Judgment

DISCIPLINARY ENQUIRY

REFERENCE:

6/5/5/2-43/2013

PREFACE

1. INTRODUCTION

At the outset of this judgment I want to acknowledge the assistance and effort of the evidence leader Ms Janine van Rensburg in compiling and indexing the voluminous exhibit files for these proceedings. Her herculean task is to be commended.

I also wish to thank and extend my gratitude to the Secretariat of the Magistrate's Commission, Mr Dawood for making available the Commission's boardrooms during the challenging times in the lockdown period and when challenges were faced when the enquiry commences at the Pretoria magistrate's court in terms of space.

I also believe it would be remiss of me, in the light of the evidence given during these proceedings not to mention the following:

(1) The appointment of Ms Duffy needs to be revisited in the light of the serious allegations of her mental state and the medical report describing her as psychotic, which is a term which relates to a severe mental disorder in which thoughts and emotions are so impaired that contact with external reality is lost. Also the evidence relating to her absence without leave and blank resignation form coupled with her paranoia in having person's pass correspondence under her chamber door and behavior in court needs to be looked at.

(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. The evidence indicates that she did not speak

out earlier because she was scared and feared losing her acting appointment. Also the evidence of Adnan Jacobs seems to suggest that Da Silva may have been rewarded by the Commission with the appointment and subsequent early transfer and received preferential treatment for testifying against the respondent. In fact, he premises his assumption of his views on what Da Siva told him, of how confident she was that she will be appointed after she was shortlisted.

(3) These views to which I have alluded to are clearly not binding on the Commission but I believe needed to be stated.

IN THE MAGISTRATE'S COMMISSION OFFICES

HELD AT PRETORIA

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

IN THE MATTER BETWEEN

THE MAGISTRATE'S COMMISSION **APPLICANT**

AND

JUDITH FREDA VAN SCHALKWYK **RESPONDENT**

JUDGMENT

Delivered on 01 October 2020 (in Pretoria Magistrate's Commission's Offices)

Introduction

[1] The respondent in this matter is Judith Freda Van Schalkwyk.

[2] Prior to the commencement of these proceedings on 02 October 2018, the respondent and others launched an application to the High Court of South Africa, Gauteng Division, Pretoria under case number 4947/15. The set down date was 30 January 2017.

[3] The application was heard in the High Court on 15 March 2017 and judgment delivered on 01 August 2017 wherein the learned judge Hughes dismissed the application in which the respondent was the first applicant. The nub of the application **centered** around the legality of the Magistrate's Regulations in terms of the Magistrate's Act 90 of 1993 and non-compliance by the Minister of Justice in terms of the procedure set out in section 16(1) of the Magistrate's Act.

[4] Application for leave to appeal to the Supreme Court of Appeal was lodged on 13 December 2017 under case number 1297/17, which application was dismissed on 12 March 2018.

The Merits

[5] The Respondent is Judith Freda Van Schalkwyk, a chief magistrate appointed at Kempton Park magistrate's court.

[6] The commissions evidence leader Ms Janine van Rensberg has preferred the following charges against the respondent relating to the contraventions of Regulations 25 (c) (h) (i) (g) (j) for judicial officers in the lower courts, 1993, further read with various other paragraphs of the said regulations as contained in the charges against the respondent, such regulation made under section 16 of the Magistrate's Act 90 of 1993.

[7] Initially, some 24 charges were preferred against the respondent. Count 17 had an alternative count as well. Charge 6 was withdrawn on account of the witness being deceased. Count 19 was excluded during the ruling given in limine on the basis that the respondent was an acting judge during the period in count 19, hence I upheld the point in limine, the full reasons are on record.

The charges in summary are as follows:

Charge:	Date:	Regulation:25	Conduct:
1	2009-31/05/13	b	Failed to adhere to official court hours in arriving late and departing early
2	09/02/2007	g	Improper use of state vehicle
3	2009-04/06/13	c	Being rude; humiliating; belittling; threatening to judicial officials and officials
4	20/03/2013	c	Being disrespectful to Jonker and Chief Justice by issuing derogatory email
5	25/10/2012	c	Allowing a magistrate from her cluster court to adjudicate in a matter where she was cited as the first respondent to be declared over indebted
7	2009	c	Gambling during official hours at Emperors Palace
Alt 7	2009	h	Absent from work without leave or valid cause
8	07/03/11-13/12/12	c	Borrowing monies from Da Silva and not paying back monies
9	2009-2013	c	Asked Da Silva to come out of court to do her hair

10	2010	c	Arranging a loan application for Da Silva without her consent
11	October 2010	c	Called Da Silva out of court to apply for Eduloan for R34 000 to pay for her sons university fees
12	2011	c	Took Da Silva out of court for 5 weeks to do Mozambican report
13	2011	c	Requested Madeline Erasmus to assist with correspondence to attorneys relating to judgments granted against her during official hours
14	June 2011	c	Took Da Silva out of court to deal with JOASA matters to call magistrates to get support for special AGM and to email them
15	26/08/2011	c	Requested Elsie Smith to search for banners during official hours
16	12/2012-04/2013	c	Took Da Silva to assist with IAJ conference and take her to meetings at Emperors Palace, Carnival City, ACSA.
17	10;11/2012	c	Requested attorney Moloi to pay for travel expenses to Washington DC or collecting cash from him using Da Silva
18	17/09/2012	c	Handed down sentence written by Mr Maodi in her matter
20	2005-4/6/2013	g	Made use of official parking at Kempton Park without paying
21	2/05/2013	i	Denying presiding in matter involving attorney Mr Moloi in 2010/2011 whereas she did a bail application

22	18/03/2013	j	Failing to comply with a lawful order of Jonker in submitting daily returns
23	2009-31/05/13	c	Asking Da Silva to pay her rental for her apartment
24	2009-31/05/2013	c	Reckless conducting of finances resulting in being declared over indebted and having default judgments being granted

[8] The Respondent was legally represented by attorney Mr Coetzee who handed in a written statement wherein the respondent pleaded not guilty to all these charges and put the Commission to the proof of these allegations.

