Ms Stuurman: "D"

(Representations)

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THE MAGISTRATE COMMISSION
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0001

REPRESENTATIONS WITH THE COMMISSION IN TERMS OF REGULATION 26 (20) (a) & (b) OF THE MAGISTRATES ACT 90 OF 1993 - YOUR REF: 6/5/5/2 – 15/2012

INTRODUCTION

1. In 2015, Senior Magistrate Dawray (hereinafter referred to as the Chairperson) from the Gauteng Province was appointed by the Magistrates Commission in terms of Regulation *26 (6) (a)* of the *Magistrates Act 90 of 1993* (hereinafter referred to as the Act) to preside at a hearing in respect of the following inquiries: *6/5/5/2 – 15/2012, 76/2013, 102/2014*, against myself.

2. The hearing began in May 2015 and final arguments by the Evidence Leader, Mr Du Preez, a Senior Magistrate from Mamelodi, also in the Gauteng Province, and myself were done in the beginning of October 2015.

3. The Chairperson only delivered the judgement on 12 December 2016, and sanctions were imposed on the 17th of January 2017.

4. It was clear from the beginning that these proceedings were out of the Chairperson's depth. That is clearly shown by the manner in which she disregarded the procedural and substantive principles throughout these proceedings, as is going to be shown below,

although such principles are the deciding factors at the end of a hearing when deciding if the hearing was fair or not.

5. Procedural and substantive principles form a code of good practice on dismissing employees and serves as a guideline on when and how an employer may dismiss an employee. That simply means that the employer may dismiss an employee for a fair reason after following a fair procedure. Failure to do so may render the dismissal procedurally or substantively (or both) unfair and could result in the whole proceedings being set aside.

6. On the first day when these proceedings were started, the whole hearing was thrown into disarray, as a result we ended up doing little on that day as the Chairperson demanded that we change the proceedings into the "criminal proceedings" format, which became apparent later that, it was what she was accustomed to. As a result thereof, myself and the Evidence Leader spend the whole day changing our documents, which I had initially submitted in preparation for the hearing in terms of *Regulation 26(5)* of the Act, to suit the Chairperson's choice of the Criminal proceedings' nature.

   The Chairperson adjourned the proceedings in order to allow me to make the changes to my pleadings which I had already submitted to the Magistrates Commission in terms of Regulation 26(5), in order to prepare myself to plead in the criminal proceedings format. During the adjournment, I asked the Evidence Leader if we are dealing with Criminal Proceedings because the terminology in the Regulations is clear that the proceedings we were dealing with were not criminal. The Evidence Leader said maybe that is the way the Chairperson wants it.

   Indeed, if you can look at the record from pages, the pleadings are conducted as if we were in a criminal court, save for the fact that I stuck to how I know things are supposed to be done and just handed my pleadings which I had sent to the Magistrates Commission in terms of Regulation *26(5)* to the Chairperson when she asked for my plea explanation.

7. I will elaborate below as to why I say the Chairperson was not supposed to conduct these proceedings in a Criminal manner/format.

8. Nothing evidences what is alleged in paragraph 4 above more than her 32 page judgement (which would have been lesser if she had not opened unnecessarily big spaces in between her headings and repeated what is contained in the annexure to charge sheet again) from the evidence adduced before the tribunal which consisted of more than 1650 pages. By law she was supposed to evaluate that evidence in totality, and not only regurgitate the Evidence Leader's submissions and spew it as her judgement. As a chairperson she was required to evaluate all the evidence and say why she was accepting or rejecting it, which she dismally failed to do, thereby misdirecting herself.

9. In addition to that, which I think is of paramount importance to Judicial Officers, the Chairperson's first judgement which deals with the points in *limine* I have raised in the beginning of these proceedings clearly shows that mentally, she is still stuck in the Police State which our country was labouring under prior 1994. Both her initial and final

judgements clearly show that she has not transitioned (mentally) to the Constitutional Democracy which our country is currently enjoying, as is going to be shown below.

10. Before the advent of the new constitutional order, the right to a fair trial was expressed in the infamous *dictum* of Nicholas AJA in *S v Rudman; S v Mthethwa* 1992 1 SA 343(A) at 387 A-B as follows: "What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice." This is a statement which Kentridge AJ, in the first Constitutional Court judgment in *S v Zuma 1995 4 BCLR 401(CC)* at paragraph [16], said was an authoritative statement of the law before 27 April 1994. The view expressed by Nicholas AJA in *S v Rudman, supra,* left no room for a residual right to a fair trial. The yardstick for fairness of trial was measured against those formalities, rules and principles of procedure which the law required. What was regarded as those abstract notions of fairness and justice was of no consequence.

11. Kentridge AJ observed: "the right to fair trial is broader than the list set out in paragraphs (a) – (j) {now paragraphs (a) to (o)} of the subsection. It embraces a concept of fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force." Steytler, *Constitutional Criminal Procedure, supra,* at p215 observes that the *dictum* by Kentridge AJ is important, first, for asserting that the articulated fair trial rights should be seen as a set of minimum guarantees and second, for extending the concept of a fair trial to include substantive fairness.

12. The words of the judge in *S v Zenzile 2009(2) SACR 407 (WCC)* couldn't be more relevant in this matter, when taking into account the Chairperson's behaviour in respect of this matter, when the judge stated: "In handing down the order I gave I made an observation of the need on us, as judicial officers, to develop what has often been referred to as the sixth sense, being constitutionalism, in dealing with matters that come before us as judicial officers. In adopting such an approach, not only will fairness of trial be ensured to both the accused and the victim, but that justice will not only be manifestly done, but will be seen to have been done."

