Representations

REFERENCE: 6/5/5/2-43/2013

IN THE MATTER BETWEEN

THE MAGISTRATE'S COMMISSION **APPLICANT**

AND

REPRESENTATIONS

JUDITH FREDA VAN SCHALKWYK **RESPONDENT**

REPRESENTATIONS REGARDING MISCONDUCT HEARING

Introduction

[1] The citation of the parties as adopted in the judgment on merits and the sanction proceedings will be adopted for ease of reference. The heads of argument of the respondent accompany these representations and any reference to Ms Van Schalkwyk must be construed as a reference to the respondent.

[2] On 01 October 2020, the presiding officer in the disciplinary hearing, Mr Maharaj, delivered his judgment on the merits in respect of twenty four (24) charges proffered against the respondent by the applicant, the Magistrates Commission ("the Commission") and found the respondent guilty on thirteen (13) of the said charges. On 2 October 2020, Mr Maharaj, handed down his judgment on sanction and **recommended** the removal from office of the respondent.

[3] The representations are directed against the whole of the judgment on merits, with emphasis specifically placed on the charges on which the respondent has been convicted; and against the approach and reasoning adopted in the judgment on sanction. The respondent proposes to deal with charges 2, 3, 4, 17, 20 and 22 first and then to turn to charges 7, 9, 10, 11, 12, 14 which relates predominantly to one main witness of the applicant.

The Merits

Ad Counts 2 and 20

Ad Charge 2: Improper use of state vehicle

[4] The evidence of Ms Johanna van Aswegen, a retired senior administration clerk, who was stationed at Kempton Park during the period 2007, formed the basis of the finding of guilty on charge 2. The nub of her evidence on this charge is summarized at paragraphs [57] and [60] of the judgment and reads as follows:

"[57] The respondent also used a state vehicle during the period of 09 February 2007 to fetch other magistrates. She confirmed that she filled out the trip authority on the respondent's instructions. The vehicle was used for JOASA purposes. According to her this was not supposed to happen but since the respondent was the chief magistrate she believed that permission was obtained. She did not report her reservations about the vehicle to any person.

[60] In cross-examination the respondent denied having giving any instruction to booking out the Toyota Condor State vehicle and put to her that it was Danie Oberholzer who approached her to do so. The witness denied that this was so."

[5] The respondent led the evidence of Mr Danie Oberholzer and Mr Tebogo Maodi ("both magistrates at the time of the incident") and Mr Itumeleng Tebe ("the office manager at Kempton Park Court") in respect of this charge. The judgment correctly summarizes the oral evidence of the said witnesses on this charge as follows at paragraphs [118], [127] and [128], save for the fact that it omits to refer to a very relevant aspect of Mr Tebe's evidence in respect of the use of state vehicles by Associations of Judicial Officers:

Mr Oberholzer

[118] ... **He was the person who arranged for the Government vehicle on 09 February to fetch magistrates from the airport and dealt with Mrs van Aswegan. The respondent was not involved. He confirms that Maodi was given the vehicle. This was a JOASA event...**

Mr Tebe

[127] ... **He cannot recall the incident about the trip authority but contends that once an official trip authority is signed for by the relevant persons, he would have no problems with the use of the state vehicle as far as he is aware**, ...

Mr Maodi

[128] ... In so far as the vehicle he signed for, it was Danie who arranged for the vehicle for him to ferry JOASA members. He fetched the keys from Van Aswegen...

[6] The judgment omits to indicate that according to Mr Tebe, the International Association of Judges ("IAWJ"), at some stage utilized a fleet of the state vehicles in Gauteng to transport delegates attending one of its conferences. The omission, it is submitted, is a material omission in the judgment, which portrays the use of a state vehicles in the context of charge 2, to be untenable. This submission is made following the reasoning in the judgment. However, it is respectfully submitted that the reasoning in the judgment is flawed, when regard is had to the evidence in its totality, on the approach the presiding officer correctly identifies, considering evidence holistically. This also relates to how the rules and principles are not uniformly applied which is an objective of the Magistrate's Commission. In Labour Law rules norms and principles must be objectively applied. The Magistrate's Commission sees nothing wrong to a fleet of state vehicles being used to transport judges and magistrates, members of the IAWJ from the airport to a conference venue hosted by the IAWJ, but it becomes the subject of misconduct when a state vehicle is used to transport members of an association not a union plus minus ten years after the fact. The time bar principle nor probity is taken into account which constitutes flawed thinking.

[7] The evidence of Ms van Aswegen was preferred against that of the respondent's three witnesses, if the reasoning is followed, on the following basis as set out at paragraphs [175] and in particular paragraph [184], page 52 (Count 2):

"[175] It is important to note that Ms Van Aswegen did not report any complaint against the respondent, in fact she did not want to get involved in this matter. She only disclosed what she knew when questioned about the matter by the investigators hence I find there is no bias or prejudice from this witness against the respondent, although she did not record dates and times on some of the incidents. There is no reason to doubt her reliability and credibility as a witness. She did not witness the respondent yell or humiliate any official at the courts. She could have easily embellished her evidence and said that she did if she had an axe to grind with the respondent. Moreover her evidence that the respondent did not pay for parking was not disputed by the respondent.

Count 2:

Johanna Van Aswegen's evidence is to be preferred over Danie Oberholzer, she was the administration clerk having served the Department for 44 years. She worked in various

portfolios including parking in the court yard. She did not initiate any complaint against the respondent hence there is no bias from her. **Her recollection of the events is to be preferred over Danie Oberholzer whose recollection of the events was unsatisfactory.**"

The basis for the aforementioned findings, clearly has as its basis what was said at paragraphs [119] and [120] about Mr Oberholzer's evidence:

"[119] **This witness also did not file any statement along the lines to which he testified at this enquiry to the Commission at the time the investigation commenced. In fact he did not want to have anything to do with the enquiry and if either the respondent or the Commission needed his evidence they could have subpoenaed him.**

[120] His evidence is based on his recollection of the events from the time of the allegations. **There are instances where he can recall likewise there are instances that he cannot. In the absence of this witness making a statement during the course of the investigations when he would have been in a better position to have recalled the events, it makes it difficult for me to place much value in his evidence or put another way the probative value of his evidence is minimal.**"

This must be juxtaposed to the testimony of Mr van Greuning, one of the investigators in relation to his testimony. He also did not prepare an affidavit and testified seven years after conclusion of the investigation. He also could not recall. The same can be said of Mr Kobie Schutte "The have you lost your marbles", "Your decisions suck," and the story about Wynand Nel is not contained in his original affidavit nor did he make a supplementary affidavit and that can only be construed as trial by ambush. The Presiding Officer's bias prevents him from weighing evidence up against each other objectively or at all.

[9] The observations at paragraphs [119] and [120] and the consequent findings at paragraph [184] in particular, fails to account for the evidence of Mr Maodi and Mr Tebe. In fact, the evidence of Mr Maodi which corroborates that of Mr Oberholzer was not rejected and neither was the evidence of Mr Tebe that he found no fault with JOASA utilizing the state vehicle or his comparison to the IAWJ delegates rejected. Whatever the perceived shortcomings the presiding officer has with Mr Oberholzer's evidence, the evidence of Mt Maodi and Mr Tebe on the gist of charge 2, could simply not be ignored. In this regard the judgment failed to deal with the evidence holistically. It is respectfully submitted that there is and was no basis to prefer the evidence of Ms. van Aswegen to that of Mr Oberholzer on the gist of charge 2 which is who arranged for the state vehicle. On that score, Mr Oberholzer testified that he arranged the state vehicle and irrespective of not deposing to an affidavit in this regard, his oral evidence which was subjected to cross examination, unlike an affidavit which is not subjected

to such scrutiny, was confirmed in a material respect by Mr Maodi, who did depose to an affidavit and more importantly, corroborated Mr Oberholzer in a material respect in this regard.

[10] It is accordingly respectfully submitted that the presiding officer erred materially in his finding on charge 2. The Commission, within its powers, is therefore respectfully enjoined to discount charge 2 as a finding of guilty and to consider charge 2 under one of the charges on which the respondent was found not guilty.

Ad Charge 20

[11] The basis of the finding of guilty on charge 20 is found at paragraph [184], page 54 (Count 20) and reads as follows:

"This Count is not disputed by the respondent in that she did not pay for parking on account of judges do not pay for parking and the move to a single judiciary."

[12] Ms van Aswegen's evidence was the only material evidence on this charge. The 1992 Circular which allegedly deals with payment of parking was never brought to the attention of the respondent and the basis of the respondent paying for parking was never clarified. In fact, Ms van Aswegen, at no stage made attempts to bring the circular to the attention of the respondent and there is no evidence to suggest that she was even aware of such a circular. When the respondent did not pay for parking, the matter was left there by Ms Van Aswegen and laid to rest without further action from 2005 to 2013. The charge, it is respectfully submitted, was opportunistic and part of the witch hunt narrative sketched in the respondent's heads of argument to the presiding officer. The gist of the allegations in charge 20 can further not be overlooked, where it is stated that:

"You therefore participated in unprocedural conduct without due regard to the image of the Judiciary whereby you misappropriated and or made improper use of property of the State and or acted without integrity and or acted in a manner which does uphold and promote the good name, dignity and esteem of the office of magistrate and the administration of justice and or acted to the detriment of the discipline or the efficiency of the administration of justice or allied activities."

[13] The evidence presented by the applicant's evidence leader is respectfully a far cry from the narrative as aforesaid. As a litmus test the respondent would invite the applicant to establish how many Chief Magistrates and Regional Court Presidents in

fact have been paying for parking and to extend the same exercise to the magistracy as a whole. I wish to venture an answer that a great majority of magistrates do not pay for parking or have not been made aware of an outdated

Circular from 1992, predating our constitutional dispensation. A in point from the evidence is Mrs Elsie Smit and Mrs Madelein Nel, both witnesses of the Magistrate's Commission, who admitted to not paying for parking as corroborated by Mrs Van Aswegen. Once again, we have to look at the Magistrate's Commission who flout their own objectives, which says, rules, norms and policies should be objectively applied. It is sorely lacking and speaks to a narrative of a witch-hunt. The Commission is respectfully enjoined to consider the finding of guilty on this charge as one of not guilty.

Ad Count 3

[14] The basis of the finding of guilty on this charge is **purportedly** premised on the evidence of Ms van Aswegen, as summarized at paragraph [58]; Mr Abraham Cronje Nel as summarized at paragraphs [71] to [79]; and Mr Willem Schutte, as summarized at paragraphs [82] to [101]. The conclusions on the evidence on this charge, is captured at paragraph [184], pages 52 and 53 as follows:

"Count 3:

While the defence witnesses testified on the exemplary conduct of the respondent, the following utterances by the respondent shows otherwise namely, "Mr Holsen decision sucks"; writing on the charge sheet of Mr Schutte "have you finally lost your marbles"; saying to Mr Nel "if I could throw you through a wall"; yelling at Johanna Van Aswegen in the corridor to call a cleaner, uttering the words, "fuck Veronica, can you believe a clerk is walking around with my salary slip."

Even Danie Oberholzer her defence witness says that the respondent is a straight shooter and not someone who minces her words as well as Adnan Jacobs who describes her as loud."

The Presiding Officer misdirected himself, Mr Jacobs never said Ms van Schalkwyk is loud. He said she has a loud voice. See transcript dated 23 January see pg 16 line 25-28. "I do not know if her voice maybe she does tend to have a loud voice, and I do not know if that could be interpreted as a shout, but if you know how she normally speaks, you would realize that it is not a shout. It is the way she speaks." The Presiding Officer's bias rules supreme in finding that she's loud because the witness said she has a loud voice. When it comes to Danie Oberholzer, the Presiding Officer says, "His recollection of the events were unsatisfactory." But when it suits him, he uses the fact that Danie Oberholzer said, "that the respondent is a straight shooter and not someone who minces her words without contextualizing it.

[15] The ultimate conclusion reached by the presiding officer at paragraph [184] respectfully does not take account of the totality of the evidence and concessions made by the relevant witnesses on this charge or findings on credibility made by the presiding officer elsewhere in the judgment as will be illustrated. At paragraph [175] for example the following is said in accepting Ms. Van Aswegen's evidence:

"...**She did not witness the respondent yell or humiliate any official at the courts. She could easily have embellished her evidence and said that she did if she had an axe to grind with the respondent**..."

This assessment of Ms van Aswegen's evidence, however, is in stark contrast to the summary of her evidence at paragraph [58], which reads as follows:

"[58] **She also mentioned that during the period 2009 – 2013 the respondent spoke rudely to her and yelled at her to call Maria the cleaner. This was done in the precincts of the corridor in view of the public. She felt humiliated. She also recalled the incident when the respondent in the presence of the other magistrate Da Silva had insulted her when she took the respondents salary slip and required the respondent to sign to which the respondent replied: "Fuck, Veronica can you believe that a clerk is walking around with my salary slip?"**

Caution should kick in re the above. Van Aswegen is a single witness here. Mrs Da Silva does not corroborate her at all. A question should be posed to her credibility because how truthful can she be if Mrs Da Silva is silent on this incident.

[16] The basis of accepting Ms van Aswegen's evidence and the summary of her evidence with respect lacks rational reasoning.

[17] Mr Nel's evidence on the allegation that the respondent allegedly told him that if she could hit him through the wall, is summarized at paragraph [73] as follows:

"[73] **He was also told if she could hit him through the wall, in response to a question he asked. He did not take the comment seriously but believed it was not a comment to be made in an open meeting with colleagues.** As this witness indicated he does not keep a book of sins. **He also mentioned that the respondent gave him the opportunity to preside in the civil courts to empower him**.

Even more telling is Mr Nel's honest concession summarized at paragraph [78] as follows:

"[78] He concedes that while the meetings may have been robust it did not amount to misconduct."

[18] Mr Schutte made the following concessions as summarized at paragraphs [100 and [101]:

"[100] He concedes that the respondent considered him to be an experienced and star Magistrate and expected excellence of him.

[101] The respondent when (sic) wrote the following; "Have you finally lost your marbles" was in response to her not expecting him to write in a red pen and that there was no malice against him, replied that he accepts this as so."

[19] It is respectfully submitted that no pertinent finding was made in the conclusions on the evidence that the respondent's alleged behaviour fell within the concluding narrative alleged in the charge and that the accepted evidence with the concessions of the witnesses and in particular, Mr Nel and Mr Schutte, is demonstrative of the fact that the approach adopted by the respondent in meetings and her boisterous character, was not construed as misconduct but directed at building the said magistrates, one who was considered a star, to becoming well- rounded judicial officers. Furthermore, charge three is vague and embarrassing. Basically, the respondent needed to write her own charges which is substantially an unfair labour practice.

[20] The basis for the finding of guilty on count 3 respectfully demonstrates a subjective approach to the evidence, bias against the respondent, and falls shy of the requirement that the evidence is to be approached objectively. The Commission is respectfully enjoined to consider the evidence on this charge as not constituting misconduct and falling under the set of charges on which a finding of not guilty should have been returned. In the alternative, whilst fully emphasizing the finding of not guilty, it is submitted that if it is found that the alleged behaviour constitutes misconduct, that the sanction which has been recommended, is unduly harsh and unmerited.

Ad Charges 4 and 22

[21] The conclusion reached on charges 4 and 22 is found at paragraph [184], pages 53, 54 and 55 and reads as follows:

"Count 4:

The respondent concedes the contents of the email as sharp, but this email was done because of being harassed by Mr Jonker as a patriarch years of victimisation attacks on her integrity. The respondent's reference to Mr Jonker sexually harassing her was not meant in the literal sense but meant gender based harassment.

Count 22:

The email by the respondent is evident that she did not comply with the request of Mr Jonker. The information required was necessary for operational or logistical purposes and there was no cogent reason for non-compliance, save to be obstinate."

[22] The evidence of Mr Jonker with respect was summarized without having regard to the totality of his evidence insofar as it impacts on his credibility as a witness and gives a background to the contention which was put to him that his actions were premised on gender based patriarchal harassment. It is further respectfully submitted that the conclusions reached as set out above, fails to identify on what basis the respondent's actions fell within the narrative sketched in the allegations in charges 4 and 22 and that the conclusion that she was obstinate cannot suffice.

[23] To demonstrate this, the summary of Mr Jonker's evidence was respectfully done in a very cursory manner. The thrust of Mr Jonker's evidence in respect of the email and its contents is captured at paragraph [64] as follows:

"[64] He felt hurt about the contents of the email relating to count 4 and reported the matter to the Magistrate's Commission. Prior to these allegations he did not have any difficulty with the respondent."

This, with respect, is the extent of the evidence summarized to justify a finding of guilty on count 4. The evidence related to Ms Duffy, which is very relevant to the respondent's contentions of harassment, could not simply be brushed off with a hope that the Commission will revisit the matter.

[24] The aspect of the intimations regarding the Chief Justice enjoyed no attention or comment in the judgment, save to note that at paragraph [63] that counts 4 and 22 relate to Mr Jonker and the Chief Justice. It is respectfully submitted that the judgment provides no basis or rational reasoning for the finding of guilty on counts 4 and 22 and that the Commission should respectfully consider the said charges under the charges on which a verdict of not guilty had been rendered.

Ad Count 17

[25] In respect of charge 17, following the introductory paragraph to the charges on which the respondent was found guilty, which reads as follows, the reasoning for the

conviction is relayed:

"The following charges have on a balance of probabilities been established by the evidence leader when evidence is viewed holistically:..."

"Count 17:

Not disputed that monies were borrowed from Mr Moloi for overseas trip and that Da Silva collected such cash."

[26] It is respectfully submitted that the reason for the finding is irrational as this common cause fact is contradicted by the summary of Mr Moloi's evidence and aspersions cast on him about not stating such details in his statement. However, an aspect that is more telling on the irrational reasoning on this charge is the finding of not guilty on charge 8, related to similar facts. The finding on count 8 and reasoning is apposite insofar as it impacts on charge 17:

"Count 8:

On this count the monies borrowed were paid back to Da Silva, although borrowing and lending of monies between judicial officers should not be encouraged and may be frowned upon, I am not persuaded that such conduct would amount to misconduct within the meaning of this expression in these circumstances."

[27] The logical question to be begged is what the difference is between the money borrowed and paid back to Da Silva as a judicial officer and the money borrowed from Mr Moloi, an attorney and friend of the respondent which was likewise paid back. It is respectfully submitted that there is no difference unless the narrative as alluded to in the respondent's heads of argument in respect of counts 17 and 21 is considered, that aspersions are cast of some corrupt relationship between the respondent and Mr Moloi. The summary of Mrs Da Silva's evidence in the following terms, respectfully suggests that the presiding officer was fixated on the evidence that the money emanating from Mr Moloi was handed to Ms Da Silva, on her evidence by a Nigerian national and that something was accordingly amiss with the source of the money:

"[35] With regard to the respondent's trip to Washington DC she approached Mr Moloi's offices to uplift monies.

[36] Mr Moloi was known to her as he had done some labour work for her husband and also frequented the court house as a legal practitioner.

[37] When she collected the monies from the offices of Mr Moloi, the monies were handed to her by a Nigerian person.

[38] The monies were sealed in an envelope and signed by this Nigerian person.

[39] A photograph of the envelope was taken which was later identified in Exhibit Q(i).

[40] The monies were handed over to the respondent."

It is telling that the presiding officer omits to mention that the money was repaid to Mr Moloi, which was never disputed.

The Commission is respectfully implored to consider charge 17 as resorting under the charges under which the respondent should have been found not guilty.

Interpose

[28] The respondent interjects as this stage, to summarize, that having regard to the evidence in its totality, on a balance of probabilities, that she should have been found not guilty on Counts 2, 3, 4, 17, 20 and 22. What remains is counts 7, 9, 10, 11, 12, 14 and 16, where the main witness was Mrs Veronica Da Silva.

Ad Counts 7, 9, 10, 11, 12, 14 and 16

[29] The main complainant on these charges is Mrs Veronica Da Silva. At the outset, the respondent wishes to express grave concern about the remarks of the presiding officer in what purports to be a disjointed introductory paragraph which sets the tone for the judgment to follow. In fact, the introductory paragraph creates the impression that the statements contained therein, are *inter alia*, made *obiter* but in fact bears the hallmarks of bias on the part of the presiding officer in favour of the Magistrate's Commission, through its evidence leader and Secretariat. The sentiments expressed in the introductory paragraph regarding Mrs Da Silva, in particular, are apposite. At paragraph (2) on page 3, the following is said:

"(2) The appointment of Veronica Da Silva as magistrate and her early transfer to the Cape also needs to be looked at in the light of her concession of claiming monies to which she was not entitled, which monies was subsequently paid back to the Department of Justice. More importantly and troubling is that as an acting magistrate she failed to live up to the oath of office carrying out her duties without fear, favour or prejudice.." (my emphasis)

[30] The aforesaid paragraph clearly is couched in such a manner that it speaks to the credibility of Mrs Da Silva and in fact portrays her character in a nutshell; a fraud. It is telling that the presiding officer noted that she conceded that she claimed monies from the Department of Justice and Constitutional Development, to which she was not entitled. That is nothing more than fraud. The hallmark of fraud is that it encompasses not only dishonesty but more importantly misrepresentation designed to prejudice. It

[31] Ms Motlekar made the observation that on an examination of the resolutions in Meijer's memorandum when compared to those of the Magistrates Commission, that there was a vast difference. What is particularly telling is the absence of any resolution by the Commission that the computers of Ms van Schalkwyk and Mr Holzen be seized; it bears no reference to the inclusion of the investigators mentioned in Mr Meijer's memorandum and is conspicuously silent on any authorization granted to Ms Nel and Ms Da Silva to access the computers and to assist the investigators with the collation of evidence from the said computers nor was access to the computers given to them.

[32] It is telling from Ms Motlekar's evidence that the seizure policy for workstations has been amended in that any information sought about a particular official, must be done by approaching the Director General and if he/she cannot assist, he/she must delegate an official to do so. Notably no policy has been put in place by the Commission to date on emails and computers. The separation of powers in respect of computers and emails of magistrates appears to still be lagging behind as with legislation and many other important issues applicable to Magistrates.

[33] It is respectfully submitted that all evidence emanating from the seizure of the computers of Ms van Schalkwyk and Mr Holzen should be ruled inadmissible, as emanating from the fruit of the proverbial poisonous tree. The Magistrates Commission, on a careful consideration of the evidence failed to acquit itself of the task of convincing this enquiry that it had a sound, legal basis for the search and seizure of the computers. The *ex post facto* attempt at suggesting that same was authorized at a meeting of the Commission does not provide a legal basis. This is exacerbated by the production of minutes in which it was suggested such authorization was granted, whilst the minutes are silent on any such authorization by the Commission. The search and seizure was unlawful and in violation of Ms van Schalkwyk's constitutional right to privacy.

[34] The factually lacking, legal basis for the search and seizure of the laptops is exacerbated by the procedural irregularities in the chain of evidence or chain of custody. None of the witnesses could account for exactly how the computers were dealt with from the time of its seizure to where they presently are. The authenticity and more so integrity of any "evidence" obtained relied on from these computers must be questioned. The uncontroverted evidence is that the alleged whistleblowers were allowed unrestricted access to the data contained therein, which is highly questionable. On the evidence of Ms Da Silva, she was in a position, if she wanted to, to tamper with any "evidence" found on the computers. It cannot be gainsaid that Ms Da Silva, as a complainant, would in all probability have had an opportunity to delete any exculpatory evidence in Ms van Schalkwyk's favour.

[35] It is accordingly submitted that the evidence the Commission seeks to be considered as allegedly found on the computers should be ruled inadmissible. The corollary would be that

all oral evidence premised on the inadmissible evidence from the computers should likewise be ruled inadmissible. Any decision on the admissibility of evidence is interlocutory and may be changed at any stage before judgement.

[36] Should the point *in limine* not be upheld, the evidence is dealt with below.

SUMMARY OF THE CHARGES

[37] A brief overview is given in respect of the submissions which will be made on each of the charges, in light of the evidence presented in support thereof by the Commission.

Charge 1 – Failure to observe official office hours - No reliable evidence was adduced on this charge.

Charge 2 – Misappropriation or improper use of State vehicle - The evidence contradicts the specifics of the allegations in the charge.

Charge 3 – Acting without integrity and dignity; failure to execute duties objectively and competently; and lacking courtesy and self-control – The character evidence of the witnesses called on behalf of Ms van Schalkwyk contradicts the scurrilous, defamatory allegations in the charge.

Charge 4 – Failure to execute duties objectively and competently; and lacking courtesy and self-control – The e-mail sent to Mr Jonker was in response to his harassment of Ms van Schalkwyk, which included, inter alia, threatening to send persons to spy on the magistrates under her administrative control.

Charge 5 – Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities - The application referred to in the charge was unopposed. Mr Holzen in his administrative role, which evidence is uncontested, appointed Ms Nel to deal with the debt review matter and made it clear to her that in the event of any opposition to the motion, the application was to be returned to him, to arrange an alternative magistrate, outside of the Kempton Park office.

Charge 6 – Acting without integrity or acting in manner which does not uphold and promote the good name, dignity and/or esteem of the office of magistrate and the administration of justice - No evidence led on this charge considering the fact that Mr Tayob had passed away.

Charge 7 and the alternative thereto – Acting without integrity or acting in manner which does not uphold and promote the good name, dignity and/or esteem of

the office of magistrate and the administration of justice – It will be shown that Ms Da Silva's evidence in respect of this charge should be rejected.

Charge 8 - Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities - Not supported by Ms. Da Silva's own evidence (even if one could attach any weight to her evidence)

Charges 9, 10, 11, 12 – Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities - Ms Da Silva's evidence in this regard is not only unreliable but must be rejected.

Charge 13 – Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities - Not supported by the evidence of Ms Erasmus-Nel. On her version she was requested by Ms Da Silva to attend to the correspondence which underscores the allegations in the charge.

Charge 14 – Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities - Ms Da Silva's evidence in this regard should be rejected. No evidence was presented to show that the efficiency of the administration of justice was affected in any way.

Charge 15 – Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities - Ms Smith was in position to inform Ms van Schalkwyk that she was busy with a matter in court and could therefore, not assist her, but chose to assist. The administration of justice was never adversely affected thereby, considering that the task would have taken no more than 15 to 20 minutes at most. Ms van Schalkwyk was in fact not the judicial head as Mr Steven Holzen was acting in the position.

Charge 16 – Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities Ms Da Silva's evidence in respect of this charge should be rejected.

Charge 17 – Acceptance of a gift, favor or benefit, or loan which may unduly influence the respondent in the execution of her official duties - Mr Moloi's undisputed evidence demonstrates unequivocally that no impropriety took place.

Charge 18 – Handing down of a judgment on sentence not prepared by the respondent - On a balance of probabilities, Mr Maodi could not possibly draft a sentence in respect of a matter he had no knowledge of, unless he was informed by me by way of my handwritten notes. To reason otherwise, would render it impossible for him to compile and type the

sentence.

Charge 19 – Point *in limine* was upheld due to the lack of jurisdiction.

Charge 20 – Misappropriation or improper use of official parking – No evidence was adduced that the contents of a 1992 circular was brought to the attention of the respondent, in which payment of a prescribed parking fee and related issues thereto is dealt with.