[9] On 21 January 2019 the evidence leader placed on record that Mr Coetzee had passed away on 20 January 2019.

[10] The respondent elected to proceed on her own due to financial considerations, to have the evidence in chief of Da Silva concluded.

[11] When the enquiry resumed on 01 April 2019 the respondent was represented by Advocate Ntsewa.

[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.

[13] Da Silva was employed as an acting magistrate during the periods mentioned in these charges.

[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.

[16] She gave a detailed account of events and incidents to support the allegations against the respondent.

[17] On occasions she was called out of her allocated court to attend to the respondents 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.

[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.

[20] The respondent also made demands on her on a monthly basis for rental monies. The rental monies were paid back to her save for the monies she paid for book club fees for the respondent.

[21] The respondent had arranged for her to take out an eduloan to pay for her son's university fees in order to graduate. The amount of the loan was in region of R34 000.

[22] The respondent had in fact filled the application form on her behalf which included her income and expenses. This was a fabricated application form filled in by the respondent.

[23] The respondent informed her that she could not apply in her own name as she was precluded from doing so on account of being blacklisted and having judgments against her name.

[24] She was badgered into signing the eduloan applications form by the respondent. However this application could not be processed by eduloan on account of issues relating to her identification details and her being a contract magistrate.

[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.

[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.

[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.

[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.

[43] The witness indicated that she complied with the respondent's instructions as she was scared that she would be targeted by the respondent in that her contract to act as a magistrate would be terminated.

[44] The witness also testified that between the periods 2009 - 2013, the respondent would arrive late for work and at times leave early. She can recall a time in 2010 when the respondent was without a vehicle she had to go to Bedfordview to fetch the respondent on route take her shopping and arrive at work.

[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.

[46] The conduct of the respondent was also called into question during the period 2009 – 2013 when she behaved rudely and abusively. She recalls that the respondent would shout, belittle and humiliate people during the meetings as well as in the tea room.

[47] Da Silva was also on the receiving end of the wrath of the respondent during the period when the respondent's daughter worked for her husband. The respondent shouted

and swore at her arising out of issues between the respondent's daughter and her husband. At some stage the respondent told her "Don't you want my son to fucking graduate". She was also shouted at by the respondent when she did not agree to do the respondent's hair or not to deliver items to the respondent in Cape Town.

[48] On 15 July 2019 the respondent terminated the services of Advocate Ntsewa and proceeded to conduct her own defence.

[49] Madeline Erasmus testified on counts 5 and 13 that she commenced acting as a Magistrate at Kempton Park on 01 June 2011. She was allocated to the civil section and shared an office with Marella Johnson Smit. She was on occasions requested by the respondent to call Da Silva out of court. She mentioned that Da Silva spent months in the respondent's office doing work of which she was unaware. Da Silva also had to drive the respondent around. She confirms that she adjudicated an unopposed debt review application wherein the respondent was the debtor. The request to deal with the application was made by Mr Holzen. She also assisted the respondent in sending emails to the respondent's creditors to accept an offer towards the debt.

[50] She was not forced to deal with the debt review application of the respondent. She also mentions an incident in which Da Silva came with an envelope to her office. She confirmed that she took a photo of the envelope and confirmed Exhibit K as the envelope. Da Silva told her that she had to pick up the cash and requested the person to put the cash in the envelope. She was also requested at some stage by the respondent to arrange a pro amico counsel to deal with an application relating to JOASA. Although she does not know about Da Silva washing the respondent's hair at the office, she did see Da Silva with a hair dryer one morning. She also lent Da Silva a tog bag to take files to the respondent in Cape Town. Da Silva was 24/7 in the chief's office and certain days the entire night. The respondent at no stage swore at her. However she did assist the

respondent with a donation of R2 000 which she secured towards a trip for another person.

[51] Maria Elsie Smit testified on count 15. She was an acting magistrate at Kempton Park during the period 01 May 2011 – 28 February 2012. In the absence of the respondent at work Mr Holzen was the acting chief magistrate. She was allocated to do civil work and shared an office with Madeline Erasmus. The respondent would request her and Erasmus to call Da Silva out of court which occurred quiet often. She described the relationship between Da Silva and the respondent as friendly but strained. She also recalls at some stage she transported the respondent to her home and took the respondent's daughter to the airport. Mr Holzen at some stage gave her an instruction to fetch JOASA banner from the Civic Centre which was required for a function to be held at East London. When she could not find the said banners she called the respondent in Cape Town. She had to leave her court for the banners during official hours. She was never humiliated or threatened by the respondent nor did she witness the respondent to this to any other person.

[52] In cross-examination she conceded that the respondent had called her and informed her that Zika Kanti needed a favour and when she had time to locate the banner. She was also given the contact number of Zika Kanti. During this time Mr Holzen was the acting chief. She cannot recall the specific dates and times that the respondent had requested her to call Da Silva out of court.

SUMMARY OF EVIDENCE

Welile Tshabalala

[53] He is employed as IT support engineer with EOH which had a contract with DOJ. He was requested to assist in obtaining information from the respondent's computer as per Exhibits FF(i) on 25/06/2018. One file was copied. Some files could not be opened and no information on the discs could be obtained.

[54] His evidence does not take the matter any further.

Johanna van Aswegen

[55] She was a senior administration clerk stationed at Kempton Park during the period mentioned in the allegations on counts 2, 3, 20.

[56] She is currently retired having served for 44 years in the Department of Justice. Her evidence in summary is that the respondent is known to her. Her duties comprised finances, admin work, parking in the court yard. She did not complain or make any statement in this matter on her own volition but rather in response to questions she was asked when this matter was being investigated. She confirmed that the respondent did not pay for parking pursuant to the circular requirement. This was despite the fact that she informed the respondent that she had to pay for parking. The respondent indicated to her because of her status of a chief magistrate she was entitled to have free parking. Other magistrates and court officials duly paid for their parking via salary deductions and debit orders or cash payments. The previous chief magistrates also paid for their parking.

