Bothma, Exhibit F

²² Exhibit K, the information note from the Legal Services of the SAPS, Free State

[28.13] The Presiding Magistrate, who dealt with the case of Ms France and also ordered that Ms France be transported in police custody in 2012, was aware of the allegation that she was raped by a police officer or officers in transit, and the subsequent conviction of these members.

[28.14] **Mr Lukas Marthinus Bothma**²³ testified at the misconduct hearing of Mr Hinx. Mr Bothma recollected that when the case was finalised against Ms France, that she reported to him in court that she had (also) been raped by Mr Hinx, the Chief Magistrate of Bloemfontein. He could not recollect the year that she made this report to him in court, but he can remember that it was at the time that the charges against the 2 police officers were pending. I can safely accept then that it must have been at the very latest before she instituted the civil damages claim in 2014. In court, she again repeated to Mr Bothma that the SAPS is not willing to assist her to open a criminal complaint against Mr Hinx.

[28.15] Mr Bothma advised Ms France in court to report the matter to the SAPS in Bloemfontein. (Further reference to the evidence of Mr Bothma in paragraph 92 and 93)

[28.16] It is unclear exactly when, but at some stage Ms France spoke to a certain Mr Chomane at Lesedi radio station, which covers the Vaal area in Gauteng.

[28.17] On 22 February 2016 a referral form was completed by a Victim Supporter of the Victim Support Room of the SAPS in Johannesburg Central.²⁴ This referral form was addressed to a Brigadier Ramokotjo of the Park Road Police, requesting assistance for 'Lerato Frans' as discussed between the writer and presumably the addressee.

[28.18] In 2015 a sworn affidavit, purported to have been made by the Complainant Ms France, came to be in the possession of Mr Hinx.²⁵ This statement appears to have been made on 21 June 2015, clearly before any criminal case docket was opened, and also before Maroka Attorneys letter of demand to Mr Hinx. I will deal extensively with this affidavit, that became known as the withdrawal statement, later in this judgment.

²³ Mr Bothma's statement Exhibit F

²⁴ Exhibit PP

²⁵ Exhibit H

[28.19] A criminal case docket Park Road CAS 1171/05/2016 was indeed opened, I accept either on the basis of the referral letter referred to in Paragraph 28.17 above, or as a result of Mr Bothma's report to Advocate Bester of the Office of the Director of Public Prosecution.

[28.20] Ms France made another statement on 20 May 2016.²⁶ This time the statement was received in English, and no name or details appears of the officer who wrote the statement, nor any details of the person who translated.

[28.21] Somewhat inexplicable is the fact that Ms France was interviewed by the Office of the Director of Public Prosecution (DPP) on 6 May 2016, therefore prior to the making of the abovementioned statement. A photocopy of cryptic notes of the interview was received.²⁷

[28.22] In the meantime, Ms France approached the same firm of attorneys who assisted her in her civil damages claim against the SAPS for the 2012 rape whilst in police custody, as well as her divorce. On 26 May 2016 Mr M S Mazibuko, an attorney who was practicing at Moroka Attorneys at the time, caused a letter of demand to be delivered to Mr Hinx. ²⁸ The relevant parts of the letter of demand reads:

"2. We hereby confirm that we are acting on behalf of Mrs Lerato Constance France herein.

3. It is our instructions that during December 2010 you undertook to assist our client with the legal problems she had at the time. You then lured our client into your residence under false pretences that you were going to help her, whereupon you forcefully had sexual intercourse with her.

4. It is our further instructions that you, subsequent to raping our client, threatened to lay false charges of theft of your money if she attempted to lay rape charges against you."

[28.23] A criminal case docket was opened by the Parkwood Police Station, namely CAS 1171/05/2016. Ms France made her statement on 20 May 2016 and a certain Captain Cilliers was the Investigating Officer. The Investigating Officer clearly received a copy of the so-called withdrawal statement from a source unknown to this hearing, since it appeared to have been faxed to him. The stamp "Parkweg CAS/MAS" had been placed and the CAS number inserted

²⁶ Exhibit QQ is a photocopy of the A1 statement in Park Road CAS 1171/05/2016

²⁷ Exhibit O

²⁸ Exhibit J1

in pen. According to Mr Bothma, Captain Cilliers came to visit him but did not take any statement from him. Mr Bothma testified that Capt. Cilliers dismissed the whole case as being a “honey trap”. This is not surprising since he already received the ‘withdrawal’ statement purported to have been made by Ms France, who was wholly unable to explain how it came to be in existence.

[28.24] Advocate Khanyile of the DPP wrote to Ms France on 14 June 2016 to inform her that “after careful perusal of the matter as well as the consultation, this office has decided that there are no prospects of a successful prosecution in this matter”.²⁹ It is clear that the so-called withdrawal statement played an integral part in the decision of Advocate Khanyile and her team not to prosecute Mr Hinxa.

The “withdrawal statement”

[29] Sometime around 2015 or the start of 2016 a “Sworn Affidavit”³⁰ surfaced. This affidavit purported to have been made by ‘Lerato Constance **Frans**’. This statement has been referred to as a withdrawal statement, but this is in fact not the case. The peculiar aspect around this statement is that the first person who made the existence of this statement known is Mr Hinxa himself. Up until today, the original of this statement cannot be located.

[30] The fact that the alleged perpetrator first disclosed this statement, to anyone and everyone as will be demonstrated later, is not the only strange aspect about this statement. The surname of the complainant has been spelt incorrectly, her ID number was omitted from the statement, and instead an incorrect date of birth had been inserted.

[31] Ms France denies ever having made the statement, and also distance herself from the contents thereof entirely, in other words, she denies making the statement and that anything contained therein was said by her or rings true.

[32] The statement reads: *“I am making this statement freely and voluntarily without any duress or undue influence in my sane and sober senses. The Moroka attornies people are the ones who arranged that I should say Mr Hinxa has raped me whereas in a/c (end of line illegible) in actual fact that is not the*

²⁹ Exhibit P

case. I am making this because they are now demand (end of line illegible) the money they paid me to lie equaling R100 000 and I don't have that money.
Deponent Signature: Lerato Frans"

[33] The amount of R100 000 was inserted in a markedly different handwriting, and the deponent signed as Lerato Frans, in different handwriting. The fourth type of handwriting appears at the bottom of the affidavit where a member of the SAPS namely William Khumalo certified *inter alia* that the above declaration "was taken down before me". See Paragraph 38 in this regard.

[34] Mr **Gerhardus M Cloete**, a retired Lieutenant Colonel from the SAPS is a **Questioned Document Handwriting and Fingerprint Expert** with nearly 44 years of experience as expert examiner of Questioned Documents, including *inter alia* the identification of a person through his/her handwriting, the individualization of signatures, typewriting, printed matter and stamp imprints; the identification of forgeries, erasures, alterations and additions, and fingerprint identification.³¹ His vast experience and expertise were not disputed, and therefore accepted.

[35] He was tasked to examine the handwriting on two different documents: (a) **the so-called withdrawal statement (Recantation of the rape charges)**³² and (b) the **Charge Sheet of Case No 20/0246/17 of Bloemfontein Court 20, where the Presiding Officer Ms Ngwata kept the written record of proceedings.**³³

[36] He testified about his examination and the various techniques he employed to conclude that the writings on (a) and (b) above, were **'without any doubt written by the same person'**.³⁴ This means that the same Ms Ngwata who was the Magistrate in 2017, wrote the **'withdrawal statement'** attributed to Ms Frans in June 2015. Since no expert or otherwise convincing evidence was presented by the Defence, I can safely find that **it was proved on a balance of probabilities, if not beyond reasonable doubt, by Expert Evidence that Ms Ngwata wrote the so-called withdrawal statement, Exhibit H.**

³¹ Exhibit W1 Page 19 titled 'Qualifications'

³² Exhibit H

³³ Exhibit W2

³⁴ As stated in Paragraph 2.4 of his Forensic Report, page 2 of Exhibit W1; and confirmed in *viva voce* evidence at the hearing.

[37] The extent of the trickery/forgery surrounding this so-called withdrawal statement deepens when the same expert was asked to analyze the signature "Lerato Frans" on this document. He submitted a Forensic Report of this signature analysis, including the techniques he employed in examining the various samples received. All the writings and examples are attached as annexures A and B to his report³⁵. His finding at the Conclusion³⁶ reads **"I am mostly convinced that the disputed signature on Q.1 (the withdrawal statement) was not written by the same person who wrote the specimen writings on S1 and S2 (the handwritten Sesotho statement written by the Complainant Ms France).**

[38] In the absence of anything to the contrary, I must therefore find that **it has been proved, on a balance of probabilities, that the Complainant in this matter, Ms France, did NOT SIGN the so-called withdrawal statement, Exhibit H.**

[39] In addition, the Police Officer **Mr William Khumalo**, who commissioned Exhibit H, did not write the statement and by his own admission, probably commissioned it after the fact without ever seeing the deponent. The disturbing practice at the Botshabelo charge office at the time was that student police constables would receive complaints and statements from the public, and afterwards take it to the 'back' office for commissioning by Ranked Officers, well after the fact.

[40] I am satisfied that I cannot attach any weight whatsoever to the so-called withdrawal statement in evaluation of Ms France's evidence as a whole. It can be dismissed as a forgery and disregarded as NOT AUTHORED by Ms France.

[41] I will return to the aspect of the withdrawal statement fully when considering what moved Ms Ngwata to write this statement, and to consider how Mr Hinxha was the first recipient of this forged 'withdrawal statement' and who placed great reliance on this. As argued by the Officers Leading Evidence in the Heads of Argument³⁷: "It is important to note that the (withdrawal) statement was constructed long before any docket was opened."

[42] This critical question remains: why would a statement be forged to withdraw or recant a criminal case not even opened yet. The probable answer

³⁵ Exhibit UU

³⁶ Exhibit UU Page 2, paragraph 2.4 of his Forensic Report, Including Annexures A and B

³⁷ Page 19 of Exhibit III received on 14/1/2021

to this question at this stage can only be that it was forged to discredit Ms France before her complaint could even be made or properly investigated, to silence apparent rumours, to compromise any civil damages claim that she may have, and to take a swipe at the integrity of Maroka Attorneys at the same time.

[43] This makes sense when considering the evidence of **Mr Kenosi McDonald Moroka**³⁸, a seasoned attorney from Bloemfontein. He is the Principal and Sole Proprietor of Maroka Attorneys, assisted by a number of Admitted Attorneys, and Candidate Attorneys³⁹ in three offices. He has more than 20 years- experience as an attorney in practice. His firm of Attorneys successfully litigated on behalf of Ms France in her damages claim against the SAPS⁴⁰ in 2014 post her rape by a police officer whilst in police custody. He had only peripheral dealings with the two legal matters of relevance involving the *Office of Moroka Attorneys and Mr Hinx*.

[44] In February 2012 Mr Moroka, assisted by one other attorney from his office, received instructions to assist a Magistrate Mr Moloabi in a misconduct complaint lodged against him at the Magistrates Commission by Mr Hinx. His testified that his relationship with Mr Moloabi was purely professional, and the “Moloabi-Hinx” matter was long before Ms France wanted to sue Mr Hinx for damages in 2016.

[45] To the best of his knowledge the Moloabi complaint had been finalized by the Commission.⁴¹ As will appear later in this judgment Mr Hinx resented and was dissatisfied with the end result of his complaint against Mr Moloabi.

[46] Mr Moroka testified that sometime prior to or around May 2016 two attorneys who worked at his office, Mr Mhlokonya and Mr Mazibuko respectively, received instructions from Ms France to institute a civil suit for damages against Mr Hinx for having raped her in 2010. A Letter of Demand was prepared⁴², and Mr Moroka had sight of this letter prior to it being served on Mr Hinx.

[47] Mr Moroka testified that as a courtesy, since Mr Hinx is a Court Official and Head of the Magistrates Court in Bloemfontein, he phoned Mr Hinx and

³⁸ Exhibit I – the statement made by Mr K M Moroka in 2017, provided to the Officers (later) Leading Evidence

³⁹ Letterhead of Mar

⁴⁰ The Minister of Police was cited as vicariously liable.