Charge 21 – Making a false or incorrect statement, knowing it to be false and/or incorrect with a view to obtaining any privilege and or advantage in relation to the respondent's position – No evidence was led to prove that the *bona fide* error was intentional as alleged, or that any privilege or advantage was obtained as a result thereof. The evidence further failed to prove in any way that the *bona fide* error prejudiced the administration of justice.

Charge 22 – Failure to comply with a lawful order – The evidence proves Ms van Schalkwyk office in fact reported daily that none of the magistrates were striking. There was accordingly substantial compliance with the order/instruction. The *pro forma* form in fact applied to magistrates who were on strike and not those who reported for duty in the ordinary course.

Charge 23 – Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities – No reliance can be placed on Ms Da Silva's evidence in this regard.

Charge 24 – Acting without integrity or acting to the detriment of the discipline or efficiency of the administration of justice or allied activities – There is no prohibition that a magistrate may not undergo debt review (or have default judgments against them). The only prohibition relates to insolvency. The fact that Ms Van Schalkwyk was subject to a debt rescheduling order does not, *per se*, lead to the conclusion that she was financially reckless. The Commission failed to prove that Ms Van Schalkwyk handled her finances recklessly, as alleged.

DETAILED SUBMISSIONS IN RESPECT OF THE CHARGES

[38] In dealing with the charges, it is not proposed that they be dealt with *ad seriatum*, but rather in manner insofar as they are relevant and impact on specific witnesses and can be disposed of as succinctly as possible. At the outset, it is submitted that Ms Van Schalkwyk should be found Not Guilty on Charges 6 and 19, where there is no evidence on the one charge and a point *in limine* on jurisdiction has been upheld on the other.

CHARGE 1

[39] The allegation in Charge 1 is an alleged failure to adhere to office hours as prescribed in regulation 35 and in particular that Ms van Schalkwyk arrived late for work, departed earlier than closing hours and absented herself during office hours without leave or valid cause.

[40] The Commission relies heavily on the evidence of Ms Da Silva on this charge. The salient aspects of her evidence on this charge, considered as a whole is a concession that she had no list or schedule of dates, times and places when Ms van Schalkwyk is alleged to have failed to comply with official office hours. Under cross examination, in particular, Mrs Da Silva conceded that concessions were made for magistrates, herself included, when they arrived at work late and that similar concessions may have applied to Ms van Schalkwyk. A telling concession on the part of Mrs Da Silva is an acknowledgement that she did not know when Ms van Schalkwyk arrived late or early (See transcript dated 18 July 2019, page 82 lines 11-20). Mrs Da Silva further conceded that Ms van Schalkwyk suffered a heart attack at some stage and could not dispute the fact that Mr Jonker had granted her permission to leave early during that period. By way of comparison and on demonstrating to Mrs Da Silva that official hours at the Johannesburg Magistrates Court was 08h00am to 16h00pm, which *per se* is in violation of the Regulations, she was loath to recall or concede that this was in fact so.

[41] Whilst the allegation of non-compliance with official office hours features as the first charge proffered against Ms van Schalkwyk, Mrs Da Silva who is the Commission's main witness in this regard, failed to make mention of this in three complaint statements she deposed to. Mrs Da Silva for the first time mentioned non-compliance with official office hours during her evidence at the enquiry. The charge which is phrased in general terms, without sufficient particularity for Ms van Schalkwyk to answer to, is not surprising considering the fact that Mrs Da Silva is unable to provide specifics as to the dates, times and places of such alleged infractions. Charge 1 does not afford Ms van Schalkwyk the necessary particularity to prepare a response or detail on the case she is required to meet. The rules of natural justice and equity demand that essential allegations that should be rebutted, must be alleged. This entails that the specific act/s constituting misconduct must be formulated concisely with sufficient information to prepare. See Popcru v Minister of Correctional Services, 1999 ILJ, 2416 (LC) pars 32-38.

[42] A lack of appreciation for the peculiar position of a Chief Magistrate is demonstrated not only by Mrs Da Silva but in the drafting of the charge itself. The absence of Ms van Schalkwyk from her post on a regular basis was not peculiar to herself, but germane to all Chief Magistrates by the very virtue or nature of the post. This is aptly encapsulated in the evidence of Ms van Schalkwyk witnesses as demonstrated *infra*.

[43] Mr Oberholzer, testified that:

"If, you say you were not always at the office that is quite true, but, you know, you attended many meetings. I was not in charge of your diary, but I knew what was happening in your diary. You had a big diary and if you just had to page through it to see all the meetings that you had. Often you were there early and often you left late, so I cannot say you did not observe office hours, on the contrary, I thought that you observed office hours better than your predecessors did."

[44] This is echoed in the evidence of Mr Van der Merwe who testified that a chief magistrate's hours as head of the office are flexible at times. They may come in very early and may likewise leave very late. The hours of a Chief Magistrate, akin to those of judges, vary.

[45] Ms Motlekar, a Chief Magistrate, and rank equal of Ms van Schalkwyk testified that she was aware that Ms van Schalkwyk attended numerous meetings. These included, amongst others, The Chief Magistrate's Forum Meeting, Sub-Cluster Meetings, Salaries Committee Meetings, Legislation Committee Meetings, meetings with other stakeholders including the police, sheriffs, magistrates, members of the community, meetings with her mentor, meetings with the Department of Justice and Constitutional Development, SAJEI meetings, JOASA meetings, Lower Court Remuneration Committee meetings and training sessions. Ms Motlekar further testified that there are other duties Ms van Schalkwyk was tasked with which she may not have mentioned.

[46] Ms Motlekar's evidence placed the issue of official office hours in context. On her evidence official hours are from 07:45am to 16:15pm with a 45 minute lunch break; hours which are not necessarily kept by a Chief Magistrate who is effectively on duty 24hours a day, even when on official leave. She testified that Chief Magistrates often embark on travel outside official hours to attend meetings. For purposes of demonstrating the irregular hours of Chief Magistrates and Regional Court Presidents, Ms Motlekar referred to a remark by Mr Pieter Du Randt of the DOJ&CD that *"If you are looking for a Chief Magistrate or Regional Court President, you will find them at the airport"*.

[47] Mr Steven Holzen, a Senior Magistrate, at Kempton Park testified in a nutshell on this charge that Ms van Schalkwyk adhered to official hours subject to the duties inherent in her post.

[48] It is accordingly respectfully submitted that there is no evidence to sustain the allegations on Charge 1 and that a finding of Not Guilty should be rendered on the charge.

CHARGE 2

[49] The allegation in Charge 2 is an alleged instruction or "insistence" on or about 09 February 2007, on the part of Ms van Schalkwyk, that a government vehicle be signed out to Mr Maodi

over a weekend to transport JOASA members from the airport on 10 February 2007, which trip was not regarded as official.

[50] Mr Dirk Van Greunen ("Mr Van Greunen") testified that he was one of the investigators appointed on 26 April 2013 by the Commission. He was a Senior Magistrate at Roodepoort but is currently retired. He did not depose to a witness statement regarding the charge and moved from the assumption that Ms van Aswegen provided the information to him regarding this charge. He testified that the problem with the charge was not that Mr Maodi used the government vehicle, but the fact that the vehicle was used for JOASA purposes which did not constitute an official trip or journey.

[51] Ms van Aswegen testified that she was requested by Ms van Schalkwyk to use the government vehicle. She completed a trip authority on 09 February 2007 for Mr Maodi to drive a Condor vehicle to pick up JOASA magistrates from the airport to be taken to Kempton Park Court. She did not enquire from Ms van Schalkwyk whether she had permission to use the vehicle and did not lodge a complaint in this regard. She could not recall how the complaint came about, save for the fact that she spoke to an investigator. Under cross examination, it was pointed out that the signature or handwriting on the trip authority was not that of Ms van Schalkwyk. She disputed the contention that Mr Oberholzer in fact approached her regarding the motor vehicle and not Ms van Schalkwyk.

[52] Mr Oberholzer testified that he recalled 10 February 2007 very well as it was his wedding anniversary. He was the National Secretary of JOASA at the time whilst Mr Maodi was the Assistant Secretary. He tasked Mr Maodi to assist with the transport of delegates from the airport to the Kempton Park Magistrates Court. To this end he told Mr Maodi to use the Condor vehicle. Ms van Schalkwyk on his evidence was not involved with this issue as it constituted duties within the ambit of the Secretariat. Mr Oberholzer testified that he approached Ms Van Aswegen and Ms Susan Moller about the vehicle and the reason for its use, being the transfer of JOASA magistrates from the airport. The trip authority was consequently approved by Ms van Aswegen, with her supervisor, Ms Moller, co-signing and approving it. On his evidence the handwriting on the form was that of Ms van Aswegen. He discussed the issue with her and it was a well-known fact that the vehicle was to be used to transport magistrates who were JOASA members.

[53] It was proposed to Mr Oberholzer that JOASA work was not considered official and therefore the transfer of magistrates from the airport cannot constitute an official trip. Mr Oberholzer's response by way of analogy, demonstrated a known fact amongst the magistracy and those involved in the management of JOASA that office time and resources were utilized to conduct the business of JOASA, as JOASA having been formed from the old Landdroste Vereniging, was an association that furthered the interests of the magistracy. In fact, the official telephone line was used to phone for JOASA's business, which included calls to of senior officials,

including Mr Jonker, and Messrs Schoeman and Barnard at the Magistrate's Commission, during office hours. Many e-mails were likewise sent out during office hours 90% of the time. He was never informed that he could not do so. As a result he found it peculiar that he could not transport magistrates from the airport to the Courthouse.

[54] In elaborating on the narrative of the witch-hunt, Mr Oberholzer's evidence gives credence thereto in that he and Mr Marais, a retired senior magistrate at Kempton Park were approached to lodge complaint statements against Ms van Schalkwyk, but he refused to do so and deposed to an affidavit to that effect.

[55] Mr Thebe, the Court Manager at Kempton Park, testified that trip authorization is the line function of the court manager. He confirmed that the trip authority was signed by Ms van Aswegen and Mrs Moller who checked it and Mr Maodi was the responsible official to whom the vehicle was issued. Mr Thebe's evidence emphatically confirms that insofar as Circular 44/2000 is concerned, all officials may use state vehicles, with exclusion of industrial unions. In his opinion, JOASA, being an association of magistrates, it was entitled to use the vehicle for official purposes. He drew an analogy to the 2017 International Association of Women Judges conference in Gauteng where the Gauteng Area Fleet of state vehicles was utilized to drive the delegates to and from the conference venue and hotels. He has no idea how the investigators secured the trip authority form or how they came on the non-compliance with the parking issue. This, accords with Ms van Aswegen's evidence that when she was called to a meeting with Mr Nair, he already had the documentation in his possession.

[56] Mr Maodi essentially corroborated the evidence of Mr Oberholzer in that the trip authority was arranged at the behest of Mr Oberholzer to utilize the vehicle for JOASA purposes, with no involvement from Ms van Schalkwyk. He in fact collected the keys of the vehicle from Ms van Aswegen. He confirmed upon seeing the trip authority that he had signed for the vehicle. He took possession of the vehicle on a Saturday morning, collected the magistrates from the airport and transported them to the Courthouse. He denied the evidence of Ms van Aswegen's allegation that Ms van Schalkwyk instructed her to make the vehicle available, which was solely at the behest of Mr Oberholzer.

[57] It is accordingly respectfully submitted that there is no evidence to sustain the allegations on Charge 2 and that a finding of Not Guilty should be rendered on the charge.

CHARGE 3

[58] The allegation in Charge 3 is essentially premised on allegations that Ms van Schalkwyk during the period 2009 to 04 June 2013 and at or near the Kempton Park Courthouse, during the daily management of her office conducted herself in a manner unbecoming of the office

of magistrate towards officials and judicial officers by either, rudely shouting at them, being discourteous towards them, swearing at them, humiliating them in meetings, uttering threats of physical harm to them, being disrespectful towards them or belittling them. The complainants on this charge were Mrs Da Silva and Mr Schutte. On the witch-hunt narrative, it is telling that the charge refers to the period 2009 to 2013, a four year period during which no formal complaints were lodged with the Commission by any of the complainants. There is uncontroverted evidence that these complaints were for all intents and purposes elicited by the investigators tasked by the Commission, contrary to the purport of the Regulations.

[59] Mrs Da Silva's evidence on this charge accords with the general nature of her evidence, which lacks specifics and embraces broad allegations. In respect of Charge 2 she testified that she was shocked by the manner in which Ms van Schalkwyk addressed the magistrates when she attended the magistrate's meetings called by Ms van Schalkwyk. She could not give specifics of the words used, but thought it was unimaginable that one could be spoken to in that way. She never spoke in the meetings, because if anyone said anything that Ms van Schalkwyk did not approve of, she would shout, belittle or humiliate you. She cited other instances where Ms van Schalkwyk allegedly shouted, screamed and often swore at her, particularly when she did not want to do what was demanded of her by Ms van Schalkwyk.

[60] One such instance on her evidence relates to the Eduloan incident where she claims she had never seen anyone that angry. On the allegation in the charge that Ms van Schalkwyk swore at judicial officers, it is noteworthy that on 22 January 2019 when she testified in response to a question by the Presiding Officer, she for the first time in her evidence alluded to swearing: *"When you say swore, what words do you perceive to be swearing? – Do you not want my 'f…' son to graduate?"*

[61] This is contradistinction to her evidence of 03 October 2018 in respect of Charge 11 – the Eduloan Charge – where she made no mention at all that Ms van Schalkwyk swore at her or used the F-word. Notably 3 months elapsed from October 2018 to January 2019 when she for the first time alluded to her being sworn at.

[62] What is even more telling on the allegation that Ms van Schalkwyk swore at her is her inability to explain the failure to mention the alleged swearing at her by Ms van Schalkwyk in her statements. True to the tenet of her evidence, she became evasive on this anomaly. In particular on 16 July 2019, Ms van Schalkwyk posed the following question to her, which was repeated to her:

"OK, let me put it to you in your statement dated 17 April 2013 and 23 May 2013. You never said that I was using the f-word swearing at you, despite the fact that one of the charges, count 3, were in general that I was swearing at the magistrates, belittling people and various other things, humiliating people, why did you not mention that"? --"…that you shouted at me,

you were aggressive".
The response to the repeated question was:
"It does not say that, but my evidence says that."

[63] Mrs Da Silva went on to other instances when Ms van Schalkwyk allegedly shouted at her, including instances where she would not come to her house to do her hair and when she did not deliver things timeously to her house in Cape Town. Another instance she recalled Ms van Schalkwyk shouting at a judicial officer when she shouted at Ms Armstrong who had an alcohol problem. In general she testified that Ms van Schalkwyk belittled people in meetings.

[64] Mr Schutte a permanent magistrate at Kempton Park, was stationed at Kempton Park at the time Ms van Schalkwyk was appointed Chief Magistrate in 2003. He assisted with the Quality Assurance in the Criminal Section. Mr Schutte had never lodged a formal complaint against Ms van Schalkwyk prior to the occasion when magistrates at Kempton Park were approached by the investigators in this matter, Mr Van Greunen, Mr Dunjwa and Ms Wessels in the tearoom at the Kempton Park Magistrates Court where an open invitation was extended to the magistrates to discuss what had happened. Ms van Schalkwyk was not present and he did not make a statement on that day. The magistrates were given a roneo form at a meeting with Mr Desmond Nair. Mr Schutte eventually deposed to an affidavit on 8 July 2013.

[65] The focus of Mr Schutte's evidence was about what has been termed "the Saayman matter" and what transpired at what was coined the 'blame and shame meeting' of 25 of February 2010 held in E court at the Kempton Park Magistrates Court. He received notice of the meeting on 24 February 2010, of which attendance was compulsory. Mr Saayman was a teacher at Birchleigh High School who lodged a complaint with Ms van Schalkwyk about the manner in which Mr Schutte and a number of other magistrates dealt with his matter. At the meeting, Ms van Schalkwyk sought an explanation from all the magistrates about their respective involvement in the matter. Ms van Schalkwyk identified a number of issues that were raised in the complaint, including, *inter alia*, the revoking of Mrs Saayman's bail without the presence of her attorney, a discussion between Mrs Da Silva and Mr Schutte about the matter over a weekend, an allegation by Ms Armstrong that Mr Schutte discussed the matter with the control prosecutor and the fact that Mr Saayman was released on bail whilst Mrs Saayman was in custody. He was then instructed to recuse himself from the matter. Ms van Schalkwyk further gave instructions to the magistrates to do training related to various aspects, including judicial impartiality.

[66] At some point, Mr Schutte handed a letter of complaint to Ms van Schalkwyk regarding an issue in the tearoom between himself, Mr Maodi, Mr Oberholzer and Ms Da Silva. Ms van Schalkwyk called all the magistrates into the office and resolved the issue. After resolving the issue, however, Ms van Schalkwyk asked him whether he was 'placing her on terms.' He

believed that it was a tongue in cheek comment by Ms van Schalkwyk. He seemingly was not affected by this.

[67] The evidence leader asked Mr Schutte whether he felt humiliated by the "blame and shame" meeting to which he replied:

"I understand the enormous position of the chief magistrate. I just felt I was not prepared about the meeting, the manner of critique was not justified, the manner was unfair and humiliating".

On whether or not Ms van Schalkwyk shouted at colleagues, Mr Schutte believed that she was firm in meetings, but in his presence at such meetings, he would not say she was screaming. According to Mr Schutte magistrates generally did not speak in the meetings. "They" advised the magistrates against it.

[68] Mr Schutte further testified about an incident where Mr Holzen placed Mr Mashabane in the domestic violence section with him and was told by Ms van Schalkwyk that the decision to place an inexperienced magistrate in the domestic violence section, "sucks". He believes that the comment was inappropriate considering the fact that Mr Holzen was a senior magistrate.

[69] He further testified about an incident where Mr Nel asked him why he did not attend a social context meeting over the weekend and where Mr Nel questioned why it was not in the week. Mr Nel was told by Ms van Schalkwyk that if she could throw him through the wall she would, and he believed these were strong words. He testified that he did not see Ms van Schalkwyk engage in any physical violence though, where she was physically out of control or intent on harming anyone.

[70] Mr Schutte testified about an incident related to case number 706/09, where he was the presiding officer. He had written on the charge sheet in a red pen. When Ms van Schalkwyk did judicial quality control, she wrote the following on the charge sheet on the J15, *"Have you finally lost your marbles?"*. He believes this remark was unprofessional and inappropriate considering the fact that the charge sheet goes to the clerk and is a public document which the public has access to until it is finally destroyed. He testified that, exhibit I(IV), the notice of 2009 was problematic and he, therefore, had difficulty with it as it stated that magistrates must ensure that they are in their sound and sober senses.

[71] Mr Schutte proceeded to testify about the relationship between Ms van Schalkwyk and Ms Da Silva, which he described as a very good relationship. From his observation Mrs Da Silva was like a shadow in Ms van Schalkwyk's company on many occasions. In a nutshell, they were friends. He demonstrated this relationship with reference an occasion where Mr

Takalani came looking for Mrs Da Silva regarding a part-heard matter, where Ms van Schalkwyk said Mrs Da Silva was hers and would be available from 11h00am.

[72] Mr Thebe, the court manager at Kempton Park Court, appointed on 6 August 2012, testified that during the period 2009 to 04 June 2013, Ms van Schalkwyk never rudely shouted at him, was never discourteous to him or swore at or humiliated anyone in meetings, uttered threats of physical harm to anyone, was disrespectful towards anyone or belittled either him or any other official in his presence. In fact, he had not received any complaints from any of the clerks that Ms van Schalkwyk exhibited such behaviour towards them.

[73] In respect of Ms Van Aswegen, Mr Thebe testified that she had at no stage reported to him that Ms van Schalkwyk was disrespectful to her or that she had sworn at her. He knew Mrs Da Silva and Ms Mia who were always in the Ms van Schalkwyk's company and it appeared that they had a very cordial relationship.

[74] Mr Maodi testified that Ms van Schalkwyk never shouted rudely at him or swore at him or any other official in his presence and neither was she discourteous to him or any other person in his presence. He knows Mrs Da Silva and never witnessed any of the swearing she alleges and neither did she ever report any swearing or abuse by Ms van Schalkwyk to him. On his account no magistrate was humiliated in meetings. He never witnessed tension in the meetings about issues Ms van Schalkwyk wanted the magistrates to do, particularly in respect of statistics. The only time there was tension was when magistrates were identified for non-compliance with their duties, but this did not entail belittlement. When Ms van Schalkwyk raised the issue of compliance with duties, it entailed clarifying why the magistrates could not work independently and nothing more. He for one never felt belittled, but instead felt empowered by the mentorship he received which instilled confidence in him. This was particularly refreshing since Kempton Park was lily-white when he was appointed. According to Mr Maodi, Ms van Schalkwyk never physically harmed him or anyone else for that matter. He was appointed on a three month contract basis and would have left if anything of that nature occurred.

[75] On the language medium employed at meetings, Mr Maodi testified that English was utilized as result of the diversity of magistrates at the office. He was present at all meetings and at no stage heard Ms van Schalkwyk saying to Mr Nel in Afrikaans that she would smack him through the wall. He further found it very surprising to learn that Mrs Da Silva testified that Ms van Schalkwyk *"nauseated her right off the bat"*. In his opinion Ms van Schalkwyk and Mrs Da Silva were very good friends who knew each other from Cape Town prior to Mrs Da Silva taking up duties at Kempton Park. They were in fact very close. They would share lunch together and he recalls that Mr Oberholzer, Mrs Da Silva and Ms van Schalkwyk even went on a non-medically prescribed diet together. He could not recall an incident where Ms van Schalkwyk told Mr Holzen that a decision he took *'sucks'*. In his opinion, he did not find the

endorsement on a charge sheet enquiring whether Mr Schutte had finally lost his marbles to be offensive as it attests to the application of one's mind and the dictionary meaning thereof refers to acting strange; strange or odd behavior.

[76] Mr Elvis Mudavhi, presently the Cluster Manager of all interpreters at Kempton Park, who has held the positions of an interpreter since 1995 to 2010 and Chief Interpreter from 2010 to 2016, that Ms van Schalkwyk had never rudely shouted at him, was never discourteous towards him or swore at him, never humiliated him or uttered threats of violence or physical harm towards him. In fact she had never been disrespectful towards him or belittled him or any of the interpreters or officials at Kempton Park in his presence.

[77] Mr Adnan Jacobs, a magistrate at Kempton Park testified that he was present at the 'blame and shame' meeting of 25 February 2010. According to Mr Jacobs he could recall some of the detail of the meeting. He was not aware prior to the meeting what would happen and he was slightly concerned. The meeting was to address the conduct of certain magistrates which was seemingly not in dispute. Ms van Schalkwyk addressed the issues as she best saw fit. She was disappointed with the conduct of the magistrates in respect of the Saayman matter and expressed the need to train the judicial officers in respect of the conduct expected from judicial officers. She emphasized how their conduct impacted on the prosecution and the rights of the affected family. Ms van Schalkwyk emphasized the need for all the magistrates present at the meeting to be aware how they conducted themselves in public, particularly with attorneys and the prosecution with whom they had long established friendships. Mr Schutte came to mind as he was very good friends with the control prosecutor Ms Lambden, as they had pursued studies together.

[78] Mr Jacobs testified that he had known Mrs Da Silva since 2009 when she arrived at the Kempton Park Court. On his observation, Ms van Schalkwyk and Mrs Da Silva were always together and the best of friends. In fact, when he would arrive in the tearoom, which is situated next to Ms van Schalkwyk's office, Mrs Da Silva and Ms van Schalkwyk would arrive together. Very early on he recalled attending a funeral of Mr Ronnie Mnguni, the current Chief Magistrate in Kroonstad's late mother, in Tembisa. Ms van Schalkwyk and Mrs Da Silva attended the funeral together. Mrs Da Silva would often tell him about places she and Ms van Schalkwyk had been to, including her visiting Ms van Schalkwyk at her home. It therefore took him by surprise that Mrs Da Silva is said to have testified that Ms van Schalkwyk nauseated her right off the bat. They were the best of friends until the disciplinary incident.

[79] Mr Jacobs further testified that Ms van Schalkwyk had never shouted or sworn at him or anyone in his presence. She notably has a loud, "shouty voice", particularly when she becomes passionate about an issue. Ms van Schalkwyk had also never been discourteous to him, but rather the contrary. She had also never humiliated him in any way, although he admittedly felt slightly small when he was addressed about shortcomings in his work. This he

however saw as Ms van Schalkwyk pointed out what they needed to correct, but not as an opportunity for her to humiliate him. Ms van Schalkwyk's was duty bound to point out these mistakes, the result of which the magistrates were to be proud of, as demonstrated in inspection reports. In his opinion Ms van Schalkwyk put in an extra effort, she would ensure that the court books were signed off, and meetings held to address problems. To address issues she would sit with piles of charge sheets in meetings, pointing mistakes out and assisting the magistrates to avoid same. In his view, Ms van Schalkwyk had a good relationship with most magistrates. Unlike most Chief Magistrates, she had an open door policy, with access to staff, magistrates and members of the public at all times. No appointment was needed to see her. Ms van Schalkwyk was the only Chief Magistrate he had encountered who was always willing and available to assist. In his opinion she was the exception to the rule.

[80] Mr Jacobs, as Mr Maodi did, testified that meetings were conducted in English, on Ms van Schalkwyk's insistence as there were black magistrates at the office and she did not want them to feel excluded. He attended all the staff meetings and at no stage did he hear Ms van Schalkwyk say to Mr Nel in Afrikaans that she would smack him through the wall or that Mr Holzen sucks. On the contrary, Ms van Schalkwyk was very professional in meetings. He was not offended by the notice which informed magistrates to be of sober mind and senses as judges often re-iterate that magistrates should be in their sound and sober senses.

[81] Ms van Schalkwyk insisted on magistrates attending at the tearoom at 11h00. He saw this as one of the strategies Ms van Schalkwyk employed to foster good relations. In addition, she would always be in the tearoom to ensure proper case flow management by ensuring the drawing of cases by magistrates who finished their rolls early. Besides the magistrates' tearoom, there were two other "tearooms". Mr Nel, his wife, an attorney, and Ms Vivian Cronje, for example, drank tea together. The main tearoom in his opinion was a success story where most magistrates would gather, as Ms Cronje and Mr Nel eventually joined the magistrates in the main tearoom and enjoyed the collegiality. Ms van Schalkwyk was always in the tearoom and would joke and laugh with the magistrates.

[82] Ms van Schalkwyk never fought with him or anyone in his presence and never belittled anyone. She had a passion to ensure the magistrates improved themselves and she strove to empower and improve them. Under her leadership she insisted on rotation of magistrates among the various sections, including criminal, civil, family and domestic violence. She always said that she wanted well-rounded magistrates. The rotation policy was met with some resistance as magistrate's offices were located next to the court rooms, which necessitated moving office with each rotation. As a result of Ms van Schalkwyk's policy and his exposure to various sections, he has become a better, well-rounded magistrate. Whilst he was initially scared and intimidated by civil work, and the prospect of replacing esteemed magistrates in

that section and was reluctant to move, today, he is in the SAJEI civil stream and lectures civil to the newly appointed magistrates.