13. *S v Moodie* **1961 4 SA 752(A)** at 756; and several other authorities that the term *justice* is not limited in meaning to the notion of retribution for the wrongdoer. It also connotes that the wrongdoer should be fairly treated and tried in accordance with the law.

14. As a result of the reasons mentioned above, some which are going to be elaborated fully below, the Chairperson committed a litany of misdirections which rendered these proceedings procedurally and substantively unfair.

15. It is trite law that before confirming the chairperson's findings, the Magistrates Commission is required to satisfy itself that these proceedings were held in accordance with justice. Once the Commission has satisfied itself that these proceedings were held in accordance with justice, the Magistrate Commission will then proceed to confirm or reject the convictions and/or sentence.

16. *S v Chabedi 2005 (1) SACR 415 (SCA)* para 5 where the court said: 'On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside'.

17. In these proceedings, the Chairperson has contravened the provisions of the very Act which was used to appoint her to preside over this hearing. She was appointed in terms of the Magistrates Act to preside over these proceedings, and yet she failed to comply with the key requirements as provided by the same Act, which would make these proceedings declared to be according to justice and fair.

18. However, that is not surprising if you read her judgement in respect of the Special Plea I have raised in the beginning of these proceedings where she feels that she cannot overturn the Magistrates Commission's decision, although its clearly shown in the submissions that the Magistrates Commission has committed a Constitutional breach. She was even directed to the remedies available in such cases as decided in the Constitutional Court judgement as quoted. I will deal with this matter below as contravening Regulation *26 (19)(b)* of the *Magistrates Act 90 of 1993.*

CONTRAVERNING REGULATION *26 (19)(b)* OF THE *MAGISTRATES ACT 90 OF 1993*

19. Regulation *26 (19)(b)* of the *Magistrates Act 90 of 1993* provides that "*After the conclusion of a misconduct hearing the presiding officer shall furnish the Commission with a copy of the record of proceedings.*"

20. The record of proceedings in respect of this matter which had been, or which will be submitted by the Chairperson to the Magistrates Commission as required by *Regulation 26(19)(b)* of the Act is not a true record of what happened during the hearing.

21. The reasoning behind that is as follows: As indicated in paragraph 2 above, the final arguments in this hearing were made in October 2015, and the Chairperson was supposed to have been postponed for judgement in November / December 2015 or January 2016. Due to the unavailability of the Chairperson in November/December 2015 and January 2016 because, according to what she told us, she would be lecturing aspirant magistrates

for SAJEI during that period. Then the Chairperson postponed the matter until the 26th of February 2016 for judgement.

22. On the 22.01.2016 the Chairperson sent an e-mail to myself and the Evidence Leader at 15:35. (See the attached e-mail), where she informed us that "Having considered the references made by Ms Stuurman regarding the inconsistencies in the transcripts, I have made the decision to "reconstruct" the record by listening to the audio recordings and simultaneously checking the transcripts."

23. You are referred to paragraphs 38 and 39 of my attached final address for the "references" the Chairperson says I made "regarding the inconsistencies in the transcripts".

24. The following conversation in the attached e-mail was between myself and the Chairperson where I was resisting the postponement, because in my little knowledge as a judicial officer, I have never heard of a judgement being postponed for reconstruction of the record in our level.

25. According to my little knowledge of our duties as judicial officers, a magistrate's court, of which these proceedings fall under, is a court of record. Due to the unpredictability of modern technology, even if there is a recording machine recording the proceedings, a presiding officer in our level is required to take down witnesses' evidence long hand. As a result, even if there is some part of the record which is not available for whatever reason, the presiding officer will be in a position to deliver the judgement and then reconstruct the record if the need arises.

    Fourthly, it must be realised and borne in mind that the statutory standard set by s 76(3)*(a)* of the Criminal Procedure Act for recording proceedings in lower courts is not a verbatim version. That is the law. That remains F the law even though technology has made verbatim recordings so frequent in larger centres that some people may form the impression that there is no other valid way. Thus the magistrate's notes, if they reflect fairly all the material evidence, remain adequate. (*S v S 1995 (2) SACR 420 (T)* **at** 423*d-e*)

26. In *Zenzile 2009(2) SACR 407 (WCC)* at 416 A-C the court dealt with the procedure to be followed by magistrates whilst dealing with the reconstruction of the record of proceedings: "... to inform all the interested parties, being the accused or his legal representative and the prosecutor, of the fact of the missing record; to arrange a date for the parties to reassemble in an open court, in order to jointly undertake the proposed reconstruction; when the reconstruction is about to commence, the magistrate is to place it on record that the parties have re-assembled for purpose of the proposed reconstruction; the parties are to express their views, and ultimately to have such reconstruction transcribed in the normal way (*my emphasis*)."

27. On the 26th of February 2016 the Chairperson postponed the matter "for reconstruction of the record", thereby "arranging a date for the parties to reassemble in an open" boardroom at the East London Regional Office.

28. On the 12th, 13th and 14th of April 2016, the Chairperson, the Evidence Leader and myself reassembling at the boardroom at the East London Regional Office. Before we commenced on each of those days, the Chairperson and the Evidence Leader would put it on record that we had re-assembled for purpose of the proposed reconstruction of record.

    Same procedure was done again on the 11th, 12th and the 13th of June 2016 when we met again for the reconstruction of the record, as well as the 17th, 18th, 19th, 20th and the 21st of October 2016. (See the defective record in respect of all those dates)

29. During all those days, the parties as mentioned above expressed their views as required during the reconstruction.

30. Therefore, what the Chairperson is saying on the 16th of January on record that we were not reconstructing the record, after she was hinted by the Evidence Leader on seeing that she was in a corner when I asked for the "reconstruction" which had been "transcribed in the normal way", is devoid of any truth. The record speaks for itself.