[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.

[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?"

59] She did not witness the respondent conducting herself in such a manner to other officials.

[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.

[61] He was the chief magistrate for Johannesburg since 2004. He is currently retired since May 2012 but was asked to stay on to June – July 2013.

[62] He gave a detailed account of how the cluster system worked and the passing of information amongst the chief magistrates.

[63] This witness testified with regards to counts 4 and 22 relating to being disrespectful by the respondent to himself and the Chief Justice and failing to comply with a lawful order of Jonker in submitting daily returns.

[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.

[65] He also confirmed that magistrates had to pay for using the parking at the courts.

[66] In cross-examination the witness maintained he did not receive and daily returns from the respondent as required by the Magistrate's Commission and Chief Justice.

[67] The responded conceded that the contents of the email on count 4 is sharp but is ascribed to years of victimization, harassment and attacks on her integrity.

[68] The witness denied this and countered that the respondent could have approached the Commission.

[69] The witness also disputed that he exposed the respondent to gender based patriarchal harassment.

[70] The respondent concedes that she did not pay for parking on the basis that she felt she did not pay for parking as an acting judge there was no need to pay for parking at the magistrate's court on account of the intention to merge into a single Judiciary.

Abraham Cronje Nel

[71] He is currently a magistrate of Kempton Park since 1999.He was working at Kempton Park when the respondent assumed her duties as a chief magistrate of Kempton Park. He made a statement in this matter as a result of the investigation that transpired. He did not lay a complaint against the respondent on his own.

[72] In so far as official hours were concerned he once confronted the respondent about late coming to which she replied it applied to district magistrate's and not for her.

[73] During meetings people were reprimanded. Mr Maree was humiliated. Mr Gobind was also treated in a manner which he believed was inappropriate. 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.

[74] He confirmed that he pays for his parking.

[75] In cross-examination he concedes he made an affidavit as a result of the investigation. He cannot recall what the investigators had told him.

[76] He did not compile a diary of the times and dates of persons who came late between 03 December 2003 and 05 June 2013. He cannot dispute that as a chief magistrate she had meetings to attend to before coming to work or giving Mr Holsen concession to come late or that Mr Jonker had given her concession to come late to work when questioned by the respondent.

"You in no position to say I did not adhere to official hours or had a legal or valid reason to come late?"

His reply was: "One can say so"

[77] He also conceded that she was not accountable to him for her schedule.

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

[79] When asked by the chairperson what words were used that he perceived to be offensive and inappropriate he replied that he could not remember the words but the words used were harsh.

<u>Karel Roux Vos</u>

[80] During April 2013 he was employed by Department of Justice. He did not depose to an affidavit in this matter and was called to testify as a result of his name being mentioned in Exhibit Y. He was a director of business systems relating to the coding of diagnostics. As far as this matter is concerned he has no personal involvement in the retrieval of emails. He merely referred the matter to Thoba Sakasa for retrieval. Gideon Brits was the person who reported to Sakasa. He is not aware of any permission being sought for the retrieval in April.

[81] Nothing really turns on his evidence on the merits of this matter.

Willem Johannes Jacobus Schutte

[82] He is a permanent Magistrate at Kempton Park since 01 March 1996 having acted from 01 April 1995.

[83] He confirms that there was a meeting in the tea room relating to the investigation against the respondent and the magistrates were invited to discuss what happened. The respondent was not present at the court during this period.

[84] He subsequently deposed to an affidavit in this matter in his own hand writing. There was a complaint in how he handled the Zaaiman matter which resulted in a meeting which he termed blame and shame. The respondent during this meeting asked him about his involvement in this matter and he gave her a detailed explanation.

[85] He felt that the manner in which the meeting was conducted made him feel humiliated.

[86] He recalled an incident where the respondent had criticized the decision of Mr Holsen in allocating an inexperienced magistrate to the domestic violence section and said his decision "suck" which he believed to be inappropriate.

[87] There was also an occasion where the respondent told Ms Duffy that she was out of line.

[88] He confirms that at a meeting the respondent told Mr Nel that if she could she would throw him through a wall. He did not witness any physical assault on any person by the respondent.

[89] The respondent also inspected his J15 as part of quality assurance and endorse on the charge sheet "Have you finally lost your marbles?" he was not happy about this as the charge sheet is a public document and is handled by the clerk. He also believed that the sobriety of magistrates should not be discussed in a meeting but rather one on one with the magistrate.

[90] Da Silva also spent a lot of time in the respondent's office; he described it as "almost like a shadow in her company". He was also told by Miranda Johnson that the respondent had asked her to fetch banners and take it to the airport. He was also told by Da Silva about collecting monies from Moloyi Attorneys and an envelope photo on her phone with the name Felix on it.

[91] On one occasion he drove the respondent to her home to take tiles as well as take her to see Mr Makam where he sat in his vehicle before going back to work.

[92] The witness on his own volition mentioned that the respondent was very good to him and gave him the opportunity to act in the regional court and was appreciative of his work.

[93] In cross-examination the following was elicited:

He made his affidavit on the 08 July 2013 which does not contain all the averments he made during his evidence in chief.

The time the investigators came to the tea room the environment was restless.

He deposed to a statement subsequent to this meeting at the Magistrate's Commission.

He also met with Desmond Nair at the Pretoria magistrate's court in connection with this matter.

He cannot comment on the specifics of the part heard cases of Da Siva when he conveyed the message to the respondent.

He could not comment fully on the extract of the court book of the 04 April 2013 since there was no court hours indicated and pages may be missing.

He cannot therefore say that the functioning of the courts was affected.

[94] The relationship between Da Silva and the respondent was very good. Da Silva was in the respondent's office on a daily basis. He cannot advance any reasons why the respondent came late. He did not keep any dates or times.

[95] He does confirm he drove the respondent to her home with tiles but he did not have any problems with taking her.