[83] In conclusion, Mr Jacobs testified that more than a year following Ms van Schalkwyk's suspension, four investigators arrived at the Kempton Park Magistrates Court where they were summoned to the tearoom. He recalls Ms Jakkie Wessels, the current Regional Court President of Limpopo being there. The investigators informed them why they there and invited the magistrates to lodge complaints against Ms van Schalkwyk, if any, and to put same in writing. He was very surprised by the process, which followed a year after Ms van Schalkwyk's suspension. He in fact raised concerns with them about looking for new complaints as though on a fishing expedition. Whilst none of the magistrates were intimidated in the process by the investigators, he did feel that they were being treated like children by being very condescending.

[84] In respect of charge 3, Ms Motlekar testified that she did not find Ms van Schalkwyk to be rude. It was her evidence that one had to look to the personality of Ms van Schalkwyk and once you get to know her, you would find that she is very passionate, which would lead to heated debates in meetings. On being confronted with Mrs Da Silva's evidence that Ms van Schalkwyk nauseated her right off the bat, Ms Motlekar's view was that, that is not what she observed. From her observation there was a friendly repertoire between Ms van Schalkwyk and Mrs Da Silva when she visited Ms van Schalkwyk's office, it was more than collegiality and she assumed as a result that they were friends.

[85] Ms Motlekar was asked about her approach to Judicial Quality Assurance and in particular her interpretation of a magistrate using a red pen on a charge sheet and being remonstrated by Ms van Schalkwyk who wrote have you finally lost your marbles on the charge sheet upon inspection. She understood that to mean "Really, have you gone off the track colleague?" In her view, it is not disrespectful if you know Ms van Schalkwyk as a person.

CHARGES 4 AND 22

[86] The allegations inherent in charges 4 and 22 relate to an alleged failure to execute a lawful order given by Mr Jonker and being disrespectful to Mr Jonker and the Chief Justice.

[87] Mr Jonker was a chief magistrate from 2004 until his retirement in 2012, although he remained on in the position until June or July 2013. He was a magistrate since 1971. He explained the hierarchy of the District Court. The chief magistrate, Johannesburg, is the cluster head for a designated area in Gauteng, with Administrative Control over the area. On his evidence, the cluster system operates as follows; the Magistrate's Commission will relay information to him which he transmits on to the sub-cluster heads. In April 2013, the sub-

cluster heads were, Ms van Schalkwyk – Kempton Park, Mr Nair – Pretoria, Mrs De Klerk – Germiston, Mrs Loots – Randburg and Mrs Riana Ikaneng – Pretoria North. The Commission would mainly disseminate circulars for purposes of quality assurance, which he would circulate to the sub-cluster head for dissemination to offices below them.

[88] At the heart of Counts 4 and 22 is Ms van Schalkwyk's involvement with JOASA, which is an association of magistrates. Mr Jonker moved from the assumption that Ms van Schalkwyk was the Secretary of JOASA, whilst she had in fact held various positions in the Association. Ms van Schalkwyk received Exhibits J and V, emails from Mr Danie Schoeman, the Secretary of the Commission, at the time, which Mr Jonker testified was forwarded to all chief magistrates in the cluster. According to Mr Jonker he had to refer the emails to the Magistrate's Commission and copied Mr Schoeman. The tenet of the emails sent by Mr Jonker is that he felt himself duty bound out of disappointment to inform the Commission and the Chief Justice of the content of the emails received from Ms van Schalkwyk, as he always believed in dealing with matters in a proper manner. He referred the matter to the Commission to be dealt with. On his account he never had any difficulties with Ms van Schalkwyk prior to the incidents which form the basis of charges 4 and 22. A letter of apology addressed to the Chief Justice, Exhibit J11, was shown to Mr Jonker. Mr Desmond Nair, the then Chairperson of the Chief Magistrate's Forum, wrote letters of apology to the Chief Justice and distanced the Forum from the contents of Ms van Schalkwyk's letter. This is not surprising because very few people can speak their minds freely and speak out against inequalities especially when it impacts on their rights and those of other magistrates. Leaders voice their concerns without fear or favour. With regard to the Chief Justice, we do not have a single judiciary, our salaries are not linked to those of judges and our status has not been sorted out. The Chief Justice, as head of the Judiciary, did not act on these concerns as he is duty bound to do and currently, he has still not addressed the issue.

[89] Ms Motlekar succinctly testified to charge 22. She was aware of a notice of intention to strike by JOASA members and aware that no magistrate at Kempton Park Court was on strike and so did Mr Jonker. The Chief Magistrates were forwarded many documents, including exhibits YY1, YY2, YY3, YY4), related to putting in place contingency plans for the strike. Contingency plans had to be submitted before the 15 March 2013. According to Ms Motlekar these documents were received from different people, all with different instructions. What was common to all the documents was a register, compiled by Mr Chris Barnard from the Magistrates Commission and Mr Nair, where the details of all magistrates participating in strike action had to be recorded.

[90] The register was not prescriptive and was to be used merely as a guiding tool by the Chief Magistrates. The effect was that if no magistrate was striking, an email to that effect would suffice or the mere striking through of the register through endorsed that no magistrates were striking. According to Ms Motlekar the register had conflicting dates on which it was to be

submitted; one form required submission on the last day of the strike, another required submission on a daily basis, and one noted the 13 May 2013. She testified that Ms van Schalkwyk had in fact written to Mr Jonker, informing him that no magistrate on her establishment was striking but if the position changed, she would inform him. The Magistrate's Commission in an email dated 12 March 2013, required of Chief Magistrates to report to it within seven days of the last day of the labour action, which was contrary to Mr Jonker's requirement that reports be submitted daily. In respect of Ms Van Schalkwyk's interaction with Mr Jonker, Ms Motlekar testified that she was aware of Mr Jonker intimating that he wanted nothing to do with Ms van Schalkwyk. This necessitated Ms van Schalkwyk reporting directly to Mr Schoeman.

[91] Ms Motlekar testified that she learnt about the issue of Ms Duffy's absconding and derogatory remarks through Ms van Schalkwyk. According to Ms Motlekar's it is clear that you cannot sign leave that has lapsed. Thirty-two (32) days had lapsed, which constituted absconding. Ms Duffy's leave form was presented to Ms Motlekar to peruse during her evidence and reads as follows:

"Leave form for Duffy from 13 July 2012 to 16 August 2012. Leave was not recommended. Leave was struck through and said, see letter of abscondment forwarded. At the bottom of the leave form, Ms van Schalkwyk wrote, 'I do not think it is proper or appropriate to sign. It does not reflect the true position' signed by Ms van Schalkwyk'".

[92] Ms Motlekar noted that in a letter Mr Jonker was intent on placing a magistrate at Ms van Schalkwyk's office, which was indicative of a break in trust, the relationship could only go down from there as it attacked the integrity of Ms van Schalkwyk.

[93] Ms Motlekar further testified that the utterance of Ms Duffy to Ms van Schalkwyk, namely, *"Jou domfok, jy het so pas jou eie doodsvonnis geteken. Moet my nie eers bel nie. God self kom met jou afreken."* was not uncalled for. Ms Motlekar opined that Mr Jonker indicating that Ms Duffy did nothing wrong, was misplaced. Ms Motlekar conceded that one could feel victimized and harassed if these actions emanated from a white male patriarchy.

[94] According to Ms Motlekar, Mr Jonker's request to Ms van Schalkwyk to backdate the leave form of Ms Duffy to avert the period of her absconding and certify them as leave, is irregular. Further, that Mr Jonker's reappointment of Ms Duffy to the Johannesburg bench on 2 April 2013 was not advisable.

[95] Ms Motlekar was aware that Ms van Schalkwyk wrote a letter to the Minister of Justice expressing concerns about Ms Duffy's appointment, considering the fact that she had been certified as psychotic. Ms Motlekar testified that the Deputy Minister of Justice, Mr Jefferies, raised concerns over acting appointments where magistrates resigned to gain access to their

pension funds and then reapplied to the bench. Her evidence is that she would have broadened the pool, by looking at the gender and race breakdown and seeking appointments from the bar or sidebar. It is noteworthy that Ms Duffy resigned from Mr Jonker's office on the 16 April 2013 and Mrs Da Silva's first statement is dated 17 April 2013.

[96] Ms Maretha Froneman ("Ms. Froneman") testified that she is a senior magistrate at Nigel Magistrate's Court. She fell within the Kempton Park Court sub cluster headed by Ms van Schalkwyk. She started as a public prosecutor on 3 February 1988. She was appointed as magistrate on 1 June 1999 and in 2001 she was elevated to senior magistrate. She has over 37 years' experience within the Justice department. She received an instruction from Mr Jonker to do an investigation regarding the Duffy matter. She was handed a letter dated 19 July 2012 headed: "Unauthorized absence of Ms Duffy." The letter stated that Ms Duffy left the office on 13 July 2012 without permission and on 16 July 2012, Ms Duffy's son and friend arrived at the Kempton Park office to submit a medical note, whilst seeking assistance in respect of her mental health, wanting to have her admitted. Ms Duffy sought to resign on 24-hour notice, which was impermissible as she was a permanent magistrate and had to give 30 days' notice. A warning was extended to her that if she was away from the office without leave it would be regarded as absconding. See exhibit ZZ(i). See too the involuntarily rehabilitation form supported by a medical certificate from Dr M Wessels, exhibit ZZ (ii). In essence, this document stated that she is psychotic and needed to be admitted to a private hospital and, if she refused, she would need to go to a state hospital. The application was completed by her son Ruan Duffy on 23 July 2012.

[97] A letter dated 14 August 2012 from Ms van Schalkwyk to Mr Jonker headed "Unauthorized absence from office" (exhibit ZZ (iii)) briefed Mr Jonker about Ms Duffy's absence, informing him that she had been contacted telephonically but refused to answer. In addition, various short service messages (SMS's) were sent to her requesting her to sign and complete forms, with no response. When Ms van Schalkwyk had eventually made contact with her, she insisted that she had resigned and forwarded a derogatory SMS to Ms van Schalkwyk. A handwritten letter by Ms Duffy was handed in as exhibit ZZ(iv), in which she stated that she had been working as an additional magistrate since 8 August 1994 and on 1 March 1996, became a permanent magistrate; she resigned on 12 July 2012 and handed the letter to a clerk, Helga, to give to the head of office. On 16 August 2012, she presented a resignation letter to Mr Jonker, once again.

[98] Ms Froneman remained adamant despite, being told that Mr Jonker denies having instructed her to investigate the Duffy matter, that she could not of her own volition commence an investigation against a magistrate. On perusal of the papers furnished to her, she realized that she would have to interview Ruan Duffy, Colonel Groesbeeck, Advocate Foort, Mr Kobie Schutte, clerk Ms Helga Fourie and the senior prosecutor Ms Lamden. During the investigation, Mr Schutte briefly explained that he knew Ms Duffy very well and observed

deterioration in her office environment, she had become an embarrassment. He had also noted that she wanted to donate her vehicle to an organization, which was out of the ordinary. He contacted her son Ruan on 19 July 2012 for assistance. Ms Duffy wanted to resign with 24 hours' notice and insisted on a cheque immediately, which was not possible. Ms Duffy further called interpreters and clerks to a meeting stating she had a calling from above and wanted to go into the ministry. The clerk of the Children's Court further explained that Ms Duffy did not conduct Children's Court proceedings the normal way. She would for example make the child kneel down and place a bible on the child and they then had to apologize to one another. Ms Duffy indicated to the clerk of the court that she was resigning, gave her an envelope and upon opening it found a blank page.

[99] Advocate Foort sent Mrs Froneman an explanation notice stating that she did not want to compromise anyone's position, but she noticed a problem with Ms Duffy's well-being. She observed that Ms Duffy was sensitive to being followed or being overheard and no one was allowed into her office. A note had to be placed under her door seeking entry. Ms Duffy believed in the existence of demonic forces. Mrs Froneman testified, Advocate Foort confirmed that she attempted to convince Ms Duffy to consult a mental health professional, but Ms Duffy was not interested. With the help of a public prosecutor and her son, they got Ms Duffy into an ambulance and admitted her. She did not remain at the facility after the admission and left when her son left. Once Mrs Froneman was informed that Ms Duffy resigned, she closed the investigation. Mrs Froneman testified that she was aware of the words uttered by Ms Duffy in a message to Ms van Schalkwyk, exhibit ZZ (v), which states, *"Jou domfok, jy het so pas jou eie doodsvonnis geteken. God self kom met jou afreken. Moet my nie eers bel nie. Ek gaan more Landdros Kommissie toe"*, signed Karen Duffy, which was widely circulated at the office.

[100] Ms Froneman was not aware that Mr Jonker had reappointed Ms Duffy to the bench at Johannesburg Magistrate's Court on 2 April 2012. The letter Ms van Schalkwyk wrote to the Minister of Justice relating to Ms Duffy's appointment was handed in as exhibit ZZ (vi).

[101] During cross-examination, the following concessions were made. Mr Jonker conceded that Ms Mia was a permanent magistrate and her appointment did not have to go to the minister's office. He conceded that he appointed Ms Duffy at his office in Johannesburg after she absconded from Ms van Schalkwyk's office. He says Ms Duffy was never charged, she resigned and there were no serious allegations against her. He conceded that he and Ms van Schalkwyk differed in meetings. He said, "Yes, she will say what she wanted to say, but it did not bother me as I had to do my duty. I never forced my authority on anyone. I gave people a chance to express their feelings". He conceded that he made use of his white senior magistrates to do the work. He was confronted and he could not remember that in November 2007 that he made numerous allegations that Ms van Schalkwyk committed fraud and

claimed for trips that she was not entitled to. One of the allegations was the purchasing of KFC in the amount of R51, which he claimed was excessive for lunch.

[102] Mr Jonker could not remember that in 2007, the late Ms Belinda Molamu did an independent investigation and nothing came of it. Mr Jonker was confronted with the fact that Ms van Schalkwyk felt victimized, harassed and abused by his actions. Mr Jonker's reply was, "You are an outspoken person and do not take nonsense, you would have come to me and told me." Mr Jonker conceded that he gave Ms van Schalkwyk permission to leave early when she had a heart attack and with her son's accident. He replied, "Yes, I did it out of empathy". He conceded that he gave JOASA magistrates concessions to leave the office between 12:00 and 14:00 when needed. He also admitted that JOASA was run from his office and there were magistrates busy with JOASA work when they were not busy. He conceded that neither Ms van Schalkwyk nor her magistrates at Kempton Park were on strike. He acknowledged that Cheryl Loots went on a go-slow. He further conceded that because of Ms van Schalkwyk's leadership role in JOASA, magistrates would approach her with their problems. He conceded that Mr Thulare was appointed to act as a chief magistrate Pretoria from 8 April 2013 to 17 June 2013 and further confessed that he changed the said appointment from 8 April 2013 to 15 April 2013. It was put to him that Mr Thulare objected to the limitation of his appointment. He said that "Mr Nair agreed to do both" (i.e. act as a chief magistrate and be a judge).

[103] He conceded that he was going to send someone to monitor Ms van Schalkwyk's office to see whether anyone was on strike, on instruction of the Magistrate's Commission. He was confronted with his actions being a direct attack on Ms van Schalkwyk's integrity. He says the Magistrate's Commission wanted him to do this. Mr Jonker conceded that as far as JOASA was concerned, the three magistrates in the executive in JOASA dealt with JOASA-related issues and it did not impact on their work. He also agreed that no leave forms were handed in for Mrs Da Silva from 27- 29 May 2013 and 30 May – 7 June 2013. He admitted that it is correct that when you take leave and you do not submit leave forms and pretend to be at work, you commit fraud. Mr Jonker also conceded that when Ms van Schalkwyk was appointed in 2004, he did not visit her office and has never given her the concomitant training.

[104] When it came to Ms Duffy, Mr Jonker could not remember anything. In particular that Ms Duffy absconded on 13 July 2012 and that he had appointed two senior magistrates, Ms Jayija and Ms Froneman to investigate her. That he wanted Ms van Schalkwyk to authorize vacation leave for Ms Duffy between 16 July 2012 and 16 August 2012, which she refused to do. That he wanted Ms van Schalkwyk to grant vacation leave retrospectively to Ms Duffy, in terms of the PSA. According to exhibit JVS 2, the day Ms Duffy spoke to Mr Jonker she was not sure whether she was on sick or vacation leave, but Ms van Schalkwyk was requested to authorize vacation leave. Despite Ms Duffy resigning on 13 July 2012, Mr Jonker presented Ms van Schalkwyk with a leave recommendation form to sign and when she

refused to, he was upset. It was Mr Jonker's contention that he requests and never instructs. This is problematic for this charge because at the heart of the charge is non-compliance with a lawful instruction. This led to the presiding officer pointing out that one does not need to comply to a request and it is not enforceable whereas one needs to comply to an instruction and it is enforceable. In this case, Mr Jonker made a request and the Magistrate's Commission overruled him.

[105] Mr Jonker was known to give unlawful instructions, namely asking Ms van Schalkwyk to backdate Ms Duffy's abscondment and change it to holiday leave. Shortening Mr Thulare's acting appointment as Chief Magistrate in Pretoria and allowing Mr Nair to simultaneously be both a judge and a Chief Magistrate is a similar example. Mr Jonker could not abdicate his responsibilities as cluster head by saying that he wanted nothing to do with Ms van Schalkwyk and crying foul when she communicated directly with Mr Schoeman, secretary of the Magistrate's Commission.

[106] Mr Jonker lied about the Duffy matter when he testified that he knew nothing about the matter and in the same breath saying that "she did nothing wrong." Ms Duffy's abscondment constitutes misconduct in itself and she resigned before she could be sanctioned. Mr Jonker appointed Mrs Froneman to investigate Ms Duffy's conduct and then later in his testimony denied that he had done so. He stated that Ms Duffy did nothing wrong despite her rude, disparaging and abusive remarks to Ms van Schalkwyk. These actions are indicative of the abuse, harassment and victimization Ms van Schalkwyk suffered at Mr Jonker's behest.

[107] The national register reflected Kempton Park's position regarding the strike action and is indicative of the fact that Mr Jonker and Mr Schoeman had been informed. The witch-hunt narrative is pertinently demonstrated by the fact that the register implemented to indicate magistrates participating in the strike displayed non-compliance by certain magistrates but no action was taken against such. However, Ms van Schalkwyk's alleged non-compliance, even though she fulfilled her obligation in this regard, constituted misconduct. Mr Jonker testified that he is a "very peaceful person", but a vindictive email from him, dated 22 March 2013 at 11:10, shows that he was the main instigator of the misconduct charges against Ms van Schalkwyk, which contradicts this assertion. The email is a clear and deliberate attempt to destroy Ms van Schalkwyk's career and future prospects in any form of employment. His remarks throughout are uncontested generalisations based on his own angry, unjustified and biased perspective. His consistent apologetic and condescending conduct during his testimony, and his request to visit Ms van Schalkwyk at her home speaks to his manipulative, deceitful nature and attitude.

CHARGE 4

[108] Mr Jonker's actions were a direct attack on Ms van Schalkwyk's integrity. The tone of Ms van Schalkwyk's letter to Mr Jonker is sharp, but this should be ascribed to the years of victimisation and harassment and his persistent attacks on her integrity. From the time that Ms van Schalkwyk was appointed Chief Magistrate, Kempton Park, her harassment by Mr Jonker, on the basis that she was a woman was palpable. This was clearly demonstrated by the fact that no other chief magistrate within his cluster, including Mr Nemanashe, Mr Booy and Mr Nair, were subjected to the treatment she had to endure. Mr Jonker penned a letter to the Chief Magistrate's Forum stating that he wanted nothing to do with Ms van Schalkwyk and that he would not attend the Forum's meetings as along as Ms van Schalkwyk attended. Ms van Schalkwyk as a result was obligated to direct correspondence related to reports on the strike to Danie Schoeman.

[109] Ms van Schalkwyk abides by her statements about the Chief Justice, in the face of the absence of incontrovertible evidence to the contrary. Many meetings were sought with the Chief Justice, to no avail. He failed to make any representation to the IRC on behalf of the magistracy and judges. The Chief Justice whilst holding the highest judicial office in the Republic, does not make him immune to criticism. The Chief Justice in fact is on record in his many public engagements, as saying that and I quote from an address at a graduation ceremony of the UKZN, where he is the Chancellor, that "The time has come for us not to be favoured and for people to clap hands for us because we say what they want us to say. It is time to be true to your convictions. Let those who condemn you, condemn you. Why should they agree with you?" That in fact is what Ms van Schalkwyk did. She remained true to her convictions, in speaking out about injustices to the magistracy. She simply stated the facts.

[110] In fact, Ms van Schalkwyk took it upon herself to intervene in order to avert the actions of the magistrates (see annexure JVS8). After all, she does have a constitutional right to freedom of expression, even as a judicial officer, as endorsed by the Chief Justice.

[111] On a careful preponderance of the totality of the evidence on charges 4 and 22, it cannot be said that Ms van Schalkwyk is guilty of misconduct. On the contrary, what the evidence clearly demonstrated is victimization of Ms van Schalkwyk by Mr Jonker, which extended to a point where he went as far as literally threatening to place spies at her office to monitor what was happening under her judicial control. It is accordingly respectfully submitted that Ms van Schalkwyk be found not guilty on charges 4 and 22.

CHARGE 5

[112] The allegation in this charge is essentially that, notwithstanding being cited as the 1st Respondent in a debt review matter, Ms Schalkwyk allowed Ms Madelein Erasmus Nel ("Ms.

Nel"), a magistrate at her office, to deal with the said matter, rather than a magistrate from another district. It is telling that Mr van Greunen, one of the appointed investigators, testified that he recommended that Ms Schalkwyk not be charged with these allegations as he saw nothing wrong with what had transpired.

[113] It is not disputed that Ms van Schalkwyk was placed under debt review. Ms Erasmus Nel would have been fully within in her rights to recuse herself from the application, if she in any way felt compromised. The evidence in fact is that Mr Holzen, the Acting Senior Magistrate assigned the matter to Ms Erasmus Nel, with a clear instruction that if she had any problem with the matter or felt uncomfortable dealing with it, she should report it to him. Ms Erasmus Nel further conceded in cross-examination that the debt review was unopposed and it remained her decision to deal with the matter or not and that there was no onus or duty on Ms van Schalkwyk to inform her not to proceed with the matter. She agreed that she could have recused herself but elected not to do so.

[114] According to Ms Erasmus Nel she saw nothing amiss with the order she granted, but felt that her judicial discretion was brought into question by Mr Pieter Koen, from Mr Jonker's office in Johannesburg, when he arrived to inspect the application. The matter was not sent on review. This action smacked of *ultra vires* conduct. Mr Holzen confirmed that Ms Erasmus Nel was allocated the application as she did not know Ms van Schalkwyk very well and the application was unopposed.

[115] It is therefore respectfully submitted that Ms Schalkwyk be found Not Guilty on this charge.

CHARGE 13

[116] The charge is that Ms van Schalkwyk during 2011 requested Ms Erasmus Nel, an acting magistrate, during office/official hours to assist her with correspondence to various attorneys in respect of making payment arrangements for her debt.

[117] The evidence demonstrates that two attorneys were approached regarding payment arrangements in respect of Ms van Schalkwyk's debt but not at Ms van Schalkwyk's behest. An email dated 7 September 2011, 11:29, between Mrs Da Silva and Ms Erasmus Nel bears this out. Ms Erasmus Nel's evidence was clear that the only involvement of Ms van Schalkwyk in this issue was when Mrs Da Silva approached her with a repayment offer, which she agreed to.

[118] Ms Erasmus Nel conceded in her evidence that on 7 September 2011 at 11:29, she forwarded the email received on 6 September 2011 at 16:03 from Mr Carstens, her personal assistant, to Mrs Da Silva only. The information related to Ms van Schalkwyk on her evidence

would have been received from Mrs Da Silva or Ms van Schalkwyk, although she was not certain whether she received an attachment about Ms van Schalkwyk's financial position from her or Mrs Da Silva. In fact, Ms Erasmus conceded in cross-examination that with regard to the attorneys and making arrangements, that she never engaged with Ms van Schalkwyk personally but reported to Mrs Da Silva and that all the arrangements that were made on Ms van Schalkwyk's behalf were facilitated between herself, Mrs Da Silva and Mr Carstens.

[119] Ms Erasmus Nel further testified stated that this task did not take much time and conceded that Ms van Schalkwyk consequently could not and in fact would not know whether case flow and court management was impacted as she had no role in the arrangements.

[120] It is accordingly respectfully submitted that Ms van Schalkwyk be found Not Guilty on this charge.

CHARGE 15

[121] The allegation is pertinently that on 26 August 2011, Ms van Schalkwyk requested Ms Maria Elsie Smit, an acting magistrate, to search for JOASA banners at Kempton Park Civic Centre, during office/official hours with no regard to court and case flow management, no regard for the image of the Judiciary and/or the constitutional rights of the accused persons to a speedy trial and/or prejudice to litigants and witnesses and in so doing abused her power as the judicial head of the Kempton Park courthouse.

[122] Ms Smit was appointed as an acting magistrate during May 2011 to 28 February 2012, with Ms Van Schalkwyk being responsible for signing her contract appointment every three months. She was instructed by Mr Holzen to fetch the banners. According to Ms Smit she did not want to make a statement of her own free will. She was contacted by Ms Jakkie Wessels who told her what to write in the statement. She wrote two statements dated 24 April 2013 and 24 June 2013. The statements differ with regard to whether Ms Van Schalkwyk called her to look for banners, with one being silent about the banners. It is important to note that on 26 August 2011, Ms Van Schalkwyk was not the judicial head of the office. She was on sick leave. Mrs Smit admitted that she was given the name and telephone no. of Zeka Xhanti re the collection of the banners and she had to liaise directly with him.

[123] It is accordingly respectfully submitted that there is no evidence on the allegations as set out in the charge and Ms van Schalkwyk should be found Not Guilty on the charge.

CHARGES 17 AND 21

CHARGE 17

[124] The allegation is that during October/November 2012 a gift, favour or benefit, even if it was a loan, was given to Ms van Schalkwyk by Mr Moloi which could have impacted on her judicial conduct and influenced her in the performance of her duties.

[125] Mrs Da Silva testified that Mr Moloi is an attorney in Kempton Park. He did work for her husband. On her arrival at Kempton Park, her husband managed the South African Division of a UK-based company and he asked for a recommendation for a good labour law attorney. Mr Oberholzer gave her a name for Mrs Swanepoel. Her husband wanted a black lawyer then Danie referred her to Mr Moloi. When her husband went to consult with Mr Moloi, she went to show him where the premises were. Her husband briefed Mr Moloi to deal with the labour matter. Her husband was not satisfied with Mr Moloi's services and terminated the appointment. Mr Moloi did not do business for her. Ms Bhoikutso practiced law and became a contract magistrate. According to Mrs Da Silva, Mr Moloi and Ms Bhoikutso's offices merged. She testified that Ms van Schalkwyk went to court to train Ms Bhoikutso. She recalled that Ms van Schalkwyk had a conversation with Mr Schutte re a bail application. According to her testimony, Ms van Schalkwyk asked her about the registration of a company. Ms van Schalkwyk did the matter with Mr Moloi and bail was granted to the accused. The accused did not return to court and a warrant was authorized for his arrest. Mrs Da Silva thinks the matter was in January or February 2011.