31. A determination whether the proceedings were held in accordance with justice can only be made on basis of a proper record of the proceedings or, in those rare instances where the whole or portion of the record is missing, on basis of a properly reconstructed record. Accuracy or the correctness of the record, particularly in instances where the record has had to be reconstructed, and where a conviction could lead to imposition of a heavy sentence, such as life imprisonment, is of paramount importance. (*Zenzile* (supra))

32. The reconstruction of the record is part of the trial process to which the constitutional right to a fair trial should apply(*Zenzile*)

33. It is ironic that the Chairperson in her judgement as well as her sentence is largely basing her findings on Mr Stander's evidence, yet that is the part of the record which the Chairperson herself found was not properly transcribed. Whilst we were busy with the reconstruction, she commented if I had noticed that it is largely what I was putting to Mr Stander which was not transcribed, or the transcriber would write what I was saying as if it was stated by Mr Stander.

34. The whole of 2016 we were busy with the "reconstruction of the record" as decided by the Chairperson in her e-mail dated 22.01.2016, and confirmed by the record every time we assembled in the East London Regional Office during the periods mentioned in paragraph 19 above.

35. Whilst we were reconstructing the record, I noticed that the Chairperson was not fully involved in the reconstruction of the record. She would be busy with her cell phone or laptop whilst we were agreeing or disagreeing about what was said in the record and who said what. By "we" I mean myself, the Evidence Leader and the Stenographer, as she was helping us in listening to the audio record. On noticing this inattentiveness on the part of the Chairperson, I asked her how she was going to do the reconstruction. She said she was going to do it herself in her computer. When I told her that she is supposed to give her

reconstructed notes to the transcribers so that they can simply change the sections we were changing, she became agitated and said she wants to do it that way and she is going to do it herself.

I was concerned because on many occasions she would not even know on which page we are on record although we all started at the same time and we were all listening to the same tape, and we would be required to stop and direct her to where we were. What I noticed was that the Chairperson used the time we were reconstructing the record to prepare her judgement instead of reconstructing the record, as she would highlight large parts of the judgement in our presence. Sometimes we would turn the page whilst she is busy highlighting and making marks on her record. I got the impression that she was under the mistaken belief that it was the Evidence Leader's duty to deal with the reconstructed record, and I left it there.

36. After we finished reconstructing the record on the 21st of October 2016 and the matter was postponed to the 12th of December 2016 for judgement, I asked the Chairperson as to when to expect the record, and she said that will depend on the Evidence Leader. I thought maybe she was going to arrange for the reconstructed record to be transcribed, and then ask the Evidence Leader to send me a copy so that by the time she comes with a certificate of correctness which we had to sign, we would have had an opportunity to see if the transcribed reconstructed record was according to what we were reconstructing.

37. On 12.12.2016, I was surprised when the Chairperson just delivered her judgement without saying anything about the transcribed reconstructed record, and us signing a certificate. Since I know that the absence of a reconstructed record cannot necessarily be the reason to postpone a judgement, I let her proceed with her judgement.

38. After she finished passing her judgement, I asked her about the whereabouts of the reconstructed record. *(See the record).* She became agitated and left the room where the hearing was held. We were left behind with the Evidence Leader and the stenographer. I put it on record that she had left us and stormed out of the boardroom. She came back after a long time, and I put it on record that I request that the transcribed reconstructed record be available on the day of the sanctions, as I intend taking this matter further.

39. The Chairperson informed me that I can use my own record which I was scribbling on during the reconstruction to take the matter further. I could not believe that I was hearing that from a judicial officer, what makes it even worse is that the Chairperson is a Senior Magistrate, and whilst we were not proceeding she would tell us about what she has done for magistrates under her.

40. On the day of the sanctions, 16 January 2017, the Chairperson had not given us a copy of the reconstructed record and the certificate to sign and confirm the authenticity of the record of the proceedings. We spend almost the whole of 2016 reconstructing the record. Indeed we made many corrections from the previous record. But until to date, I have not received a copy of the reconstructed record.

41. The method adopted by the magistrate in undertaking the reconstruction process in the manner he did, falls foul of the value of openness and transparency as espoused in section 1 of the Constitution of the Republic of South Africa. *(Zenzile)*

42. The right to fair trial is arguably the closest right to an accused person in the Bill of Rights. The accused's right to a fair trial is not premised on any relative degree of fairness. The trial is fair or is not fair. *(Zenzile)*

43. Regulation *26 (19)(b)* of the *Magistrates Act 90 of 1993* is based on **"A Labour Guide to Disciplinary Hearings"** which clearly state that: ***"the full proceedings must be recorded in writing in the minutes. Needless to say, this is not negotiable. If the proceedings are not reduced to writing, your whole case ends up on the compost heap. The minutes must be as complete and as detailed as possible."***

44. The Constitution of the Republic of South Africa, 1996, provides, through S35, that an accused person has a right to a fair trial, which includes the right to appeal or review. If the appeal Court or the review Court is not furnished with a proper record of proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot properly be adjudicated. In that regard, the only avenue open to protect the right of the accused or the appellant is to set aside those proceedings if it is impossible to reconstruct the record." *(S v Sebothe 2006 (2) SACR 1 (T) at par [8])*

45. Therefore, the record which the Chairperson has submitted or is going to submit to the Magistrates Commission is defective, and is not the true version of what really happened in the hearing. Even if the Chairperson submits her typed reconstructed version, such a version has not been confirmed by myself and the Evidence Leader as being a true version of what we had reconstructed. In *S v Joubert* 1991 (1) SA 119 (A) the following was state at 126E - I: the decision in *S v Marais* 1966 (2) SA 514 (T) where it was held that the appellant was "entitled to receive a copy certified as correct" was confirmed, as the court held that the appellant had been frustrated in a basic right. It was held that in "these circumstances the only thing to do is to set aside the whole of the proceedings."