[96] He does not know any details surrounding the envelope save what was told to him by Da Silva and seeing a picture of the envelope on her cell phone.

[97] While he concedes that the respondent has a strong voice and is firm he cannot say she was shouting.

[98] He also concedes that there are averments in his evidence in chief are not contained in his written statement and he was not asked to file any additional statements.

[99] He also concedes that perhaps he could have handled the Zaaiman matter differently which led to the name and shame meeting and he gave a detailed account of his involvement in the matter and why the respondent felt it necessary to hold such a meeting.

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

[101] The respondent when 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.

Stanley Norman De Wit

[102] He was employed by DOJ at the time of these allegations as deputy director of management. His involvement in this matter arises in 2018 when he was called upon by the evidence leader in this enquiry to assist in granting access to emails in this matter. The emails were not tampered with and the information could not be altered.

[103] Although in 2013 he was aware of these investigations he was not involved.

Gideon Brits

[104] During 2015 he was employed as operation and service delivery manager at EOH which was a service provider to DOJ. He was responsible for IT duties, investigations, and general run of IP services. As a result of a request received from the Magistrate's Commission which request was for Kallie De Vos he was asked to assist in obtaining information from the respondent and Mr Holsen. The IP address of the respective computers was given to him which resulted in him obtaining the necessary information. A back up was made. An external hard drive was used to store the information. He also received 5 work stations in his possession. The work stations and external hard drive was subsequently handed over to the Commission. At no stage which the items and information was under his custody was it tampered with or interfered. He assisted the evidence leader in obtaining the email from the computer of the evidence leader which was a relatively simple process.

Dirk Cornelius van Greynen

[105] He was a senior magistrate based in Roodeport who was appointed by the Magistrate's Commission as one of the investigators in obtaining evidence against the respondent. He is currently on retirement having served the Department of Justice for 39 years. 28 years as senior magistrate and 11 years as magistrate. His appointment as investigator is dated the 26 April 2013. He explained in great detail the manner in which evidence in this matter was obtained. He also investigated in total + - **/(approximately?)** 50 cases on behalf of the Commission. The importance of his evidence in the main is that he kept a backup on an external drive as a matter of experience. None of the information in his custody was tampered or interfered with. He confirms he provided the evidence leader with CD's and DVD's of the information he had which she collected from his home. The information was copied onto the evidence leader's laptop.

Aron Ropeng Moloyi

[106] He is a practising attorney in the precincts of the Kempton Park area near the court. He also has other business interests. From his personal interaction with the respondent he found that she managed the court on the basis of strict compliance. He admired her character because of her positive impact on the court. He did not see the negative side of her. He confirms that at some point he assisted the respondent in terms of travel and accommodation fees to go to New York on a conference. He did this as a matter of goodwill because he was happy with the court. On her return the respondent repaid him the monies although he was reluctant to take it he did. The amount he lent may have been between R20 000 – R25 000. He also assisted with other sponsorship when called upon to do and when the funds were available. He confirms that he was present at some point in the bail application before the respondent but that accordingly to his knowledge he was not initially seized with the matter but Mr Pule from his office was Mr Pule was not comfortable with two judicial officers on the bench, hence he was called.

Elsie Johanna Jacoba Schneter

[107] She is currently a senior magistrate stationed at Mamelodi. In so far as her knowledge relating to the respondents conduct during meetings at Kempton Park she cannot say that the respondent threatened anyone although she concedes that the respondent was strict with court hours.

[108] Her contact with the respondent was limited with the respondent as she was mostly at Tembisa. She confirms that the investigators in this matter came to Kempton Park tea room and told them to give statements in this matter. She was upset in the manner in which the meeting was conducted. She refused to furnish any statement on the basis that she was not a party to any complaint against the respondent. She was also upset with Mr van Greynen about being asked about monies in the respondent's bank statement and about her brother-in-law a Schneter who was handling some legal work as the respondent's attorney.

[109] Nothing really turns on the evidence of this witness on the merits as Mr van Greynen confirms in the main her evidence.

Stephen Holsen

[110] He is serving as a magistrate in Kempton Park. During the period mentioned in these allegations he acted as a senior as well as a chief magistrate. The respondent was the chief magistrate of Kempton Park. With regard to the MC 15 form relating to Ms Da Silva he denies he filled any details on the form. In fact Ms Da Silva was the author of

these forms and signed the form for the statistics. He was of the view that given the average court hours she sat in court it was unlikely that she would have been all the time in the chief's office. Da Silva was a person who wanted to ingratiate herself in the good books of the chief and others. The respondent and Da Silva were friends. As far as his relationship with Da Silva is concerned he did not want to humour her. Da Silva was a gossip monger of note. He believes there is not an iota of truth relating to the allegations on count 3 which deals with the conduct of the respondent in how she treated the magistrate's at meetings. The respondent was always respectful to all magistrates. In so far as count 5 is concerned he agrees that he requested Erasmus to deal with the matter but gave her an option to refuse should she decide to. In so far as the respondent gambling is concerned he believes that it is ridiculous because she always informed him of where she was going. The allegation that the respondent was gambling during official hours is utter nonsense that someone can concoct something like that. On count 9 relating to the respondent having her hair done in court did not happen. However Da Silva did go to the respondent's home to do her hair. The witness made an interesting remark that is "not that someone was running around with a hair dryer." (Erasmus says she saw Da Silva one morning with a hair dryer). He concedes he may have told Maria to look for the banner.

[111] Da Silva doing typing for the respondent on account of her being a fast typist did not affect or impact the running of the court.

[112] In so far as JOASA work was concerned he is not aware of that as it never affected the court.

[113] He cannot say if the chief left early or came late. However he did see her car in the morning and when he left at times.

[114] He did not talk to Da Silva on account of her behavior.

Annamarie van Vuuren

[115] Her evidence is in the main is that she is a hair dresser and the respondent is a client and friend and has been doing the respondent's hair since 2005.