[126] Soon thereafter, Ms van Schalkwyk said that a Congolese delegation of judges will be visiting South Africa and JOASA will host them. Mrs Da Silva's testimony was that she was approached to ask attorneys for donations to arrange meals for the Congolese. Mr Moloi hosted a braai at someplace in Centurion. She does not know where it was but Mr Moloi covered the costs. The Congolese delegation came in February 2011. Mr Moloi attended Ms van Schalkwyk's 50th birthday party and made a financial contribution to her party. There was a Washington trip and monies were requested from the Chief Justice. The Chief Justice did not provide the monies and she was requested to phone Mr Moloi to come and see her. Upon his arrival, she left the office. According to her, Ms van Schalkwyk later informed her that Mr Moloi was going to pay for her accommodation and travel costs. Two ladies from Mohad's Travel Agency arrived the next day. Mrs Mia took Ms van Schalkwyk to the embassy to get a visa at 08:30 in the morning. Mrs Mia also took her to the airport when she flew to Washington.

[127] Upon Ms Mia's return to Johannesburg, Mrs Da Silva took over the arrangements for Ms van Schalkwyk's travel and accommodation. Mrs Da Silva apparently spoke to the ladies at Mohad's Travel Agency and the credit card that was supplied by Mr Moloi could only be used to secure the accommodation but not to effect payment. Mrs Da Silva tried to phone Mr Moloi, but she could not find him because he was somewhere in Africa, namely, Kenya. Her testimony was that Moloi's office gave her the contact number of a person that Mr Moloi said

must sort this thing out or assist her. Mr Moloi's office gave her a number for this gentleman and she phoned him a few times. According to Ms Da Silva, he said the credit card could not be used and he gave her cash. Mrs Da Silva said that the man sounded Nigerian and she handed the phone to Ms van Schalkwyk and after she put the phone down, she said, "Don't ever let me speak to that man again."

[128] Mrs Da Silva further testified that Ms van Schalkwyk requested her to collect an envelope at Mr Moloi's office. Mrs Da Silva did as requested and on arrival at Mr Moloi's office, the receptionist informed her that Mr Moloi was not present and that she should wait. A Nigerian man eventually approached her and handed over a wad of money to her. She was taken aback and told him that she was there to collect an envelope, which he then placed in an envelope and sealed it. According to Mrs Da Silva's she requested the man to sign across the back of the envelope, once he sealed the envelope. She was scared by the events and phoned Madelein Erasmus who told her to take a photo of the envelope. She reported the incident to Mr Holzen. She ultimately handed the envelope to Ms van Schalkwyk. Her testimony is that she did not know the Nigerian. It was only months or years later or maybe a year later that she was shown a photograph of an asylum seekers permit and she was asked if she recognized him and **it appeared to be the same person**, Felix, the accused in the bail application that had been dealt with by Ms van Schalkwyk. Much is to be desired by this opportunistic identification process. If this was in the context of a criminal matter, no weight would be attached to this evidence and the same approach should be adopted in this enquiry.

[129] In cross-examination the following was elicited. Law Students take up employment in different fields, some eventually become magistrates, attorneys, prosecutors, legal consultants and judges. Mrs Da Silva conceded that when you have dealings with people in different professions, it does not entail that such dealings are illegal or not above board. That being friends with an attorney does not impact on the fact that it will affect one's impartiality or integrity, meaning one can be friends with attorneys and advocates. Mrs Da Silva was not aware of the fact that Ms van Schalkwyk and Mr Moloi had a unique relationship. Mr Moloi never came to Ms van Schalkwyk's office when she was present. Mrs Da Silva agreed that she approached Mr Moloi to do a labour law matter for her husband on the referral of Mr Oberholzer and that Mr Moloi did work for the company her husband was employed at. She, however, denied that she had handpicked Mr Moloi. She at no stage escorted Mr Moloi to her husband's offices, but waited in the car.

[130] Mrs Da Silva agreed that Ms van Schalkwyk was the Chairperson of JOASA's funding committee, that one of the missions of JOASA is to obtain funding for the organization and that various attorneys were approached to financially assist with the Congolese visit. She readily accepted that it is not illegal for attorneys to contribute funds to associations. She could not dispute that Ms van Schalkwyk had secured the permission of Mr Jonker, the

Commission and Lower Court Management Committee to travel to Washington. Mrs Da Silva, although she could not recall when Ms van Schalkwyk was subject to debt review, accepted that she could not use her credit card during that period. She denied that she approached Mr Moloi about the Washington trip on the basis that she had a professional relationship with him and that it was on this basis that she approached him first to assist Ms van Schalkwyk with her travel costs to Washington. Ms van Schalkwyk did not dispute that she had a special relationship with Mr Moloi or that she subsequent to Mrs Da Silva approaching Moloi likewise approached him, which Mrs Da Silva disputed. Mrs Da Silva could further not dispute the contention that Ms van Schalkwyk was unaware of the fact that Mr Moloi instructed his partner Felix to hand the money to Mrs Da Silva in cash, when she assisted Ms van Schalkwyk with Mr Moloi, but denied that she was involved from the outset. Mrs Da Silva could not dispute that Ms van Schalkwyk repaid the monies Mr Moloi advanced to her in full. On the issue of taking a photo of the envelope in which the money was handed over to Mrs Da Silva by Felix, Mr Moloi's partner, creating sensation, Mrs Da Silva testified that she was upset and it was not her idea to take a photo. Mrs Da Silva ultimately accepted that the money was given by Mr Moloi, collected by her and ultimately returned by Ms van Schalkwyk. On a question why Mrs Da Silva did not report what she thought was untoward behaviour she maintained that she was fearful of Ms van Schalkwyk who had a direct line to Mr Barnard at the Commission.

[131] During October/November 2012, Ms van Schalkwyk requested to use Mr Moloi's credit card to pay for her travel and accommodation expenses in Washington DC to attend an IAJ conference. When the local organizers of the trip wanted the credit card holder to present it, Mr Moloi arranged that cash be handed equal to the amount requested, to be collected by Ms Da Silva.

[132] Ms van Schalkwyk did not participate in conduct without due regard to the image of the judiciary. She did not accept a gift or benefit which had unduly influenced her in the execution of her official duties, as the loan was repaid. From the onset of the evidence led it was alleged that Ms van Schalkwyk did a bail application with Mr Moloi. The said bail application was portrayed as being shrouded in controversy and corruption. Mrs Da Silva intimated that Ms van Schalkwyk never did bail applications, but on this particular day she stepped up to the plate. Mrs Da Silva further alleged that Ms van Schalkwyk never did training, but on this specific day she wanted to train the late Ms Bhoikhutso. Mrs Da Silva further testified that Mr Moloi and Ms Bhoikhutso's practices merged and that people were upset that Moloi appeared before Ms Bhoikhutso. Mr Moloi, however, testified that their offices never merged. Ms van Schalkwyk did this bail application in case number D137/11, State v Felix Anekwe Felix Chidi. Bail was granted to the accused and he did not return to the court and a warrant was authorized for his arrest. Mrs Da Silva said she was shown a charge sheet, D137/11 State v Felix Anekwe Felix Chidi. She testified that the gentleman whose photo she was shown was the man she collected the money from in Mr Moloi's office. Despite Ms van Schalkwyk contention of what happened in the case and the case record being mechanically recorded,

she was not believed. In cross-examination, Mrs Da Silva was specifically asked whether she thought Ms van Schalkwyk, Mr Moloi and Ms Bhoikhutso conspired to do corrupt activities, and she said, "No, that's not what I'm saying." Ms van Schalkwyk was openly painted as corrupt.

[133] Mr Moloi testified that he was approached by Mrs Da Silva to help with flight and accommodation costs. He had a closer relationship with her than with Ms van Schalkwyk. There was a credit card involved. He was involved in the beginning of the Washington trip where he said he would assist with the flight and accommodation costs. He left for overseas and got stuck in Kenya. He arranged with his partner Felix Lumbalo, to give the money to Ms Da Silva. These monies were given back to him at Mimmo's. He testified that he was not sure how much it was, it was between R20 000 and R25 000. The bail application he did was plus minus two years before the money was lent. There was no nexus between the two. He testified that the Felix in the bail application was not his business partner, Felix Lumbalo. He assisted JOASA with the arrangement of the DRC Congolese delegation. He assisted with the Youth Day project for Bronte's as many other attorneys did. He was approached by JOASA for assistance to host of the IAJ conference in the Western Cape, but he could not. Mr Moloi's evidence in regard to the bail application in case D137/11 State vs. Anekwe Felix Chidi, is corroborated by Mr van Greunen. It is quite clear, like Mr Moloi said, the money given had no nexus to this. His testimony is corroborated by Mr van Greunen. When one peruses the transcribed proceedings dated 21 January 2020, page 56, lines 11-19, Mr van Greunen said, "i printed it on the back (indistinct) just bear with me. All I want to say is I was aware of such an allegation, an allegation but, ek het hier geskryf vir onsself my en die ander ondersoekbeamptes be careful, revisit the money received one year and nine months later. Can we say that there is a nexus except that the accused was the person who handed the money? It was an allegation". In a question by Ms van Schalkwyk to Mr van Greunen on page 55 of the transcript dated 21 January 2020, she asked him whether he could dispute the fact that she had have never received any money from any accused in her life or whilst in the employ of the Department of Justice. He answers on page 55, transcript dated 21 January 2020, lines 18 – 25, "This is with regards to a statement by Mrs Da Silva" and it reads as follows: "That on 16th February 2011 during a bail application, she referred that Ms van Schalkwyk presided over a criminal case, D137/11, in the State vs. Anekwe Felix Chidi to wit, a matter wherein she had a direct or indirect interest in that the accused in this particular case was represented by the said Mr Moloi from which she during November 2012, through his business associate, one Felix whom appeared to be the accused (Felix) in this particular case after bail was granted earlier on 16 February 2011 obtained and or borrowed money in an official capacity as chief magistrate of Kempton Park in respect of her duties and abused her position to assist him with an application ..."

[134] The above speaks directly to Mrs Da Silva's credibility, her tendency to be economical with the truth and embellish her evidence and her tendency to provide vague evidence and to

proceed from assumptions. According to Ms Da Silva, Anekwe Felix Chidi in case number D137/11 is the business partner of Mr Moloi. Mr Moloi testifies his business partner is Felix Lumbalo. In Mr Moloi's affidavit in support of Ms van Schalkwyk's representations, he speaks about his partner Felix Lumbalo. Mrs Da Silva says she was shown an ID photo of Anekwe Felix Chidi in case number D137/11 which Mrs Da Silva has never seen in person, all she knows is that he is Nigerian, and according to her, he was the person in Mr Moloi's office that she collected the money from. Mr Moloi testified, that was not so. Felix Lumbalo is his business partner, Anekwe Felix Chidi is not Felix Lumbalo. There is no cogent evidence to suggest that any accused person gave Ms van Schalkwyk money. See transcript dated 22 January 2020 page 48 line 1-7 wherein Mr Moloi's testimony says, "He took the liberty of calling the skills company in, you will see there we are business partners, you can see two companies, you will see his name there – he is a director, Felix Lumbalo. So we had a group of companies, Lumbalo and Moloi group and Esther and Bontle, actually that is his daughter's and my daughter's names. So, we were in business together, so that is why I say he was (indistinct) a business associate until he relocated to the US." It is clear, once again, that Mrs Da Silva and Hennie Smit run with figments of their imagination and untruths with the intent to defame and to smear Ms Van Schalkwyk's name.

[135] The proceedings in case number D137/11 were not transcribed and Mr Moloi's undisputed evidence is the only evidence on record as to what transpired and importantly that no impropriety took place. Mr van Greunen's attempts at convincing his co-investigators that the loan had been given two years after the case had been heard and no charge should be proffered in this regard is therefore telling.

[136] Mr Moloi testified that the loan had been settled and that there is no evidence of impropriety. He testified that he thought the late Ms Bhoikutso was the presiding officer, not Ms van Schalkwyk - a *bona fide* mistake, as you do not normally find two presiding officers on the bench. Ms Bhoikutso, who could shed light on this matter, unfortunately passed away and could not be called by Ms van Schalkwyk.

It is accordingly respectfully submitted that Ms van Schalkwyk be found Not Guilty on this charge.

CHARGE 21

[137] The allegation is that Ms van Schalkwyk in response to a letter by the Magistrate's Commission, dated 19 April 2013, on 2 May 2013 indicated that she never did a case with Mr Moloi, which constituted a false statement.

[138] The basis for this charge emanates from a letter forwarded to her by Mr Meijer on 23 April 2013, titled "Possible provisional suspension: Yourself". In particular, the allegation at paragraph 2.8 reads as follows:

"That during 2010, 2011 you presided over a criminal matter where the accused was represented by the said Moloi from which you obtained money."

[139] Ms van Schalkwyk was requested to provide a written response before 2 May 2013 to the aforementioned allegation, with no specifics provided to her, on the basis of the allegation set out in paragraph 2.8.

[140] It is respectfully submitted that the judgment of Ntshangase v Speciality Metals CC (1998) 19 ILJ 584 (LC) is to a certain extent apposite in respect of the circumstances which gave rise to this charge. In Ntshangase, the applicant employee was absent from work without permission for three days. He faced three charges at his disciplinary enquiry: On charge one (late for work without good reason/permission) he was given a written warning valid for six months. On charge two (absence from work without good reason/permission) he was given a final warning valid for 12 months. **On charge three (breach of duty of good faith to the company) he was dismissed. Charge three was based on the employee's explanation of his whereabouts on the days of his absence, which explanation was later found to be false**.

[141] At paragraphs 15 to 17 of the Ntshangase judgment, Mlambo J states:

"15 Does the respondent have good prospects of succeeding in the review application? Considering the facts set out in papers before me, respondent's main ground is that Commissioner Pandya erroneously found that there was unfair splitting of charges. This is a reference to the third charge on the basis of which applicant was dismissed. Respondent's contention is that applicant's false explanation for his lateness and absenteeism presented a clear breach of the trust the respondent had placed on him. Respondent therefore contends that with the trust breached it was entitled to formulate a separate charge following therefrom and dismiss him.

16 If applicant had a good and acceptable explanation for his lateness and absenteeism it would have been unfair to dismiss him under those circumstances. The fact that applicant had no good or acceptable reason for being late and absent made it proper for him to be charged. In charging him on account of lateness and absenteeism respondent made an election. Having made this election respondent went further and used applicant's unacceptable and false explanation to formulate a third charge.

17 In my view this was unfair. It is clear that the basis for finding applicant guilty on the first two charges was applicant's unacceptable explanation. Using the explanation to formulate a third charge took the issue beyond the realms of fairness. The picture would be different had the respondent charged applicant with only one charge relating to breach of trust."

[142] The distinguishing fact from Ntshangase in the present matter is that it is maintained that Ms van Schalkwyk did not intentionally make a false statement about doing a case with Mr Moloi. However, the principle set out in Ntshangase that using an explanation to formulate a charge which takes the issue beyond the realms of fairness is squarely applicable. Fairness dictates that if Mr Meijer or the Commission was aware of evidence or had evidence at its disposal that Ms van Schalkwyk presided over a matter where Mr Moloi was involved, this should have been disclosed to her and the basis for raising this fact with her has likewise to be disclosed. The fact of the matter is that the Commission did not disclose the basis for its allegation at paragraph 2.8 of the letter addressed by Mr Meijer. This led to the position where Ms van Schalkwyk without willful intent replied that she had not. Premised on Ms van Schalkwyk's reply, the charge was formulated which respectfully militates against the very notion of procedural fairness in the disclosure of the material facts on which an allegation is based. And as was found in the Ntshangase case, this simply went beyond the realms of fairness. It is respectfully submitted that this charge in any event constitutes an unfair splitting of charges, when regard is had to Charge 17. It is clear that the narrative the Commission seeks to portray with this charge is, based on the allegations inherent in charge 17, that Ms van Schalkwyk received a loan from Mr Moloi, which points to a mutually symbiotic relationship akin to corruption, which Ms. van Schalkwyk on this charge allegedly attempted to cover up with a false statement. It is submitted that this charge is nothing more than a splitting of charges with charge 17, which is impermissible when regard is had to the Ntshangase case. It is disingenuous to say the least. The Commission's case on this charge when regard is had to Mr van Greunen's evidence that he had informed his co-investigators that no charge be proffered as formulated on Count 17, should be dispositive of not only charge 17 but the present charge as well.

[143] To illustrate the patents problems with this charge even further by way of analogy to the Labour Relations Act, it is submitted that whilst a lacuna exists in our law, whether labour laws are applicable to magistrates, one cannot shy from the salutary principles of our Constitution which provides for equality before the law, which should apply to magistrates. To this end, section 188 of the Labour Relations Act provides that, to be fair, a dismissal that is not automatically unfair must be for fair reason and in accordance with a fair procedure. To add to this, it must be emphasized that the role of the Commission is stated unequivocally in the Magistrates Act as follows:

"Objects of commission shall be –

To ensure that the appointment, promotion, transfer, discharge, or **disciplinary steps against**, judicial officers in the lower courts **take place without favour or *prejudice***, and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly."

[144] It is imperative that employers and the context of the present matter, the Commission, should advise accused magistrates of the precise charges they are required to answer in precise and simple terms. The principle inherent behind this is to afford the magistrate to adequately prepare for the charge or to formulate an informed answer. Misconduct procedures are not intended to be utilized in manner which seeks to trap a magistrate into furnishing a reply to a vague question or allegation as that found in paragraph 2.8 of Mr Meijer's letter of 23 April 2013. In Le Roux and GWK Ltd (2204) 25 ILJ 1366 (BCA), the employee, Le Roux was found guilty of charge of breakdown of the trust relationship and dismissed. The arbitrator held that *"the nature of the charge that Le Roux had to meet was vague and confusing. The breakdown of the relationship is a consequence of an aberrant act on the part of the employee and not a discrete offence for which an employee can be disciplined."* In Police and Civil Rights Union vs the Minister of Correctional Services and other (1999) 2011 – 2461 (LC) it is stated: "The furnishing of factual information of an allegation (misconduct offence) against an employee should be thus that he knows what is the case that he should meet. It should be sufficient to enable him to make his right to prepare a real and not an illusionary right..."

[145] The esteemed Chief Justice Innes observed in Rex vs Kamana 1925 AD 570 at 575, as follows: "Now, it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial or during the trial." Furthermore, Sections 23, 33, 31 and 35 of the Constitution of the Republic of South Africa, at 108 of 1996 enshrines the right to be informed of all the factual information and detail of a charge in a language that the employee will understand. The rules of natural justice and equity of demand that the essential allegations that must be rebutted should be alleged. It stands to reason that the specific act/misconduct must be formulated concisely with sufficient information to prepare. You simply cannot expect that it is the duty of the employee to discover his case and such vague charges could constitute an unfair labour practice in itself.

[146] It is further apposite to have regard to Regulation 26 which provides for the procedure for preliminary investigations and misconduct hearings, before turning to the merits of this charge, insofar as it is submitted that the procedure followed by the Commission in respect of the charge was procedurally flawed and not countenanced by the Regulations or the tenets of procedural fairness in misconduct investigations. Regulation 26(1), (3), 4(a) and (5) provide that:

(1) If a magistrate is accused of misconduct, the Commission may appoint a magistrate or an appropriately qualified person (hereinafter called the investigating officer) to conduct a preliminary investigation and to obtain evidence in order to determine whether there are any grounds for a charge of misconduct against the magistrate: Provided that, if the Commission is of the opinion that there is *prima facie* evidence to support the charge, the Commission may charge the magistrate

concerned in writing with misconduct without the said preliminary investigation.

(3) After the conclusion of the preliminary investigation contemplated in sub regulation (1), **the investigating officer shall recommend to the Commission whether or not the magistrate concerned should be charged, and if so, what the contents of the charge in question should be**.

(4) If, after the conclusion of the preliminary investigation, the Commission is of the opinion that-

(a) there are sufficient grounds for a charge of misconduct against the magistrate concerned and the allegations are of such a serious nature that they may justify the removal from office of the magistrate, the Commission may, in writing, charge the magistrate with misconduct;

(5) A charge contemplated in sub regulation (1) or (4)*(a)* shall be accompanied by an invitation to the magistrate charged to send or deliver within a reasonable period specified in the invitation to a person likewise specified, a written explanation regarding the misconduct with which he or she is charged in order to establish which allegations are admitted and which allegations are disputed."

[147] It should be clear that on a reading of the aforementioned provisions, that it is only once the charges have been identified and formulated, that the magistrate concerned may in terms of regulation 26(5) be afforded an opportunity to furnish a written explanation regarding the misconduct which she is charged with and then it is for the sole purpose of determining which allegations are admitted and which are disputed. In the present matter Mr Meijer's letter is procedurally flawed and is not sanctioned by the Regulations.

What exacerbates this procedure by Mr Meijer is that the final investigators were only appointed by the Commission on 26 April 2013.

[148] It should further be clear in line with the submissions above that the explanation furnished by Ms van Schalkwyk could in any event not summarily be used to charge her on the basis of the explanation she furnished in response to letter phrased "Possible Provisional Suspension: Yourself." The letter had nothing to do with the preliminary enquiry or the formulation of the charges.

[149] The evidence presented demonstrates in any event that the innocent response by Ms van Schalkwyk that she did not do any matter with Mr Moloi was not motivated by any willfulness on her part to provide an alleged false statement. The evidence of Mr Moloi and Mr van Greunen should lay rest to the spurious allegation in this charge.

[150] Mr Moloi in fact testified that there were two magistrates on the bench and this was not gainsaid by any evidence from the Commission. On his evidence, he thought Mrs Bhoikhutso was doing the case and laboured under the impression that Ms van Schalkwyk was assisting and training Ms Bhoikhutso. The record reflects on 9 February 2011 Pule's name as defence. Mr Moloi is on record for 16 February 2011, but for judgment. It does happen that attorneys sit in to note judgments on behalf of their colleagues. Mr Moloi has never done a trial matter

with Ms van Schalkwyk where she presided or otherwise. He cannot recall whether or not he just sat next to Pule and assisted. The matter was mechanically recorded and no transcription was made of the proceedings, which would have been helpful.

[151] Mr Van Greunen on page 45 of the transcript dated 21 January 2020 corroborates, verifies and supports Mr Moloi's testimony at lines 6-15:

"On 7th February, Mrs Bhoikhutso was again the presiding officer and I see I wrote here, Mr Moloi was the defence, we just have to make sure of that. Mr Moloi testified, "On the 9th of February 2011, you were the presiding officer and the defence was Mr Pule. And on 16 February 2011, you were the presiding officer and the defence was Mr Moloi, but that was only for judgment and to determine the bail amount, which was R50 000. So, to summarize, during the trial Mr Moloi did not appear for the defence. He was only there for judgment and that is how I saw it on the appearance of the case".

[152] The evidence leader further failed to prove that this error was intentional as alleged, nor that Ms van Schalkwyk obtained any privilege or advantage therefrom. Furthermore, there was no proof adduced that the administration of justice was prejudiced in any way.

[153] It is accordingly respectfully submitted that Ms van Schalkwyk be found Not Guilty on this charge on the same basis as Count 17.

CHARGE 18

[154] The allegation is that Ms van Schalkwyk on or about 17 September 2012, presided in the case of S v Johan De Wet and another, case number D211809 where she handed down judgment on sentence and sentenced both accused. The judgment on sentence and sentence is alleged to be identical to a draft sentence in the said case submitted to herself by an e-mail message from Mr Maodi, an acting magistrate.

[155] Mr van Greunen testified that he made a copy of an email dated 17 September 2010 that was forwarded to Ms van Schalkwyk, marked exhibit R(I). Exhibit RR (II) is a certified copy of the charge sheet of case number D2118/2009 S v Johan De Wet and another. He compared the content of the email with the judgement on sentences. He observed it is the same as what Mr Maodi sent.

[156] In cross examination Mr Van Greunen made several crucial concessions which essentially should lay to rest the allegations in this charge. He accepted that the defended accused were arraigned on five charges and that it may be that the matter was a long and complicated matter as he had seen the probation officers reports and correctional supervision reports. The matter was not transcribed. The most telling concession by Mr Van Greunen is that he

could not say Mr Maodi wrote the judgment and sentence. He had only found the email which on 17 September 2010 was sent to her computer. The investigators moved from the premise that Ms van Schalkwyk did not want to appear before the investigator's team for an interview and they only had one side to this issue. They did not know what transpired prior to this, or in particular what caused Mr Maodi to send a motivation for sentence and the suggested sentence which was similar to that in the trial. He could not dispute the contention put to him that Mr Maodi was given a handwritten draft to peruse and type as Ms van Schalkwyk does not type. He further could not dispute that the judgment on sentence and sentence was Ms van Schalkwyk's intellectual property considering the fact that she had presided over the matter for many days engaging with the facts, listening to argument and applying her mind thereto.

[157] Mr Maodi testified that he was not the presiding officer in case number D2118/09 S v Johan De Wet and Ryan Boshoff. The charges were malicious injury to property, *crimen injuria* and assault with the intent to do grievous bodily harm. The matter was defended and the proceedings were mechanically recorded. The record of proceedings was not transcribed. He in fact testified that criminal law was one of his weaknesses. The writing style of the judgment on sentence was not his writing style. If he had to write the judgment, he would have had to listen to the record to write judgement on sentence and sentence and that would constitute an injustice to the accused.

[158] On his evidence Ms van Schalkwyk handed him a pad with a handwritten judgment on sentence and the sentence which he was requested to type. He obliged and typed the judgment and returned the writing pad back to Ms van Schalkwyk. He stated that Ms Van Schalkwyk types with one hand and that is why he assisted her. He always did when he had the time.

[159] It is submitted that the evidence of Mr Maodi cannot be gainsaid when regard is had to the concessions made by Mr van Greunen and that Ms van Schalkwyk should accordingly be found Not Guilty on this charge.

CHARGE 20

[160] The allegation is that during 2005 to 4 June 2013 Ms van Schalkwyk made use of official parking, whilst refusing to pay the prescribed parking fees.

[161] Ms van Aswegen, now retired, was a Senior Administrative Clerk in the finance section at the Kempton Park Magistrate's Court. She was responsible for parking and the use of government vehicles. She testified that magistrates had to pay for parking. Parking was allocated to Ms van Schalkwyk as chief magistrate and she accordingly approached Ms van

Schalkwyk with a request to pay for the parking by way of a salary deduction. Ms van Schalkwyk informed her that she was the chief magistrate and as such entitled to parking. She did not ask Ms van Schalkwyk why she did not want to pay for the parking as she was scared of her and did not want to become embroiled in an argument. She did not report the so-called 'non-compliance' and Ms van Schalkwyk continued to use the allocated parking space. According to Mrs van Aswegen no other magistrates refused to pay and that previous chief magistrates paid for their parking.

[162] Mr Van Greunen under cross examination testified that he was not present when Ms Van Aswegen approached Ms Van Schalkwyk about the parking and could not testify on whether Circular 30/92 dated 28 August 1992, which states, "1. A copy of the circular 9/1992 issued by the DG of the department of public work is attached. The increased rental money for parking spaces with effect from 1 September 1992 will be collected from official's salaries who use the parking spaces. 2. And with the issuing to parking to officials, the officials must in writing indicate that they accept the terms and conditions as set out in circular 9 of 1992 by public works", was shown to her. He further conceded, albeit that he was not present, that when Ms van Schalkwyk was approached by Ms Van Aswegen to pay for parking, that she expected explanation as she had a right to know why she should part with her money. He further accepted the contention that Ms Van Aswegen did not return to Ms van Schalkwyk with an explanation thereafter.