⁴¹ The Magistrate’s Commission

⁴² Exhibit J

arranged to go and see him at his office in the months prior to the service of Letter of Demand. He wanted to inform him that (a) Moroka Attorneys has received instructions to act for a lady who accuses Mr Hinxha of rape, (2) that they act purely in their professional capacity as attorneys, and do not want him to think that he is being ambushed, and (3) that Mr Hinxha may want to consider getting his own legal representative OR talk to this lady to settle the dispute. Mr Hinxha denied this visit when Mr Moroka was cross-examined. Mr Moroka went on to say that Mr Hinxha thanked him (very much) for what can be described as the 'heads-up', said that he will think about it and that they will talk again.

[48] He testified that Moroka Attorneys never proceeded to issue summons since Ms France could not pay for their services going forward. A deposit was required in her case.

He dismissed the proposition that he or any attorney at his firm would pay Ms France the hefty sum of R100 000.00 to falsely accuse Mr Hinxha of rape. He testified that he harbours no ill feelings toward Mr Hinxha, and if he actually did, he had every opportunity to use the legal process or instrument that the instructions of Ms France presented, and pursued the claim against Mr Hinxha on a contingency fee basis. As to any attorneys who is or was employed by him, he dismissed the proposition that any of them paid Ms France to falsely accuse Mr Hinxha as highly improbable. The highest paid attorney at his office do not even earn anything close to R100 000.00 per month, and no payment will go out of his office without his endorsement – not even for a petrol payment.

[49] Mr Moroka impressed with the calm and dignified manner in which he testified and answered all questions. Adv Edeling, the legal representative of Mr Hinxha, even placed some unsolicited comments on record during cross-examination, such as that Moroka Attorneys have an impeccable reputation and that it is a well-known fact that many well-known and successful attorneys have been "produced" by Moroka Attorneys.

[50] In addition, Adv Edeling remarked that Mr Moroka himself comes from the Royal Family of King Moroka in Thaba Nchu, and that his firm also act for high-profile litigants. This fits in with Mr Moroka's evidence that he feels terrible that he has been dragged into these false allegations, that even made it to a local newspaper. He repeated that he has no motive or reason to lie.

[51] Based on my finding that it was Ms Ngwata, and not the complainant who authored the statement implicating Moroka Attorneys⁴³ the last paragraph of Mr Moroka's affidavit is telling: "I have also not offered nor paid Ms France any money for her to initiate a civil claim for damages against Mr Hinx, nor even advised her to make contentions against Mr Hinx. If there are such allegations made against me or us as lawyers, such allegations will only be a figment(ation) of imagination ⁴⁴of such person(s) mind, probably to divert attention from that person(s) doing or conduct".

[52] In my view, the nail in the coffin of the theory or suggestion that Moroka Attorneys, or even Mr Moloabi, could have had anything to do with Ms France's allegation of rape against Mr Hinx, is to be found in the fact that the earliest written record of her rape allegations date back to 2011 (Letter from the Public Protector). This is long before Ms France even enlisted the services of Moroka Attorneys, and before the alleged unpleasant exchange between Mr Hinx and Mr Moroka regarding Mr Moloabi's matter.

[53] After Ms France eventually got the attention of the SAPS, almost 5 years after the request to assist her was made by the Public Protector's Investigator⁴⁵, a case docket was opened. It is common cause that by now at least three potentially crucial witnesses have passed away. Captain Cilliers would be unable to collect affidavits and/or evidence from Tsidi (Mr Tsidiso Joseph Mohata), from Dr Morake and from the police officer "Matsetshaba" (Nasiwe Flora Cholo). The alleged partial video recording on Ms France's old Blackberry phone was disbelieved by Adv Khanyile, who found this "improbable in the extreme".⁴⁶ The Police case docket was closed and Ms France dismissed for good. This may very well be a classic example of the old adage: "Justice delayed is justice denied."

[54] Ms France did not have the necessary funds to continue to pursue a civil claim against Mr Hinx. It is evident that she was no longer considered a person-of-straw by Moroka Attorneys who successfully sued the SAPS on her behalf, and there was no criminal conviction to rely upon. In the circumstances it makes sense that Moroka Attorneys did not want to take on the matter on a risk basis. In addition: 1. Ms France wants to sue the Head of the Magistracy in Bloemfontein Cluster A, which must be an unenviable instruction for any attorney, and 2. false allegations appear in a newspaper report that Moroka

⁴³ Exhibit H

⁴⁴ Exhibit I paragraph 7.3.

⁴⁵ Exhibit MM

⁴⁶ Paragraph 2.2.2 of Exhibit P

Attorneys themselves paid the Complainant to fabricate the rape claims. This would make any litigant, with all due respect to Mr Moroka, shy away from prosecuting the civil claim without cover.

[55] And so Ms France, who has vowed to bring Mr Hinx to justice many years ago, no matter how far she will have to go, still continues to seek the opportunity to be heard and bring her charges of rape to the attention of the Authorities. She testified, and Mr Bothma confirmed, that she went to him yet again to report that her approach to the criminal justice system was unsuccessful. A Court Interpreter took her to his office. This must have been somewhere between 14 June 2016 (when the DPP decision was made)⁴⁷ and 29 July of 2016. I say this since Mr Bothma, on this last occasion, advised Ms France to write to the Minister of Justice.

[56] On 29 July 2016, with the assistance of a person conversant with English and Typing, Ms France made her appeal to The Minister of Justice and Constitutional Development, Mr Masutha⁴⁸.

[57] By this time, rumour and gossip was rife within the Magistracy and the legal fraternity in Bloemfontein. The same allegation resurfaced time and again. Mr Hinx already presented the so-called "withdrawal statement" to colleagues to dispel rumour and discredit the Complainant. Both Mr Mokgobo, now acting Chief Magistrate and Senior Magistrate Ms Mbassa testified that Mr Hinx showed them this statement, and Ms Rolisusu testified that she was asked to attach same to Mr Hinx's application to act as Judge at the High Court.

[58] It is therefore my view that since the Minister was approached and expected a resolve, the Magistrates Commission probably felt it was time to address this: since on the one hand Ms France persists with her allegation that Mr Hinx raped her and she is denied the opportunity to be heard, and on the other, Mr Hinx's esteem and integrity (and the good name of the Judiciary as a whole) is compromised by consistent and serious allegations. This led to the decision to investigate and the appointment of the two Investigators.

Evaluation of the evidence

⁴⁷ Exhibit P

⁴⁸ Exhibit RR

[59] On a number of occasions throughout the hearing, the legal representative of Mr Hinxa and the OLE continued to place objections and general recordals of complaints about the other parties' conduct on record. At times the hearing was markedly acrimonious, save to say that the recordals and objections did very little by way of addressing the core issues.

[60] In evaluating the evidentiary material, I will not deal with the countless amount of matter placed on record that is immaterial to the issues in dispute. I will not discuss nor evaluate the evidence that cannot contribute to the material issues in dispute. To this end, I will disregard the hearsay evidence of Mr Mashee that was provisionally allowed.

Evidence of Ms France

[61] **Ms Lerato Constance France** was around 45 years old when she testified at the hearing. She was 36 years old when the events unfolded in 2010. She testified over the course of a number of days, months apart at times and at different venues. She was cross-examined extensively by Adv Edeling, who took instructions from Mr Hinxa before and during the hearing.

[62] She testified in a separate room, linked to the courtroom by Closed Circuit television (CCTV). The Officers Leading Evidence brought an application akin to the procedure provided for in Section 158(2) and (3) of the Criminal Procedure Act 51 of 1977. The application was opposed by Adv Edeling on behalf of Mr Hinxa, albeit somewhat inanimately. I was satisfied that potential prejudice and harm may result if she, as the alleged victim of a sexual offence, had to testify in open court, and conversely that no prejudice will result to Mr Hinxa, who can cross examine the Complainant and fully ventilate the dispute with her whilst observing her reaction. The application was granted. The Presiding Officer, Officers Leading Evidence, Mr Hinxa, his Advocate and Instructing Attorney, the Interpreter and other court personnel saw Ms France on a colour-television monitor in the courtroom we used. A smaller monitor was also positioned on the bench next to the Presiding Officer. On the very last occasion when she testified, upon a request by Mr Hinxa to have her recalled after his legal team withdrew from the hearing, Ms France testified seated behind a make-shift screen in court. This was done in a desperate attempt to get this matter to finality, given a number of systemic delays in the past to secure (a working) CCTV system.

[63] Like most victims of sexual offences, Ms Frans is a single witness in respect of both charges against Mr Hinx. In criminal proceedings, an accused can be convicted of any offence on the single evidence of a competent witness in terms of Section 208 of the Criminal Procedure Act⁴⁹. It is a well-established rule, that the evidence of a single witness be treated with caution. This cautionary rule, although in respect of criminal matters, requires of the trier of fact to be constantly mindful of the inherent dangers of the mere acceptance of the evidence of a single witness. The evidence of a single witness must be examined carefully, considering all the merits and demerits, the probabilities and any corroboration that may exist.

[64] In the judgment of **S v Sauls and Others**⁵⁰ the Appeal Court describe the cautionary rule in the context of evaluating evidence as follows: "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness...the trial judge will weigh his evidence, will consider its merits and demerits and...whether there are shortcomings or defects or contradictions in his testimony, and having done so, will decide if he is satisfied that the truth has been told."

[65] Although the **Sauls** judgment *supra* was delivered in a criminal appeal matter, with a different burden of proof (beyond reasonable doubt) it is in my view also the correct and appropriate approach to adopt in this matter.

[66] Ms France impressed in the manner in which she testified about the events, and remained steadfast in her version of events. If her version of the events in 2010 and 2011 are to be believed, she had to overcome overwhelming odds to eventually get to tell her story, albeit in a misconduct trial. Her evidence at the hearing was consistent with what she already alleged 8 years before, that she was forced or compelled by Mr Hinx to have sexual intercourse with him without her consent on two different occasions. I must accept that some details have become less clear in her memory given the passage of time, but the crux of her evidence remained the same.

[67] A number of people who may have been able to corroborate or support her version in certain peripheral respects, are unable to do so due to no fault of Ms France. The gentleman who accompanied her all those years ago, both on occasion to go and see Mr Hinx at his office and earlier on the evening of

⁴⁹ Act 51 of 1977

⁵⁰ 1981 (3) SA 172 (A)

the 10th of December 2010, Mr Tsidiso Joseph Mohata ("Tsidi"), passed away on 8 July 2012 at Botshabelo from natural causes.⁵¹

[68] Dr Letsoako Paul Morake, who used to practice from a surgery at J-Section, Botshabelo, passed away on 22 July 2013 at the Bloemfontein Hospital⁵². His widow Mrs Mmantwa Dorothy Morake made a statement⁵³ when Mr Ivor Botha went to interview her in November 2017. They went to Dr Morake's erstwhile practice and was met with suspicion and what appeared to be reluctance by the Receptionist Ms Mafusi Ntsepe. This much was testified by Mr Botha, and confirmed by Mrs Morake in her statement. No file for Ms Lerato Constance France could be located in the records of patients from the practice, nor from some old appointment and receipt books for 11 December 2010 that his widow made available. It is still probable that Ms France's file was collected in late 2011 or early 2012 by Constable Cholo, and along with the Blackberry cellular phone, all traces thereof disappeared when she passed away in July 2012.

[69] It must be noted that medical evidence, if it exists or existed, may have been helpful to the extent that Dr Morake may have noted signs of forced sexual intercourse, but the absence thereof in no way detracts from the evidence of the Complainant. It is in any event a fact that even if vaginal or other injuries had been found, it would not shed light on the identity of the perpetrator unless genetic material had been found and carefully preserved for DNA analysis.

[70] Even with the passage of time, some corroboration for the version of Ms France can be found in the following:

[70.1] **Ms Nontobeko Sybil Rolisisu** is the Senior Secretary to the Chief Magistrate at the Bloemfontein Magistrates Court since 2004. She worked for Mr Hinxha for many years, and indeed up until his suspension from office in 2017. She remembers that the Complainant, Ms France, came to see Mr Hinxha. She also remembers that Ms France said she experiences problems to get help with a complaint. Ms Rolisisu testified that she went to Mr Hinxha, reported that a lady would like to see him, and Mr Hinxha invited Ms France into his office. They spoke in the office for a while before Ms France left. She only remembers this one visit, and cannot remember the date.

⁵¹ Exhibit WW Annexure B

⁵² Exhibit WW - Death certificate marked D attached.

⁵³ Exhibit WW Annexure C

[70.2] The evidence of Ms Rolisisu is important since Mr Hinxa denies ever meeting Ms France in his office or otherwise. Ms Rolisisu views Mr Hinxa as a Father, and she found it extremely difficult and traumatic to testify at this hearing. To a large extent her loyalties lie with Mr Hinxa. She has no motive to lie, and impressed in the manner in which she testified. Her evidence, in as much as it can contribute to the material facts in dispute, is accepted as credible and reliable.