46. *S v Leslie 2000 (1) SACR 347 (W)* it was held that: " In casu, both counsels were of the view that the notes of the magistrate give one an idea of what happened during the trial. That is not enough. I am not satisfied that there has been a proper construction of the record in the circumstances. To me, the process will be fair if the other parties, that is, the accused or his legal representative and the prosecutor are given an opportunity to comment on the notes made by the magistrate, and also add their comments thereto."

47. In *Zenzile 2009(2) SACR 407 (WCC)* at 419 the court held that: "A determination whether the proceedings were held in accordance with justice can only be made on the basis of a proper record of proceedings, or, in those rare instances where the whole or a portion of the record is missing, on the basis of a properly reconstructed record."

48. In a case where defective record was submitted in an appeal, such record was held in *S v Mcophele 2007(1)SACR34 (E)* to be "inadequate" as the (Magistrates Commission)

would thus be "in no position to decide whether or not the proceedings were in accordance with justice." The conviction and sentence had therefore to be set aside. (At 36*h* - 37*g*.)

49. By not submitting the true record of the proceedings as to what happened at the hearing, the Chairperson has committed an irregularity which is fatally detrimental and is prejudicial to myself, as the Magistrates Commission will not have a correct version of what actually happened in that hearing, and be in a proper position to decide whether to confirm or reject her decision. (*S v Appel 2004 (2) SACR 360 E)* the court held that it was incumbent to consider the record of the proceedings and to be satisfied that the proceedings were in accordance with justice. The immediate problem with would confront (the Magistrates Commission) is that the mechanical transcript of the proceedings submitted to it is defective in that large portions of the evidence were described as being 'indistinct' and some words were spelt with a totally different meaning.

50. *Zenzile* - The question which arises in the circumstances of this matter is to what extent does the reconstruction process and the events subsequent thereto measure to the accused's constitutional right to fairness of trial.

51. *S v S 1995 (2) SACR 420 (T)* it was held that "Material evidence in casu riddled with inaudible sections - Conviction and sentence set aside on appeal. The appellant contended that the missing evidence was material for a proper adjudication of the case and since it could not be rectified, the appeal had to succeed. As regards the appellant and his witness' evidence, the Court pointed out that there were so many 'inaudible' portions indicated therein that no judgment could be made as to the quality of the accused's evidence. All S's answers, which amounted to material evidence, were inaudible. The Court accordingly held that no fair adjudication of the case could take place on the basis of the available record. In respect of the State's submission that the Court on appeal could rely on the magistrate's summary of the evidence and his credibility findings rather than on the incomplete question and answer portion of the record, the Court held that this argument could not be sustained since it was the magistrate's evaluation of the evidence which the Court had to evaluate on appeal. The Court accordingly upheld the appeal and set aside the conviction and sentence."

52. What makes this irregularity most fatal and prejudicial to me is the fact that the Chairperson did not even analyse the evidence adduced before her when she made her judgement. Out of 1650 pages of evidence and evidential material, her judgement is only 30 pages, with no reference at all to the evidence adduced before her, and what she found probable and/or improbable, as required.

53. In *Trans-African Insurance Ltd v Maluleka* 1956 (2) SA 273 (A) the court held that prejudice is the deciding factor to permit interference with a judgement when less than perfect procedural steps are raised to have been taken. In *S v Joubert* 1991 (1) SA 119 (A) the following was stated at 517A - B the judgment proceeded: "If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. It seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice."

54. In *S v Leslie 2000(1) SACR pg 347 (W)* the important principles on reconstruction of the record were enunciated. Amongst other things, it was held that "the accused is *entitled not only to know what was written as a reconstruction of lost material* but is entitled to participate in the process of reconstruction. It was held that the object is to obtain the best available evidence to prove what was testified in the court which convicted and sentenced the accused.

55. "The absence of such a record hampers a just hearing of the appeal .... Accuracy or the correctness of the record particularly in instances where the record has to be reconstructed, and where a conviction could lead to an imposition of a heavy sentence, such as life imprisonment, is of paramount importance". (*S v Chokoe 2014 (2) SACR 612)*

56. In *Zenzile* it was held that the accused would have verified the correctness of the reconstruction; that the reconstruction accorded with his recollection of the evidence tendered by the state witnesses at trial; that he had studied the record, as reconstructed, in the presence of his legal representative; and that nothing had been omitted.

57. The Chairperson's actions in respect to the submission of an incorrect record of proceedings to the Commission also borders on procedural unfairness, as explained below.

PROCEDURAL UNFAIRNESS

58. Procedural fairness, amongst other things, refers to the procedures followed at the hearing itself.

1. Contraverning *Regulation 26 (11) and (15) of the Magistrates Act 90 of 1993*

59. *Regulation 26 of the Magistrates Act 90 of 1993* deals with the Procedure for Misconduct hearing.

60. *Regulation 26(11)* provides that the law relating to privilege as applicable to a witness summoned to give evidence in a *civil trial* before a court of law or to produce a book, document or object is applicable in a misconduct hearing.

61. *Regulation 26(15)* further provides that "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."