[163] Ms Motlekar testified that Ms Van Aswegen should have returned to Ms van Schalkwyk to explain to her why she should pay for parking and have brought the contents of Circular 30 of 1992 to her attention.

[164] The charge highlights the witch-hunt narrative. The alleged non-compliance in respect of the parking fee ranges from 2005 to 2013. At no stage during that period did the Commission take issue with Ms van Schalkwyk on the allegations inherent in this charge. It is common cause that many magistrates across the country do not pay for parking. In fact, Mrs Elsie Smit and Ms Nel are on record that they did not pay for parking.

[165] It is accordingly respectfully submitted that Ms van Schalkwyk be found Not Guilty on this charge.

CHARGE 24

[166] The allegation is that Ms Schalkwyk during 2009 to 31 May 2013, conducted her personal financial matters recklessly which lead to her being declared over-indebted and default judgements being granted against her, thereby acting without integrity or a manner which did

not uphold or promote the good name of magistrate and esteem of the office of magistrate and the administration of justice and or acted to the detriment of the discipline or the efficiency of the administration of justice or allied activities.

[167] It is respectfully submitted that this charge is once again indicative of the witch-hunt narrative. It is telling that Mr van Greunen testified that the investigators recommended that Ms van Schalkwyk not be charged in this regard, as with Charge 5. The plight of many magistrates who have been placed under debt review as result of financial stress is well-known to the Commission, so much so that it has decided to cease charging magistrates, and opening files for debt review, according to Mr Chris Barnard.

[168] It is accordingly respectfully submitted that there is no cogent evidence on the allegations set out in the charge and that Ms van Schalkwyk should accordingly be found Not Guilty on this charge.

CHARGES 7 TO 12, 14 AND 16 AND 23
THE CHARGES RELATED TO THE EVIDENCE OF MS DA SILVA

CHARGE 7

[169] The allegation is that during 2009 Ms van Schalkwyk absented herself from her place of duty and gambled at Emperor's Palace, alternatively, that she was away from the office without leave or valid cause.

[170] Mrs Da Silva testified that during the latter part of 2009, she had just arrived at the Kempton Park Court. Ms van Schalkwyk's secretary entered the court around 10h00am and told her to adjourn the court as Ms van Schalkwyk wanted to see her. She obliged and was instructed by Ms van Schalkwyk to close her court as they were going to Emperor's Palace. The purpose according to Ms van Schalkwyk was to have a cup of coffee. She went back to court and postponed all the matters. On arrival at Emperor's Palace, they either had coffee first and then lunch and Ms van Schalkwyk thereafter gambled.

[171] According to Mrs Da Silva she had no issue with gambling, but did not gamble. She felt uncomfortable as it was during broad daylight and there were people who appeared before her in criminal matters. An acquaintance of her husband was also there and she could not believe that she was on the gambling floor.

[172] Ms van Schalkwyk, according to her, gambled excessively. Mrs Da Silva having had some relationship with Mr Oberholzer told him about the incident and he assured her that he would see to it that it does not occur again. Mr Oberholzer cautioned her against Ms van Schalkwyk,

warning that she had financial difficulties, had lots of unpaid debt and enjoyed gambling. Mr Oberholzer told her to plead poverty as he had to approach a very big law firm to request R150 000,00 in his name. To this end he retrieved a letter from a drawer and showed it to her. On her account Ms van Schalkwyk gambled compulsively, did not want to venture how many times she was aware of, but indicated that Ms van Schalkwyk would gamble on her own at times and they would have to fetch her. At times she would take her and fetch her or Mr Oberholzer would do so late at night. On one occasion, she was instructed to fetch Ms Schalkwyk at 19h00pm just for her to put money in a machine, ask money from her and instruct her to make withdrawals from her account to continue gambling.

[173] Ms van Schalkwyk was not concerned about whether Mrs Da Silva's husband would shout at her or whether she had to take care of her granddaughter. According to Mrs Da Silva Ms van Schalkwyk would ask for a printout of her account, if she told her that she did not have money. Ms van Schalkwyk on one occasion in 2012 gave her R200 to place in the machine and instructed her to play. She sat at the machine, literally asleep and Ms van Schalkwyk remonstrated with her for being bad luck. When they left the casino she had to take Ms van Schalkwyk to Bedfordview and then drive back to Kempton Park.

[174] In cross examination, it was highlighted to Mrs Da Silva that in the three statements she deposed to, only a single episode of gambling in 2009 was alluded to. The general response to this anomaly is that she could not say how many times but she had been at the casino during the day and had fetched Ms van Schalkwyk at night at times. This in all probability accounts for the alternative allegation in the charge that Ms van Schalkwyk was away from the office without leave or a valid cause. It was not an unassailable task for Mrs Da Silva to give specifics of the times she alleges Ms van Schalkwyk was at the casino during 2009 to 2013 on her evidence, instead of blaming her inability to the lapse of time.

[175] Mr Oberholzer emphatically denied the evidence of Mrs Da Silva that he told her he would ensure the incident when Mrs Da Silva was called from court to go to Emperor's Palace does not happen again or that he would fetch Ms van Schalkwyk from Emperor's Palace. He further testified that Mrs Da Silva's husband operated a transport business and more often than not she would not have a vehicle at the office, as her husband used her vehicle in his business. He denied that either Mrs Da Silva or himself took Ms van Schalkwyk to Emperor's Place or any similar place or fetched her. Mr Oberholzer, in relation to the R150 000.00 that he is alleged to have borrowed from an attorney, dismissed this as totally untrue and labelled Mrs Da Silva as having a very fertile imagination. He further denied ever telling Mrs Da Silva that Ms van Schalkwyk had financial difficulties or that she gambled excessively.

[176] Mr Holzen testified on the evidence of Mrs Da Silva about herself and Mr Oberholzer fetching her from Emperor's Palace that he had never heard of something so ridiculous, untrue and that not a single magistrate had ever approached him to complain or inform him for that matter

that they had to fetch Ms van Schalkwyk from some gambling house. Ms van Schalkwyk never went for coffee or lunch to gamble with Mrs Da Silva during office hours in 2009. The one occasion on 11 April 2013 when they went to Emperor's Palace for coffee, was to meet a certain Mrs Findlay to discuss funding for JOASA.

[177] Mrs Da Silva's evidence is gainsaid by credible evidence of Mr Oberholzer and Mr Holzen and stands to be rejected on this charge. Mr Oberholzer and Mr Holzen must have made a favorable impression in the enquiry, with no indication of any bias or improbabilities in their evidence. As officers of the court, they stand to gain nothing and risk their own credibility and careers as a magistrate and attorney, if found to be untruthful. A careful perusal of the charge alludes to a single incident, which accords with Mrs Da Silva's statements, yet, years later she testifies that this happened so often that she could not recall how many times. Her evidence is embellished to cast aspersions on Ms van Schalkwyk which is not borne out by the evidence as a whole on this charge. The evidence that Ms van Schalkwyk absented herself from the office on numerous occasions is vague and, furthermore, Ms van Schalkwyk had no reason to report to Mrs Da Silva.

[178] It is accordingly respectfully submitted that Ms van Schalkwyk be found Not Guilty on this or the alternative charge.

CHARGE 8

[179] The allegation is that Ms van Schalkwyk borrowed monies from Mrs Da Silva as per a schedule totaling R8500,00, and failed to pay back the money, thereby acting without integrity and or in a manner which did not uphold and promote the good name, dignity and esteem of the office of magistrate and the administration of justice and or acted to the detriment of the discipline and or the efficiency of the administration of justice or allied activities.

[180] At the outset it must be highlighted that the specifics of this charge is that Ms van Schalkwyk **borrowed** monies from Mrs Da Silva at or near the Kempton Park Court House on specific dates in 2011 and 2012. Mrs Da Silva's evidence was very general in this regard. She testified that there were times Ms van Schalkwyk would ask for money and she would tell her that she did not have money. She testified about an unrelated amount of R7500,00 for rent, which is either not alleged in the charge or what amount she borrowed her as what she termed toned down amounts. At times she had the requested amounts available but did not want to advance such substantial amounts of money. On her account she was not in the habit of advancing loans or asking anyone for money as she lived a simple life and made do with what she had. Mrs Da Silva claimed that Ms van Schalkwyk would also ask Berenice Armstrong for money. Ms Armstrong has not lodged any complaint nor testified and this is to be regarded as hearsay and inadmissible. Mrs Da Silva's evidence is that Ms van Schalkwyk

borrowed money from her on a monthly basis and at times told her to get money from her husband, with the only time she did not really ask for money, being when she was in Cape Town - off sick. Mrs Da Silva later testified that Ms Van Schalkwyk's requests for money were in fact demands, which she could not refuse as Ms van Schalkwyk was the chief magistrate and did not take kindly to being turned down. She was very intimidating and her appointment was dependent on Ms van Schalkwyk. In an attempt to break her ties with Ms van Schalkwyk, whilst she had struggles getting custody of her grandchild, she sought employment at Eskom and Plascon Paints in Germiston, without success.

[181] In evidence in chief Mrs Da Silva testified that she had EFT transactions on her banking statements and pleaded with Ms van Schalkwyk to return her money when she was paid, which she did. The only amount she had not repaid was her book-club fees, which was R70 per month.

[182] In cross examination, it later became clear that Mrs Da Silva and Ms van Schalkwyk were friends and mutually borrowed each other money, this notwithstanding Mrs Da Silva initially testifying that they were close friends but denying that Ms van Schalkwyk borrowed her money. What is most telling is she conceded that Ms van Schalkwyk, her friend at the time, did not owe her any money, as every amount loaned had been repaid save for the book-club fee of R70.00. Strangely, the charge sheet makes no mention of book-club fees and neither does Mrs Da Silva's affidavit or the attachment to the charge sheet, Annexure B. Furthermore, Annexure B sets out the dates and times monies were borrowed and not repaid, but the evidence, contrary to the charge sheet, confirms that all the monies have been repaid. It is thus inconceivable that Ms van Schalkwyk owes Mrs Da Silva any monies.

[183] It must be accepted as common cause, on the totality of the evidence presented, that Mrs Da Silva and Ms van Schalkwyk were intimate friends, despite vehement protestations by Mrs Da Silva against the friendship. It is not far-fetched therefore that as friends they would loan each other money. It is therefore inexplicable how the Commission would regard borrowing of money from a friend, as constituting misconduct, which would impact on the office of magistrate or the administration of justice.

[184] It is accordingly respectfully submitted that there is no basis for the charge and that Ms van Schalkwyk should accordingly be found Not Guilty on this charge.

CHARGE 10

[185] The allegation on this charge is that Ms van Schalkwyk called Mrs Da Silva from her court to her office, where she in the presence of a Nedbank employee indicated to her that the said Nedbank employee would assist her to arrange a loan of R150 000.00 for Mrs Da Silva, whilst

Mrs Da Silva did not of her own volition apply for or consent to the loan. The gist of the charge, however, is couched in such terms that it has nothing do with the intended loan application but the impact of Mrs Da Silva being called out of court which is said to have had an impact on the image of the Judiciary and or the Constitutional Rights of accused persons to a speedy trial and or prejudice to litigants and witnesses, which constituted an abuse of power.

[186] Mrs Da Silva's evidence on this charge is that Ms van Schalkwyk informed her that she wanted to resign and suggested that herself and Ms van Schalkwyk should start a law firm. Ms van Schalkwyk suggested that she would get all of the money but Mrs Da Silva had to first secure a loan of R150 000,00 to pay some of Ms van Schalkwyk's debts.

[187] In respect of the allegations in the charge, Mrs Da Silva testified that during 2010 or 2011 she was summoned from court and on arrival in Ms van Schalkwyk's office she encountered a tall black male person from Nedbank. Ms van Schalkwyk told her that the said person would arrange a loan from Nedbank for her. She, in turn, informed Ms van Schalkwyk that it would not be possible as she already had an account with Nedbank. The loan would be in Mrs Da Silva's name as Ms van Schalkwyk could not apply for a loan as a result of judgments against her. The incident is said to have occurred after Ms van Schalkwyk's son had been in an accident, a few months after Mrs Da Silva arrived at Kempton Park. According to Mrs Da Silva she told the Nedbank employee that it would not work as she did not have a good record with Nedbank. No paperwork was completed as a result and she returned to court.

[188] It is also highly improbable that Ms van Schalkwyk would ask for a loan of R150 000 if she were in debt in the amount of R1.9 million according to the Magistrate's Commission.

[189] In cross examination, it was highlighted to Mrs Da Silva that in three complaint affidavits deposed to, she made no mention that the intended Nedbank loan application was for Ms van Schalkwyk with the intention to open a law practice. This omission cannot be overlooked. The charge proffered must be based on the contents of the complaint statements, which are eerily silent on the issue. It remains inexplicable, therefore, how this charge made its way into the charge sheet.

[190] Mrs Da Silva remained adamant that Ms van Schalkwyk had not tried to help her secure a loan but the money was intended for Ms van Schalkwyk. She further denied the contention that she said that she did not want to make use of a Nedbank loan as her Nedbank debit and credit cards were in arrears. Mrs Da Silva further denied that she had complained about her own money woes and that Ms van Schalkwyk had referred her to Bayport to apply for a loan, which loan was declined as Mrs Da Silva was a temporary employer. Mrs Da Silva's propensity to adapt her evidence when the pinch of the shoe becomes too much is easily

demonstrated by her initial evidence that she was surprised to find the Nedbank employee in Ms van Schalkwyk's office, to later state that the meeting was pre-arranged.

[191] She alleged that this incident took place a few months after her arrival at Kempton Park. Remember, she had conceded that she came to Kempton Park Magistrate's Court in September 2009, but then testified that the incident occurred in 2010-2011.

[192] The improbability of Mrs Da Silva's version is easily demonstrated by the fact that Ms van Schalkwyk's son was involved in an accident on 28 June 2011, whilst Mrs Da Silva maintains that the Nedbank loan incident occurred shortly after she started working in Kempton Park which was long before the said accident. In addition, the charge pertinently refers to 2010 and not 2011 as Mrs Da Silva tried to suggest. The fact remains that no Nedbank loan was ever approved as no loan application forms were completed.

[193] In a nutshell on the evidence of Mrs Da Silva that Ms van Schalkwyk was intent on resigning and opening a law practice in Cape Town, this would not have been possible as Ms van Schalkwyk only has a B. Iuris degree and cannot be admitted as an attorney only with this degree. The allegations on Charge 11, are analogous to those one Charge 11 and it will be submitted below after consideration of Charge 11, that the evidence presented on these charges is such that Ms van Schalkwyk should be found not guilty on both these charges.

CHARGE 11

[194] The allegation on this charge is that Ms van Schalkwyk summoned Mrs Da Silva from court to her office, where she on Ms van Schalkwyk's behalf could apply for an Eduloan on behalf Ms van Schalkwyk's son to the amount of R34 000.00. The gist of the charge, as with Charge 10, is that it is couched in such terms that it has nothing do with the intended loan application but the impact of Mrs Da Silva being called out of court which is said to have had an impact on image of the Judiciary and or the Constitutional Rights of accused persons to a speedy trial and or prejudice to litigants and witnesses, which constituted an abuse of power. It bears further nuances that Ms van Schalkwyk is alleged to have threatened or co-erced Mrs Da Silva into signing the application despite the application form containing incorrect information about Ms Da Silva. Aspersions are further cast about Ms van Schalkwyk essentially fraudulently doing a credit check on Ms Da Silva.

[195] Mrs Da Silva testified that shortly after her arrival at Kempton Park in October 2009, she was requested by Ms van Schalkwyk's secretary, Louise Phillips, to adjourn court to attend at Ms van Schalkwyk's office. Ms van Schalkwyk informed her that her son's university fees had to be paid or he would not graduate. Ms van Schalkwyk explained that she wanted to apply for a loan at Eduloan, but could not do so as she was blacklisted following civil judgments against

her; and requested Mrs Da Silva to apply on her behalf for a loan in an amount of about R34 000 or R35 000. According to Mrs Da Silva she was shocked and taken aback by the request and not comfortable with it. She added that Ms van Schalkwyk shouted at her, asking her if she did not want her son to graduate.

[196] It is Mrs Da Silva's evidence that she told Ms van Schalkwyk that the loan application was not a good idea as she too had judgments against her name. Ms van Schalkwyk asked for her identification number and she furnished a wrong number, as she wanted to avoid having that loan in her name at all costs. She returned to court and ten minutes later, the secretary returned and she was summoned back to Ms van Schalkwyk's office. Ms van Schalkwyk angrily threw a piece of paper at her and told her that she had no judgments against her name. Ms van Schalkwyk according to her clearly obtained her financial information without her consent.

[197] On Mrs Da Silva's version, Ms van Schalkwyk almost instantaneously produced an application form, which had already been completed, with all her (Mrs Da Silva's) details, including her income or as close to it and "alleged expenses". The information according to Mrs Da Silva was not completed by her in the form and neither did she supply the information. She pointed it out to Ms van Schalkwyk that the information was incorrect and in law not correct, but Ms van Schalkwyk told her not to worry and just to sign the application form. Feeling pressured and bullied into signing the application form, she did so, but not by consent. On returning to her office she could not believe that she had been bullied into signing the application form, and being on contract, she was scared that Ms van Schalkwyk would not honour the obligation to repay the loan. She then phoned a friend in Cape Town and told her what happened. The unnamed friend told her that she would go to Eduloan to ensure that the application was not processed, but she indicated that it was a matter she needed to resolve herself.

[198] According to Mrs Da Silva she tried to phone a Ms Jacobs at Eduloan, could not get hold of her and left for home. She could barely sleep that night and not tell her husband about the incident. She eventually made contact with Ms Jacobs and, without her saying anything Ms Jacobs informed her that there were two aspects in the application that were problematic; the fact that she was on contract and the identity document being in a previous marriage surname. According to Mrs Da Silva, Eduloan informed Ms van Schalkwyk about the outcome of the loan application and she in turn said she would phone Mr Danie Oberholzer to write a letter stating that Mrs Da Silva had a three-year contract. It is Mrs Da Silva's evidence that she phoned Mr Oberholzer and informed him that he would commit fraud if he wrote such a letter. As a result of the alleged problems with Mrs Da Silva's application, the Eduloan application was never processed, and Ms van Schalkwyk later informed her that her ex-husband had applied for the loan.

[199] In cross examination, a number of anomalies were highlighted to Ms Da Silva, which it is respectfully submitted goes to credibility. The main being her inability to testify satisfactorily to time frames when the incident occurred, that is whether it was October 2010 as alleged in her affidavit or October 2009 as her oral evidence states; whether the Eduloan application was typed and failure to explain if the amount of the loan was written in or typed. It is telling on the credibility of Mrs Da Silva that the Eduloan application mysteriously disappeared. Mrs Da Silva claims that she tried to get a copy of the application form, but was told by Eduloan that they do not retain the documents, which was wiped off the system and more so where an application had been dismissed, or not granted, no copy is kept on the system. Yet she would want this enquiry to accept that she requested a copy of the application form a year or two later after the incident. Mrs Da Silva's evidence is further contradictory in that she claims to have given her identity number to Ms van Schalkwyk verbally, who noted it on a piece of paper whilst in her oral evidence she testified that Ms van Schalkwyk retrieved her identity number from her file. Mrs Da Silva denies completing the application form and insinuates that Ms van Schalkwyk filled in the income and expenses sections which she in one breath says was close to correct and in another disavows this by stating that it was not her data. Mrs Da Silva's evidence is further contradictory on whether Ms van Schalkwyk phoned to do a credit check on her or simply secured an ITC computer printout. Mrs Da Silva's propensity to embark on a character assassination of Ms van Schalkwyk is demonstrated by the constant embellishment of her evidence. She initially claimed that Ms van Schalkwyk, in anger it must be added, asked her if she did not want her son to graduate, but later in her evidence added the profane word "f****ing" to this statement. The ability of Mrs Da Silva to be economical with the truth is further inherent in the fact that her evidence on what she intimated to her friend in Cape Town about the incident and the friend informing her that she, the friend, would attend at Eduloan in person to stop the processing of the application is contradicted in her affidavit of 17 April 2013, where she stated that the friend told her that she should phone Eduloan offices to ensure the loan is not processed.

[200] Notwithstanding these contradictions, the fact is that Mrs Da Silva filled in the form and provided the details regarding her income and expenses. The underlying reason the fact that application for the loan was always consensual between Mrs Da Silva and Ms van Schalkwyk, as friends. This was premised on the friendship between Ms van Schalkwyk and Mrs Da Silva and not motivated by purposes that would bring the administration of justice or the image of the magistracy into disrepute.

[201] The exhibits, L1 and L2, do not reflect that Mrs Da Silva asked Ms Jacobs not to proceed with the application. There is an email from Lee Jacobs dated 20 October 2020 at 11:31 am that provides Mrs Da Silva reasons why she could not process the application, namely that there was no physical address, no cell number and no marriage certificate, furthermore, her appointment date was 1 September 2011 and she had to be employed for at least six months to qualify, and the application and the ID had different surnames.

[202] It is important to note that Ms Jacobs' email contradicts Mrs Da Silva's testimony which says: "Ms van Schalkwyk almost immediately introduced an application form which had already been completed with all her (Mrs Da Silva's) details, including her income and alleged expenses." Unsurprisingly, Mrs Da Silva did not send Ms Lee Jacobs an email not to proceed. It was only after she had been officially informed that her application had not been successful and that she was unable to process it that Mrs Da Silva then did damage control in the V. Da Silva email dated 20 October at 4:11pm that she says: "Please confirm that you will not proceed with my application." She then referred Ms Jacobs to a telephonic conversation when Ms Jacobs informed her that she had deleted the application from the system. This is a blatant untruth. Ms Lee Jacobs called her out in the email dated 20 October 2010 at 4:21pm stating, "Good day, I did not (noted underlined) process your application. It is not uploaded on the system. I cannot upload incomplete applications, and yours was incomplete. Your application will not be considered unless you make a new application. Regards, Lee Jacobs"

[203] It is quite clear from the above that Lee Jacobs denied deleting Mrs Da Silva's application. It is clear that Ms Lee Jacobs made no reference to a telephone conversation. It is also evident that Ms Jacobs' email would have been differently worded, for example such a message would have read: "as per your telephone instruction, I did not proceed with the application." Most importantly, for one to delete something, one has had to upload it first and the application had never been uploaded. Mrs Da Silva has a tendency to use her three surnames interchangeably. A few pertinent illustrations of this are the Eduloan application in which she is Mrs Veronica Valerie Da Silva, for the transfer application to the Western Cape she is Veronica Valerie Crowie and she used the identity number of Mrs Veronica Valerie De Beer in the Eduloan application. One can only conclude that her purpose in these instances was to mislead and deceive. Mrs Da Silva is not Mrs De Beer anymore – she knowingly provided wrong information. She only requested a copy of the loan application "a year or two Later" which she did not receive. The only inference that can be drawn from that is that she had voluntarily applied for the Eduloan at the time. Ms Lee Jacobs is the only person who could give us the true position of what really transpired. She was, however, not called to testify, therefore, a negative inference must be drawn from it. If one looks at the balance of probabilities, one has to reject Mrs Da Silva's version which is riddled with lies and accept that she voluntarily applied at Eduloan, which explains the lack of a true copy of the application. It is important to note that if Mrs Duffy had not "triggered" her, she would not have complained.

[204] On the allegation that Ms van Schalkwyk would contact Mr Oberholzer to pen a letter stating that Mrs Da Silva had a three-year contract, Mr Oberholzer categorically denied this allegation in his evidence. Whilst he could recall something about Eduloan, the exact nature of which he could not recall, his evidence was clear that neither Mrs Da Silva nor Ms van Schalkwyk approached him about writing a letter. Mr Oberholzer made it clear that he would

not have done so, even considering the fact that Ms van Schalkwyk was the chief magistrate, as he would not, on her instructions, have acted fraudulently to his own detriment. What is telling on this charge is Mrs Da Silva's evidence that this complaint was "triggered' by Karen Daffy.

[205] As submitted at the conclusion of Charge 10, the evidence on charges 10 and 11 does not constitute misconduct of any kind to justify the allegations inherent in the charges. It is therefore respectfully reiterated that Ms van Schalkwyk be found not guilty on these charges.

CHARGE 9

[206] The allegation is that during 2009-2013 at or near Kempton Park, Ms van Schalkwyk instructed Veronica Da Silva to do her hair during office and/or official hours at the Kempton Park Court or at her house.

[207] According to Mrs Da Silva she attended an HIV, Tuberculosis Symposium and met Mr Ronnie Mnguni, an acting senior magistrate at Tembisa in a chance encounter, which triggered a memory of Ms van Schalkwyk. This memory was expounded in great detail in evidence as follows. During May and September 2009, Mr Mnguni told her that Ms van Schalkwyk wanted to know whether she could roll hair. When she said she could, he told her that Ms van Schalkwyk wanted her to do her hair as she needed to attend a fundraiser. Mr Mnguni then offered to take her to Ms van Schalkwyk's home and went as far as placing another magistrate in her court that morning. They drove to Morningside in Bedfordview where she did Ms van Schalkwyk's hair. She remembers Vincent, the surname of the person having evaded her, was present at Ms Van Schalkwyk's home as he was to take Ms van Schalkwyk to the function.

[208] Mrs Da Silva explained that having been raised as a coloured person, she knew how to do curly, frizzy hair and doing hair is a really big deal in the coloured community as it is all about getting the frizz out. She went on to give a detailed explanation on the process, explaining that it entails washing the hair, conditioning the hair when wet, rolling curlers into the wet hair from the front to the back and the sides and then drying the hair. As Ms van Schalkwyk's hair was quite long, the whole process took two hours and forty five minutes. Once the hair was dry the curlers have to be removed, the hair has to be styled which could take the process to three hours.

[209] Mrs Da Silva, as common in her evidence, was at pains to recall timeframes. In elaborating on the allegations in Count 9 she testified that either during the latter part of 2009 or 2010, Ms van Schalkwyk requested her to come to her home after work to groom her hair. She obliged and travelled from Kempton Park to Bedfordview. She was unsure of the time frame

Ms van Schalkwyk requested her to do her hair during court hours, but she did her hair two or three times a week. In 2011 she would take Ms van Schalkwyk home where she would do her hair as she did not have a car. Ms van Schalkwyk would at times come to her home in the mornings to have her hair done and they would arrive back at court at around ten or eleven in the morning. According to Mrs Da Silva, Ms van Schalkwyk at times had her daughter's car and she would travel to her house to have her hair done. Ms van Schalkwyk's car broke down in 2010 and she utilized Mr Tayob's car and had to be careful.

[210] Around mid-2011 to early 2012, Ms van Schalkwyk's son was involved in an accident and she did not do her hair during this time. On another occasion, Mrs Da Silva testified, her granddaughter had suffered some trauma, she instituted proceedings in the High Court in Cape Town and travelled to Cape Town every second week for her to be assessed. As a result of these proceedings, her granddaughter was placed in her care and came to live in Johannesburg. When her granddaughter lived with her, she did not have the flexibility of doing Ms van Schalkwyk's hair. The result of this inflexibility was that she was expected to do Ms van Schalkwyk's hair during the day. She tried to make excuses not to do so, but Ms van Schalkwyk did not take no for answer and be angered to the point of meting out some form of punishment and according to Mrs Da Silva she was scared to say no to her.