[71] I therefore accept on a balance of probabilities that Ms France did in fact go to Mr Hinxa's office to seek assistance with (legal) problems, and met with him.

[72] **Small yet intimate details** about the events of December 2010 had been described by Ms France. These are details that she would not have, unless she had first-hand knowledge. She provided an account of his office, and the fact that he has a female secretary at his front office. A person from Botshabelo, with only the Botshabelo Magistrates Office as reference point, would not have this info. Not all magistrates have secretaries, and not all magistrates who are Heads of Courts have secretaries, and of course not all secretaries are female.

[73] Ms France gave a **cellular number** belonging to Mr Hinxa when she made a Sesotho statement in October 2011⁵⁴ as being no 072 365 1997. Mr Hinxa did not dispute that such a number ever belonged to a cellular phone of his, and this number appears on his cheque account statement when he bought "airtime top-up" on 3 December 2010.

[74] Ms France testified that on the evening of 10 December 2010 Mr Hinxa picked her up in a blue **Mercedes Benz**. Mr Hinxa did not dispute that he had a Mercedes Benz motor vehicle in 2010, but denied that he had one that is blue in colour. The Officers Leading Evidence handed in Exhibit XX which contains two photographs of Mr Hinxa's Mercedes Benz Sedan with Registration number CPJ 437 FS. It is dark green in colour. Mr Hinxa had this particular Mercedes Benz in 2010 and 2011, as is clear from his official motor vehicle claims. Looking at the photographs⁵⁵, especially where shade falls onto the Mercedes Benz, it is entirely probable that it can be mistaken for blue in the

⁵⁴ Exhibit OO

⁵⁵ Exhibit XX

evening. Ms France even mentioned the size of Mr Hinxa's genitals during evidence. Mr Hinxa took no issue with this evidence.

[75] Ms France always alleged, from her earliest statement in up until her *viva voce* evidence in court that Mr Hinxa took her to his **flat**, and that she was raped in this flat. She described details of this flat, many years after the alleged rape, in court. She testified that it was not a ground floor flat (her recollection was that it may be on the 3rd or 4th floor), that it had a security gate in front of the door to the flat, that upon entering the flat you are met by the kitchen first, that it has a lounge and 2 bedrooms, that the bathroom/toilet is opposite the main bedroom, that the main bedroom has built-in cupboards with storage cupboards on top and that there is only one entrance to this flat. In addition, she describes Mr Hinxa as having neighbours on both sides of his flat.

[76] After Ms France concluded her evidence, and before the Officers Leading Evidence closed their case, an inspection *in-loco* to Mr Hinxa's flat was undertaken on 25 November 2020 (almost 10 years since the alleged events). Mr Hinxa has moved away from the flat in the suburb of Arboretum in Bloemfontein around 2011 or 2012, but rents it out *via* Rental Agents. The flat is on the second floor, and has neighbouring flats on both sides. The inside of the flat was inspected and a floor map was prepared by myself, and received into evidence after all parties were satisfied that it correctly reflects the layout of the flat⁵⁶.

It is uncanny how Ms Frans' description of the layout of the flat, and the actual layout, is virtually the same.

[77] The only reasonable and inevitable inference must be that Ms France had been inside Mr Hinxa's flat at No. 202 Naval View in Arboretum.

[78] Captain Setsumi Abel Nduna corroborates the Complainant on a number of peripheral aspects, namely that she approached the Crime Intelligence Collection Unit at the Mangaung Branch and that Constable Cholo also known as Matsetshaba (before her passing in July 2012) was tasked with assisting her and to follow up on the alleged video material. He corroborated the Complainant that Constable Cholo was not trustworthy.⁵⁷

[79] I must pause to mention that the appearance of Captain Nduna as a witness at the misconduct enquiry, ironically bore testament to the power and

⁵⁶ Exhibit FFF (not according to scale)

⁵⁷ He went as far as saying she was corrupt.

influence that the title of Chief Magistrate in Bloemfontein holds. The OLE informed Mr Hinxa that they intend calling Captain Nduna, and discovered the recently obtained statement to Mr Hinxa a day prior. Captain Nduna testified that he was called in by his Superior after the Chief Magistrate phoned Brigadier Monaruri, who in turn phoned his superior Colonel Ditshabe. Captain Nduna was told that he may not testify at this hearing unless he takes leave or put in extra hours to make up. Mr Hinxa admitted to phoning Nduna's Superior Officer, but indicated that he was well within his rights to do so as part of his own investigation into witnesses.

[80] It was clear that even the suspended Chief Magistrate has the ear of high-ranking police officials and that his telephone call almost compromised important evidence being heard.

[81] Ms France testified at length about the role that Nomsa played post her alleged rape in December 2010, and for some time thereafter. I have no reason not to accept that Nomsa, the Public Prosecutor at Botshabelo; Ms Nomsa Ngwata, the acting Magistrate at Bloemfontein Magistrate Court, and the 'Colleague' that Mr Hinxa messaged in 2018⁵⁸ is one and the same person.

[82] Ms France testified that she asked the Prosecutor Nomsa more than once why she is seemingly assisting Mr Hinxa and not her, as the victim. On one such occasion Nomsa said to her that Mr Hinxa promised to elevate her to the position of Magistrate. Corroboration for this evidence is to be found in the fact that Nomsa did in fact resign as Prosecutor and joined the staff of Mr Hinxa at the Bloemfontein Courthouse as a Magistrate. This cannot be pure coincidence.

[83] Ms France had no way of knowing that a prosecutor can become an acting magistrate with the approval of the Chief Magistrate of a particular Cluster. I must accept that Ms France came to this knowledge exactly how she testified, namely because Nomsa told her so. It will also explain the almost inexplicable behaviour and deception committed by Nomsa. Logic dictates that Nomsa quite clearly wanted to win the favor of Mr Hinxa, and used the circumstances as presented by Ms France as an opportunity to gain his favor (if not indebtedness) by deceiving Ms France and protecting Mr Hinxa.

[84] I will not venture as far as to say that Nomsa and Mr Hinxa colluded from the very minute that Ms France first approached Nomsa. The objective facts

⁵⁸ Exhibit HHH handed in by Mr Hinxa

demonstrate that they had dealings with each other about the alleged rape long before the ill-fated withdrawal statement was concocted.

[85] Mr Hinxha handed in a printout screenshot of a WhatsApp communiqué between himself and Nomsa Ngwata on 7 August 2018⁵⁹, which was before the hearing commenced and prior to the Handwriting Expert testified. It is interesting that Mr Hinxha twice called Ms France “Lerato” in his message, as opposed to “the complainant” or Ms France. This must suggest familiarity. Be that as it may, Mr Hinxha goes on to say: “To me it sounds ridiculous especially in view of **our interaction throughout regarding circumstances leading to you getting the said affidavit from Lerato.**”⁶⁰ This sentence lends credence to what Ms France testified, namely that Nomsa would phone Mr Hinxha in her presence and clearly kept him informed.

[86] Mr Hinxha asks Ms Nomsa Ngwata in the abovementioned text message: “how far true is it that that affidavit was made by you not by Lerato...?” In answer to this question Ms Nomsa Ngwata denies this, and adds: “Even if that were true why would I confess to him and if that was true why did the police not pick it up during their investigations.”⁶¹ This answer by Ms Nomsa Ngwata is telling, and it is quite clear that she seeks to not only deny any involvement, but to shift the blame and be argumentative. She did not answer Mr Hinxha that she wrote the statement whilst Ms France dictated, thereby effectively removing all possibility that she wrote the statement and Ms France signed. Mr Hinxha relies on this clearly untenable proposition in his Heads of Argument.

[87] I considered calling Ms Nomsa Ngwata in terms of Regulation 26(13)⁶², but the abovementioned answer made it clear that it is highly unlikely that she will be honest and a credible witness. In fact, if she were to be made to testify, she may make herself vulnerable to possible criminal prosecution.

[88] A number of witnesses testified who added little or no value by way of corroborating the version of the Complainant Ms France, nor contributed to the material issues in dispute.

The witnesses however assisted greatly to construct the timeline of events and to explain how certain documents came into being.

⁵⁹ Exhibit HHH

⁶⁰ My emphasis

⁶¹ Page 2 of Exhibit HHH

⁶² Regulations for Judicial Officers in the Lower Courts, Reg Number 361 of 11 March 1994

[89] Ms France's evidence and the manner in which she testified is not without criticism. During cross-examination she often asked for a question to be repeated, and she was reluctant to make any concessions. She appeared to be deeply distrusting of the legal representative of Mr Hinxha, and clearly apprehensive that she may be 'tricked' or misled by long-winded questions, unfamiliar terms and legal arguments. This, in my view, is not surprising given the disbelief, trickery and ridicule she faced over many years. I must take in account that she responded well to, and answered simple direct questions, clearly.

[90] Long-winded questions, repetition and statements rather than questions formed a large part of the cross-examination style of Adv Edeling. This did not make for any positive engagement with Ms France, but rather left her uncertain and confused as to exactly what she is meant to answer to. It is true that at times she became almost stubborn, and insistent that the crux of the matter (the alleged rapes) should be focused on rather than the surrounding circumstances.

[91] She ultimately conceded that she may be mistaken about having seen Mr Hinxha on 6 and 7 December 2010. She however insisted that she is not mistaken about the dates of 8 to 11 December 2010. The dates of 8 to 11 December 2010 are consistent with her earliest (Sesotho) statement made on 27 October 2011. Memory is often fallible, and any witness is subjected to outside influences and doubt with the passage of time. In this matter, even more so given the amount of time that passed since the alleged incidents and Ms France being heard. Generally greater reliance can be placed on written accounts of events that are made soon after the fact, when the deponent's memory is fresh. I am satisfied therefore, that where her evidence differs or is unclear about a particular aspect, that the contents of her first statement should be accepted as correct.

[92] Ms France always alleged that she was raped in December 2010 at the **flat** where Mr Hinxha resided. She did not understand and could not explain why Mr Bothma referred to a Brandwag residence. She is clearly not even aware of the fact that Mr Hinxha moved to a house in a different suburb after the alleged events of 2010. Mr Bothma made his statement years after the fact, and I can accept that he incorrectly assumed she refers to Mr Hinxha's house in Brandwag, or perhaps even embellished out of his own accord. He was privy to the fact that Mr Hinxha resided there for a number of years already when the report was received. I accept the evidence of Ms France that the 2010 incident

occurred in the Arboretum flat, since she stated this in 2011 already and provided quite an accurate account of the lay-out thereof. I reject the evidence of Mr Bothma insofar as it is inconsistent with the evidence of Ms France.

[93] Mr Bothma was not the so-called 'first report' witness, and therefore his evidence in respect of the content of the report received is in any event not admissible. His evidence is only relevant to give context to the timeline of events. I agree with Mr Hinx's submission that Mr Bothma's assessment of her credibility is uncalled for and irrelevant.

[94] Ms France never alleged or testified that she had been physically forced into the flat or car of Mr Hinx, but rather that she was misled or duped into circumstances that left her vulnerable once inside the flat and car. In addition, on both occasions she was in the company of a powerful and authoritative male public figure, whilst she was stranded, without money or resources, illiterate and thus utterly powerless.

[95] The circumstances described in Paragraph 94 above, set the scene for compelling Ms France to have sexual intercourse with Mr Hinx against her will. I accept that in such circumstances she attempted to ward him off, but her options were limited: She was threatened with arrest and being labelled a thief. She was left with no choice – either submit to sexual intercourse or be arrested as a thief breaking into the Chief Magistrate of Bloemfontein's flat.

[96] In the light of this background, her evidence about the events is credible. She remained steadfast over many years that she had been raped by Mr Hinx, without any apparent motive to lie. Even when it became clear that he will not be criminally charged and that she is unable to pursue a civil claim for damages against him, she was unable to let it rest. This is indicative that she was humiliated and wronged in a deeply painful manner.

[97] In the words of the decision in *S v Sauls and Others* supra, having weighed the merits and demerits in her testimony, the shortcomings and defects, I am satisfied that the truth has been told. Her evidence is credible, reliable and the probabilities favour her version of the events.

Probabilities

[98] Regulation 26(15) of the Regulations⁶³ reads: "After the conclusion of the evidence and the arguments or address at a misconduct hearing, the presiding officer shall on a balance of probabilities make a finding as to whether the magistrate charged is guilty or not guilty of the misconduct as charged."