62. Balance of probabilities is a burden of proof which is required in civil cases, as opposed to proof beyond reasonable doubt which is a standard of proof required in criminal matters. See the different standards of proof as defined by Lord Denning in *Miller v Minister of Pensions [1947] 2 All ER 372* (KB) at 374 as follows: "It must carry a reasonable degree of probability but not so high as is required in a criminal case."

63. You are also referred to Lord Denning again in *Bater v Bater [1950] 2 All ER 458* where he further explained that: "It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. In criminal cases the charge must be proved beyond a reasonable doubt... In civil cases the case must be proved by a preponderance of probability. A civil court does not adopt so high a degree as a criminal court, but still it does require a degree of probability which is commensurate with the occasion."

64. As indicated above, it is clear that in civil cases the burden of proof is discharged as a matter of probability. The standard is often expressed as requiring proof on a "balance of probabilities". What is required is that the probabilities in the case be such that, on a preponderance, it is probable that the particular state of affairs existed.

65. When determining whether an employee is guilty of misconduct, the proper test is proof on a balance of probabilities, not that of beyond reasonable doubt, which is the burden of proof as it applies in our criminal law system. *(Avril Elizabeth Home for the Mentally Handicapped v CCMA & others [2006] 9 BLLR 833 (LC))*

66. Therefore, it goes without saying that the procedure required and to be followed in misconduct hearings is the procedure used in determining civil cases, and not the one used in deciding criminal matters.

67. In *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others [2006] 9 BLLR 833 (LC)*, the Labour Court set out the requirements for procedural fairness as follows: "The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness."

68. In *Mondi Timber Products v Tope [1997] 3 BLLR 263 [LAC]*, the Labour Appeal Court also held that disciplinary procedures in employment context should not to be judged according to standards expected of criminal courts or applied inflexibly. The general requirements are that, amongst other things, the tribunal should act in good faith.

69. The Labour Appeal Court previously held in *Highveld District Council v CCMA & others [2002] 12 BLLR 1158 [LAC]* that "when deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinise the procedure actually followed. It must decide whether in the circumstances the procedure was fair".

70. After the Magistrates Commission notified me about the charges they intended putting against me, we exchanged pleadings in terms of *Regulation 26 (5)* of the Act. (See attached "written explanation in terms of *Regulation 26(5)*)

71. On the first day of the hearing, the pleadings were closed and we were ready to submit the documents to the Chairperson to proceed with the hearing, but the Chairperson insisted that we proceed with the matter in a criminal court manner. (See the record of proceedings in respect of the pleadings). I insisted that I was going to file the papers which I had already exchanged when I was exchanging pleadings with the Commission.

72. As if that was not enough, in the middle of the proceedings when I was making an application for absolution from the instance, the Chairperson changed the proceedings and ordered me to do an application in terms of *S74 of the Criminal Procedure Act 51 of 1977*. (See the record of the hearing) .

73. *S74 of the Criminal Procedure Act 51 of 1977*, as the name of the Act suggests, is used when dealing with criminal matters, and the equivalent thereof in civil proceedings as suggested by the Regulations is an "application for absolution from the instance".

74. Although the Chairperson mentions on several occasions in her judgement that she had found "on a balance of probabilities" that I am guilty, that only came as an "afterthought". This was after I had suggested to the Evidence Leader to hint the Chairperson, after she told me to make my application in terms of *S74 of the Criminal Procedure Act 51 of 1977* that the hearing is not supposed to be done in the criminal manner. You can see in the record where the Evidence Leader subtle suggests to the Chairperson that the matter has to be decided on a balance of probabilities, hoping that she was going to get the point that the proceedings are more civil in nature.

75. The standard of proof applied by the Chairperson in deciding the proceedings in this hearing is clearly that of "proof beyond reasonable doubt", which is a standard used in criminal matters. In *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others [2006] 9 BLLR 833 (LC)* it was found that the commissioner, while purporting to apply that probabilities test, had in fact applied the test of proof beyond reasonable doubt. The court held that this was in itself a ground for review.

76. In *NUM obo Mathethe / Robbies Electrical [2009] JOL 23871 (CCMA)* when the court was dealing with Procedural fairness it was held that: The "Criminal justice model" is no longer applicable to workplace disciplinary hearings.

2. Refusing postponement to allow me to address the tribunal before sanctions

77. After the reconstruction of the record on the 21st of October 2016 as mentioned above, the hearing was postponed until the 12th of December 2016 for judgement.

78. Before the matter was set down for 12.12.2016, the Chairperson, the Evidence Leader and myself deliberated over the next date for postponement off record to check for a common date for our availability. I informed them that I was taking my annual leave on the 15th of December 2016 and we decided on the 12th of December 2016, a date which was suitable to all of us. Therefore, the Chairperson was aware that I was taking my annual leave on the 15th of December 2016 until 2017.

79. During the hearing whilst we were off record, it had transpired that I am not originally from East London, and as it often happens in such cases I would now and then take my "pilgrimage" out of East London to my home town when we have family gatherings and/or bereavements in the family. It goes without saying that during my annual leave, I would be out of East London as I would be spending my annual leave with my larger family. This was common knowledge which was discussed loosely off the record.

80. On the 12th of December 2016, the Chairperson delivered her written judgement by reading it on record, but did not give me and the Evidence Leader a copy thereof. The hearing was postponed until the 16th of January 2017 for sanctions.

81. On the same date, 12.12.2016 @ 13:18 I requested a copy of judgement from the Chairperson in order to prepare my address before sanctions. (See the attached e-mail regarding such a request). The Chairperson did not respond to my request. She did not even acknowledge receipt of my e-mail and inform me when to expect the copy of the written judgement.