[211] According to Ms Da Silva, Ms van Schalkwyk returned from Cape Town during 2012 and arranged for Ms Shanaaz Mia (presently Judge Mia) to work at Kempton Park, to transport her. At that time Mrs Da Silva claims to have done Ms van Schalkwyk's hair at the office as she would come to work with her hair washed. She would curl Ms van Schalkwyk's hair in the office, dry her hair and then style it. This was for the duration of 2012 and 2013. At times Ms van Schalkwyk would wash her hair in the ladies' staff bathroom and with a mere three to four steps she would be in her office. This would happen twice a week. On her account Ms Mia or Ms Phillips may have been present when she did Ms van Schalkwyk's hair.

[212] Whilst she claims that she did not try to outsource the hair regime because Ms van Schalkwyk would be angry with her, she at the same time testified that she told her to have what is called a Brazilian done at Charlotte Weideman Salon at Midstream Estates and in fact took her there, possibly twice, as something was wrong with the gearbox of Ms van Schalkwyk's car. Notably, this witness, Charlotte Weideman, was not called. An adverse inference must and should be drawn.

[213] In cross examination, a number of anomalies, as the norm was in her evidence as a whole, was highlighted to Mrs Da Silva. In her affidavit dated 17 April 2013, she stated that soon after starting working at Kempton Park Court, Ms van Schalkwyk asked her to do her hair. The implication of the statement is that this would have commenced in September 2009. This is stark contrast to her evidence that it is only when she had the chance encounter with Mr Mnguni that it triggered her memory that she actually started blowing Ms van Schalkwyk's hair at Tembisa and by implication not Kempton Park. It would therefore have been at

Tembisa Court where Mr Mnguni removed her from court to do Ms van Schalkwyk's hair and not Kempton Park. This is a material contradiction which impacts heavily on her credibility as a witness. Notwithstanding this glaring contradiction in her evidence where her complaint which is on oath, she maintains that she did not err in this regard.

[214] Mrs Da Silva's court book should reflect the date and time she left, yet this was never presented as evidence. The absence of the court book which would serve as corroboration for her version must be questioned. The person referred to as Vincent by Mrs Da Silva would be Mr Vincent Ratshibvumo who was acting in the Regional Court at the time. It is highly improbable that he would be at Ms van Schalkwyk's house on a court day at midday when he had duties to attend to in the regional court and on her account be dressed for the occasion. It is further improbable because the JOASA function was only scheduled to commence at 20h00pm. To exacerbate the contradictions in her evidence, she testified during cross-examination that Mr Ratshibvumo was at Ms van Schalkwyk's house when she arrived and then changed her version to say that he arrived whilst she was there.

[215] Ms Madeline Nel testified that hair was never washed or seen to be washed at the court. Ms Sunette Marx, a magistrate, deposed to a statement which reflects that Ms van Schalkwyk and Mrs Da Silva had a deep-founded relationship and Mrs Da Silva would do Ms van Schalkwyk's hair over weekends at times. Ms Annamarie Karen van Vuuren, called by Ms van Schalkwyk testified that she is a qualified hairdresser, who had a standing appointment once a week with Ms van Schalkwyk. On her evidence it took 45 minutes to do Ms van Schalkwyk's hair and not three hours as Mrs Da Silva testified. The washing of the hair took place only once a week. Mrs Da Silva's evidence is so wrought with untruths that she omitted to mention that Ms van Schalkwyk went to Joy, her friend's house in Pretoria, and that she washed Ms van Schalkwyk's hair twice at Joy's house. The trend of Mrs Da Silva embellishing her evidence continues on this count where she testified that Ms van Schalkwyk would say, "Do my fucking hair," whilst this was never mentioned in any of her there three statements.

[216] An inexplicable aspect of Mrs Da Silva's evidence is that on her account she did Ms van Schalkwyk's hair consensually but 99.9% of the time she felt compelled to do it. This state of affairs would have carried on for four and a half years, with her too scared to say no. This is a perfect example of a contradiction in terms. The death knell to Mrs Da Silva's evidence and the undue influence exerted on her by Ms Duffy was clearly demonstrated under cross examination on this charge. Mrs Da Silva was asked in particular why it took her four years and five months, or close on five years to report this alleged behavior of Ms van Schalkwyk. Experience tells that a witness who answers a question by introducing the answer with the word "Truthfully" should have her evidence approached with caution. In true style Mrs Da Silva answered this question as follows, to demonstrate the point, "Truthfully, I did not see that reporting this was even an option because I was too scared to do so. I thought I would get a permanent post and that I would be in a different position and maybe go to another

court. I never... I was scared, I would never have come out myself if Ms Duffy had not approached me or informed me or suggested to me that I could speak freely".

[217] It is respectfully submitted that none of the evidence of Mrs Da Silva on this count could possibly be accepted as true insofar as it is contradicted by cogent evidence presented by Ms van Schalkwyk, and that a verdict of not guilty should follow on this charge.

CHARGE 12

[218] The allegation on this charge is that Ms van Schalkwyk during 2011 removed Mrs Da Silva from court for approximately five weeks to write a report on her behalf as the Rapporteur who visited Mozambique as representative of the International Association Judges (IAJ), regarding Mozambique's application for membership of the IAJ.

[219] The evidence of Mrs Da Silva on this charge is premised predominantly on the e-mails which form part of the evidence that has been sought to be ruled inadmissible. In fact, Mrs Da Silva's evidence on this charge is based on a reading of the said e-mails. According to Mrs Da Silva, Ms van Schalkwyk was appointed in November 2010 as a Rapporteur by the IAJ to write a report on whether member status should be bestowed on Mozambique. According to Mrs Da Silva, Ms van Schalkwyk wrote an email on 18 February 2011 at 14:11 in which she was involved both in the drafting and translation, which was addressed to Vitalina Papadakis whom she thinks, was the Second Rapporteur. She used Google Translator to translate from Portuguese to English. Ms van Schalkwyk also sent an email to a Mr Matos. Ms van Schalkwyk prepared the email that she dictated to Mrs Da Silva in broad scope. An email was further forwarded to Mr Papadakis and Ms Collis, as Ms Collis accompanied Ms van Schalkwyk on her visit to Mozambique. Mrs Da Silva typed the email and dispatched it. The email requested Mr Papadakis to make arrangements for Ms van Schalkwyk to meet some of the role players. According to Mrs Da Silva, Ms van Schalkwyk would tell her what the correspondence should entail and she would type it and dispatch the email. The emails on record were the only emails that could be retrieved and essentially relate to the arrangements for Ms van Schalkwyk's visit to Mozambique.

[220] At the outset Mrs Da Silva testified that her involvement was limited, in that it would be an hour or so where she was needed. She did perform her court duties at the time and would be called intermittently to Ms van Schalkwyk's office to attend to the correspondence. In this process according to Mrs Da Silva there was never regard for the legal parties in the process, but, as she was allocated to the family court, there was room for lots of flexibility. However, she testified that her court work suffered as she was at times told to close her court or postpone matters.

[221] Ms van Schalkwyk phoned Mr Dario Dosio to furnish a sample copy of a fact-finding report. Mr Dosio obliged and sent a copy of the Algeria report. Ms van Schalkwyk had concluded her first trip to Mozambique and made a summary of what was concluded pursuant to this trip. Following Ms van Schalkwyk's first visit, she informed Mr Matos what transpired and requested him to accompany her on a second visit. She requested him to fill in the gaps in the report regarding the principles of the Constitution and the international instruments ratified by Mozambique. Ms van Schalkwyk further indicated to Mr Matos that she was not sure whether she would recommend Mozambique's acceptance as a member. Mr Matos sent Ms van Schalkwyk's documents to her in Portuguese to assist her with the drafting of the report. She requested the Mozambican organisation to translate those documents.

[222] According to Mrs Da Silva Mr Holzen also assisted with the correspondence and the first draft. Ms van Schalkwyk wrote an email to Mr Papadakis, the second rapporteur, informing him that she was returning to Mozambique for a follow up meeting. Ms van Schalkwyk would inform Mrs Da Silva what to do and include the correspondence. Mrs Da Silva could not recall whether she had read the draft report to Ms van Schalkwyk or if it was printed. At this stage, there was grave urgency as a report had to be finalized by the end of May 2011. On 26 April 2011 at 10:01, she received an email that she forwarded to Judge Musi. According to Ms Da Silva, an email was forwarded on 4 May 2011 at 08:59 to Mr Papadakis in which she was involved, for her to arrange a second visit. At 09:14 on 4 May 2011, an email was sent to Mr Matos requesting him to do some additional research in respect of the administrative, economic, political and judicial circumstances in Mozambique. According to Mrs Da Silva she had not personally been to Mozambique.

[223] Mrs Da Silva's evidence is that during April 2011 to May 2011 she was seated in Ms van Schalkwyk's office, except at times where she had other commitments or important matters that she would have to attend to quickly. During this time, she was not allocated a court. When Ms van Schalkwyk had people coming to see her in her office, Mrs Da Silva would forward the report to her office and continue working on it. Later she testified that she recalls sitting in her office full-time because she had many conversations with people about it.

[224] According to Mrs Da Silva, she Googled and downloaded an Open Society Report and worked from it. She also Googled and used a United Nations report. She copied the Amnesty International Mozambique document and the annual Mozambique report, dated 2010 from which she copied and pasted. Mrs Da Silva testified that she was required to work into the late hours and if there was an urgent issue. She never went home to sleep. On 20 May 2011, at 10:32, Ms van Schalkwyk sent all the final documents to Ms Phillips to save and on the same day at 16:08, the final report was sent to Mr Matos. Ms van Schalkwyk according to Mrs Da Silva told her what to type. Mr Matos was requested to make a recommendation and amendments with regard to whether Mozambique had to be admitted as an ordinary or

extraordinary member. The final report was forwarded on 24 May 2011 at 14:16. Ms van Schalkwyk's secretary, Ms Phillips, got the electronic signature from Mr Matos.

[225] In cross examination, Mrs Da Silva conceded that Ms van Schalkwyk rose through the ranks of JOASA and is a foot soldier of the organization, that Mrs Da Silva was not a member of JOASA, that Ms van Schalkwyk was quite knowledgeable about the workings of JOASA and that Mrs Da Silva was not knowledgeable about the workings of JOASA. On the charge itself, the following emerged from Mrs Da Silva's evidence. Ms van Schalkwyk gave her a piece of paper with a couple of things written on it, which was the report. In addition, she was given two previous reports about two other countries. With this information at hand she was instructed to write the report from time to time. They would chat about the report as she did not know what Ms van Schalkwyk meant at certain places in the report. Mrs Da Silva conceded that she would be told from time to time what to write in the report. In addition, when Ms van Schalkwyk met with the Minister of Justice, she would brief her. On whether or not she knew what the issues were so as to write the report, Mrs Da Silva testified that she knew what the requirements were as she wrote about the geographical information and the laws of Mozambique and its Constitution. She would enquire from Ms van Schalkwyk who she met in Mozambique and be briefed accordingly on the discussions that took place. Mrs Da Silva did not want to concede that she was merely the typist of the report, maintaining that she typed some of the documents but drafted the report. The guidelines for the drafting of the report were received from Ms van Schalkwyk. She was unaware of the fact that Ms van Schalkwyk wrote two membership reports for Mozambique and one for Lesotho and she was not involved in those reports. She in fact never visited Mozambique, accompanied Ms van Schalkwyk there and never met the President of the Mozambican Judicial Officers Association or the Council and local judges. Premised on this Mrs Da Silva was asked how she could draft the report without having accompanied Ms Schalkwyk or having met the relevant parties and the nub of her answer was that she had a discussion with Ms van Schalkwyk and asked her about the Minister's response and based on the feedback she would put it in the report. She disputed the contention that Ms van Schalkwyk gave her a handwritten draft report with all the information and data.

[226] She conceded that Amnesty International reports on systems in Mozambique and that she did not compile or draft that information but merely printed it off the internet and placed it in the report. Mrs Da Silva further conceded that with Ms van Schalkwyk meeting with the role players on two occasions when she went to Mozambique, some of the feedback information found its way into the report. She could not confirm with certainty that Ms van Schalkwyk met with non-governmental organisations, including the Mozambican League of Human Rights Association and with the prison authorities. Mrs Da Silva was loathe to concede that Ms van Schalkwyk compiled and wrote her findings following visits to these sources. She denied that she merely typed the report as Ms van Schalkwyk dictated to her and that she was seeking to take credit for the work done.

[227] Mrs Da Silva remained adamant that she sat in Ms van Schalkwyk's office permanently in May and April 2011, with a rider that she either sat in Ms van Schalkwyk's office or her own office. Mrs Da Silva was confronted with her statistics for April 2011, which signature on the document she confirmed as hers, but maintained on the contents that Mr Holzen created it and she signed it without checking it. Mrs Da Silva then sought to challenge the authenticity of the document by maintaining that it was a copy and she did not know if the contents were legitimate. To add insult to Mrs Da Silva's attempts at shying from the statistics, she attempted to shy from her evidence that it was her signature on the statistics to saying that it had been superimposed on the document. When shown that her hours for April and May was 111 and 119 hours, respectively. She stated that she signed without looking as she was under pressure. When confronted with the reality that the court hours contradicted her evidence that she stayed permanently in Ms van Schalkwyk's office in April and May 2011, she simply stated that she stood by her version, adding that she "predominantly spent the time in her (Ms van Schalkwyk's) office."

[228] Notably to demonstrate the inability of Mrs Da Silva to testify satisfactorily to timeframes, Ms van Schalkwyk was not appointed as a rapporteur to visit Mozambique in 2011 in respect of Mozambique's application to be admitted to the IAJ as per the charge sheet premised on her statement and evidence, but in 2010 at the IAJ's meeting in Dakar, held from 5-10 December 2010.

[229] Mrs Da Silva professes to have single handedly written the Mozambican Report at first, but testified that Mr Vitalina Papadakis was the second rapporteur. Firstly, Vitalina Papadakis is a woman and she was the President of the Mozambican Judicial Officer's Association. In fact, Ms van Schalkwyk was the first rapporteur and Mr Matos, a male person, was the second rapporteur. If Mrs Da Silva proclaims to have drafted the report, she would at the very least have understood the basic role players. Mrs Da Silva was not a JOASA member and had no inkling of the workings of the Association or the workings of the IAJ. Mrs Da Silva conceded that Ms van Schalkwyk had far greater knowledge than herself about JOASA issues and that it is an honour to be approached by the IAJ to be appointed to write prospective membership reports. Mrs Da Silva had never been to Mozambique and consequently would not be *au fait* with the finer details of the content of the meetings with various role players in Mozambique. Any knowledge pertaining to what happened in Mozambique, was peculiar only to the person/s who visited and interviewed the role players, who included the President of the Constitutional Council, the President and Deputy President of the Supreme Court, local judges in Maputo, the Attorney General of the Republic, the Director of the Centre De Formilao Juridici and Iudiciarta (CFJI), the Deputy Minister of Justice, Associacao Mocambicano Das Mulleres De Carreiro Juridaca (AMMC), the Association of Women Lawyers and the Mozambican Head for Human Rights. Ms van Schalkwyk travelled to Mozambique on a second occasion during 15-17 May 2011 where she met the Reclusion

Deputy Minister of Justice, the Centre De Reclusao Feminiso De Ndwalela – a prison situated in Maputo and the Association of Mozambican Judges.

[230] The specifics related to these meetings are listed in the Mozambican Report under headings relevant to the aforementioned sources. It is improbable on Mrs Da Silva's version that what is contained in a written report she claims to be the author of that the comprehensive detail could have emanated from Ms van Schalkwyk giving her "a piece of paper with things written on it' or in her words 'chats' about her visits to Mozambique. The specifics of what transpired at these meetings could not be researched on the internet. It is underscored that the information is *sui generis*; retrieved, written, researched and reported on by Ms van Schalkwyk. To demonstrate this submission is apposite to consider the following by way of analogy from Ms van Schalkwyk's meeting with the Association of Mozambican Judges, as covered in the report; Background, Goals and objectives of the Association, Financial stability, Activities, The Rapporteurs meeting with members of the Association in March and May 2011.

[231] Further, Mrs Da Silva would want the enquiry to accept that role players, whom she had never met provided Ms van Schalkwyk with information in respect of the Mozambican Legal System, the governing system of Mozambique, the structure of the courts, the Constitutional council (the composition, requirements for appointment and gender balances, judicial courts, supreme courts, provincial courts, district courts, administrative courts and other courts, which was written on a piece of paper.

[232] The report demonstrates that Ms van Schalkwyk clearly interviewed, discussed and engaged with the sources on various topics, including the independence and the accountability of the judiciary, the appointment and dismissal of judges, and professional judges and the election of judges. In addition, discussions centred around the duties, qualifications, training and remuneration of judges.

[233] The ineluctable deduction on the probabilities inherent in Mrs Da Silva's evidence on its own is that a handwritten draft report with all the relevant information was handed to her by Ms van Schalkwyk. The Mozambican Report was simply not Mrs Da Silva's intellectual property, drafted by her as she claims. At most, she typed the report and assisted with the translation from Portuguese to English and vice versa. The report is Ms van Schalkwyk's intellectual property which was expounded upon with excerpts googled and copied into the document by Ms Da Silva.

[234] In the final analysis on this charge, the question is not so much who drafted the report as it is whether Mrs Da Silva's role in typing the report impacted on case flow and case management or as the Commission charges whether the constitutional rights of the accused had been infringed. Mrs Da Silva's statistics is a classic case of *res ipsa loquitur* and speaks

for itself. Mrs Da Silva's evidence not only on this charge but as demonstrated in other charges paints herself as the victim of bullying by Ms van Schalkwyk, to whom she could not say no. In this charge the victim card is played further by Mrs Da Silva insinuating that Mr Holzen would have drafted false/fraudulent statistics for April and May 2011 and abetted Ms van Schalkwyk in placing pressure on Mrs Da Silva to sign the factually incorrect statistics form and later even more seriously alleging that her signature was superimposed on the statistics forms. When the originals were located at Kempton Park and shown to her, she had no option but to admit that it was, indeed, her signature. Mrs Da Silva is a highly qualified legal practitioner with a part LLM, who must be acutely aware that appending your signature to a document implicates that you understand the contents which are certified as correct. On her own account she is guilty of serious misconduct.

[235] Mr Holzen in fact testified that he did not generate Mrs Da Silva's statistics as alleged and had no reason to commit fraud on her part or implicate himself in fraud for that matter. Mr Holzen explained that on examining Mrs Da Silva's statistics, specific time was apportioned to domestic violence matters, maintenance matters, criminal matters and research matters. He would not have known the specifics in respect of her time management. Mrs Da Silva's propensity to falsely implicate Ms van Schalkwyk in allegations which are not borne out by independently verifiable facts is clearly demonstrated on this score. It is further telling that she would drag Mr Holzen into the fray with scurrilous assertions against him.

[236] To conclude on the statistics debate, Mrs Da Silva's signed statistics emphatically shows that she recorded a total of 111.15 hours for April and 119.50 hours for May 2011. Statistically in April 2011 that tallies an average of 6.175 hours and May 5.975 hours. The average court hours far exceed the judicial norm required of magistrates. Logically, if Mrs Da Silva spent all this time in Court in April and May 2011, there are not enough court hours in the day to have been sitting in Ms van Schalkwyk's office on a permanent basis drafting the Mozambique Report.

[237] It is accordingly respectfully submitted that the evidence on this charge, on a balance of probabilities, points to the innocence of Ms Schalkwyk on the allegations inherent in the charge. It is therefore submitted that Ms van Schalkwyk be found not guilty on this charge.

CHARGE 14

[238] The allegation is that during June 2011, Ms van Schalkwyk removed Mrs Da Silva from court to attend to JOASA matters and to phone magistrates to secure votes for a Special General Meeting, and to follow up with phone calls and emails.

[239] On this charge Mrs Da Silva testified that it was difficult for her to recall which court was allocated to her, as during 2011 she could have been assigned to the domestic violence or the family court. She testified that as an acting magistrate she did very little of work because she was placed in a court where there was always an additional magistrate, Ms Armstrong, during the first half of 2011. She in fact was given the title of relief magistrate which freed her to do work for Ms van Schalkwyk. In the same breath she suggested that Ms van Schalkwyk was a very controlling person.

[240] As she was not a JOASA member, she tried to become a member, but acting appointees did not qualify for membership. It was her desire to fight for the rights of acting magistrates. Ms van Schalkwyk was the ex-president of JOASA but, at that stage, she was the chairperson of the funding committee. A Congolese delegation of judges was going to visit South Africa and JOASA hosted some of the events. Mrs Da Silva claims that she phoned guesthouses for accommodation and associated costs in April 2011. Notably, if we cast our minds back, April 2011 was also the month Mrs Da Silva on Count 12 claims to have been particularly busy with the Mozambique Report. Magistrates were approached for donations to effect payment of meals for the visiting Congolese delegation. Mr Mahlangu took the Congolese delegation to a restaurant at News Café and the guests refused to pay. They left Mr Mahlangu with the bill of R3500 to pay. Ms van Schalkwyk approached the NEC to reimburse Mr Mahlangu and after first undertaking to do so, they reneged. This resulted in a huge battle between Ms van Schalkwyk and various members of the NEC which led to a paper war with drafting and sending of emails.

[241] On 26 May 2011, the National Secretary asserted that they would not pay. Ms van Schalkwyk lodged a complaint regarding the non-repayment of Mr Mahlangu's monies, JOASA's refusal to consider an application to the Mali Conference, problems related to the treasurer of JOASA and in particular the treasurer's refusal to comply with an NEC instruction. Ms van Schalkwyk was processing a vote of no confidence in the NEC treasurer and the President. According to Mrs Da Silva whilst this would go on for eight hours a day, there were literally hundreds of emails to different people and hundreds of telephone calls. She was in Ms van Schalkwyk's office and, whilst speaking to various persons, she would draft and send the emails.

[242] To give effect to a vote of no confidence in the President and Treasurer, a special general meeting had to be called and to do that Ms van Schalkwyk had to secure a hundred votes from the members. According to Mrs Da Silva she had to get hold of the magistrates on the lines but she did not speak to them as she did not know much about what was happening in JOASA. She would hand the phone to Ms van Schalkwyk who would speak to the person and persuade them to vote and return their signature. A form was drafted that gave reasons for calling the special general meeting, including the issue of Salaries, the Loss of Identity of JOASA and a Possible vote of no confidence. Once Ms van Schalkwyk had spoken to the person, Mrs Da Silva would follow up with an email. All of this happened in June. Ms van

Schalkwyk was determined to get the votes which she finally received, totaling 107 votes. She drafted and collated the votes and forwarded these to JOASA secretary requesting a special general meeting, which was done on 9 June 2011. Notably on the disputed emails, many were sent after hours. According to Mrs Da Silva she would sit at her desk at night and Ms van Schalkwyk would dictate what to write. The President of JOASA disputed the validity of the signatures and the process started all over again.

[243] The second request for the special general meeting was sent later in June 2011. The President agreed to the holding of a special general meeting and he set a date for such meeting, being 12 August 2011. Ms van Schalkwyk instructed Maodi Attorneys to write a letter to the JOASA President to refrain from influencing members to stop voting in the process and to convene the special annual general meeting. Ms van Schalkwyk's son was involved in a motor vehicle accident on 28 June 2011, she left for Cape Town and was on leave of absence from 29 June 2011 until she returned in May 2012.

[244] In cross examination Mrs Da Silva conceded that she is not a member of JOASA and did not understand the internal affairs of the organization. Mrs Da Silva accordingly could not have drafted the emails to members of JOASA if she did not understand how it operated, its dealings, activities and functions. She could not recall if she asked Ms van Schalkwyk to place the plight of temporary magistrates on the JOASA agenda notwithstanding her evidence creating the impression that she wanted to become a JOASA member to fight for the plight/working conditions of temporary magistrates.

[245] Mrs Da Silva conceded that Ms van Schalkwyk told her what to write and how to reply to emails and in fact conceded that she would type the content of the emails, with Ms van Schalkwyk seated next to her and at times she would be told telephonically. The emails were forwarded as Ms van Schalkwyk's emails and not Ms Da Silva's, which she conceded. According to Ms Da Silva, there were certain times when she sat for days on end with the emails. Mrs Da Silva admitted that she was in court whilst busy with the SGM which is contradictory. In particular, Mrs Da Silva testified that she was taken out of court to attend to the Special General Meetings, including the issues, the disputes, the correspondence and arranging of the SGM. The evidence, however, demonstrated that the emails were not all sent during court hours.

[246] Charge 14 is very specific with regard to time frames, in that pegs the period of the alleged misconduct as being "during June 2011". It must be emphasized that a misconduct hearing falls within the sphere of a civil law application and, therefore, the date of alleged misconduct must be specified unlike the criminal law where a timeframe of three months prior to and three months after the date, may suffice. For purposes of this charge, submissions will accordingly be constrained to June 2011.

[247] Mrs Da Silva according to the charge sheet accordingly would have pegged the date at June 2011 when she was taken out of court to phone magistrates to gain support for a Special General Meeting and to follow up with the said magistrates by way of phone calls. Mrs Da Silva contradicted this charge in her evidence in chief by testifying that she had to get hold of the magistrates on the line but she did not speak to them because she did not know much about the workings of JOASA. She would hand Ms van Schalkwyk the phone who would speak to the person and persuade them to vote and to return their signature. This is farfetched.

[248] On the allegation that Mrs Da Silva was taken out of court, she contradicted this in her evidence when she testified that when she was attending to the issues around the Special General Meeting, she still had court work and would have to juggle it or adjourn it or would go to court and then at some point be instructed to postpone all the matters. Mrs Da Silva's recollection of events leaves much to be desired. Later in her evidence she creates a different impression that at certain times she would be seated in Ms van Schalkwyk's office for days.

[249] Emails forwarded during June 2011, demonstrate that they were forwarded after hours, some early in the morning, late in the afternoon and even late at night. In particular on 6 June 2011 emails were sent at 18:55 PM, 19:11 PM and 18:48 PM. Court and case-flow management could not have been affected at these hours in terms of regulation 41 of Act 19 of 1993. The more probable version of Mrs Da Silva's evidence emanates from her evidence that she would sit at her desk late at night and Ms van Schalkwyk would dictate to her. Being friends that was more likely.

[250] Mrs Da Silva submitted statistics for June 2011 recording 120.25 hours, of which 56.4 hours were dedicated to maintenance matters, 59.15 hours to domestic violence matters and 4.30 hours on research. As with her April and May statistics she signed the statistics and certified them as correct. The narrative of being pressured by Mr Holzen to sign the statistics persists on this charge. The statistics submitted by Mrs Da Silva for June 2011 must be accepted as correct, notwithstanding her contradictory evidence to the contrary, which should be rejected as false. On that basis, it becomes clear that Mrs Da Silva in fact sat longer hours in court than required as a norm. This logically begs the questions how court and case flow management was affected during June 2011 on the allegations set out in Count 14.