[99] I must examine the evidence of Ms France, in conjunction with the other evidence received, to pronounce on the probabilities. I am satisfied that her evidence that she met Mr Hinxa on more than one occasion, both inside his office and outside of his office, and that she was inside his Naval View flat is probable. The converse is true, namely that it is highly improbable that she would have knowledge of his office set-up, his cellular phone number, the type of vehicle he drives, the fact that he lived in a flat, and the exact layout of this flat if they never had any interaction.

[100] In evaluation of her evidence about the specifics of the two incidents of compelled sexual intercourse I must take in account that her explanation for having approached Mr Hinxa, trusting him and entering his flat with her baby is probable. Her evidence that he locked the front door and thereby made escape impossible, is probable. The location and layout of the flat makes it probable that no-one would be aware of a struggle inside the flat. The fact that she, along with her baby, found herself in an unfamiliar part of Bloemfontein late at night, without money and social standing, makes her submission to forced sexual intercourse probable. In addition, she was at the mercy of the Chief Magistrate, who in her mind, is powerful and influential.

[101] Her evidence that she was turned away at the police stations, would at first glance appear improbable. So too did Adv Khanyile of the Office of the Director of Public Prosecution argue. However, she was not appraised of all the facts. Her evidence of how she was refused assistance at a number of police stations after being raped (shocking and disturbing as it may be) is probable, given the letter from the Public Protector's Investigator in November 2011, the confirmation by Captain Nduna that she approached their offices at Crime Intelligence before the death of "Masetshana" in 2012, the oral evidence of Mr Bothma that she complained to him more than once, and the written referral by the Victim Support Room of the Johannesburg Central Police in February 2016.

⁶³ Footnote 53 supra

[102] Her evidence that she did not make the so-called withdrawal statement, and consequently that the contents had been fabricated, is not just probable, but in fact proven beyond reasonable doubt.

[103] Her evidence that Moroka Attorneys did not have anything to do with her allegation that Mr Hinxa raped her, nor paid her to lie, is probable. It is probable since (1) Ms France first complained in writing of having been raped by Mr Hinxa on two separate occasions in October 2011, long before she had any dealings with Moroka Attorneys, (2) the content of the withdrawal statement being a fabricated forgery, and (3) the absolute improbability that a firm of esteemed attorneys would do so without any apparent self-interest therein. There is not a shred of evidence that Mr Moroka or any attorney from his office had a bone (of this magnitude) to pick with Mr Hinxa. The only vague suggestion from Mr Hinxa is that an erstwhile client of theirs, Mr Moloabi, has a motive.

[104] Her evidence about how Nomsa interfered after she was raped, and compromised (if not tricked) her instead of rendering assistance, is far more probable, given that Ms Nomsa Ngwata authored the fabricated 'withdrawal statement' and forwarded the statement to Mr Hinxa, the fact that Ms Nomsa Ngwata resigned as prosecutor and became Mr Hinxa's 'colleague' as an acting Magistrate in Bloemfontein, and of course Ms Nomsa Ngwata's dishonest denial in her text message response.

[105] Her evidence that she was misled by the Public Prosecutor Nomsa in June 2011, and the circumstances leading up to her getting into Mr Hinxa's vehicle is probable, especially given what has been established about Nomsa's interference and fraud. The fact that this second humiliation and deception must have left her angry and determined to get justice, is equally probable.

[106] It is improbable that Ms France concocted and fabricated the two incidents of forced sexual intercourse in October 2011 when she made the first statement to the Public Protector without any apparent motive. It is important to note that back in 2011 she was still married, she had not been raped by the police officer yet, nor did she foresee the possibility of a civil damages claim. In 2011 she hasn't met Moroka Attorneys or any other person who wanted to plot against Mr Hinxa.

[107] It is entirely improbable that she was paid or used by a third party to falsely accuse Mr Hinxa of rape. Any attorney attached to Moroka Attorneys,

the Magistrate Mr Moloabi or any 'enemy' of Mr Hinx, who is intend on conspiring against him, would probably find a simpler and more sophisticated way of executing a plot. It is improbable that an uneducated woman from Botshabelo will be selected as the central character in such a plot. It is improbable that she will be left without any support in her quest, and that she will instead rather be thrown to the wolves. It makes no sense that she was used by more powerful people behind the scenes to destroy Mr Hinx, since she did not even get as far as reporting the matter to the SAPS. In addition, this matter would never have seen the inside of any courtroom if it wasn't for Ms France's refusal to let it be.

[108] Her evidence did not appear to be rehearsed or scripted, again suggesting it improbable that she was paid, influenced or otherwise part of a plot against Mr Hinx. I must accept that if any intelligent person or persons (such as a firm of esteemed attorneys or a fellow magistrate as suggested by Mr Hinx) put the Ms France up to this, a simpler and cleaner plot would surely be selected. Any information "fed" to Ms France would be 100% accurate, unlike some of her evidence which was only partially correct, for instance the make and colour of Mr Hinx's Mercedes Benz.

[109] It is lastly highly improbable that Ms France, woman alone, would persist with the rape claims for almost a decade, if she never met Mr Hinx. It is especially improbable given that she had been humiliated, ridiculed, turned away and used in her decade long quest for justice. If someone put her up to it, she would have abandoned the mission as impossible. It is far more probable that she persists with her claim that he raped her because that is exactly what happened. Differently put, it is probable that Ms France was in fact raped by Mr Hinx, and that having been forced to have sexual intercourse with him is the logical explanation for her decade long quest to bring Mr Hinx to justice. It is entirely probable that she was denied the justice that she rightfully seeks, as the objective facts of her documented efforts clearly shows.

The "DEFENCE" of Mr Hinx (the Magistrate Charged)

[110] On **24 November 2017** the Magistrates Commission served Mr Hinx with the two charges of misconduct in a document marked "confidential".⁶⁴ The charges are exactly the same as those read out at this hearing. The last paragraph of this notice, with certain portions highlighted as follows, reads:

⁶⁴ Exhibit E

“You are **invited** in terms of regulation 26(5) of the Regulations to send or deliver a **written explanation** regarding the misconduct which you are charged in order to establish **which allegations are admitted and which allegations are disputed** within **10 (ten) days** after receiving this charge sheet. Such explanation is to be made to the Secretary, Magistrates Commission...Should you fail to reply within the stipulated period it will be deemed that you do not wish to submit any explanation.

Mr Hinxa did not provide any written such written explanation, and I can now safely accept that he did not wish to.

[111] At the start of the misconduct hearing, and confronted with the same charges, Mr Hinxa pleaded not guilty to both charges, and elected not to provide any explanation of his plea.

It is important to be reminded that this is a misconduct hearing, and not a criminal trial or even a civil suit. This is a unique process where the Magistrates Commission, as the “Watch Dog” for members of its own, is charging a Chief Magistrate with serious allegations of misconduct within the Regulatory Framework and the Act.⁶⁵ The integrity, honesty and transparency integral to the offices we hold as Magistrates, be it as Senior-, Chief- or Regional Magistrate, almost demands a frank and candid plea explanation. Even if I am wrong in saying we should feel accountable and compelled to explain ourselves due to the office we hold, it remains improbable that Mr Hinxa would not want to clear the air at the earliest available opportunity. However, Mr Hinxa elected to furnish no explanation in plea at the hearing, and decided to leave us in the dark.

[112] The right to remain silent is indeed a valued and respected right in our Constitutional Democracy. To wait and see what your accuser or accusers can accomplish before you decide on your response, has become the tactical approach of many accused persons in the criminal justice system. It is not unusual or uncommon. This however, is a misconduct hearing and within the context of protecting the integrity of the Magistracy, one would have expected Mr Hinxa to file a proper pleading in answer to the allegations against him.

[113] Mr Hinxa’s defence was so unclear that it led to countless objections, arguments and rulings about what can comfortably be (1) stated to witnesses as having been established, (2) which questions and statements to witnesses will be supported by evidence, except for Advocate Edeling’s reference to

⁶⁵ Footnote 1 and 2 supra

“should Mr Hinxia elect to testify later or call witnesses” and (3) whether questions can be couched as facts, where no basis has been laid.

[114] Mr Hinxia elected **not to testify or call any witnesses** when the Officers Leading Evidence closed their case. In the result, there is no oral evidence of his defence under oath that could be tested by means of cross-examination to establish the veracity thereof. It is well-established in our law that questions and statements to witnesses do not constitute evidence, unless it has been properly pleaded and/or repeated under oath. It is further trite that oral evidence under oath is subject to the scrutiny of cross-examination, and therefore will carry more weight as evidence. The merits and demerits of this evidence is considered with reference to clarity, truthfulness and probability considering the scrutiny of cross-examination.

[115] Even though Mr Hinxia did not testify under oath, and consequently none of his allegations and assertions could be tested by means of questioning, I must still consider the probability of his alleged alibi and the alleged conspiracy against him in light of the totality of the evidence and lastly his argument regarding the validity of the complaints procedure.

[116] He relies on the following documents / Exhibits in his defence:

1. The withdrawal statement;
2. The travel and subsistence claim
3. Banking statements
4. The representations Mr Hinxia made to the Ethics Committee of the Magistrates Commission on 22 February 2017⁶⁶
5. The Transcribed interview between the Officers Leading Evidence and Mr Hinxia on 22 August 2017⁶⁷
6. The statement Mr Hinxia made on 23 August 2017⁶⁸

[117] The Complainant Ms France did not make the so-called withdrawal statement, this purported affidavit has been proved on a prima facie basis not to have been narrated, written or signed by Ms France. Simply put, unless compelling evidence to the contrary was presented by Mr Hinxia or a witness he may have called, the withdrawal statement was shown to have been

⁶⁶ Annexure to Exhibit ZZ

⁶⁷ Exhibit YY

⁶⁸ Exhibit ZZ

forged.⁶⁹ This affidavit is of no value or consequence, and does not assist Mr Hinxa in his defence. Unfortunately this affidavit rather suggests that Mr Hinxa himself, or a supporter or supporters of Mr Hinxa, deliberately attempted to derail Ms France's case against him.

[118] The person or persons who cleverly crafted this forged affidavit, must have been aware that it is a powerful tool to discredit Ms France. In the circumstances it is not surprising that Mr Hinxa was the very first person to publicly make the existence of the statement known. The following was recorded in his statement⁷⁰: "I was phoned by Nomsa Ngwata who then gave me the statement of the complainant...". The same person who wrote the statement falsely pretending to be 'Lerato Constance Frans' gives the statement to Mr Hinxa (and NOT the police). Mr Hinxa chose to ignore this uncomfortable truth in his Heads of Argument. He continues to place reliance on the statement which had been shown to be a forgery. He also elected not to explain how he came to be in possession of the statement in mid 2015, 8 to 10 months prior to a criminal case docket even being opened in May 2016 and the investigation started.

[119] This forged statement, which is wholly detrimental to the credibility of Ms France, was clearly sent or supplied to the police detective(s) tasked with investigating the criminal case against Mr Hinxa, and formed part of the case docket given to Adv Khanyile of the Provincial Director of Public Prosecution. It was shown to colleagues of Mr Hinxa to exonerate and shield him. Mr Hinxa also supplied Mr Ramoroka, the then secretary of the Magistrate's Commission, with the statement and later attached same to his Representations to the Commission in February 2017. He says in Paragraph 1.15.1 "I immediately supplied Mr Ramoroka with Annexure B which was fortunately in my briefcase..."⁷¹

[120] Much of what is contained in Mr Hinxa's representations to the Ethics Committee of the Magistrates Commission on 22 February 2017⁷², his statement on 23 August 2017, his cross-examination of witnesses and his Heads of Argument focusses solely on discrediting and dismissing the Complainant. He elected to attack her credibility, her worth and her human dignity. He writes as follows in his representations:

⁶⁹ Exhibit W1 in respect of the handwriting, and Exhibit UU in respect of the signature.