82. Again on the 15th of December 2016 at 10:03, I requested a copy of the judgement from the Chairperson. I wanted to prepare during the holidays for my address before sanctions, as I did not understand her judgement when I was listening to her putting it on record. Again, the Chairperson did not respond to my request.

83. Just in passing, I find it ironic that the Chairperson did not respond to my two e-mails requesting and dealing with an important aspect of the hearing, whereas she did not even take three hours to respond to an e-mail from the Evidence Leader on the 24th of January 2017, whereas there was not even a reason for her to respond to that e-mail.

84. On the day the matter was postponed for sanctions, I also requested a copy of the transcribed reconstructed record from the Chairperson (See the record of the proceedings). As already noted above, until to date, I have not received it.

85. In order to properly address the chairperson in respect of the sanctions, I needed the above mentioned documents, as I had maintained throughout the hearing that I was not guilty, but the Chairperson found me, based on the documents I required from her, that I was guilty.

86. On the day of the sanctions I informed the Chairperson that I was not ready to address her in respect of the sanction, as she has not provided me with the above mentioned documents timeously. My reasons for not being ready are noted in the record of the proceedings.

87. I was unable to receive the Chairperson's copy of judgement as she had e-mailed it to my work place's e-mail address and I was out of office from 15.12.2016 until 13.01.2017. I only came back to East London when my office is situated on the evening of the 15.01.2017.

88. The Chairperson deliberately e-mailed her judgement on my work e-mail address on the 23rd of December 2016, eleven (11) days after I had requested it, and well knowing that I was on my annual leave during that period.

89. The chairperson knew that if I was out of office and I had no access to any e-mail containing voluminous documents. This had been part of the evidence and it is on record that I do not have a 3G card which allows us as employees to have access of the voluminous documents contained in our work e-mail address.

90. The Chairperson deliberately sent a copy of her judgement on my work e-mail eleven (11) days after I had requested it, without giving any reasonable explanation for that, well knowing that I was on (annual) leave, and yet she refused to give me an opportunity to go to the office on the 16th of January 2017, which was my first day on duty, to print a copy of her judgement in order to study it and prepare for my address before sanctions.

91. Throughout the hearing, it was the first that the matter would be postponed due to my request or fault. In the HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION CASE NO: 2014/14425 in the matter between: EVELYN NOMSOMBUKO MKONDO and MEC FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT the court held that it could not be said that the defendant was abusing the process as it was the first time that he was requesting for an indulgence.

92. In *Carephone (Pty) Ltd v Marcus NO and Others 1998 (10) BCLR 1326 (LAC)* What is normally required is a reasonable explanation for the need to postpone. A magistrate is empowered to grant a postponement mero motu where the 'circumstances justify it and refusal of the postponement should lead to an injustice being done to the party seeking it'

93. An unassailable reason for a postponement would be if it should appear to be in the interests of justice to postpone the matter. (*Momentum Life Assurers Ltd v Thirion [2002] 2 All SA 62 (C))*

94. This was confirmed in the Constitutional Court judgement of *Lekolwane and Another v Minister of Justice and Constitutional Development 2009 (2) BCLR 158 (CC)* where it

was held that "A postponement will not be granted, unless (a) court is satisfied that it is in the interest of justice to do so."

95. "(There is a) need on us, as judicial officers, to develop what has often been referred to as the sixth sense, being constitutionalism, in dealing with matters that come before us as judicial officers. In adopting such an approach, not only will fairness of trial be ensured to both the accused and the victim, but that justice will not only be manifestly done, but will be seen to have been done." *S v Zenzile 2009(2) SACR 407 (WCC)*

96. The chairperson in this hearing committed an irregularity which was prejudicial to me, thereby resulting in an unfair hearing when she refused to postpone the matter and insisted that she was going to impose the sanctions after I explained to her that I have not received the copy of the judgement yet, and giving her the reasons thereof as stipulated in the record of the hearing.

SPECIAL PLEA - POINTS IN *LIMINE*

97. You are referred to the points in *limine* I have raised as a special plea in the beginning of the proceedings.

98. The assertions made in the points in *limine* are confirmed by our Cluster Head, Mrs Raphahlelo in her testimony when she testified that Mrs Gqiba bypassed her office without her knowledge or permission and send the complaints to the Magistrates Commission. Had the complaints came to her office, she would have dealt with them in another manner besides charging me with misconduct, taking into account the strained relations between myself and Mrs Gqiba.

99. The authority supporting our Cluster Head's testimony is contained in the Constitutional Court judgement of *Van Rooyen and Others v S and Others 2002(8) BCLR 810 CC* at para 97 where it was held that "Regulations governing the procedure to be followed in making and dealing with complaints (against the magistrates) have been made. They are referred to as the Complaints Procedure Regulations and make provisions for complaints to be considered by committees established for each **cluster** (my emphasis) and regional division. The complaints committee can either deal with the complaint itself or refer it to the Commission (my emphasis) to be dealt with in accordance with Regulation 26"

100. The Cluster Head's assertions are confirmed by a judgement in ***Childline Northern Cape v The Magistrates Commission & Others 1865/2012 NC*** at para 44 where the learned judge held that: "In the circumstances we cannot turn a blind eye against the frosty relationship that has been amply demonstrated between Regional Magistrate Hole and Regional President Nqandala." For this reason, it was held to be prudent that Mr Hole deal with another senior Regional Magistrate besides Regional President Nqadala.