[251] It is accordingly respectfully submitted that Ms van Schalkwyk be found not guilty on this charge.

CHARGE 16

[252] The allegation is that during December 2012 to April 2013, Ms van Schalkwyk removed Mrs Da Silva from court to arrange an IAJ conference and to take her to meetings pertaining to the arrangement of the IAJ conference.

[253] On this charge Mrs Da Silva testified that during December 2012 she was utilized in the family section and paired with another magistrate whilst also doing part-heard matters in the criminal court. She was, however, utilized primarily in the maintenance and domestic violence section. During the early part of December 2012 Ms van Schalkwyk informed her that she would be taken out of court. She was then requested to write a business plan and to do a draft budget, which she forwarded to Mr Dosio as a member of the local planning committee of the IAJ.

[254] According to Mrs Da Silva when she worked at Law, Race and Gender, she was exposed to organizing conferences and this is how she knew how to draft budgets. A local organizing committee was established comprising mostly of JOASA members and she was seconded by Ms van Schalkwyk as the administrator. Ms Collis and herself phoned a number of places, including hotels to obtain quotes. Ms Collis also phoned to get quotes from various hotels. The travel agency Mohad's, which is Mr Moloi's travel agency, also furnished a quote. The conference catered for 120 people which was to be held in the Western Cape. She sent out various letters to mining companies, ACSA and Emperor's Casino since it was also her duty to source funds from the companies. Funding requests were forwarded to the Director General of Tourism, Jutas, Lexus Nexus, Patrice Motsepe's African Rainbow Minerals Company, Goldfield South Africa, Harmony Mines, Anglo-Gold Ashanti Cyril Ramaphosa's company, Taswell Papier, Mr Tayob and Edward Nathan Sonnenburg. An email was sent to the mayor of Cape Town, Patricia de Lilie, requesting her to host and contribute towards a dinner to be held on Robben Island, at the request of Mr Dosio. The job entailed phoning the relevant person, obtaining all the facts, phone numbers and email addresses. Mrs Da Silva testified it was a cumbersome process.

[255] She had to compile progress reports and explain what action had been taken, drafted a letter to the Chief Justice to do a keynote address at the opening banquet. She had to write to Dr Dlamini-Zuma requesting her to be the keynote speaker at one of the planned functions. She prepared the agenda for a meeting to be held on the 13 December at a hotel in Bedfordview and at that meeting it was decided that she had to do research for the names of mines and mineral resource companies, namely Sasol Ltd, Exoro Resources and Monkis Mining. Mr Zeka, of JOASA, provided names and details and she had to get the other particulars. She had to arrange coaches or cars to transport the delegates from the airport to the hotel and on their excursions. She also had to seek the details of VIP protection services. Someone else was tasked to get ten delegates from the Western Cape.

[256] She testified that she sat in Ms van Schalkwyk's office and forwarded the emails even when she was in her office from 14 December and whilst Ms van Schalkwyk was on leave until 18

January 2013, she sat in Ms van Schalkwyk's office and dealt with her correspondence. Mrs Da Silva took leave only between Christmas and New Year, as acting magistrates are not remunerated when taking leave.

[257] According to Mrs Da Silva, Ms van Schalkwyk was very anxious about the lack of funding for the IAJ Conference, with the resultant effect that enormous pressure was placed on her to pursue the request for funding letters aggressively. None of the emails were written by Ms van Schalkwyk, and none of the correspondence had been drafted by her.

[258] Mrs Da Silva testified that on her judicial MC15 returns she wrote 'research' for the work she did in Ms van Schalkwyk's office.

[259] In cross examination, the following was elicited. The hosting of the IAJ conference by JOASA was going to be a huge honour for JOASA and the RSA, Ms van Schalkwyk was elected at the AGM of JOASA to be the Chairperson of the local organizing committee, which consisted of esteemed ex-presidents, chairpersons and ex-treasurers, that Mrs Da Silva availed herself for the position of administrator, that meetings were initially attended at the Bedfordview during court hours but later changed to 16:30 or in the evenings, that she did not think it would be a colossal task and that just emails would be sent out and calls made. That Mrs Da Silva was not the only person who worked on arranging the conference but included the likes of now Judge President Cagney Musi, Dario Dosio, Xanti Zeka, Vincent Ratshbvumo, Colleen Collis and Ms van Schalkwyk, who all kept providing input. None of the facilitators of the meeting ever complained four years later about their input and work on the conference. Mrs Da Silva was never forced to assist.

[260] It was pointed out to Mrs Da Silva, that in her affidavit dated 17 April 2013, she stated that at the beginning of December 2012, she was informed by Ms van Schalkwyk that she would be taken out of court for months and that she was instructed to write several letters, which she conceded. Yet she testified on 3 October 2018 that in December 2012 she was still in the family section and remembers that she had part-heards in the family court but she was primarily in the domestic violence section and the maintenance, which contradicts her statement.

[261] As with the two previous charges, the improbability of Mrs Da Silva's evidence becomes clear. As a contract magistrate, she is not entitled to any paid leave. Notwithstanding this she travelled to the Western Cape "on leave" from 27 to 31 December 2012, and was paid for these days. Ironically her statistics, however, end on 20 December 2012. Mrs Da Silva recorded a total of 79.15 hours for a period of 16 days for December 2012. Her average court hours were close on five hours. Mrs Da Silva's conduct once again constituted fraud, to the detriment of the DoJ&CD. When confronted with this fraud, she claimed that Ms van Schalkwyk stated that this set-off against the fact that she worked so hard. This was a poor

attempt on the part of Mrs Da Silva to cast aspersions on Ms van Schalkwyk. However, a perusal of her salary advices, demonstrates a tendency to book off work against remuneration. This is demonstrated by the fact that between 27 to 29 May 2013 and 31 May to 7 June 2013, whilst at Mr Jonker's office, she was booked off against remuneration. The undue remuneration for that period was deducted from her salary in July 2013 when her attention was drawn to this fact.

[262] The evidence further demonstrates that Mrs Da Silva was untruthful about her MC51 statistics. Notwithstanding her evidence that she was cooped up for many months in Ms van Schalkwyk's office on a near 24/7 basis, doing either JOASA work, personal chores, IAJ or JOASA work her January 2013 statistics indicate hours totalling 147.2 hours, 53.53 hours for family matters, 19 hours for civil and 64.30 hours for criminal matters, with other hours reflected as 10 hours. Mrs Da Silva signed those statistics. It would therefore be nigh impossible for Mrs Da Silva to have been busy only with the IAJ conference arrangements for the two months she claims. Mrs Da Silva cannot blow hot and cold on this major contradiction, she was either in court or in Ms van Schalkwyk's office. If her evidence is accepted that she was in Ms Schalkwyk's office, she is by implication guilty of misconduct for furnishing false statistics. If it is accepted that she was in fact in Court, then by implication the allegation that case flow management was affected must fall away. Mrs Da Silva testified that she was in fact utilized as a relief magistrate, with another magistrate assigned with her and on this basis too, there could be no suggestion of an impact on case flow management and an impact on the Constitutional rights of accused and litigants.

[263] In the final analysis, Mrs Da Silva's assistance with the planning of the IAJ conference as part of a local organizing committee involved research, was aimed at advancing the interests of the magistracy, to secure international relationships and to provide an international platform to discuss the independence of the judiciary and peer training.

[264] It is accordingly respectfully submitted that the evidence advanced in support of this charge falls far below the threshold of proving any misconduct on the part of Ms van Schalkwyk and that she should be found not guilty on this charge.

CHARGE 23

[265] The allegation is that during the period of 2009 to 31 May 2013 Ms van Schalkwyk asked Mrs Da Silva to pay amounts for the rental of her apartment directly to her landlord, a Mrs C Da Silva.

[266] Mrs Da Silva testified about payments she made on behalf of Ms van Schalkwyk. A screen shot of the beneficiary was shown with a payment history. Three payments were made, 01 October 2012, for sum of R2500; 2 April 2013, for the sum of R2500 and 4 March 2013, for R2500. The payments made are common cause, as friendship knows no boundaries. Mrs Da Silva assisted Ms van Schalkwyk as a friend by offering to pay Mrs Collette Da Silva, the landlord directly. That is where the matter should end. It would be a sad day when friendships and interactions and arrangements amongst friends would constitute misconduct.

[267] It is accordingly submitted that there is no basis for the charge and that Ms van Schalkwyk should be found not guilty on this charge.

CONCLUDING REMARKS

[268] These heads of argument have sought to provide an overview of the evidence relevant to the charges as succinctly as possible, without overzealously rehashing all the evidence. In concluding, the credibility of the evidence of the Commissions witnesses when juxtaposed against the credibility of the witnesses of Ms Van Schalkwyk and the probabilities and improbabilities inherent in the evidence, is addressed as an overarching conclusion.

[269] As stated *supra*, the genesis of the charges is the JOASA industrial action of 2013 and at more or less the same time period, the quagmire with Ms Duffy and her alliance with Mr Jonker; and the subsequent entering into the fray of Ms Da Silva. At the heart of all of this lies a sad reality, begging serious questions on the credibility of these judicial officers and equally so the credibility of the procedure and processes adopted and followed by the Commission in bringing the twenty four (24) charges before this enquiry.

[270] It is respectfully submitted that the charges demonstrate a concerted effort to target Ms Van Schalkwyk in a manner which was both procedurally and substantively unfair, whilst the the disciplinary procedure is not applied uniformly to the body of magistrates over whom the Commission has oversight authority. The witch-hunt narrative sketched in these heads of argument is counter the salutary objectives of the Commission contained in the Magistrates Act 90 of 1993, on the correct manner of dealing with alleged misconduct. I repeat for the sake of convenience the objectives of the Commission:

"Objects of commission shall be –

To ensure that the appointment, promotion, transfer, discharge, or disciplinary steps against, judicial officers in the lower courts take place without favour or prejudice, and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly."

[271] The evidence of Mr Dreyer van Merwe on his role as a magistrate and Secretary of JOASA, demonstrated that nothing was amiss with the manner in which Ms Van Schalkwyk attended to not only to her office and the business of JOASA and the arrangement of International Conferences. What is particularly telling insofar as Mr van Der Merwe's evidence is concerned is Mr van Greunen's intimation that Mr van Der Merwe should have been given an A+ Merit award for all his hard work in arranging international conferences and his work for JOASA. There was accordingly no justification to proffer charges against Ms van Schalkwyk that she had essentially brought the administration of justice into disrepute and damaged the title of magistrate.

[272] Mr Barnard's indication that the Commission has not charged magistrates who find themselves confronted with debt and civil processes, whilst Ms van Schalkwyk was pertinently burdened with charges of such a nature, makes a mockery of the salutary objects of the commission in dealing with magistrates on allegations of misconduct uniformly and without favour or prejudice. By way of analogy, at the heart of these objectives is the very oath of office germane to all judicial officers in the Republic of South Africa, to apply the law without fear, favour or prejudice, which is a Constitutional imperative. Mr van Greunen's evidence in this regard is once again telling, the investigators had recommended to the Commission that no charges be brought in this regard. The reason for the drafter of the charges to include the charges accordingly serious questions about the motives of the Commission.

[273] Mrs Da Silva, it is submitted, could not have made a favourable impression on the presiding officer, when it is considered that he had to remonstrate with her on a number of issues where she was evasive and sought to avoid questions when the pinch of the shoe became too much. On the whole, Mrs Da Silva, it is submitted was an extremely poor witness, motivated by an innate intention to see the downfall of Ms Van Schalkwyk, for her own personal gain and advancement in the magistracy. Mrs Da Silva's clandestine permanent appointment with an indulgence of a transfer to the Western Cape contrary to the Commissions own policy and with an amassed body of serious complaints, which have mysteriously fallen by the wayside, should cast serious aspersions on the procedure and processes of the Commission. It must be said that, even if Mrs Da Silva's evidence is accepted, which it should not, she made herself guilty of serious misconduct of epic proportions. Mrs Da Silva is the epitome of the adage, "With friends like these who needs enemies". It is submitted that no part of Mrs Da Silva's evidence, insofar as it differs from the evidence of the credible witnesses of Ms Van Schalkwyk, should be accepted.

[274] Mr Jonker, as with Ms Da Silva, it is respectfully submitted, was a very poor witness, who was constrained to make numerous concessions in his evidence and who was further shown to be a consummate liar, who was contradicted by evidence of Ms Froneman and Ms

Motlekar, amongst others. The nature of his evidence is such that it is a bad indictment on the office of a magistrate, particularly a magistrate who held one of the highest ranks in the lower court judiciary. It is respectfully submitted that his evidence, insofar as it is a contradiction to that of Ms van Schalkwyk's witnesses, should be rejected as false.

[275] The witnesses called by Ms van Schalkwyk were, on the whole, all officers of the Court, who themselves, if disbelieved in this enquiry, may face serious consequences from the Commission and/or their governing statutory bodies, which may merit impeachment or striking from the roll. It is submitted that their evidence should be accepted, as no criticism of any nature can be levelled against their evidence and more importantly their evidence was not motivated by any bias in favour of Ms van Schalkwyk. They simply testified as to the truth, which vitiates all the allegations against Ms van Schalkwyk inherent in the twenty four (24) charges.

[276] In the final analysis, it is implored that Ms Van Schalkwyk be found not guilty on all twenty four (24) charges, including alternative charges where applicable.

JF Van Schalkwyk
Chief Magistrate
KEMPTON PARK

MAIN HEADS OF ARGUMENT

INTRODUCTION

[1] At the heart of this disciplinary enquiry is a story of victimization and abuse of power. It is a far cry from the twenty four (24) charges proffered by the Magistrates Commission ("the Commission"). The antithesis of this disciplinary enquiry is a proverbial witch-hunt, led by now retired Chief Magistrate, Mr Gert Jonker ("Mr Jonker") and perpetuated by forces within the hallowed halls of the Magistrates Commission.

[2] The genesis of what would culminate in the disciplinary enquiry is the call for a strike by magistrates at the behest of the leadership of the Judicial Officers Association of South Africa ("JOASA"), early in 2013. The President and National Secretary of JOASA at the time were charged with misconduct pursuant to this call to action by the Magistracy. The Commission and Mr Jonker, moved from the premise or assumption that the Chief Magistrate charged ("Ms van Schalkwyk") was actively supporting the strike and protecting the magistrates under her administrative control who were suspected of embarking on strike action, from disciplinary action. This is the watershed moment which culminated in the victimization and which underscores the many frivolous and unsubstantiated charges proffered against Ms van Schalkwyk.

BACKGROUND

[3] It is common cause from the evidence of Ms Maretha Froneman ("Ms Froneman"), that Ms Karen Duffy ("Ms Duffy"), an acting magistrate under Ms van Schalkwyk's administrative control, who was diagnosed with psychosis, discontinued her medication resulting in a psychotic breakdown. Ms Duffy absconded and lodged complaints against Ms van Schalkwyk, wherever she could. The unmitigated allegations were never taken seriously or pursued with any vigour. The central issue related to Ms Duffy has its origins in an instruction from Mr Jonker to approve and backdate Ms Duffy's leave when she absconded from work and Ms van Schalkwyk's refusal to accede to the inherently unlawful instruction. Mr Jonker, who was the acting Chief Magistrate at the time, deemed it fit to grant Mrs Duffy leave and to backdate same accordingly. A letter to the Deputy Minister requesting that Ms Duffy be removed from office clearly attests to her absconding. On the witch-hunt narrative it therefore comes as no surprise that Ms van Schalkwyk's refusal to approve and backdate Ms Duffy's leave is absent from the plethora of charges.

[4] The witch-hunt narrative is clearly demonstrated by the actions of Mr Jonker, who on or about 18 March 2013, appointed Ms Duffy as an acting magistrate at his office in Johannesburg, fully aware of her mental instability. The only plausible explanation for this is the perception that Ms Duffy could assist him in victimizing Ms van Schalkwyk with her false, incriminating accusations. When Ms van Schalkwyk became aware of the appointment of Ms Duffy at the behest of Mr Jonker, she penned a letter to the then Minister of Justice and Constitutional Development which occasioned great embarrassment to Mr Jonker when he was forced to summarily terminate Ms Duffy's acting appointment.

[5] The central figure in the witch-hunt narrative is Ms Veronica Valerie Da Silva ("Ms Da Silva"), whose allegations form a great portion of the charges proffered against Ms van Schalkwyk. It is conceded by Mrs Da Silva that her involvement in the charges is acutely linked to Ms Duffy's complaints. The only logical deduction considering the relationship between Mrs Da Silva and Ms Duffy is collusion to bring about the downfall of Ms van Schalkwyk and some clandestine behind the scenes decisions taken at the Commission. The statement is not made lightly, as it is inexplicable how Ms Da Silva, who despite amassing numerous formal complaints against her at the Commission from litigants she is alleged to have traumatized both verbally and through her actions, was instead, permanently appointed as an additional magistrate and if not reward enough; whilst serving her probationary period in an unprecedented manner as Mr Jacob's evidence demonstrates and, if it may be added, the Commission's own transfer policy, secured a transfer to the Western Cape.

[6] To further emphasize the witch-hunt narrative, Ms Madelein Nel ("Ms Nel") seemingly also received a permanent post for her complicity and co-operation.

THE BASIS OF THE CHARGES

[7] It is respectfully submitted that the Commission or those tasked by the Commission in particular failed to follow due process of law in the manner in which the charges were investigated. The process was respectfully vitiated by a contravention of the complaints' procedure as set out in the Regulations. The investigation process, amongst others, was in violation of Ms van Schalkwyk's right to privacy as guaranteed in the Constitution; in flagrant disregard of procedural steps applicable to search and seizure of "evidence"; and in the ordinary course of labour law the process embarked upon in the investigation, would in customary labour processes be *ultra vires*. The ineluctable deduction on the witch-hunt narrative is that those tasked with the investigation by the Magistrate's Commission had a mandate to dig as deep as possible to proffer charges, whether sustainable or not against Ms van Schalkwyk. The cogency of the aforementioned submissions will be demonstrated.

When regard is had to the inescapable fact that many of the charges date back several years, if not close on a decade prior to 2013, with no formal complaints having been lodged in accordance with the recognized procedure in place in the Regulations at the time. The process giving rise to the charges was simply substantially and procedurally unfair. It offends the principle of probity in terms of which all disciplinary measures must be instituted as soon as possible.

POINT *IN LIMINE*

[8] The evidence of Ms Da Silva on a number of charges is premised on emails and bank statements, the property of Ms van Schalkwyk, extracted from computers issued to Ms van Schalkwyk and Mr Holzen by the Department of Justice and Constitutional Development ("the DOJ&CD"). The legality of the seizure of the computers and the authenticity of the emails allegedly retrieved from the computers, in circumstances that are not clear, is highly circumspect. It will be demonstrated that the seizure was not only unlawful, but unconstitutional and all evidence emanating from it should be ruled inadmissible. It will be demonstrated that the entire process leading up to the seizure and subsequent actions attendant thereto is devoid of legality.

[9] The accepted legal position is that when a computer is seized for purposes of evidence in a trial or a misconduct hearing, **proper authorization is to be obtained. Proper authorization** is a requirement applicable to government authorities, system owners, system custodians and principals. Before removal of any computer proper written authorization is required. The Commission failed dismally in this regard, as will be shown.

[10] Mr Gideon Britz ("Mr Britz") from EOH, an information systems contractor of the DoJ&CD, testified that he received an instruction to proceed with the collection of the data. Mr. André Louw ("Mr Louw") forwarded instructions to a Mr Kallie Vos, whereafter he received it. According to Mr Britz, in terms of the security policy of the DoJ&CD, the manager of the person being 'investigated' has the right to request from the service provider, being himself (EOH), to extract data from a workstation, which he did.

[11] At the outset it must be highlighted that Mr Louw is a magistrate at Judicial Quality Assurance and in fact not the manager of Ms van Schalkwyk, who is a Chief Magistrate and in fact his senior in rank. This is a fact readily conceded by Mr Britz. The lack of line authority of Mr Louw over Ms van Schalkwyk is exacerbated by the fact that as at 18 April 2013 at 11:38, according to an email presented in evidence, when Mr Louw is alleged to have given "authorization" to EOH, he lacked any mandate from the Commission at that stage to do so, as the Commission only decided to proceed with a preliminary investigation on 19 April 2013 as per the minutes of the Commission of 19 April 2013. The basis of Mr Louw's "authorization"

without mandate from the Commission as set out in the email of 18 April 2013 is that the Commission was said to be in possession of *prima facie* evidence of alleged criminal activities and misconduct involving both computers in issue. Ms van Schalkwyk was not criminally charged and has not been so charged to date. The allegation of criminal activities is a serious allegation which it is submitted has a major bearing on the seizure of the computers. It must further be emphasized that for all intents and purposes the computers were not the property of the Commission but the DOJ&CD. At all relevant stages leading up to the preliminary investigation and more importantly the seizing of the computers as at 26 April 2013, no authorization was sought from or given by the DOJ&CD to remove the towers, being its property, from the premises of the Kempton Park Court.

[12] The issue of authorisation to seize the computers does not end there. A memorandum written by Mr Hans Meijer ("Mr Meijer"), a magistrate at Judicial Quality Assurance at the Commission, dated 3 May 2013 does not constitute proper authorisation to seize the computers, on the same submission as with Mr Louw; as he is not Ms van Schalkwyk's manager. It is reiterated that authorization must be obtained from the Government Authorities, System Owners, System Custodians and Principals and respectfully Mr. Meijer does not fall within any of these categories. For what it is worth, the contents of the memorandum are highlighted to demonstrate the anomalies in the evidence on the chain of custody. According to Mr Meijer's memorandum, the Commission made the following resolutions on 19 April 2013:

1. Mr Britz was authorized to seize Ms van Schalkwyk and Mr Holzen's computers.
2. Mrs Da Silva and Madelein Nel were given access to the computers to download information.
3. The evidence leaders who were appointed were Mr Dunjwa, Ms Jakkie Wessels and Mr Van Greunen.
4. The minutes of the Commission's meeting of 19 April 2013, however, makes no reference to what Mr Meijer alleges in his memorandum of 3May. Where Mr Meijer thus came on these alleged resolutions remains a mystery.

[13] In respect of the chain of custody, Mr Britz could not tell this enquiry who collected the towers from Kempton Park Court nor could he say who handed the towers to him. Mr Britz was not in a position to testify as to the actual identifying marks (sic serial numbers) on the towers. Mr Britz could further not say who the towers he received belonged to, save to say that he received five towers. He made no contemporaneous notes to identify the computers. Once he made, on his evidence, mirror copies of the towers (sic hard drives) which he saved to an external hard drive, he handed it to an official from the Magistrate's Commission, but cannot say who the official was. Mr Britz could not say what happened to the external hard drive once it left his custody and neither can he say what happened to the original towers which were collected from his office on 14 July 2013, where he stored it.

[14] By 2018, Mr Britz was no longer employed by EOH, the service provider of the DoJ&CD. It must be emphasized that Mr Britz in 2018 had no authorization to assist or do any work related to his former employer EOH/DoJ&CD. Notwithstanding this fact, Mr Britz was contacted by Ms Janine Jansen van Rensburg ("Ms Jansen van Rensburg"), the evidence leader, exacerbating the problem with the chain of custody of evidence by in fact embarking on an investigative process of her own, years after Ms van Schalkwyk had already been formally charged. She requested Mr Britz's assistance to extract emails, which she had on her laptop, which as her evidence will show she could not provide a chain of custody for. Mr Britz agreed to assist her and made available a secure Microsoft Office 365 drive cloud folder, to which it was agreed the emails on Ms Jansen van Rensburg's laptop would be copied. The cloud folder automatically replicated to his laptop and once fully replicated he connected the files which were in Microsoft Outlook personal storage table PST format to his local Outlook Instance, with the aim to confirm that the files were readable. One of the documents was found to be in an unreadable state, which he subsequently successfully repaired by executing a Microsoft Utility repair. On 25 October 2018, he met with Ms Jansen van Rensburg to confirm the readability of the content and once confirmed he assisted Ms Jansen van Rensburg to link the PST files that were extracted from the workstations of Ms JF van Schalkwyk and Mr S Holzen to a Microsoft Outlook instance.

[15] Mr Britz conceded that he could not vouch that the disks or documents brought by Ms Jansen van Rensburg could have been altered, deleted or tampered with. He could only vouch for what happened to the hard drive when it was in his office, but not thereafter.

[16] Ms van Rensburg could not tell this enquiry where she received the documents from and added that she is not an information technology specialist. To further exacerbate the fatally flawed chain of custody she informed the Inquiry that the original hard drives were still missing. Ms Van Rensburg, however, in the same breath stated that "they" took backups made by Mr Van Greunen to Mr Britz and he managed to recover some of the emails which were utilized at the start or during the time of the investigation. They were provided with over ten weeks of recovered data. How Mr Van Greunen came to be in position of the documents remains a mystery and exacerbates the fatally flawed chain of custody of evidence even further.

[17] The issue of the emails now extracted by Mr Britz in 2018 becomes inexplicable when regard is had to the evidence of Mr Welile Tshabalala that he could not open the documents Ms Jansen van Rensburg brought as it was corrupted. These questions raise red flags, and even more so on Mr Britz evidence that he could not authenticate the content of the emails placed on Ms Jansen van Rensburg's Microsoft Office 365 drive cloud folder as a copy of the original.

[18] It is respectfully submitted that the Commission's purported authorization of 19 April 2013 according to Mr Meijer's memorandum, which is not reflected in its minutes, is in any event

flawed in law. For the sake of completeness, it is highlighted why. On the allegations of Mr Louw, the Commission had *prima facie* evidence of criminal activities against Ms van Schalkwyk. *Prima Facie* evidence of criminal activities by implication would entail the laying of criminal charges and on that test, Ms van Schalkwyk would in all probability have been charged criminally by the NPA. If that had been done, the only authorization to search and seize the computers, would have been by authorization of a magistrate in terms of the Criminal Procedure Act, Act 51 of 1977. This it is submitted is the first fatal flaw in the Commission's purported "authorization" to seize the computers.

[19] It must be accepted that no criminal charges were laid against Ms van Schalkwyk and the allegation of criminal activities cannot be countenanced. Any reliance thereon by the Commission must simply be ignored. Turning attention to the seizure in the context of envisaged misconduct proceedings, it is respectfully submitted that the Commission failed in its duty in this regard as well.

[20] The actions of all the role-players in the seizure and subsequent dealing with the "computers", for which there is no chain of custody is *ultra vires*, constitutes unconstitutionally obtained evidence and stands to be excluded. No legal authorization existed for any of the actions taken. The legal position applicable to what is termed chain of custody or chain of evidence is dealt with *infra*, to demonstrate succinctly the patent problems with the manner in which the Commission and/or its delegated officials dealt with the "computers" alleged to be that of Ms van Schalkwyk and Mr Holzen.

[21] The traditional requirement for proving the integrity/authenticity of evidence is the chain of custody. In the context of criminal proceedings, Van Der Merwe Dana: Information and Communications Technology Law et al, page 156, says that the prosecution needs to convince the court that the evidence was not interfered with from the time it was seized to its presentation in court. Forensic investigators should ensure that digital evidence remains secure throughout the analysis. Forensic investigators must account for all the acquired evidence from the point when it was within their custody. A chain of custody should be viewed as a record that chronologically captures the movements and handling of evidence. It is submitted that the same position applies to evidence in anticipated or pending misconduct proceedings.