⁷⁰ Exhibit ZZ

⁷¹ Page 2 of Annexure to Exhibit ZZ

⁷² Annexure to Exhibit ZZ

“the DPP has not only declined to prosecute but has lambasted the “complainant’s” credibility in the superlative degree”, (Paragraph 1.3) and “They came out with a finding akin to her being a pathetic, pathological and hopeless liar” (Paragraph 1.12)

[121] The DPP⁷³ did not make a finding in any of those terms, but ironically, was particularly skeptical of Ms France’s explanation for the delay in reporting the case and specifically her denial that she made the withdrawal statement. They disbelieved her version of the role that Masetshaba and Nomsa played. They were of course not privy to the Reports by the Handwriting Expert that the OLE obtained. It has now been established, as per paragraph 39 of this judgment, that Nomsa wrote the ‘withdrawal’ statement, and obviously, Ms France could not explain why an imposter would have written a false statement. Mr Hinxa cannot rely on the findings of Adv Khanyile of the DPP to attack the credibility of Ms France. Adv Khanyile clearly did not have the full picture, and this hearing is in any event not bound by any decision regarding criminal prosecution. The charges, the legislative framework and the purpose of the proceedings differ substantially.

[122] I was asked to consider calling Ms Nomsa Ngwata as a witness, since she was not called by the Officers Leading Evidence, nor by Mr Hinxa. I explained earlier⁷⁴ why I elected not to. I must accept that Mr Hinxa would have called her as a witness if she was in any way able to advance his defence. I accept that she cannot credibly assist him in his defence.

[123] In the absence of any other explanation for the fraudulent statement, common sense dictates that Ms Nomsa Ngwata, either on her own initiative or in cahoots with another person or persons, wanted to discredit Ms France, take a swipe at Moroka-Attorneys AND exonerate Mr Hinxa, all at the same time. The desired effect was in fact achieved until the Magistrates Commission and the OLE treated Ms France differently and investigated her claim that she did not make the statement.

[124] The Travel and Subsistence Claims, submitted to the Regional Office of the DOJCD⁷⁵ was handed in as support of an alibi that Mr Hinxa introduced during the hearing. Unfortunately, the evidence received in respect of his travel and subsistence claims has been shown to be unreliable:

⁷³ Director of Public Prosecutions: Free State

⁷⁴ See Paragraph 84 of this judgment

⁷⁵ Department of Justice and Constitutional Development

- (a) Mr Hinxla often did not fill out his own subsistence claims, but more often than not, left it to his secretary. His secretary in turn would construct his travels from receipts and till slips, often poorly preserved (some even suffered the misfortune of corrosion)⁷⁶.
- (b) His travel claim for the first half of December 2010 was only compiled and signed on 24 March 2011, more than 3 months later.⁷⁷ Mr Hinxla, and or his secretary reconstructed his travels more than 3 months after the fact, relying amongst other things, on faded illegible slips. His travel claim suggest that he left Bloemfontein on 30 November 2010 at 11:00 and travelled to Pretoria. He arrived back in Bloemfontein on 3 December 2010 at 15:00. He left Bloemfontein again on 8 December 2010 at 11:00 to travel to Willowvale, and returned on 10 December 2010 at 16:00⁷⁸.
- (c) This travel claim does not exclude the possibility that he met Ms France on 8 and 10 December 2010 as she alleged.
- (d) His own travel claim contradicts his statement to a number of witnesses that he was not in Bloemfontein for the entire period from 30 November up until 13 December 2010.
- (e) Other travel claims submitted in evidence have been shown to be inaccurate in respect of his actual whereabouts, since Mr Hinxla allege that he would complete forms in such a way that it may be at odds with his actual whereabouts over weekends, to separate personal and official business. In other travel claims he covered extraordinary distances by motor vehicle on a single day.⁷⁹
- (f) Without any evidence from Mr Hinxla regarding his exact whereabouts or alibi, and the discrepancies in his travel claims, doubts remain regarding the precision and accuracy thereof. The probative weight that can be attached to his travel claims in general, is therefore limited.

[125] Mr Hinxla did not embody any reference to an alibi in his Representations to the Commission, his interview with the OLE, his statement of August 2017 or during plea proceedings. He declined to testify at this hearing.

[126] By his own admission, he only started reconstructing his whereabouts on the relevant dates after his legal representatives urged him to do so during consultation. This is strange and improbable. Any person who is accused of

⁷⁶ Affidavit by Mr Hinxla on 5 April 2011, explaining the invisibility of figures, amounts and dates on some slips.

⁷⁷ Page 4 of Exhibit GG

⁷⁸ Exhibit GG

⁷⁹ Exhibits BBB, CCC and page 30 of the Heads of Argument by the OLE (Exhibit III)

rape would ordinarily first attempt to recollect their whereabouts during the period when the rape is alleged to have occurred. For many people it would be an impossible task if the allegations surface long after the alleged event(s). For a professional person in the position of Chief Magistrate, such an exercise would be easier since he operated with a diary, a secretary, email and leave records, records of meetings, and travel and subsistence claims. As Chief Magistrate he was often required to travel for official business.

It is highly improbable that Mr Hinxa did not investigate and collect all relevant data regarding his whereabouts as soon as he became aware of the allegations. The inescapable inference to be drawn from this is that Mr Hinxa indeed met with Ms France as she alleged and therefore it did not occur to him to attempt to rubbish her claims by investigating his exact whereabouts.

[127] If Ms France was a random stranger who attempted to extort him for money, he surely would have poured more effort into establishing his whereabouts much sooner than only after being formally investigated and interviewed. Instead, Mr Hinxa in his own words 'interacted with Nomsa Ngwata throughout' and obtained a false 'withdrawal statement'.

Mr Hinxa elected not to explain this anomaly. In effect, Mr Hinxa carried out his threat to Ms France that no-one will believe her by getting a false withdrawal statement in his possession. By distributing this fraudulent statement, he ensured that the SAPS and the DPP did not believe her. I must also accept that if Mr Hinxa and Ms France had consensual sexual relations, he would've testified to that effect in order to explain that she attempted to extort money from him afterwards.

[128] The Willowvale case record⁸⁰ was handed in to support an alleged alibi to which Mr Hinxa never testified or accounted for in writing. The original court charge sheet was not discovered or presented at the hearing. Mr Hinxa, or someone in his stead, had a copy certified as being a true copy of the original on 15 February 2019 at the Willowvale Police Station and Mr Hinxa handed this copy in as an exhibit on 19 February 2019. The Officers Leading Evidence argue that the absence of the original court charge sheet is suspicious, much in the same way as the absent original (albeit forged) 'withdrawal' statement. In addition, the OLE's refer to the fact that the Willowvale Police Station was approached to certify a copy instead of the Clerk of the Court at the Willowvale Magistrate's Court. I must agree that this is indeed irregular, since the Clerk of the Court at every Courthouse is the custodian of original charge sheets. As such, they would be the only entity who could produce and certify

⁸⁰ Exhibit R

copies of charge sheets as being true copies. The evidence of Mr Ivor Botha that this particular charge sheet could not be found in 2017 at the Willowvale Magistrates Court is a cause of concern.

[129] Mr Hinxa did not testify to explain how he came to be in possession of a copy of an official court document in 2019, whereas the custodian no longer holds the original. This unfortunately impacts the weight that can be attached to the copy. Even if I am prepared to accept the copy of the handwritten court record (and consequently that Mr Hinxa was in Willowvale on 9 December 2010), it does not exclude Mr Hinxa's presence in Bloemfontein on the morning of 8 December 2010 or the afternoon of 10 December 2010.

[130] The Credit Card⁸¹ and Cheque Account⁸² statements were received as Exhibits provisionally, given that it was fully expected that Mr Hinxa will testify about his alleged alibi. To this extent questions and statements by Adv Edeling, on behalf of Mr Hinxa, were allowed during cross-examination of witnesses, with Adv Edeling stating that Mr Hinxa will testify about his alibi. Witnesses were confronted with details of the alleged alibi as if this alibi will be attested to, and as such they made concessions. Mr Hinxa of course elected not to testify, and he has no pleadings to rely upon or refer to. Witnesses were in fact given the incorrect information when it was put to them that evidence will be led regarding his alibi.

[131] I will nevertheless consider the content of the statements referred to above. The Credit Card statement shows that Mr Hinxa was issued with at least two credit cards with different numbers. One card was presented in Umzimkulu and Pietermaritzburg on 4 December 2010, and the other was presented at Butterworth on the same day. The cards must clearly be in the possession of two different people. Importantly, no purchases appear on any of the two cards after 4 December 2010 up until 13 December 2010. No inference whatsoever can be drawn from the Credit Card Statement.

[132] The Platinum Cheque Account reflects two debit orders went off the account on 8 December 2010, on 9 December 2010 payments were made to American Express and a Nedbank Credit Card, a once-off payment was made to cellular number 084 555 5294 and an amount was credited as payment from "Justisie". On 10 December 2010 another payment was made to cellular number 084 555 2494. Save for these, no other payments were made between

⁸¹ Exhibit S

⁸² Exhibit U

8 and 13 December 2010. The Cheque Account statement means nothing in the absence of evidence from Mr Hinxa to explain the relevance.

[133] Adv Edeling referred to two debit card purchases from the abovementioned cheque account, at 'S*Myezo 1 Stop' on 4 December 2010 for R567.42, and a purchase on 6 December 2010 at Kei Motor Services. Two Google search printed documents were provisionally allowed, and Adv Edeling was entitled to put statements as instructed by Mr Hinxa as to his whereabouts. Since Myezo Motors is in Nelson Mandela Drive, I incorrectly questioned whether it is located in Bloemfontein. I accept that these businesses are located in Mthatha and in the Eastern Cape. It is now of little consequence since Mr Hinxa elected not to testify about any alleged alibi, and since Ms France could only be definitive about the dates of 8 to 11 December 2010.

[134] The documents handed in by Mr Hinxa in support of an alleged alibi does not assist in assessing the probabilities, and in the absence of proper pleading, carries little weight.

[135] The Representations made by Mr Hinxa, his transcribed interview with the OLE and his statement is largely a regurgitation of Mr Hinxa's allegation of a plot or conspiracy against him, a portrayal of himself as the victim and his dismissive attitude of the credibility of Ms France and a denial of any wrongdoing. I have dealt with the improbability hereof.

[136] The Point *in limine* argued by Mr Hinxa in a nutshell pertains to the letter of Ms France to the Minister, which sparked the Commission's investigation and later decision to charge him. He argues that since the Complaint was not in the format of an affidavit, there had been no compliance with Section 6B(4) of the Magistrates Act.⁸³ In addition, he takes issue with the complaint having been lodged to the Minister, and not the Commission and lastly that the complaint had not been brought to his attention within 5 days of receipt thereof to give him the opportunity for comments.

[137] In this regard, Mr Hinxa had been aware of the allegations of the Complainant for many years, and in fact even prior to the police case docket being registered. He was prepared for the eventuality, armed with the 'withdrawal statement' which he believed will fully discredit Ms France and lend credence to his conspiracy theory. Fact is, Mr Hinxa was made aware of

⁸³ Page 2 Exhibit JJJ

the criminal case, he was aware of the investigation by the OLE and the later charges. Ms France did not just write a letter with a frivolous complaint, it was her last effort to seek justice after a long and documented history of her complaint.

[138] As stated in *Nkabinde & Another v Judicial Service Commission*⁸⁴ it is clear that the rationale for the requirement of an affidavit is to provide the required degree of solemnity to a complaint and discourage frivolous complaints being lodged. Ms France made her first affidavit in October of 2011 already. Her complaint is anything but frivolous. In the circumstances I can safely find that there had been substantial compliance with this requirement.

[139] I find that Mr Hinxa's defence of a conspiracy, alternatively the alleged alibi, on the limited evidence placed before this hearing, is highly improbable. The probabilities in this matter not only favour the version of the Complainant Ms France as probable, but exclude the probability of the denial of Mr Hinxa.

[140] The totality of the evidence establishes, on a balance of probabilities – if not beyond reasonable doubt – that Mr Hinxa forced or compelled Ms France on two separate occasions to have sexual intercourse with him without her consent; and as result he acted without integrity and he brought the good name, dignity and esteem of the Office of the Chief Magistrate into disrepute.

[141] It follows for all these reasons that Mr Hinxa stands to be found guilty of the two charges of misconduct preferred against him.

[142] In the result, in terms of Regulation 26(15) of the Regulations for Judicial Officers in the Lower Courts, I find that it is proved on a balance of probabilities, that Mr M D Hinxa is guilty of both charges of misconduct as formulated by the Magistrates Commission.

Ms M Greyvensteyn
Presiding Officer

⁸⁴ Case no 20857/2014 ZASCA

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PROCEEDINGS ON 30 NOVEMBER 2021: [11:57]

CHAIRPERSON: I am going to remove my mask for purposes of judgment if there is no objection. I am sitting far away from anybody else so...