101. The Cluster Head's views are supported by the evidence adduced in the hearing of the frosty relationships over the years between myself, Mrs Gqiba and Mr Stander. Documentary evidence adduced in the hearing and submitted to the Chairperson also

shows that I had reported the status of my relationship with Mrs Gqiba and Mr Stander to the Magistrates Commission on many occasions. The documentary evidence also shows that, at a certain stage, when I saw that nothing was being done about my complaints by the Magistrates Commission, I reminded them about my complaints. But until to date, I have not received anything from the Magistrates Commission informing me about what happened to my complaints.

102. In addition to that, Mrs Gqiba confirmed in her evidence that during the period when she bypassed the Cluster Head's office and when the decision was taken by the Ethics Committee that I must be charged, she was a member of the Ethics Committee. The Ethics Committee is the same body in the Magistrates Commission which decided after Mrs Gqiba filed the complaints with it that I must be charged with misconduct.

103. There is no evidence before the Chairperson which states that when the decisions were taken that I be charged with misconduct, Ms Gqiba, as a member of the Ethics Committee which took such decisions, was not part of the Committee which took such decisions. Such evidence was crucial to the Chairperson in order to decide an absence of the conflict of interest, which would boil down to an unfair hearing.

104. The Chairperson misdirected herself in dismissing the points in *limine* raised at the when these proceedings started.

SUBSTANTIVE UNFAIRNESS

105. An employer may dismiss an employee for a fair reason after following a fair procedure. Failure to do so may render the dismissal procedurally or substantively (or both) unfair.

106. Substantive fairness can be split into two elements namely: establishing guilt; and deciding on an appropriate sanction.

107. In summary, substantive fairness means that the employer succeeded in proving that the employee is guilty of an offence and that the seriousness of the offence outweighed the employee's circumstances in mitigation and that terminating the employment relationship was fair.

108. In *Van Rooyen and Others v S and Others 2002(8) BCLR 810 CC* at para 192 Chaskalson CJ explained that 'What constitutes misconduct by a judicial official cannot really be defined with any precision. It depends upon the nature of the conduct complained of, and the particular circumstances in which that conduct was committed.

109. There is undisputed evidence in the record of the hearing that the circumstances under which the conduct complained of by the Magistrates Commission were not normal circumstances, as is going to be shown below.

110. There is evidence which has been submitted to the Chairperson that during the proceedings that I had notified the Magistrates Commission about the abnormal circumstances and what I was going through at the workplace as a result thereof.

111. There is undisputed evidence before the Chairperson that I had been subjected through a series of investigations and a misconduct inquiry by Mrs Gqiba and Mr Stander, which were unsuccessful.

112. There is undisputed evidence before the Chairperson that the complaints which led to the investigations as well as the investigations which followed never went through her office and they were never brought to her attention as a Cluster Head in my region.

113. Yet the Chairperson misdirected herself by judging the matter by standards which are applicable under normal circumstances.

114. The Chairperson has misdirected herself by failing to take into account the following:

115. Count 1

That there is undisputed evidence before her which shows that Mr Nolusu:

(i) has been frustrating my courts before this incident
(ii) was in cahoots with Mrs Gqiba to frustrate me in the workplace
(iii) did not file a formal complaint in respect of the matter he was writing to me about as required
(iv) Mrs Gqiba, who was the head of my office, did not call Mr Nolusu into order through his manager about the manner he was handling this matter.
(v) Therefore, we were not dealing with a conduct which occurred under normal Circumstances, which had to be judged by standards applicable under normal circumstances.

116. Count 3 and 18

That there is undisputed evidence that the complainant:

(i) In respect of count 3, was not a clerk officially allocated to my court, and therefore, she was interfering with my court as well as sabotaging it, and it was my duty to invoke paragraph 11 of the Code of Conduct.
(ii) Has tried to sabotage my court even after that by destroying my judgement before it was handed to the relevant attorneys.
(iii) Submitted two contradictory statements in respect of count 8 as to how the incident happened, as well as contradicting herself during her testimony - See the record of the hearing.
(iv) Was sabotaging my court again in respect of count 18, whereas she was not the clerk officially allocated to my court.

117. Count 4,5 and 6

That the evidence before her shows that:

(i) The trust relationship between myself and Mr Stander was irretrievable broken down as a result of the incidents which are contained on record of the hearing.
(ii) Mr Stander did not follow procedure whilst dealing with me as required; he just did what he wanted as he pleased.

In page 13 of her judgement, starting from paragraph 2, the Chairperson seriously misdirected her. She says that "it is obvious, that Ms Stuurman has no idea what the consequences are in matters which are taken on appeal and where Judicial Officers are cited taken as respondents".

It is clear that the Chairperson had no practical experience of what she talking, she was just theorising. She seems concerned about a cost order being granted against Mrs Gqiba, who was quoted as the fifth respondent. The Chairperson then goes on misdirecting herself and quoting cases which are not even relevant to the charge or the matter she was dealing with in page 13.

It is very embarrassing to explain this to a judicial officer, but no court of law would grant a court order against the party in the proceedings who was not the course of the postponement or delay. In court, the costs follow the cause. That simply means that whoever is the cause for a grievance in a case, must pay the costs. If that is the case, then how would Mrs Gqiba be liable for costs whereas I was also cited as a party in the proceedings, if I was the cause for delay?

What makes the Chairperson's reasoning more sinister is the fact that the matter was finalised a long time ago and no judgement was granted against anybody in his/her personal capacity, and yet she was still speculating in her judgement on what she thinks could happen. If I was wrong as she has found, why didn't the High Court rule that and order a cost order against me?

The evidence in respect of Mr Stander's testimony was the evidence which was most missing from the record of the hearing, as discovered through the reconstruction of the record. The Chairperson even commented herslf whilst we were transcribing the record that "had I noticed that the evidence which was most missing were my questions and what I had put to Mr Stander whilst I was cross-examining him?"