[22] The basic rules applicable to a chain of custody is that there should be: 1. A unique identifier; 2. A record of who accessed the evidence, at what time and place; 3. A record of who checked the evidence in or out of storage and for what reason and for whose authority; 4. A record of any unavoidable changes made to the evidence, who made the changes and a justification for introducing the evidence to the court. In the context of the present enquiry, the evidence demonstrably fails on all the basic rules, leaving the issue of the flawed authorization aside.

[23] The Commission's alleged resolution authorizing Ms Da Silva and Ms Erasmus (both magistrates currently based at Strand and Pretoria respectively) to assist the investigating officers in retrieving all official documentation, correspondence and possible evidence relating to the investigation which was stored on the workstation devices, is contrary to best forensic practice. The Commission respectfully is not enabled by the procedure for conducting preliminary enquiries and investigations to authorize access to its complainants of evidentiary material, for which I add, no chain of custody exists as though they are the appointed investigators.

[24] In addition the Commission was not vested with the authority to provide access to Ms van Schalkwyk's computers to third parties to download possible personal information. This was in direct conflict to her right to privacy and in conflict with RICA regulations which provides that an employer cannot allow a third party access an employee's personal information on their computers. An individual's personal information and banking statements cannot be downloaded considering the confidential nature thereof, unless prior permission has been granted by the owner. In terms of the RICA Act, an employer is legally bound to secure the personal information of its employees, and no one has the right to download such information or be given access to it in breach of the right to privacy. Such conduct is criminalized and bears a penalty upon conviction of a fine of R2million or ten year's imprisonment. That is how serious the legislature views such a violation.

[25] In light of the absence of a proper chain of custody and no indication when exactly Ms Da Silva had access to Ms van Schalkwyk's computer or any information downloaded from it, the Commission's blanket authorization led to Ms Da Silva downloading and getting access to ninety (90) of Ms van Schalkwyk's FNB bank statements, contrary to the RICA regulations and more importantly in violation of her constitutionally entrenched right to privacy. Any purported authorization by the Commission in terms of the Magistrate's Act 90 of 1993 and its regulations does not muster the test set out in the limitation clause in section 36 of the Constitution and the Act further does not trump the RICA Act.

[26] On the issue of an email policy, it must be highlighted that the Commission itself had no email policy and the email policy applicable to magistrates at the time of the alleged misconduct was a policy of the DOJ&CD. It is respectfully submitted that this itself has to bring the "authority" of the Commission to authorize access to the content of computers and emails questionable. The applicable extracts of the email usage policy dated 31 July 2003 provided as follows: "4.1 - provisioning of email services to:

1. The Department of Justice and Constitutional Development.
2. Contractors employed by the department.
3. As well as a temporary employer."

4.2 - The email system belongs to the state. The electronic mail system including the computers, software, licenses, network addresses and messages are state property.

4.3 – Occasional and brief personal use is allowed.
5 - Emails will not be viewed without authorization"

[27] The email usage policy dated 31 July 2003 was not applicable to magistrates as it was pertinently governed by the Public Service Code of Conduct, which was not applicable to magistrates. Even if Ms van Schalkwyk saved bank statements or personal information on her computer, the policy, which was not applicable to her, allowed occasional and brief personal use, which in itself was vaguely defined. These personal documents contained in emails could not be viewed without authorization. This ill-defined concept, in any event also begs the question, on whose authorization emails may be viewed. On all interpretations of the DOJ&CD email policy, the Commission simply had no jurisdiction over the computers and its content.

[28] It must be underscored that any attempts at referencing the Information Technology Acceptable User Policy implemented on the 19 November 2013 is opportunistic as it was not applicable to Ms van Schalkwyk who was suspended since 4 June 2013 to date.

[29] Ms Abida Motlekar gave an overview of the Judicial Quality Assurance Office at the Commission. To avoid any prolix, it is submitted that her uncontested testimony in this regard be accepted. It is proposed rather to focus on the most important and relevant aspect of her evidence in respect of the memorandum of Mr Meijer and the minutes of the Commission's meeting of 19 April 2013, insofar as it relates to the chain of custody or chain of evidence.

[30] Ms Motlekar read the minutes of the Commission's meeting dated 19 April 2013, (Exhibit WW 1) where the following was resolved:

"1. It is resolved that reliable evidence exists indicating that the allegations against Ms van Schalkwyk are of such a serious nature as to make it inappropriate for her to perform her functions as a magistrate while these allegations are being investigated.
2. It is further resolved to afford her, in accordance with the provisions of section 13(3)(a)(1) of the Magistrate's Act, the opportunity to comment on the desirability of her provisional suspension in view of the fact of the allegations against her. Her return representations, if any, should reach the Commission not later than Thursday 2 May 2013.
3. It is further resolved to inform the ethics division that the appointment of Ms A. Alberts and Mr E. Patterson, who both serve as Regional Magistrates in Gauteng, to conduct a preliminary investigation is not desirable and that investigators from outside the borders of Gauteng should be considered."

is accordingly submitted that this statement by the presiding officer purportedly made in passing, when read with the entire introductory paragraph was very relevant in assessing the evidence in its totality and could not be relegated to a subjective view by the presiding officer, which he states is not binding on the Commission. In fact, these views of the presiding officer merited serious consideration in giving effect to the salutary principles of a fair and unbiased mind being brought to the merits of the matter and ultimately any sanction, in the event of a finding of guilty on any of the charges. These views, amongst others, which the presiding officer omitted to deal with in the judgment formed the basis of the respondent's submissions that the disciplinary investigation was a well-orchestrated witch-hunt against the respondent. The presiding officer, failed to deal with the respondent's narrative of a witch-hunt anywhere in the judgment, as it did not fit in with the predetermined outcome which the introductory paragraph sketched.

[31] It is respectfully submitted that the presiding officer was bound to approach Mrs Da Silva's evidence with caution in light of his own finding, sketching her as a fraud, which he respectfully failed to do. It will be demonstrated that what he in fact sought to do in his judgment was grasp at straws from other evidence to give credence to Ms Da Silva's evidence, where he phrases as corroboration.

[32] The judgment deals with the evidence of Mrs Da Silva under the heading, "The charges in summary are as follows:', commencing at page 9 to 15, paragraphs [12] to [47] and is concluded with under the heading "Relationship Between Da Silva and The Respondent", commencing at page 38 to 39, paragraphs [136] to [142]. To wrap up the aforementioned evidence and views of the presiding officer, a paragraph headed "Work Relating to JOASA" and in particular paragraph [143] is apposite. The evaluation of the evidence of Mrs Da Silva which is a pivotal aspect of the basis on which her credibility and reliability of her evidence is to be assessed is found at pages 45 to 46, in four (4) very brief paragraphs [171] to [174].

[33] The relevant aspects in the respondents view which impact on the assessment of the evidence of Mrs Da Silva as extracted from the judgment are set out below.

"[12] The evidence of Da Silva was adduced to support the allegations on various charges inter-alia 8; 9; 10; 11; 12; 14; 16; 17; 23. *(To this should be added Count 7)*

[14] **She initially commenced her duties at the Tembisa court in 2009 and subsequently moved to Kempton Park magistrate's court**.

[15] **The respondent was known to her prior to her acting appointment as a magistrate**. *(The respondent was not only known to Mrs Da Silva, they were in fact friends as*

borne out by the overwhelming evidence in this regard)

[16] **She gave a detailed account of events and incidents to support the allegations against the respondent**. *(Paragraph [174] in respect of a few aspects according to the presiding officer calls for criticism. It is respectfully submitted that the aspects were far from being few and are aspects which were directly relevant to her credibility as witness and her propensity to embellish her evidence. In addition, the alleged detailed account of events was marred by what the presiding officer highlights at paragraph [174] as a few aspects of criticism of her evidence)*

[17] On occasions she was called out of her allocated court to attend to the respondent's hair in other words to roll or do the hair. This process would take 2-3 hours to complete.

[18] At times she had to go to the respondent's home to do her hair and then returned to court at about 11am.

(In an attempt to justify Ms Da Silva's evidence the presiding officer latched onto the evidence of Ms Madelein Erasmus who testified that she once saw Ms Da Silva at the court with a hair dryer and Mr Holsen having allegedly remarked that someone was running with a hair dryer. It is respectfully submitted that that evidence cannot lead to the deduction that the self-confessed fraudster Mrs Da Silva would spend hours at court doing the respondent's hair as found under the conclusion on count 9. It is simply a stretch too far by the presiding officer – my comment)

[19] She also took the respondent to Emperors Palace to gamble during her court hours. She had to postpone all her court cases and allocate new dates in order to accommodate the respondent's request to go to Emperor's Palace.

(The presiding officer, wrongly in the respondent's view, discounted Mr Oberholzer's evidence on the sole basis that he did not provide a statement in the investigation. Mr Oberholzer at no stage in his evidence confirmed that he told Mrs Da Silva that the respondent had gambling problems. Yet the presiding officer found under conclusions on count 7 that according to Ms Da Silva, Mr Oberholzer told her about the gambling problems. This offends the basic premise of hearsay evidence. The probative value of such evidence depends of the evidence of the person from whom such hearsay evidence emanated. The presiding officer respectfully erred materially in law on his conclusions reached on count 7.)

[25] During December 2012 the respondent took her out of court for some time in order to secure sponsorship and attend the arrangements of the International Association of Judges–African Region conference which was hosted by JOASA. The respondent was the chairperson of the local organizing committee and she was seconded as an administrator.

[26] She was also requested to draft and amend various business plans for the conference. The business plan set out the history of the IAJ and JOASA and provided details of the conference such as the purpose and objective of the conference, the theme and details of the participants and the programme.

[27] She also drafted the budget for the conference and was required to make amendments in respect of the number of delegates attending and amendments in line with funding received.

[28] During December 2012 she researched companies and obtained a list of companies, their email addresses and telephone contact details to direct applications for sponsorship.

[29] The letters were drafted from both her office as well as the respondent's. The respondent's computer was also used to email these persons.

[30] The respondent also instructed her to address several letters to the Chairperson of the African Union; The Office of the Chief Justice, the Minister of Justice; the Minister of Tourism; the office of the Mayor Cape Town; Lexis Nexis and a number of influential persons in order to secure funding and participation in the conference.

[31] The respondent also instructed her to arrange various meetings with the members of the organizing committee; attend such meetings, take minutes and distribute same.

[32] She also drafted correspondence to prospective speakers of the conference, the IAJ regarding delaying the date of the conference, ministers in the Department of Tourism; Trade and Industry, Law firms and other entities and persons.

[33] She was also involved telephoning, drafting email correspondence, drafting letters requesting special general meeting, drafting petitions, collating the petition forms, following up on members to submit the forms which were sent to the secretary of JOASA at the behest of the respondent.

[34] The witness identified and confirmed the contents of various emails in the bundles of Exhibits namely P (i) (ii); O (i) (ii) in files 4, 5, 6, 7, 8,9.

(Paragraphs [25] to [34] and the nature of how these arrangements are made was described in detail by Mr Dreyer van der Merwe. The presiding officer, however, elected to discount this evidence as being irrelevant to the issues. In that regard it is submitted that he erred. Hefurther erred in relating the work of JOASA and other judicial associations as not being judicial work or a judicial function as a whole. It will be shown below that this subjective view is in fact not correct. I wish to invite the Commission to consider the numerous ex-Presidents and National Secretaries of JOASA as a point of departure, who have been elevated to higher office in the Judiciary, who respectfully often found themselves in the same position the respondent did in arranging conferences of International importance to the Judiciary as a whole and enhancing the image of the South African Judiciary in particular. If the respondent in engaging Ms Da Silva to assist in this regard, is guilty as she has been found, the Commission is reminded of regulation 7 in respect of its salutary duty not to act with favour or prejudice.)

[41] In so far as filling in of the stats forms were concerned, she cannot recall filling in such forms to reflect the work done for the respondent. However she confirms that Mr Holsen filled in the stat forms and inserted "research" for the work that she had done while out of court. (Mr

Holsen emphatically denied this and respectfully his evidence was not gainsaid)

[42] As a result of the foregoing, her court work suffered. The respondent never had regard for the legal parties and she was told to postpone matters. (*This general statement was not supported by any evidence. In fact, when Ms Da Silva was not in court, other judicial officers attended to her work as court work was often shared.)*

[45] In 2012, after the accident of the respondent's son, the respondent was taken by Mia to do her shopping, hair and to go to the Embassy. They would leave at midday. Mia also had to fetch the respondent from her home. (*The aspersions cast by Mrs Da Silva impacts gravely on the character of Ms. Mia, or Judge Mia, having been appointed to the High Court bench. This further demonstrates her propensity to be economical with the truth.)*...

Relationship Between Da Silva And The Respondent

[136] **The relationship between the respondent and Da Silva from the evidence would appear to have been initially sweet and then turned sour. Clearly the evidence of Da Silva that respondent nauseated her off the bat is exaggerated. However in the light of the following it is clear that both Da Silva and the respondent spent much time together. Willem Schutte says Da Silva spent a lot of time in the respondent's office and was almost like a shadow in her company. Da Silva's relationship with therespondent was good**.

(It is submitted that the assessment that Da Silva's evidence that the respondent nauseated her off the bat as being exaggerated is correct. The summary respectfully, however, falls shy of identifying the true nature of the relationship between Ms Da Silva and the Respondent; they were in fact the best of friends, as echoed by numerous witnesses. It is further emphasized that the presiding officer's disjointed introductory paragraph in respect of Ms Duffy and his failure to identify her relationship with Ms Da Silva, who was prompted by Ms Duffy to lodge the scurrilous allegations against the respondent, is highly questionable. Da Silva initially denied the existence of a friendship, then spoke to a close relationship. Her rationale was to prove her narrative of abuse and misuse of power. It is respectfully submitted that the Presising Officer's finding of "a sweet friendship turned sour" was not proven. Da Silva stuck to her narrative that the respondent nauseated her right off the bat).

Work Relating To JOASA

[143] **While the work of JOASA in enhancing the efficiency of the magistracy is to be lauded, it cannot be elevated to the status of a judicial function**. Even Mr Van der Merwe had to concede that he had to do JOASA work during the mornings and when he finished court. Part XIV of the Magistrate's Regulations recognises any professional society representative of the majority of magistrates or regional magistrates or both as provided for in section 41. Likewise, if judicial officers are members of the legal practice council or advocates council or part or an attorney's council work done for these bodies cannot amount to a judicial function should they be a majority. **Hence any work done for JOASA, The IAWJ, IAJ during official court hours cannot be a judicial function**. *(The De Rebus published the following address by the Chief Justice at the AGM of JOASA in 2014: "Single judiciary discussed at Judicial Officers Association of South Africa AGM." De Rebus, March 2014:8 [2014]*

*DEREBUS 29. **Chief Justice Mogoeng advised JOASA to recognise and work very closely with the existing statutory leadership of the magistracy to avoid a multiplicity or duplication of engagements and judicial projects. 'The state of being a unified judiciary requires that we shy away from the fragmentation of the judiciary by operating as several independent pockets of judicial structures or leaders. [T]o do otherwise, would compromise the efficiency and effectiveness of the judiciary and its leadership,' he said.**)* It is respectfully submitted that the broad statement that work done by associations like JOASA and the IAJ does not constitute a judicial function is subjective and misplaced.

In a very useful exposition on this issue, the University of Chicago's Law School article titled *Judicial Roles In Nonjudicial Functions* (2014) in its reference to the WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW, the following is pertinent:

"I. NONJUDICIAL FUNCTIONS

We can consider a continuum of nonjudicial functions in terms of **being more or less similar to judicial functions**. At one end of the spectrum, **there are nonjudicial functions that can be seen as quasi-judicial or seemingly judicial functions** ... we suggest the following framework:

(iii) Nonjudicial functions related to judicial functions: management of courts, **serving in judicial council or other commissions related to the court system** or to judicial selection, retention, or disciplinary action; ...

(v) Nonjudicial functions that promote law: teaching and writing, **working in judicial associations**; ...

(viii) Seemingly executive functions: chairing administrative agencies (usually crime prevention related); **serving as ambassadors or executive officers**; ..."

It is respectfully submitted that Ms van Schalwyk's role, in this regard, fits the descriptors highlighted above.

Furthermore, the Code of Conduct does not explicitly exclude work performed for judicial associations as not being a judicial function.

Evaluation Of The Evidence

Veronica Da Silva

[171] She was not the most impressive of witnesses for the following reasons:

She was loquacious, garrulous and prone to prolix and generally had difficulty focusing on answering questions which required a direct or concise answer and on many a time went off at a tangent and had to be reined in during her evidence.

[172] **Her evidence was at times was punctuated with the following adjectives: "can't recall," "not sure", "was scared to say no"**.

At times she refused to answer questions and complained of being badgered when robustly being cross-examined.

[173] A few aspects of her evidence which calls for criticism relate to the following:

"it was a long time ago not have absolute certainty".

"it triggered a memory".

"trying to think".

"not sure of the exact time frame".

"scared to say no" (6 times).

"can't recall words respondent used to shout at magistrates".

"can't recall dates".

"cannot recall date when interviewed by Meier".

"cannot recall if MC15 forms were signed by her".

"cannot recall how many days she went to court".

"she was under pressure from herself to sign the MC15 forms".

(Paragraphs [171] to [174] are telling of the character of Mrs Da Silva and certainly most unbecoming not only of her as a witness but more importantly as a judicial officer and self-confessed fraudster. It is stressed that these finding along with the earlier submission on Mrs Da Silva must lead to one conclusion that none of her evidence may be accepted and that it was wrong of the presiding officer to latch onto aspects of her evidence which was not corroborated in a material respect and on which flimsy deductions were made.)

The following corroborates her evidence:

The photograph of the envelope on the cell phone.

The numerous emails and the times they were sent for JOASA.

The bank statements amounts for monies lent.

The lent monies not being disputed by the respondent.

Doing the respondent's hair after hours was not disputed.

Madeline Erasmus confirmed calling Da Silva out of court on the respondent's instructions and Da Silva occupying long periods in the respondent's office and seeing Da Silva on one occasion carrying a hair dryer at court during official hours.

Elise Smith also confirmed calling Da Silva out of court."

[34] Having highlighted the anomalies in the approach to Ms DA Silva's evidence, it is respectfully submitted that the respondent should have been found not guilty on

counts 7, 9, 10, 11, 12, 14 and 16.

THE SANCTION

[35] If we move from the premise that the findings of guilty are in order, which as highlighted above, the respondent submits, it is not. The sanction imposed is irrational and calculated with respect with what appears to be a predetermined outcome to remove the respondent from office for treading on the toes of protected officers of the Commission and those allied to it. The reference to a plethora of American precedents in judicial misconduct is as far as the respondent is aware unprecedented. No reference with respect was made by the evidence leader to any authority from our own jurisdiction and whilst the presiding officer made general reference to the American authorities he failed to identify with specificity which decisions he relied on if any. The American authorities on sanction was presented to the presiding officer one day before the sanction was imposed following the conviction of the respondent.

[36] Turning to the reasoning of the presiding officer, it is respectfully submitted that it constitutes in the words of the old adage, a "*contradictio in terminis*". It is further clear that the presiding officer approached the question of sanction on the basis, amongst others, that the respondent was corrupt, with none of the charges on which she was convicted speaking to corruption, lest one follows his misplaced reasoning on the Moloi charge in which he seeks to suggest a corrupt relationship but conveniently does not call it that. This statement attributed to the respondent is further at variance with her description by the presiding officer as a mitigating factor as will be shown. The presiding officer further suggests that the respondent engaged in deeds of an evil nature where Ms Da Silva, a self-confessed fraudster who was labeled with many negative attributes as a witness, suddenly becomes a good woman. In this regard paragraphs [4] and [5] of the judgment on sanction is apposite:

"[4] Edmond Burks said "The only thing necessary for evil to triuph is when good men do nothing."

[5] John Edward Dalberg said "Power tends to corrupt and absolute power corrupts absolutely."

[37] The presiding officer sets out the sanctions provided for Regulation 26(17)(a)(i) to (iv) and subregulation 17(b), with question marks placed next to the first four sanctions, for some inexplicable reason, or maybe not so inexplicable when one considers the ultimate sanction imposed, as follows:

"(a)? Caution or reprimand the magistrate;

(b) ? Specify the manner in which he or she should be cautioned or reprimanded;

(c) ? Direct the magistrate to tender an apology in a manner specified by the presiding officer, or

(d) ? Postpone the imposition of a sanction for a period not exceeding 12 months with or without conditions which may include counseling, treatment of attendance of a training programme, or

(e) Recommend to the Commission that the magistrate concerned be removed from office as contemplated in section 13 (4) (a) (i) of the Magistrate's Act 90 of 1993."

[38] The presiding officer says the following in respect of his discretion in imposing a sanction and the approach to a considering a suitable sanction:

"[10] What is of importance to note is that neither section 13 (4) (a) (i) of the Act of Resolution 26 (17) mentions any gross misconduct or categories of conduct which amount to misconduct that warrants removal from office. In other words, there are no categories of misconduct defined in the Act or Resolutions that provide for removal. **The decision of removal is the perogative of the presiding officer as provided for in subresolution *(sic)* (17) (b) which is subject to subresolution *(sic)* (22) (b) of Regulation 26**.

[26] In any proceedings whether within the sphere of a criminal matter of a quasi-judicial tribunal or any enquiry **where a sanction has to be imposed one must have regard to the foundational principles that the sanction must be fair, balanced and proportionate taking into account various mitigating and aggravating factors and the purpose of the sanction seeks to achieve, a specific outcome and to serve the legitimate interests of the judiciary and society in terms of integrity and respect**."

[39] Notwithstanding what the presiding officer says at paragraphs [10] and [26], he proceeds to make the following contradictory statements are made in the judgment on sanction, which is submitted is irrational and constitutes a material misdirection in the sanction ultimately imposed:

"[13] **The charges of which the verdict of guilty was rendered did not involve dishonesty or criminal charges and NONE OF THEM ARE IMPEACHABLE**.

[14] **The charges may be described as ethically or morally incorrect and NONE OF THESE CHARGES COMMITTED WARRANTS DISMISSAL OR IS DISMISSABLE**.

[32] In my view, **given the multiple charges that the respondent has been found guilty of, the seriousness of these charges and the need for the sanction to reflect the gravity of these charges** and to engender respect from those whom we serve and to emphasize the point that no person is above the law or any chief magistrate to consider their court house as

their fiefdom, and whose conduct impinges upon the integrity of the judiciary as a whole, it is my considered view having considered the aforesaid factors, which pains me as a brother judicial officer, is to find that **the only appropriate sanction is to recommend to the Magistrate's Commission that you be removed from office as contemplated in section 13 (4) (a) (i) of The Magistrate's Acting 90 of 1993 read with regulation 26 (17) (b)**."

[40] The presiding officer in light of paragraphs [13] and [14] clearly did not align himself with the submission of the evidence leader at paragraph [21] which reads as follows:

"[21] The evidence leader considered the receiving of monies from Mr Moloi as particularly serious to warrant or justify removal on its own."

[41] With respect the presiding officer, however, clearly latched onto the following statement of the evidence leader at paragraph [23] at paragraph [27], with no basis to suggest that the likelihood of the statement and not mere possibility of the misplaced submission couched in the subjective belief of the evidence leader:

"[23] **The evidence leader BELIEVES** that there has been no indication that the respondent will modify her conduct should she be allowed to return to her position, the same abuse of power is likely to occur.

[27] The multiple convictions on 13 counts is reflective that rehabilitation is slim for the respondent. All these transgressions occurred while she was a high ranking magistrate achieving the status of chief magistrate."

[42] It is further respectfully submitted that the statement at paragraph [24] was never pertinently reflected as the basis of the finding of guilty on any of the charges and in particular the highlighted portion that the public trust was violated:

"[24] **The respondent failed to lead by example but acted in a manner that violated public trust** and which detrimentally affects the integrity of the judiciary and undermines public confidence in the administration of justice."

[43] The point was made above in respect of paragraphs [4] and [5] of the judgment on sanction and the emotive language and aspersions conveyed thereby. This is in total contradiction to the most favourable aspect of the evidence in mitigation and as gleaned from the evidence in its totality, even from the respondent's accusers. In this regard, paragraphs [30] and [31] are apposite:

"[30] There were comments from the witnesses which were also favourable to the respondent, namely:

(a) Abraham Nel – **The respondent gave him an opportunity to preside in the civil court to empower him**.

(b) Kobie Schutte – **The respondent was very good to him. She gave him an opportunity to act in the regional court. She was appreciative of his worth.**

(c) Aaron Moloi – Found the respondent to have managed the Kempton Park court on the basis of strict compliance. **He admired her character because of her POSITIVE impact on the court**.

(d) Elsie Schneter – Says the respondent was strict with court hours.

(e) Stephen Holsen – **the respondent was always respectful to all magistrates**.

(f) Adnan Jacobs – **the respondent was always professional in the manner she conducted the meetings**.

[31] It would appear that the respondent had a genuine intention to uplift and have magistrates that are experienced in all fields of law in that while her heart was in the right place to empower magistrates, however, the manner in which she did this was not in keeping with that ethos."

[44] The presiding officer was scathing of the evidence of Mr Holzen, yet he accepted in mitigation at sanction stage that Mr Holzen said the respondent was respectful to all magistrates. The presiding officers own summary of the mitigating and positive aspects to the credit of the respondent demonstrates anything but a chief magistrate motivate by evil and corrupt motives but rather a chief magistrate intent on empowering her subordinates to strive for greater heights.

[45] The respondent's management style may on the evidence accepted not be in keeping with what the presiding officer subjectively expects of a chief magistrate, but it is respectfully submitted that it is a far cry from the manner in which he characterizes her as evil and corrupt. None of the evidence suggests this in the merits or evidence accepted by himself in mitigation.

[46] It is respectfully submitted that the presiding officer misdirected himself on the sanction which recommends removal from office, in light of his own findings that the conduct inherent in the convictions are not impeachable offences and do not merit removal from office.

[47] The Commission is empowered by subregulation (22)(b) to impose a sanction provided for in the regulations other than the recommended sanction, if it is of the opinion that that the magistrate concerned should not be removed from office. In passing, it must be said that the presiding officer's statement at paragraph [34] is unfortunate as he calls into question the Commission's powers over his

recommendation, which he appears to regard as sacrosanct.

[48] Consequently, If the convictions are found to be in order, it is respectfully submitted that the more appropriate sanction which would serve the purpose stated by the presiding officer in imposing a suitable sanction would be the postponement of the imposition of a sanction for a period not exceeding 12 months with or without conditions which may include counseling and attendance of a management training programme.

[49] In conclusion, the Commission is implored to reconsider the findings of guilty and to replace same with findings of not guilty. If the Commission is not in agreement with the submission on some or all of the charges on which a verdict of guilty has been rendered, it is implored to impose the sanction as proposed by the respondent.

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JUDITH FREDA VAN SCHALKWYK
RESPONDENT

IN THE DISCIPLINARY ENQUIRY

between

THE MAGISTRATES COMMISSION

and

MS JUDITH FREDA VAN SCHALKWYK
CHIEF MAGISTRATE KEMPTON PARK