J U D G M E N T


(EX TEMPORE)

I am going to proceed to deliver judgment in respect of the sanction on an *ex tempore* basis. Firstly I want to just say
10 that I can safely accept today that Mr Hinxha do not intend to appear at today's proceedings and that he does not want to bring any application for postponement. This matter has always been accompanied by facts of urgency ...[inaudible] Magistrate's Court Act and regulations require conclusion as soon as possible but also because Mr Hinxha desperately sought finality.

On 9 July 2021 Mr Hinxha was found guilty on two charges of misconduct. Copies of the written judgment were handed to Mr Hinxha, the Officers Leading Evidence and the
20 representative of the Magistrate's Commission. On the same date Mr Hinxha requested two months postponement in order to *inter alia* get medical reports relating to his health and present this evidence albeit as an expert report or reports and/or to call witnesses in mitigation of the sanction. The matter was postponed on 9 July for this purpose affording Mr Hinxha


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enough time to get reports and prepare. In September 2021 Mr Hinxha did not attend the hearing and instead informed the Officers Leading Evidence two days prior by SMS' or E-mails that he is not feeling well with numerous ailments ...[indistinct].



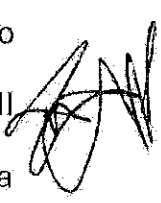
The IG Services of the Department of Justice was ...[indistinct] interrupted around this time and shut down later. Mr Hinxha did in fact E-mailed a medical certificate. In none of his communication he requested postponement of the hearing nor did he propose future dates for the sitting. I nevertheless
 10 postponed the matter to 22 September since Mr Hinxha was put off sick until 17 September. However expectation that he obtained the reports of the medical professionals during the two months postponement I consequently made it clear that the matter will proceed on the 22nd unless a substantive application for postponement is made. This was communicated to Mr Hinxha. Mr Hinxha elected not to bring such an application on 22 of September but instead forwarded a medical certificate two days prior. On this occasion he was put off until the 28th.


Given the terms of the regulations and specifically
 20 Regulation ²⁶(14) I am entitled to order that the hearing proceed
 In his absence and given the urgency of the matter I ordered that the hearing proceed in his absence. I nevertheless thereafter invited Mr Hinxha to address and submit any mitigating factors to this hearing in writing given that he had taken the initial two months post to finding a guilt to prepare



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and obtain medical reports. There was no obligation on me as presiding officer to do so nor is it provided for specifically. This was an extraordinary invite to afford Mr Hinxa to place the evidence before the hearing in circumstances where he felt too unwell to attend. Mr Hinxa seemingly interpreted the order to proceed in his absence on 22 September 2021, as an order barring him to appear and should the matter be postponed. There is no legal or rational basis for such an interpretation.

When he alluded to such an interpretation in his written
 10 submissions he was encouraged to attend on the next date of hearing 29 November 2021 that being yesterday and to present viva voce evidence. This time he accused the presiding officer of reversing or rescinding her own order and refused to comprehend or acknowledge that he still have the right to appear, refused to acknowledge ^{or appreciate the} ...[indistinct] goodwill  associated with this invite and he also did not bring a substantial application for postponement to call witnesses which was all indulgences for his own benefit. From the latest communication it is apparent that Mr Hinxa had already sought
 20 medical attention that had been presented to me by E-mail when he forwarded mitigating factors so pursuant to as he calls it conviction and I take that into account.

Mr Hinxa has throughout thoroughly adopted the approach to portray himself as the victim and anyone who is not supportive of him becomes the so-called "enemy." To this 

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^{end}...[indistinct] he has not only sought to diminish the worth of the complainant but ^{it} also involved ~~in~~ unwarranted attacks on the Officers Leading Evidence, the Magistrate's Commission and myself who were appointed by the Minister to perform certain official functions. ~~The~~ ^{He} ultimately devoted ~~late~~ ^{eight} of his twelve and a half pages of his address in mitigation to comments, corrections and criticism of functionaries. Mr Hinxa takes issue ...[indistinct] not been given and I quote,

10 "a slight opportunity to present his side of the story."

He, and I quote,

"refers to crazy submissions which dominated his hearing and led to the ruling's instructions."

But all of these complaints, corrections and criticisms do not translate to any kind of request to a postponement in order to sensibly address this hearing or present medical evidence or further medical evidence in mitigation.

Now the imposition of an appropriate and just sanction is informed by firstly the sanctions listed in Regulation ²⁶ (7) of
20 the Regulations to the Magistrate's Court Act. I am going to read this regulation. It reads as follows:

"The presiding officer at a misconduct hearing may if a finding of guilty has been made (a) impose one of the following sanctions or any combination thereof on the Magistrate's charge: 1. Caution or

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"reprimand the Magistrate. 2. Specify the manner in which he or she should be cautioned or reprimanded. 3. Direct the Magistrate to tender an apology in a manner specified by the presiding officer, or 4. Postpone the imposition of sanction for a period not exceeding 12 months with or without conditions which may include counselling, treatment or attendance on a training program."

And then,

10 "or (b) recommend to the Commission that the Magistrate concerned be removed from office as contemplated in section 30 of the Act. The imposition of the appropriate sanction is further informed by the principle of proportionality in other words the sanction must be proportionate to the seriousness of the misconduct, the interest of justice and the personal circumstances of the Magistrate charged."

In this case I must also consider the victim Ms Lerato
20 Constance Frans who suffered greatly for many years as a result of the actions of Mr Hinx. So moving then to the specific misconduct that Mr Hinx was found guilty of, he was found guilty of two charges of misconduct the specifics of the charges and subsequent findings are that on two different occasions in December 2010 and June 2011 respectively he

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compelled Lerato Constance Frans to have sexual intercourse with him against her will or without her consent. I must then take into account as aggravating the seriousness of the charges.

Generally speaking the details of the two charges of misconduct ~~we~~ translate to charges of compelled rape in our Criminal Law. The specific findings in ^{this matter} ~~these matters~~ falls squarely within the definition of compelled rape and whilst I emphasised in judgement that Mr Hinxha is charged with
 10 misconduct and not subject to a criminal trial, the seriousness of and the details of this particular misconduct he committed cannot be overstated. Simply put it amounts to rape. The sexual violation and abuse of particularly women and children has reached epidemic proportions in South Africa and has occupied law enforcement agencies NGO's, the media and the criminal justice system for decades now. Various campaigns and initiatives followed on and the resulting message is loud and clear that violence against women and children and the sexual violation of another person will no longer be tolerated.

20 Since 2007 with the coming of into operation of the Sexual Offences and Related Matters Act 32 of 2007, a person who commits rape on more than one occasion faces a mandatory sentence of life imprisonment. This is indicative of the seriousness and gravity of the misconduct committed by Mr Hinxha. Moving to the specifics of this matter the commission

or the misconduct committed in this matter is linked to the office that Mr Hinxa held.

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intrinsically
...[indistinct]

Ms Frans first ~~left the~~ ^{met Mr Hinxa} ~~...[indistinct]~~ when she travelled from Botshabelo to Bloemfontein to seek the help of the Chief Magistrate of the Bloemfontein Magistrate's Court. He was the highest ranking official within the ^{Magistrate Court} ~~...[indistinct]~~ of the Magistracy in Bloemfontein and surrounds. As a member of the public she had every right and reason to trust the Chief Magistrate due to the office he holds. She believed as a result
10 of her trust given his position and because he told her so that he was influential, powerful and could assist her with her legal problems.

Mr Hinxa abused this trust that the complainant had in him as the Chief Magistrate in order to mislead and dupe her into believing that he is taking a special interest in her problems and that he is going out of his way to assist her. He ended up violating her privacy, dignity and bodily integrity by forcing her to have sexual intercourse with her against her will. I take into account that in doing so he violated her rights to
20 privacy, dignity and bodily integrity which are fundamental rights entrenched in our Constitution and as judicial officers an oath is taken to uphold the Constitution. Again her vulnerability and ignorance was exploited. Afterwards Mr Hinxa did not only rubbish her claims but continued to belittle and diminish her worth by referring to her as a pathetic

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pathological
 ...[indistinct] liar in his representations to the Commission. He used a forged statement to discredit her and in my view this greatly assisted in letting him escape criminal prosecution.

Now ~~he portrayed~~ ^{his portrayal of} himself as the victim keep in the circumstances despite what I have said about the circumstances of the misconduct and I think the old say here is apt that you cannot play the victim to circumstances that you created. In doing so by committing this misconduct he brought the office of the Chief Magistrate in serious and almost
 10 irreversible disrepute. Looking at the mitigating factors I take into account the factors presented by Mr Hinxa in his written address and specifically then I take into account those factors from page ⁸⁻⁹ onwards where he refers to his mitigating circumstances. Taking into account as far as his personal circumstances are concerned that he is currently 61 years old, he divorced and remarried and he is presently the father of eight children, five biological children and three stepchildren. The youngest of his children is 16 years old and thus still a minor.

20 I take into account that whilst on suspension Mr Hinxa was still paid his salary with certain additional benefits such as a cell phone allowance and his laptop no longer available to him. I take into account and it is listed saying that he has a number of debts including for immovable property, two immovable properties, two vehicles as well as ^{mounting costs related} [indistinct] to

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legal bills. I take into account that his current wife is employed and I also have to take into account that Mr Hinxa has joined as he said the Government in April of 1979, that he later became a senior and Chief Magistrate and that he contributed significantly during his ^{tenure} ~~10 years~~ as a Magistrate. I take into account the fact that he has an unblemished service record and a number of achievements to the extent that he represented the Judiciary at local and international events and conventions. Taking into account that in 2002 according to his
10 mitigating papers he became a born again Christian and that he is currently in his own words a fully fledged preacher of the Methodist Church of Southern Africa who delivers sermons.

As far as his health is concerned I take into account that his health problems surfaced in 2017 and it is directly related to his notice of possible suspension, the investigation into the misconduct and then later in being charged and found guilty of misconduct. I take into account and I agree with Mr Cox that two medical reports is included and from this I can readily accept as I do that Mr Hinxa has the following conditions, that
20 he has a stress and anxiety disorder, that he has suffered from depression and hypertension and high blood pressure. I also accept the appeal by Dr Jacobs and the other doctor to consider his poor health and the impact that this misconduct charges and hearing has had on his health over the last couple of years.

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I take into account that in respect of the charges the complainant did not suffer serious physical injuries, further also take into account that she was raped subsequently to the incident with Mr Hinxa and that this must have contributed to her trauma over the years. In other words I am simply saying that that was a contributing factor that leads to her trauma and the fact that she was still very emotional at the time when she had to testify at this forum. I have to in this particular matter take into account the Code of Conduct for Magistrates which

10 very specifically states the following, and I am going to only refer to few of the items in the Code of Conduct but to start off with number 1 it states that,

"A Magistrate is a person of integrity and acts accordingly. There is no degree of integrity, integrity is absolute."

Later at number 4 it states,

"A Magistrate acts at all times also in his or her private capacity in a manner which upholds ...[indistinct] dignity and ...[indistinct] office of

20 Magistrate and the administration of justice."

And ^{No} page 16,

"A Magistrate shall not act to the detriment of a discipline or the efficiency of the administration of justice or allied activities."

Now in addition the Chief Justice issued norms and

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standards and again these are binding on all judicial officers. According to the norms and standards it seeks to achieve the enhancement of access to quality justice for all to affirm the dignity of all users of the court's system and a number of other objectives which is not as relevant here. But what is important is the following. That as the objectives of the norms and standards states as follow:

10 "These objectives can only be attained through the commitment and co-operation of all judicial officers in keeping with the oath or solemn affirmation to uphold and protect the Constitution and Human Rights entrenched in it and to deliver justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law."

This again is just a reminder that Mr Hinxa has taken an oath of office to uphold and protect the Constitution and the Human Rights entrenched therein. This while he is now been convicted of violating a complainant Ms Lerato Frans in the most intimate way and thereby having complete disregard for
20 her fundamental rights which is entrenched in the Constitution and which judicial officers ^{takes} ~~to taking~~ an oath to uphold and protect.