[116] She did not do the respondent's hair at court but the respondent would come to her place of business or home to do her hair. The relevant part of her evidence was to dispute Da Silva evidence that it takes 2 – 3 hours to do the respondent's hair or a Brazilian. It takes about 45 minutes.

[117] This witness did not do the respondent's hair at court, nor can she say what transpired at court.

Dani Oberholzer

[118] He was a magistrate at the Kempton Park offices at the time that this enquiry commenced. He has subsequently resigned as a magistrate and is working for a firm of attorney. He has also acted as a senior and chief magistrate at times. He denies he went with Da Silva to pick up the respondent from Emperor's Palace. He disputes all parts of Da Silva evidence where he is mentioned. He did not confide in Da Silva as to how he

was treated and did not tell Da Silva about the respondent's financial position or her gambling problem. 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 Moadi was given the vehicle. This was a JOASA event. He denies that the respondent shouted at anyone in meetings but describes her as a straight shooter and not someone who minces her words.

[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.

[121] The evidence leader addressed on the merits that the evidence established the respondent's guilt on the following charges.

[122] The respondent addressed that she should be acquitted on all charges. She argued that her right to privacy was violated and that the evidence obtained from her computer, via the emails, bank statements, medical records were unlawfully obtained.

[123] The respondent surprisingly did not testify. The evidence presented by the commission in terms of the direct evidence of Da Silva created circumstances which in my view, a reasonable expectation existed that if there was an explanation consistent with her innocence it would have been proffered. She however did not rise to the challenge. For her not to have challenged and disputed the evidence of Da Silva herself was nothing short of damning (see *Osman & another v Attorney General Transvaal* 1998 (4) SA 1224 (CC) and *S v Boesak* 2001 (1) SA 912 (CC).

[124] Where there is direct prima facie evidence implicating a person in the commission of an offence, his or her failure to give evidence in rebuttal whatever his or her reasons may be for such failure in general tends to strengthen a party's case because there is nothing to gainsay it and therefore less reason to doubt his or her credibility or reliability.

[125] Approaching the matter and evidence holistically one is bound to conclude on a balance of probabilities that the evidence excludes any doubt that the respondent committed these acts on the following charges.

Dreyer Van Zyl Van Der Merwe

[126] He is currently serving as a magistrate in Pretoria with some 37 years' experience. His evidence centered mainly on the genesis of JOASA consequent upon the demise of MASA. He gave a very detailed and lengthy account of the aims and purposes of JOASA as a vehicle that would assist the judiciary of South Africa in being effective. He also highlighted the frustrations experienced by magistrates with the Department of Justice vis a vis salaries. Among the objectives of JOASA included promoting a human rights culture, remuneration of judicial officers, collect and publish guidance for judicial officers to create

uniformity of and to arrange conferences to promote wholesome and frank relationships with magistrates to comment on proposed legislation and amendments to existing legislation to publish articles. JOASA was also a vehicle that would be used to bring South Africa into the international fold. In his view JOASA was an integral part of the magistracy and judiciary. From the evidence given by this witness it was abundantly clear that he was a committed, dedicated and passionate servant of JOASA and he wanted harmony in the judiciary. He also had to balance his judicial functions with the work he did for JOASA working an average of 4 – 5 hours a day. Various exhibits were handed through this witness from (RR)(i) to RR(xiv) as well as exhibit 1 relating to the Chief Justice comments about the magistracy. Exhibit SS(i)(ii) as well as exhibit TT were handed in. From his answers in cross examination it was clear this witness was not fully aware of the allegations against the respondent and his opinion on what act or conduct constituted misconduct was based on whether the running of the court would be affected by doing JOASA work during the day. His evidence when viewed against the allegations against the respondent does not take or advance the case for the respondent on the merits. In other words nothing in the evidence of this witness assists the respondent in her defence, however he should be commended for his role and effort he invested in JOASA to achieve its intended purposes.

Itumeleng Tebe

[127] He is currently the office manager at Kempton Park magistrate's court since 6 August 2012. There are 74 personnel in the administration staff of which he has oversight at the time when he was at Kempton Park with the respondent. There were no incidents where he was belittled, threatened with physical assault by the respondent nor was a witness to such incidents to other officials by the respondent. He does recall the incident concerning Van Aswegen about the salary advice where the respondent had some concerns. 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, the relationship between Da Silva and the respondent was cordial. He also mentions that he always saw Da Silva in the respondent's office.

Mr Maodi

[128] He is currently a practising attorney He acted as a magistrate at Kempton Park during the period March 2006 and December 2010. He primarily presided in the civil section. He was involved in JOASA work. At no stage was the respondent rude, discourteous or swore at him. Da Silva did not make any report of being sworn at by the respondent to him. The meetings held by the respondent were conducted primarily in English. He was not aware of any physical threats made to him or any other of the magistrates Da Silva and the respondent were good friends prior to Da Silva coming to Kempton Park. He also confirmed that himself Da Silva, Oberholzer and the respondent went on a diet at some point in time. 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. He cannot recall anything about case no.D2118/09. Johan De Wet and Ryan Wessels were the accused. He confirms he did type the sentence in this case, however he was given a written page by the respondent with the sentence already written which he subsequently typed and emailed back to the respondent. His evidence relating to the section 58 and Ms Booikutso does not take the matter any further save to say that she worked for him once her acting appointment was over.

Abida Motlekar

[129] She is currently the chief magistrate of Welkom having been appointed in 2004.She outlined her career path from prosecutor in 1991 to being appointed to the

bench in 1996 and senior magistrate in 2002.She also serves and has served on many judicial fora in the lower courts and chief magistrate's forum. She is the chairperson of the budget committee in the chief's magistrate's forum. She also detailed the workings of the cluster system within the magistracy as well as the role of the judicial quality assurance. The respondent is known to her for some time. She gave her views and opinions on various documents handed to her by the respondent relating to the resolutions of the Commission regarding the allegations against the respondent. The instruction to seize the respondent's computer and emails, the fact that Da Silva was part of the investigation against the respondent. Her considered opinion was that the actions of those that initiated the investigation without proper authority was irregular. She also outlined her interpretation of the policy relating to seizure of computers and emails that should be done on proper instructions from the Commission. Her view is that members of the ethics committee should not be involved in the investigations. She also gave her views on the chain evidence relating to the seizure of emails and there is a process to be followed to access the contents of the emails, her opinion and views on backdating of leave forms, Ms Duffy's, conduct official hours, and parking. Her view of the relationship between the respondent and Da Silva was friendly and more than collegiality. They were friends. She also gave her opinion on the emails relating to the strike by the magistrates.