118. Count 7 and the alternative

The evidence contained in the record of the proceedings and the documentary evidence submitted to the Chairperson clearly shows that at no stage did I refuse to accept a notice of motion and thereby carried my duties in a negligent or indolent manner.

The documentary evidence showing that I had explained my absence was submitted to the Chairperson as evidence. During the period indicated that I was absent, any judicial officer is supposed to know that High Courts are in recess. No Motion Courts (for the record: notice of motion is only used in Motion Court) sits and no services are exchanged between the 15th of December until the 15th of January the following year, unless it's an urgent matter. A Notice of Motion is not treated as an urgent matter, that is why it is called a "notice", because the other party has to be given notice, as opposed to *ex parte* urgent matters.

The evidence clearly shows that I had sacrificed my family time and came to the office during the weekend in order to listen to the record from the recording machine when Mr Stander and his crew sabotaged the transcribed record being handed to the Civil section for me to respond to the notice of motion. I went out of my way and had gone an extra mile in order for me to carry my duties.

It is ironic that the Chairperson found that I had carried my duties in a negligent or indolent manner, whereas it took her eleven (11) days to e-mail me a copy of an already

written judgement which I needed to prepare for an address before sanctions in this hearing.

The Chairperson goes on misdirecting herself in page 15 when she talks about *Rule 51* and quotes *Jones and Buckle*. At no stage did the Magistrates Commission charge me for failure to submit reasons in terms of *Rule 51*. It is clear that the Chairperson does not know the difference between *Rule 51* and the document in question in these proceedings. The reasons which were required were required by the State Attorney, not the High Court, in order to decide whether to oppose the matter or not.

The Chairperson in page 15 goes on and quote evidence from Desire Nel, Mr Mdalane, Luyanda Mncameni which they were not even sure of, some of it being hearsay from the Sherriff who never came to verify it. I had submitted documentary proof confirming my defence to the Chairperson, but at no stage did she even mention it on her judgement.

119. Count 8

The complainant in this matter did not even bother to come and testify, whereas she was in East London. The chairperson misdirected herself on relying on the evidence of Mr Meyer, who could not even remember where the incident happened, but could remember verbatim what Mr Stander said he had written down sometime after the incident. Mr Meyer is under the supervision of Mr Stander, and he has to be in good books with him.

Mr Stander's irretrievable broken down trust relationship with me as indicated above is the warning sign which required the Chairperson to treat his evidence with caution. The Chairperson misdirected herself by not evaluating all the evidence placed before her, and disregarding the cautionary rule against the evidence of Mr Stander.

120. Count 9 and 17

The chairperson misdirected herself when she said the Magistrates Commission has proved beyond reasonable doubt its charge against me, as the Cluster Head had testified that she is not aware of any rule which prevented me from pasting the letter in the wall. No publication of a letter was ever proved against me by the Commission besides the pasting in front of my office and the Civil Court Section as testified.

121. Count 10

The Chairperson has failed to take into account that this conduct did not occur under normal circumstances, therefore, it cannot be judged by standards applicable to normal circumstances. The Chairperson has failed to take into consideration the relationship between myself and Mrs Gqiba, as shown during the proceedings.

122. Count 11, 12, 13, 14

The Chairperson misdirected herself by assuming the judge's duties over what happens inside the court in our lower courts. These incidents, which followed the abnormal circumstances as indicated on record, happened inside the court. Only a High Court can intervene in the proceedings by a magistrate inside a court of law, either by review or appeal.

123. Count 15

The Chairperson misdirected herself by failing to take into account that there was a directive to the attorneys not to approach the magistrate through an e-mail for things which require going through the clerk of the court. The Chairperson has failed to take into

account that I have been accused of bias before this as count 9 shows, therefore, I had to protect myself.

In addition to that, I have never heard of a magistrate dealing directly with the clerks of attorneys, even from the magistrates before me. The clerk of an attorney is supposed to get information from the clerk of the court, and not from a magistrate directly.

126. Charge 16

The Chairperson has failed to take into consideration the relationship between myself and Mrs Gqiba, as shown during the proceedings. (See the *Van Rooyen* case as qouted above)

SANCTIONS

127. Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of fairness *(Avril Elizabeth Home for the Mentally Handicapped v CCMA & others [2006] 9 BLLR 833 (LC)).*

128. When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.

129. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC), the Constitutional Court per Navsa AJ held that in deciding how the task of determining the fairness of a dismissal should be approached by commissioners, "it is important to bear in mind that security of employment is a core value of the Constitution ".

130. Employers are advised to consider circumstances in aggravation and mitigation before deciding to recommend a dismissal as appropriate sanction. In addition to this the employer will have to prove that the trust relationship that existed between the parties deteriorated beyond repair or that the employee made continued employment intolerable. Employers should also remember that there are three areas of fairness to prove to the arbitrating commissioners; procedural fairness, substantive fairness – guilt, substantive fairness – appropriateness of sanction.

CONCLUSION

131 .In considering the matter before her, the chairperson had a wide discretion, which had to be exercised judicially on a consideration of all the facts before her. In essence, in exercising that discretion, a court must strive for fairness to both sides. – *(Mogorosi v The State (410/10)(2010) ZASCA 147)*

132. The Chairperson has misdirected herself, and committed irregularities which resulted in the hearing being unfair, procedurally and substantively, as shown above.

133. Therefore, because of those irregularities, these proceedings has to be set aside.

XB STUURMAN
ADD. MAGISTRATE
EAST LONDON