Now the imposition of a sanction today is contrary to the belief of Mr Hinxa not a ^{victory} ~~good treat~~ to anybody. Today is rather a disgraceful ^{and shameful day} ~~ful~~..[indistinct] not only for Mr Hinxa but for the entire

Magistracy. It is an indictment and a ^{stain}...[indistinct] on the Magistracy and brought the Magistracy in disrepute and compromised the entire Judiciary. Mr Hinxha was preoccupied with self interest, had no concern for the effect of his actions on the complainant. He made no admissions throughout. He took no responsibility whatsoever and although Mr Hinxha placed a number of factors before me in mitigation of the sanction I must be reminded that Mr Hinxha is not the victim. That his preoccupation with self interest does not take into

10 account the gravity of the misconduct nor does it propose any appropriate sanction for me to consider. The sanctions listed in Regulation ²⁶(17) (A) 1 to 4, whether alone or in combination are all disproportionate and inappropriate given the gravity of misconduct committed by Mr Hinxha. A Judicial Officer or Magistrate made himself guilty of such serious misconduct should not and cannot continue to hold office and in the circumstances of this matter and in terms of Regulation ²⁶(17) subsection B I recommend to the Commission that Mr Hinxha BE REMOVED FROM OFFICE as contemplated in section 13 of the

20 Magistrate's Court Act.

And lastly Mr Hinxha is hereby informed that of his right to lodge representations with the Commission in terms of sub-regulation 20. And I will also then request that the Magistrate's Commission ^{obtain and have transcribed} [indistinct] the record of today's proceedings (and yesterday's for that matter) to be typed and

JUDGMENT

that Mr Hinxa be placed in possession of a copy thereof.

Thank you.

MR COX: Thank you Madam Chair.

PROCEEDINGS ADJOURNS [12:29]

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that so far as it is audible to me, the foregoing is a true and correct transcript of the proceedings recorded by means of a digital recorder in the matter between:

MAGISTRATE'S COMMISSION // MR HINXA

CASE NUMBER	: 414/20/2016
RECORDED AT	: BOTSHABELO
DATE HELD	: 2021/11/30
NUMBER OF PAGES	: 14

PROBLEMS EXPERIENCED WITH RECORDING

1. The recording was transcribed verbatim and therefore grammar was not corrected.
2. The Chairperson was often very soft and sometimes unclear as a result of which several indistinct/inaudible words and/or phrases appear in the transcript.
3. A disturbing background noise also resulted in indistinct and/or inaudible words.

DATE COMPLETED: 2021/12/08

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Representations

REPRESENTATIONS AGAINST CONVICTION AND SANCTION

1. INTRODUCTION

1.1 On 08 July 2021 I was found guilty on two counts of rape although the Chairlady sugar coated it as bringing the judiciary into disrepute by having sex with the complainant without her consent despite the evidence being led boldly throughout on rape of complainant without any intervention from whatever circle. Consequently, I was defending two counts of rape throughout. It is unavoidably evident that the Chairlady came with a criminal approach from the very first, up to the last, day of this supposedly disciplinary hearing.

1.2 On 30 November 2021 a sanction of removal from office (dismissal) was recommended.

1.3 Both are awaiting confirmation by the Magistrates Commission after which the latter will recommend endorsement by the Parliament.

1.4 The hereunder representations are against both conviction and sanction as I deem both inappropriate.

2. AD CONVICTION

2.1 Disregard of my Heads of Argument. See them herewith attached. Annexure A. It will be noted that despite same amounting to more than 100 pages, very little, if any, reference was ever made to them in the judgment even if solely for the purposes of dismissal.

2.2 Distortion of evidence

2.2.1 The first statement by the complainant was **clearly** made on 08/12/2010 yet at paragraphs 73; 28.3; and 91 she inappropriately found the aforesaid statement to have been made in October 2011. See complainant's first statement clearly dated 08/12/2010. Annexure B. Complainant also confirmed both under evidence in chief and under cross examination that the afore stated statement was undoubtedly made on 08/12/2010. See page 3 para 20 to page 4 para 5 of the case record of 02/10/2019, Annexure C and also page 60 paragraph 20 to page 61 paragraph 10 of the case record of 05/11/2019, Annexure D This was also canvassed extensively in my Heads of Argument (Annexure A above) to no avail (See para 4.5.6 c page 52). **Making of a statement on 08/12/2010 of rapes by complainant yet the first rape only happened two days to come i.e on 10/12/2010 would be a proof beyond reasonable doubt of my defence of conspiracy because it would be completely impossible for the complainant to prophet rapes before the happening of even the first one. The**

Chairlady's distortion irregularly and maliciously defeated my very material defence.

2.2.2 At para 92 the Chairlady found, "I can accept that he (witness Bothma) incorrectly assumed that she (complainant) refers to Hinxa's house in Brandwag". According to Mr Bothma he never assumed but was told by complainant in his court when complainant appeared as an accused that she was raped by me in Brandwag. (See Mr Bothma's Afrikaans statement , para 2 , attached as Annexure E). The Chairlady in her distortion herein negated and deliberately ignored a very material contradiction on the venue of the first incident because , according to complainant, the first rape occurred in my flat (which is) at Arboretum suburb, whereas she told witness Bothma that it occurred in my house at Brandwag suburb, which are kilometres apart. This distortion further lends credence to my allegation of conspiracy because the complainant could never have known my two properties yet she was allegedly raped in only one. The irrefutable inference is that I was conspired upon and my two properties could not escape such conspiracy.

2.2.3 At paragraphs 8 and 110 the Chairlady found , "Hinxa did not provide any written explanation (after he was served with the charge sheet) and I can now safely accept that he did not wish to". There was no evidence ever led to that effect. On the contrary , I challenged the charges in High Court and I wonder if the Chairlady bothered to investigate about that instead of jumping to unfounded , yet detrimentally – to – me , conclusion. (See the relevant portion of my founding affidavits. Annexures F&G).

2.2.4 At para 18 , the Chairlady found , "Complainant recorded initial events but not actual rape (with her cellphone)". This was not complainant's evidence. According to complainant, she recorded the whole incident. (See para 10 page 37; para 20 page 42; para 5-10 page 43, of 05/11/2019 record, Annexure H). The fatal blow of this distortion to my case is the negation of gross improbability, if not impossibility, of the rape victim's capability to record rape incidents throughout. This is clearly what the Chairlady wanted to cover for the complainant's serious incredibility in her case.

2.2.5 At the end of para 66, the Chairlady found , "Crux of evidence (of complainant) remained same". This is a travesty of the complainant's evidence. (See para 4.5.4 to 4.5.7 page 67 of the Heads of Argument which highlighted the glaring contrary and which the Chairlady did not even bother to address).

2.2.6 At para 28.24 the Chairlady found , "Withdrawal statement played an integral part in nolle prosequere". This is a gross distortion. (See para 12-14 of the DPP's findings Annexure I). The fatal blow to my case sparked by this finding/distortion is that the DPP's findings on the complainant's lies found no consideration in the Chairlady's judgment.

2.2.7 At para 129 , the Chairlady found , "Even if I am prepared to accept ...that Mr Hinxa was in Willowvale on 09/12/2010 , it does not exclude Mr Hinxa's presence in Bloemfontein on morning of 08/12/2010 or afternoon of 10/12/2010". This distorts

complainant's version of meeting me continuously from 08-11/12/2010. See para 20 pg 10 – para 5 pg 11 of 06/11/2019 record, Annexure J. Complainant's version is also disputed by the OLE (Mr Cox) at para 10 page 40 of 27/05/2019 record who conceded that I was at Willowvale on 09/12/2010. See Annexure K.

2.2.8 At para 113 the Chairlady correctly alluded that Adv Edeling would under cross examination refer to , “**Should Mr Hinxa elect to testify later or call witnesses ...**”. The correctness hereof is further buttressed by , inter alia , the last paragraph of page 12 of the record of 19/01/2019. See Annexure L. The contents of para 130 of her judgment that , “Witnesses were in fact given incorrect information when it was put to them that **evidence will be led** regarding his alibi” is not only distortion but a regrettable contradiction of para 113 of her judgment, hence my bolding / emphasis. It bears mentioning that much weight was irregularly accorded to this paragraph to shift , illegally so, the onus to me hence I was convicted.

2.2.9 At para 129 she found, “... Mr Hinxa did not testify to explain how he came to be in possession of a... document ...whereas the custodian (of the court judgment) no longer holds original”(which led to her conclusion that my alibi document was suspicious). This is a complete distortion of Ex CC (which was read into record and admitted by consent hence the custodian Ms Nompumelelo Somdaka was not called by the defence).Ex CC clearly states that she(Ms Somdaka), the custodian of the court record , had the original but she (Ms Somdaka) could not find Mr Botha telephonically.(See page 36-38 of 27/05/2019 , Annexure M).

2.2.10 At para 70.2, she found,“the evidence of Ms Nontobeko Rolisisu is important since Mr Hinxa denies **ever** meeting Ms France in his office or otherwise” (my bolding). I never denied **ever** meeting Complainant in my office. What I denied was meeting Complainant at the times and dates alleged by Complainant which were inextricably linked to the first rape as I was in Willowvale. See page 33 ,para 20 – page 34 para 5 ; and page 35 ,para 10 , 16/07/2019 record on the evidence of Ms Nontobeko Rolisisu, Annexure N.The said Nontobeko did not have even a slightest clue about the times and dates of the so called meeting /s and even conceded that I might have been away. Coming to the evidence of the complainant , it was pertinently put to her that perhaps I might have seen her, what I was denying was the allegations in the charge sheet. See page 19 para 10 of the 06/11/2019 record, Annexure O.

2.2.11 Still at para 70.2, the Chairlady , in her distortion, found , “Ms Rolisisu views Mr Hinxa as a father , and she found it extremely difficult and traumatizing to testify at this hearing”. Whilst the complainant indeed testified that I was a father figure to her, the rest is not only distortion but the evidence of the Chairlady's personal knowledge as it never emanated from Ms Rolisisu. See pg 20 para 5 of 29/05/2019 record, Annexure P.

2.2.12 At the middle of para 70.2 the Chairlady found , “To a large extent her (witness Nontobeko Rolisisu's) loyalties lies with Hinxa”. There was no evidence at all to this extent. If one peruses the record s/he will find that the *ratio decidendi* was to glorify this

witness and vilify me. What Ms Rolisisu said was only that we had good relationship, even on that relationship it was till March 2017. See para 20 pg 19 of the 29/05/2019 record , Annexure Q.

2.2.13 Still at para 70.2 , the Chairlady found , "She has no motive to lie". This is not only in sharp, but in ridiculous, contrast; to her crystal evidence that as from 01/04/2017 she was suspended and dismissed because of me. See pg 4 para 10 of 16/07/2019 record read with pg 2 para 10 of 29/05/2019 record, Annexure R.

2.3 Selective and dismissive approach

2.3.1 Out of my defence affidavits (Ex YY&ZZ) , the Chairlady at para 135 only selected what she regarded as improbable to sustain my conviction. She did not even consider , even for the sake of dismissal , my account of how complainant could have known my flat and Mercedes Benz (which complainant described as blue whereas it was green), an account that carries much weight.

2.3.2 At para 124 (a) she found as one of the reasons why my claims i.e Ex R, which would boost my alibi, were **unreliable** as , "Mr Hinxa often do not fill his own subsistence claims, but ...left it to his secretary", yet she found the very secretary not only **reliable** but also **credible** at para 70.2 when this **reliability** and **credibility** would sustain conviction.(my bolding and emphasis). Still at paragraph 124 (a) , whilst those claims were not reliable to sustain my alibi they were reliable to prove that I could see complainant either in the morning of 08/12/2010 or in the afternoon of 10/12/2010 as reflected in the said claim . (See para 129 of the judgment). She is conveniently silent about 09/12/2010 which undeniably placed me at Willowvale because complainant emphatically stated that throughout i.e from 08-10/12/2020 we were together in my office finalizing the trip to Bheki Cele(Pretoria).

2.3.3 At para 28.12 the Chairlady applauded the vindication of the complainant in a successful prosecution of the policemen who also raped her but the very Chairlady is silent , deliberately so , on the complainant's admission in this hearing that she lied during the trial of those policemen. (on this admission on her lies , see page 28 para 10 and 29 para 5 of the record of 06/11/2019). Had she referred to these admitted lies , complainant's credibility would definitely be tarnished in the extreme, especially that the hearing was also about yet another rape.

2.3.4 At para 70.1 , she alluded to corroboration between the complainant and Ms Rolisisu regarding complainant's meeting with me in my office), but the Chairlady , deliberately so, does not refer , even if for the sake of dismissal , to my highlighted extremely material contradictions between complainant and Ms Rolisisu regarding "meeting" in my office (See para a-d at pages 17-18 of my Heads of Argument).