[130] The evidence of this witness does not affect the merits of the matter. While I accept that she has the right to express her opinions and views on what she was asked to comment on, my view is that those opinions are non-binding on this enquiry. The presiding officer has to decide the matter holistically and make its own finding and not substitute another person's opinion for its own. Consequently I find that the evidence of this witness does not advance the case for the respondent on the grounds of relevance and opinion.

Elvis Mudhavi

[131] He is currently the cluster head for interpreters at Kempton Park area. During 2010 he was the chief interpreter. He denies that at any stage while the respondent was the chief magistrate at Kempton Park she was rude or discourteous to him or any other interpreter on the basis that no complaints were made to him.

Maretha Froneman

[132] She is currently a senior magistrate stationed at Nigel and part of the sub-cluster of Kempton Park magistrate's court. She was approached at some point in time by Mr Jonker to investigate Ms Duffy which she did, but the investigations stopped on the basis that Ms Duffy had resigned. Various exhibits ZZ(i) to (v) were handed in through this witness. The preliminary investigation suggested that Ms Duffy was mentally incapacitated to function as a magistrate based on the doctor's report and the paranoia of Ms Duffy. Nothing in her evidence affects the merits of the evidence in terms of the allegations against the respondent.

Adnan Jacobs

[133] He is currently a magistrate. During the period of 2006 he was at Kempton Park magistrate's court where the respondent was the chief magistrate. At no stage during any meeting that was present was the respondent rude, discourteous, and belittling to him or any other magistrate in his presence. In his view Da Silva and the respondent were the best of friends and were always together. He filled in his own statistics and believed it was not possible for someone else to fill in another magistrate's statistics. The primary language used in the meetings convened by the respondent was English. He does not know anything about any threats made to Wyand Nel. The respondent was always professional in the manner she conducted the meetings, although he does concede she

has a loud voice. He also confirmed that the respondent did quality checks on the charge sheets and errors were pointed out to him where he had transgressed. The witness also made reference to his disappointment of having been refused his transfer multiple times whereas Da Silva was transferred two years after her appointment in 2013. He verily believes that Da Silva's appointment and rapid transfer was a reward for her to implicate the respondent. He also took issue that Da Silva's surname was different in the short listing notice. He mentions that Da Silva was confident that she would get the post and be in the Regional Court.

[134] That concluded the evidence of witnesses the respondent elected to call in her defence.

[135] The respondent elected not to testify in these proceedings.

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 the respondent was good.

[137] Madeline Erasmus says she was requested to call Da Silva out of court on the respondent's instructions and Da Silva spent months in the respondent's office doing work.

[138] Elsie Smith says the respondent has also asked her to often call Da Silva out of court.

[139] Adnan Jacobs says the respondent and Da Silva were the best of friends and were always together.

[140] Abida Motlekar says the relationship between Da Silva and the respondent was more than collegiality in that they were friends.

[141] Mr Maodi says that Da Silva and the respondent were good friends.

[142] Itumeleng Tebe says Da Silva and the respondent relationship was cordial. He always saw Da Silva in the respondent's office.

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.

[144] The respondent elected not to call Mr Loots and Mr Maharaj as her witnesses although they were available for reasons already placed on record.

[145] As mentioned above the respondent chose not to testify and closed her case.

[146] The evidence leader addressed on the merits and asked for the conviction of the respondent.

[147] The respondent argued for her acquittal on all the counts.

[148] This is then the evidence before me to decide the matter.

[149] I have considered the following law in deciding this matter.

[150] While some of the cases are of a criminal nature I believe the sentiments expressed in these cases apply mutatis mutandis to the evaluation of the evidence.

[151] The respondent surprisingly did not testify. The evidence presented by the evidence leader in terms of the direct evidence of Da Silva and the circumstantial evidence of the witnesses created circumstances which in my view, a reasonable expectation existed that if there was an explanation consistent with her innocence it would have been proffered. She however did not rise to the challenge. For her not to have challenged and disputed the evidence of Da Silva herself was nothing short of damning. (See *Osman and another v Attorney-General Transvaal* 1998 (4) SA 1224 (CC) and *S v Boesak* 2001 (1) SA 912 (CC).

The Law

[152] I have taken the liberty to make reference to case law, which in my view mutatis mutandis apply to this enquiry.

[153] Regulation 26 (15) provides:

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

[154] In my view, this would mean that a balance of probabilities means it is more likely than not to have happened. In other words some event happens which is more than 50%.

[155] Section 33 (1) of the Constitution provides that everyone has the right to administrative actions that is lawful reasonable and procedurally fair.

[156] In *R v Kristusamy* 1945 AD 549 as per Davis JA at page 556:

"After all, one cannot expect a witness to be wholly truthful, in all that he says. But, it is off course, necessary that the court should be satisfied beyond reasonable doubt that in its essential features that the story which he tells is a true one. If more than that were required, the administration of justice would in many cases be rendered impossible".

[157] In *S v Oosthuizen* 1981 (3) SA 571 (TPD) per Nicholas J at page 577 H-Z: held

"where a witness had be shown to be deliberately lying on one point, the trier of fact may (not must) conclude that his evidence on another point cannot be safely relied upon. The circumstances may be such there is no room for an honest mistake in regard to a particular piece of evidence, either it is true or it has been deliberately fabricated".

[158] The admissibility of documents were placed in issue, in particular the obtaining of her bank statements, her emails and her medical records.

[159] In this regard I am cognizant of the provision of Section 14 of the Constitution which provides:

"Everyone has the right to privacy, which includes the right not to have" –

a) Their person or home searched
b) Their property searched
c) Their possessions seized; or
d) The privacy of their communications infringed

[160] Note however that section 36 (1) of the Constitution provide the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

a) The nature of the right;
b) The importance of the purpose of the limitations;
c) The nature and extent of the limitations;
d) The relation between the limitation and its purpose,
e) Less restrictive means to achieve the purpose

[161] In *S v Makwanyane and another* 1995 (3) SA 391 (CC) Chaskalson J formulated the approach to limitation of right as follows:

"The limitation of constitutional right for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment of proportionality. The requirement of proportionality calls for a balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which that right is limited and the importance of that purpose to such a society; the extent of that limitation; its efficacy and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

[162] See also *Key v Attorney-General Cape Provincial Division* 1996 (4) SA 187 (CC) where Kriegler J dealt with the question whether fairness requires evidence to be excluded and held at paragraph [22] as follows:

"Fairness is an issue which has to be decided upon the facts of each case. At times fairness might require that evidence unconstitutionally obtained be excluded. But there

will also be times when fairness will require that evidence albeit obtained unconstitutionally nevertheless be admitted."

[163] Compare with *Ferreira v Levin NO and others* 1996 (1) SA 984 (CC)

[164] The Magistrate's Act 90 of 1993 is a statute which has general application (herein after referred to as "The Act.")

[165] Section 4(a) of the Act provides that the objects of the Commission shall be to ensure that disciplinary steps against judicial officers in the lower courts take place without favour or prejudice.

[166] Section 7(a) of the Act enables the commission to carry out its functions in section 4 which provides:

a) Carry out or cause to be carried out any investigation that the commission deems necessary; **and**
b) Obtain access to official information or documents.

[167] Section 16(1)(b) of the Act provides for the making of regulations relating to discipline to judicial officers as one of its objects.

[168] Reading the Act together with the regulations holistically, I find that the Magistrate's Commission has the authority to have seized documents from the respondent's computer without seeking permission from her to do so and to have used Da Silva or other person to do so.

[169] If notice had been given to the respondent about the initial investigation would have in my view in all likelihood defeated the purpose of the investigation in obtaining the necessary documents that may well have been removed or secreted.

[170] In this regard I cannot find that the conduct of the commission in obtaining the documents was unreasonable or unfair given the unique circumstances of this case. These documents obtained were in my view more of a corroboration to the oral evidence of Da Silva in order to substantiate the charges against the respondent. Having regard to the aforementioned case law and provisions of the Constitution, I find that all the documents pertaining to this matter was lawfully obtained by the commission.

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".

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

[174] 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".

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.

Johanna Van Aswegen

[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.

Aron Ropeng Moloyi

[176] His evidence in chief contradicts his affidavit he made in response he made to the allegations against him in two aspects:

He denies advancing, giving or lending any monies to the respondent or for the respondent.

He denies appearing before in court proceedings.

He clarifies these contradictions in that he was in Kenya when he arranged with a business associate to give a sum of money to Da Silva at his office.

He also believes that when one appears in court it would be for trial or something more substantial than sitting in for a matter as happened in this case concerning the bail application when Ms Pule called him. Surprisingly this witness did not file a supplementary affidavit clarifying the position.

Stephen Holsen

[177] His choice of words is indicative of a person who lacks objectivity and is bitter about what happened during this investigation against the respondent and the manner in which he was treated. The following words are suggestive of the above "ingratiate", "gossip monger of note", "nonsense", "rumour monger", "embellishment and exaggeration of the truth", "horrified in the manner I was treated during the investigation," investigation tainted with impropriety"

[178] He says he felt intimidated that the Commission wanted him to testify against the respondent yet he did not file an affidavit in support of the respondent or complain that he was intimidated by the Commission.

[179] He indicated that never in a million years would he fill another magistrate's stats form, In fact he goes on to qualify that by saying never in a million years would he concoct a magistrate's stats.

[180] Initially when asked if he did the respondent's stats he denied doing so, however when the evidence leader presented him with the stats of the respondent which he signed on her behalf he concede that he did assist the respondent with her stats. She gave him the information and he filled in the MC15 and signed on her behalf. The reason he advanced for doing so was that the respondent was not very computer literate. He also assisted the respondent with doing correspondence on her behalf at times. This begs the question what the respondent's secretary was doing?

[181] In my view this witness did not impress in the manner in which he testified and makes it difficult to believe his evidence. As a result of the aforesaid reasons I am inclined to find that he is not a reliable or credible witness.

[182] When the investigations commenced against the respondent nothing prevented him from filing an affidavit in favour of the respondent along the lines he testified in this enquiry. Clearly he did not live up to his oath of being "fearless'.

[183] His evidence relating to whether the respondent's hair was being done at the office elicited the following replies:

"he never saw that happen".

"he was not at the office at the time".

"her hair was done at her house".

And rather curiously added "Not that anyone was running around with a hair dryer".

This reply gives credence to Ms Erasmus' evidence that she saw Da Silva walk with a hair dryer on one occasion.

Conclusion And Findings

[184] As result of the aforesaid expose I make the following findings:

The below mentioned charges cannot be sustained on a balance of probabilities for the following reasons:

Count 1:

The charge is vague and embarrassing in the manner in which it is couched namely, constantly arriving late for work and departing early.

Count 5:

This was a consent order hence it would have made no difference as to which judicial officer presided. Furthermore it was Mr Holsen who requested Madeline Erasmus to deal with the matter not the respondent. Madeline Erasmus was the given the opportunity of declining to deal with the matter by Mr Holsen which she did not.

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.

Count 13:

On this count Madeline Erasmus indicates that assisting the respondent did not affect her court work and was done quickly.

Count 15:

On this count the charge sheet alleges it was the respondent who requested Elsie Smith to search for the JOASA banner, however the evidence is that it was Mr Holsen who requested her. There was no averment that Mr Holsen was acting under the authority or instruction of the respondent.