2.3.5 At para 57 the Chairlady only referred to , "...to ...dispel rumour (of rape) and discredit complainant...Ms Mbasa testified that Mr Hinxa showed them this statement" (the so called withdrawal statement). But the Chairlady conveniently for the conviction left out Ms Mbasa's concessions on the propriety and regularity of my claims.(See pages 20&26 of 27/05/2019 of the record , Annexure T).

2.3.6 At para 128, the Chairlady found , "...the original court charge sheet was not recovered ..." The Chairlady omitted selectively Mr Ivor Botha's testimony who stated that he discovered the court record book at Willowvale which reflected that indeed my case which would prove alibi was on roll on 09/12/2010. This witness also conceded my alibi; the reality that existed that complainant was lying to say she ever consulted Dr Morake after the so called first rape; and that it was impossible that I could be in Willowvale and Bloemfontein during the period under review.(See pages 14;16;&39/41 of 23 /11/2020 record, Annexure U).The Chairlady , once more, only selected Mr Botha's testimony that tended to diminish my alibi and omitted the one that materially conceded to, or proved, it.

2.3.7 Still at para 128 of her judgment , the Chairlady does not mention that my original claim form (which proved my alibi) for the motor vehicle travel claims was recovered from the Regional Office and the OLE (Mr Cox) unreservedly acknowledged that.(See page 1 of 20/02/2019 record,Annexure V).

2.3.8 At para 124 (a-f) the Chairlady found that my claims, which would prove my alibi, are unreliable without any reference to any reason thereof, yet did not allude to the reality that they were all paid by the Regional Office after intensive scrutiny and were never queried by the Auditors and the Judicial Quality Assurance Officers. To rub salt into my wound, not even an Accounts Clerk, let alone the aforementioned experts, was ever called either by the OLEs or the Chairlady to cast even a slightest aspersion on the validity / legitimacy of my claims. In the absence of any refutation and existence of approval and payment, proved , not only on balance of probabilities, but beyond reasonable doubt, that I was at the place reflected therein i.e Willowvale.

2.3.9 At para 78, the Chairlady ruled, "Captain...Nduna **corroborates** complainant on a number of **peripheral** issues" but does not refer to the reality that he **contradicts** complainant on a number of **crucial** issues and also **concedes** to such contradictions and my alibi (my boldings and emphasis). See pages 6-8 of 27/10/2020 record, Annexure W.

2.3.10 At para 68,she found , "...no file for Ms ...France could be located on the records of patients ...". Strategically for the conviction, she omitted to make an adverse finding that this was despite the receipt book and register of all the patients of the affected period (08-11/12/2010) being provided by the staff of the surgery at which she (complainant) was falsely examined after the alleged first rape. Complainant's name was not there hence witness Botha testified that a possibility existed that complainant was lying. (See 5-10 page 39; para 5-10 page 40; para 5-10 page 41 of 23/11/2020

record; See Annexure U(iii)-U(v). Failure by the Chairlady to ever allude to this grave anomaly was not only a deliberate move to cover for complainant's blatant lies already conceded to by witness Botha, but a gross irregularity by the Chairlady descending from the bench to testify against witness Botha in favor of complainant in order to attain her predetermined conclusion.

2.3.11 At para 74, Ex "XX" depicting the colour of my Mercedes Benz was admitted by consent and found to be carrying much weight without complainant testifying on it, yet my affidavits (Ex YY&ZZ) elaborating on my defence also admitted by consent were only mentioned very much in passing at para 116(5) & (6) but never received any further attention, let alone admission of my defence encapsulated in both.

2.3.12 At para 76, she found complainant's description of my flat accurate, yet, deliberately for the purposes of conviction, omitted to state complainant's material discrepancy of existence of CCTV which never existed and the floor on which my flat was situated. Strategically still for the conviction, she never at all alluded to my extensive explanation, even for the purposes of dismissal, of how complainant could probably and even possibly have known my flat.

2.3.13 At para 49, she found, "Mr Moroka impressed with the calm and dignified manner in which he testified and answered all questions". She deliberately omitted the material contradictions between Mr Moroka and the complainant on the number of rapes, with Mr Moroka told of only one rape by the complainant yet the latter testified about two rapes during the hearing. Regarding undignified, unimpressive, and a not calm manner of Mr Moroka's testimony, wherein both the Chairlady and my advocate had to even calm him, "See page 14" of 19/01/2019 record, Annexure X.

2.3.14 The Chairlady throughout the proceedings accepted Ex H (complainant's affidavit) copy which was **not even certified** solely for the adverse findings against me, yet she rejected a copy of the Willowvale Magistrates Case record which supported my alibi solely because it was **certified** at Willowvale Police Station instead of the Clerk of the Court, according to her. This was not only a selective conviction approach but also a gross misdirection in law which will be addressed hereunder. (my boldings and emphasis).

2.3.15 At paragraph 36 she found "...I can safely find it was proved ...by expert evidence that Ms Ngwata wrote so called withdrawal statement..." The Chairlady deliberately left out a very crucial and unusual anomaly in the viva voce evidence of the expert during which he surprisingly told the hearing that the Magistrates Commissions' officials instructed him not to consider the signature in his analysis of the so called withdrawal statement as the signature was not in dispute. See para 10 pg 22 of 27/05/2019 record, Annexure Y. The anomaly flies on the face of the reality that ownership of any document is not determined by who wrote it but by who signed it. To put the final nail in the coffin of the expert both literally and figuratively, it was only after

his death that another report was submitted talking to the signature now, very surprisingly so. My objection to this circus /soapie was overruled.

2.3.16 At paragraph 74 she found that complainant knew my blue benz because I fetched her with it. She omitted that the very same complainant testified that she was told about my blue benz by somebody she would not reveal. See page 19 , para 20 of Annexure O above. Still at paragraph 74 the Chairlady further found that complainant reasonably mistook the green colour of my Mercedes benz to be blue since it was in the evening. She omitted that according to the very same complainant the 2011 rape with the same Mercedes benz was during the day.

2.4 Misdirections in law

2.4.1 At paragraphs 11 and 134 of her judgment she invoked "pleadings" akin to the civil proceedings to find against me, yet throughout the hearing she was relying on "sui generis" nature of the hearing when it was suiting her to find against me.

2.4.2 At para 124 (e) she admitted new evidence (Ex BBB&CCC) at argument stage which irregularly suited conviction.

2.4.3 At para 28,21 she found the interview of the complainant by the DPP, the consequences which would drive to my acquittal , "some what inexplicable...", yet she did not call the DPP to explain the "inexplicable". The same holds true of Nomsa Ngwata on whose adverse findings the conviction was heavily premised. The said Nomsa has challenged this gross irregularity in Bloemfontein High Court seeking, inter alia, expungement of all the offensive paragraphs against her which are about 43. See Nomsa's affidavit ,Annexure Z. Without preempting the judgment in that case, it is highly unlikely that the court will countenance this irregularity and not grant the remedy. Even in the unlikely event that Nomsa does not succeed , and the Commission approves my judgment, it is highly unlikely that this irregularity per se wont amount to unfairness of the judgment when I take it on review. Failure to call both witnesses yet adverse findings were made against both did not only amount to unlawful flouting of the *audi alteram partem*, but also to a dismal failure to be as investigative and inquisitive on the part of the Chairlady as required in misconduct enquiries.

2.4.4 The Chairlady did not refer to / consider any of the authorities I quoted , even if for the purposes of distinguishing them from the facts of this hearing.

2.4.5 The Chairlady, in rejecting the Willowvale Magistrate Court record which would prove my alibi, solely because it was certified by the police and not by the Clerk of the Court, erred in law because in terms of Section 4 of Justices of the Peace and Commissioners of Oaths Act 16/1963, the commissioned officer of SAPS can "...perform all such duties ...imposed on justices of peace".

2.4.6 At paragraph 114 , she found that I should have testified so that I could be tested. This did not only disregard my affidavits (Ex YY&ZZ) admitted by consent, but also

flouted trite law that I should have testified only if there was a *prima facie* case against me.

2.4.7 At para 88 she found all the witnesses called to support complainant irrelevant, yet also relevant , which is a glaring contradiction in law.

2.4.8 The Chairlady dismissed my defence of the affidavit made by the Complainant exonerating me from any offence mid trial and found that it was never made by Complainant and that was a cause for concern to her(Chairlady),which was a gross misdirection in law. See para 5 page 7 30/05/2019 record, Annexure AA.

2.4.9 She also dismissed my motor vehicle claim form alibi document mid trial by finding that the documents presented did not show that I was elsewhere on the day of the rape, which was another gross misdirection in law because the motor vehicle claim form clearly showed that from 09-11/12/2010 I was at my rural home in Willowvale. See para 10 , page 41 , 27/05/2019 record , Annexure BB.

2.5 Non existing evidence used in conviction

2.5.1 At paragraph 82 the Chairlady implied that I had appointed Nomsa Ngwata as an Acting Magistrate in Bloemfontein as a compensation for her assistance in covering up the rape charge against me. Apart from the fact that there was no stint of evidence to sustain this finding, it has since emerged from Nomsa's litigation alluded to at para 2.4.3 above that Nomsa was actually appointed by Mr van der Merwe who was acting during my absence. See Annexure CC.

2.5.2 As a cover up for the complainant's incredibility , at paragraph 20 she found that complainant , "hails from ...a poverty stricken former homeland ". Not even a shred of evidence was ever led to justify this finding.

3.AD SANCTION

3.1 Procedural misdirection

a) The Chairlady changed the rules of the game by ordering in my absence that the OLEs should begin to tender aggravation. This gross irregularity sparked double prejudice : Firstly , instead of mitigating generally, I had an uphill battle of specifically showing cause why I should not be dismissed. Secondly, instead of me beginning with my mitigation, then OLEs responding with aggravation , then me lastly responding to the aggravation, it was the other way round, the prejudicial consequence being that I was afforded only one opportunity instead of two whilst the OLEs were afforded two instead of one.

b) The Chairlady ruled that the matter should proceed in my absence because I had not made any substantial application for postponement notwithstanding that I tendered medical certificates. This gross irregularity immeasurably prejudiced me in that inaccurate submissions were admitted against me.

c) The Chairlady ruled in my absence that I should submit my mitigation via email thereby depriving me of my Constitutional right to tender viva voce evidence. When I complained about this gross irregularity she altered her order and "allowed" me to call witnesses which alteration still amounted to yet another deprivation/refusal, albeit in a glorified fashion because :

i) The medical expertise sought to be challenged was tendered by Ms Smile on 22 September. It was only around 15 November that I was given two weeks to consult with, organize, and coordinate all my witnesses which comprised of General practitioners, psychiatrists, and psychologists as indicated in my mitigation. That the conviction was delivered on 09 July i.e 5 months ago is neither here nor there because then the medical expertise of Ms Smile had not yet emerged. My medical experts had been throughout examining me without any benefit of such countervailing medical expertise which they had to consider in the two weeks afforded to me.

ii) To rub salt into my already painful wound the Chairlady offered me only 1 day (29/11/2021) to call all my witnesses which to me appeared to be a mere formality as I think it will so appear to anyone reading these representations.

iii) As if that was not enough, no opportunity was afforded to the OLEs to gainsay my medical evidence with theirs should they deem it fit, which added credence to my impression of a mere formality.

iv) To put the last nail in my coffin, despite the expected intensive medical quantity and quality of my viva voce evidence, the sanction would be imposed on the very following day "30 November 2021" The inference became more irresistible that the entire exercise was just a smokescreen.

3.2 Substantive misdirection

The Chairlady attached no weight whatsoever to the extensive medical documentation tendered which depicted that a sanction of dismissal will be nothing short of death penalty. She did not address the possibility of death penalty despite enormous medical evidence at her disposal. In imposing her sanction, she did not, even in the remote, attempt to circumvent the reality of the death penalty or perhaps she reasoned inwardly that even if it occurred it has nothing to do with the employer but much to do with the employee.

4. Conclusion

4.1 Ad conviction

Due to innumerable factual and legal misdirections , it is submitted that the conviction is unsustainable.

4.2 Ad sanction

Each of the procedural irregularities standing alone is so gross as to trigger immense prejudice vitiating the proceedings. If not individually, there can be no doubt that cumulatively the procedural irregularities vitiate the proceedings of the sanction.

4.3 It is accordingly submitted that the Magistrates Commission must not endorse conviction and sanction; must lift suspension; and reinstate me at the earliest convenience.

M.D.Hinx (Respondent)