Count 18:

On this count it cannot be gainsaid that Mr Maodi received a draft sentence to type for the respondent, although the respondent has her own secretary or typist. At best this conduct is suspicious.

Count 21:

On this count the record indicates that Mr Pule a candidate attorney was on record. Mr Moloi went in later as the candidate attorney was surprised to see two judicial officers on the bench. It therefore cannot be said that Mr Moloi appeared in these proceedings in the

true sense in the proceedings absent the transcripts of those proceedings, although the initial denial by Mr Moloi that he appeared before the respondent is suspicious.

Count 23:

On this count as I alluded to elsewhere while borrowing of monies should be discouraged between judicial officers, the payment of rent for the respondent by Da silva does not amount to misconduct, at best it is suspicious.

Count 24:

On this count the conducting of judicial officer's finances is a personal matter barring criminal conduct. It may be frowned upon that a judicial officer becomes over indebted for reasons of recklessness, I do not believe that such action can amount to or be elevated to misconduct, in that the law provides for persons to apply for debt relief who are in need, clearly judicial officers are not excluded from such relief.

Accordingly, on counts 1, 5, 8, 13, 15, 18, 21, 23, 24 the respondent is found **NOT GULITY.**

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

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.

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.

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 7:

Main count: the probabilities suggest she did gamble, Da Silva says they went for coffee and Oberholzer told her that the respondent had gambling problems, also consistent with this probability is that the respondent told her that she was bad luck causing her to lose money.

Count 9:

Veronica's evidence is corroborated by Madeline Erasmus in that she saw Da Silva at court one morning with a hair dryer and also Mr Holsen who sarcastically mentioned "not that someone was running with a hair dryer" supports the probabilities that Da Silva did the respondent's hair at court more so that she had to roll the hair.

Counts 10, 11, 12, 14, 16 are also favoured by the probabilities that it occurred. Madeline says she called Da Silva out of court and spent months in the respondent's office doing work. Elsie also called Da Silva out of court.

Count 17:

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

Count 20:

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.

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.

Accordingly, the respondent is found **GUILTY** on the following charges:

Counts 2, 3, 4, 7, 9, 10, 11, 12, 14, 16, 17, 20, 22 (13 counts in total)

M Maharaj

Presiding Officer

Sanction

JUDITH FREDA VAN SCHALKWYK

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

DISCIPLINARY ENQUIRY

SANCTION

Delivered on 02 October 2020

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[1] Section 165(2) of the Constitution of the Republic of South Africa provides:

"The courts are independent and subject only to the Constitution and the law which they must apply impartially and without fear favour or prejudice."

[2] The "oath of office" of a judicial officer includes the provision that he or she will uphold and protect the Constitution and the human rights entrenched therein and will administer justice to all persons alike without fear, favour or prejudice.

(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.

[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 (17) (b) which is subject to subresolution (22) (b) of Regulation 26.

[11] Both the respondent and evidence leader were given the opportunity to present mitigating and aggravating factors as provided for in subresolution (16) (b).

[12] The respondent submitting the following factors as mitigating:

(a)? She is 59 years old.

(b) She has 3 children:

Jordan who is 26 years old.

Trent who had the accident and is disabled.

Karen who is 33 years of age and lives with her.

(c) She has not being paid a salary since 12 December 2017.

(d) She also has a life partner.

(e) She is not working on account of not being allowed to work (however I note section 15 of The Magistrate's Court Act 90 of 1993 provides that no magistrate shall, without the consent of the Minister, perform any paid work outside his or her duties of office.)

(f) She is afflicted with the following ailments:

Suffer with cholesterol;

Is diabetic;

Myelofibrosis.

[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 of morally incorrect and none of these charges committed warrants dismissal or is dismissable.

[15] The evidence leader read out a prepared or written argument on the appropriate sanctions in aggravation referring to a plethora of American authorities relating to judicial misconduct.

[16] She also made reference to schedule E of the Code of Conduct which sets out what behavior is expected from magistrates relating to the integrity of a magistrate.

[17] Execution of a magistrate's duty objectively; competently and with dignity, courtesy and self-control.

[18] A magistrate acts at all times in a manner which upholds and promotes the good name; dignity and esteem of the office magistrate and administration of justice.

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

[20] The charges of which the respondent was found guilty occurred while she was in the position of chief magistrate at Kempton Park.

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

[22] There was no acknowledgement of responsibility for the allegation she was convicted of but instead portrayed herself as the victim.

[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.

[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.

[25] Hence her submission was that the respondent be removed from office.

[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.

[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.

[28] The choice of words used by the respondent which I have alluded to in the judgment but warrants repeating, namely:

"If I could throw you through a wall."

"Fuck Veronica can you believe a clerk is walking around with my salary slip."

"You don't want my son to fucking graduate."

"Have you finally lost your marbles."

"You are sexually harassing me."

"Your decision sucks."

[29] These comments, in my view, seems to validate Veronica Da Silva's portrayal of the respondent's conduct as dictatorial and tyrannical in the manner in which she conducted herself towards her. In short the respondent was the proverbial iron fist in a velvet glove.

[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) Karel Roux Vos – 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 intension 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.

[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).

[33] As a result of finding and sanction I am obliged to bring to your attention of your right to lodge 26 representations and in terms of subresolution (20) with the Commission which must be in writing; be lodged with the Commission within 21 working days after today and set out the grounds for your representation.

[34] A rather curious conundrum is provided in subresolution (22) (b) which provides If the Commission is of the opinion that the magistrate concerned should not be removed from office, it may impose any of the sanctions contemplated in subresolution (17) (a). This begs the question, should Parliament or the High Court not be called upon to make that determination instead of the Commission which now has the power of review over the presiding officer that it has appointed in the first place. I say this orbiter on the basis of the latin maxim nemo index in sua causa.

M Maharaj

Regional Magistrate KZN (Durban)