MINISTRY
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

400009923

Enq: Lungisile Pakati (Mr)
Tel: 021 467 1725
Mobile: 082 905 2651
Fax: 021 467 1715

PARLIAMENT OF SOUTH AFRICA
01 AUG 2012
RECEIVED
CLERK OF THE PAPERS

Speaker of the National Assembly
Honorable M V Sisulu
Parliament of the RSA
Cape Town
8001

Dear Honourable Sisulu

SUBJECT: SUSPENSION OF MAGISTRATE MS N NDAMASE: ADDITIONAL MAGISTRATE AT PRETORIA

Mr J T Radebe, Minister for Justice and Constitutional Development wishes to inform Parliament of the suspension from office of Ms N Ndamase, an additional Magistrate at Pretoria, pending consideration by Parliament of a recommendation by the Magistrates Commission for her removal from office as a Magistrate in terms of section 13 (4) (a) (i) of the Magistrates Act, 1993 (Act No 90 of 1993).

Kind regards

Pakati

MR L PAKATI
MINISTRY FOR JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

DATE: 01/08/12.

with the contravening of the Code of Conduct for Magistrates in one way or the other, as set out in Schedule E of the regulations,

- 12 counts in terms of regulation 25(d), in that she was negligent/indolent in the carrying out of her duties,
- 2 counts in terms of regulation 25(h), in that she absented herself from office or duty without leave or valid cause,
- 19 counts in terms of regulation 25(j) in that she refused to execute lawful orders.

2.3 Having heard the evidence presented at a lengthy misconduct hearing, the Presiding Officer, in his 209 page judgement, found Ms Ndamase guilty of eleven (11) counts of misconduct, eight (8) in respect of her refusal to execute lawful orders as contemplated in regulations 25(j) of the Regulations and three(3) counts in respect of her failure to execute her official duties objectively, competently and with dignity, courtesy and self-control as contemplated in regulation 25(c) read with paragraphs 2 and 3 of the Code of Conduct for Magistrates.

2.4 The Presiding Officer at the conclusion of the misconduct inquiry on 2 May 2012 recommended that Ms Ndamase be removed from office in terms of section 13(4)(a)(i) of the Act. Ms Ndamase elected to conduct her own defence throughout the inquiry. The following aggravating and mitigating factors weighed with the Presiding Officer:

Aggravating factors:

1. Ms Ndamase shows total disrespect towards her Judicial Head of Office.

13. She refuses to accept shat she had some shortcomings in the Civil Section. She blatantly refused to accept further mentoring in this regard.

14. Ms Ndamase lacks introspection as to where she is at fault.

15. Ms Ndamase does not show remorse. She still does not accept any rulings made by the presiding officer during the trial.

Mitigating factors:

1. The period from 2008 to the date of finalization of the hearing was stressful for Ms Ndamase.

2. She experienced health problems during this period.

3. Ms Ndamase lost her daughter prior to being charged with misconduct, which was and is a traumatic experience for her.

4. She has approximately 23 years of service of which 14 to 15 years are as a magistrate.

5. Ms Ndamase is 58 years old, has one child of her own and is involved with two other children who are in a children's home.

6. She is divorced and a single parent.

4.2 A report in which such suspension and the reason therefore are made known, must be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

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

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

4.5 At its meeting held on 20 and 21 July 2012 the Commission considered the following documents as required by regulation 26(22) read with regulation 26(19) of the Regulations for Judicial Officers in Lower Courts, 1994:

- a copy of the charge sheet in respect of the misconduct inquiry, the presiding officer's findings in relation to the charges and the reasons therefore, which includes his findings in relation to the aggravating and mitigating factors;

- the presiding officer's recommendation in terms of regulation 26(17)(b) of the Regulations and the reasons therefore.

- Ms Ndamase's representations in terms of regulation 26(20) of the Regulations dated 12 May 2012 and received on 14 May 2012.

MAGISTRATES COMMISSION **LANDDROSTE-KOMMISSIE**

P O BOX/POSBUS 9096, PRETORIA, 0001 ☎ (012) 325 3951 FAX/FAKS (012) 326 0094

The Honourable Mr J T Radebe, MP
The Minister of Justice and
Constitutional
Development
Private Bag X276
PRETORIA
0001

Reference / Verwysing : 6/5/5/2:117/08

Enquiries / Navrae : Mr J Meijer

Date / Datum : 23 July 2012

Dear Minister

SUSPENSION/REMOVAL FROM OFFICE ON THE GROUND OF MISCONDUCT: MS N NDAMASE, ADDITIONAL MAGISTRATE, PRETORIA

1. The purpose of this letter is to appraise you of the circumstances which moved the Magistrates Commission to recommend that Ms Ndamase be removed from office on the ground of misconduct in terms of Section 13(4)(a)(i) of the Magistrates Act, 1993 (Act 90 of 1993, hereinafter the Act).

2. Ms Ndamase, an additional magistrate at Pretoria, was charged with 42 counts of misconduct. She denied all the allegations against her. At the conclusion of the misconduct inquiry she was found guilty of 11 of the 42 charges preferred against her.

3. Ms Ndamase is 58 years of age and was permanently appointed to the office of Magistrate on 1 July 2000.

4. The charges of misconduct against her consisted of the following:

2. She was found guilty of eight counts of misconduct where she refused to execute lawful orders from her judicial head of office.

3. The other three counts relate to failure to execute her official duties objectively, competently and with dignity, courtesy and self-control.

4. Ms Ndamase is very difficult to work with.

5. She refuses to receive any written communication from her judicial head of office.

6. She has no respect for her supervisors.

7. Her behaviour inside and outside the court from time to time lacks dignity, courtesy and self-control which is not in the interest of justice.

8. Ms Ndamase was not a reliable witness.

9. Her disrespect for her seniors impacts negatively on the management of the Pretoria Magistrate's Office.

10. It is impossible to work and to communicate sensibly with Ms Ndamase.

11. She wants to work on her own terms and conditions in the office. This hampers the proper management of the office which is not in the interest of justice.

12. Ms Ndamase does not care what she says and to whom she says it. This is not always in the interest of justice.

13. She refuses to accept shat she had some shortcomings in the Civil Section. She blatantly refused to accept further mentoring in this regard.

9. At its meeting held on 20 and 21 July 2012, the Magistrates Commission considered the Presiding Officer's findings and recommendation as well as the representations submitted by Ms Ndamase and resolved to recommend to the Minister that the recommendation of the Presiding Officer in terms of regulation 26(17) (b) of the Regulations for Judicial Officers in the Lower Courts, 1994 that Ms Ndamase be removed from office, be accepted. The Commission is of the view that Ms Ndamase's conduct as set out in the charges of which she was found guilty is so serious that it justifies her removal from office. Her conduct renders her unfit to hold the office of Magistrate any longer.

10. In terms of section 13(4) (a) of the Magistrates Act, No. 90 of 1993, the Minister for Justice and Constitutional Development, if the Magistrates Commission would recommend that a Magistrate be removed from office on ***inter alia*** the basis of misconduct, must suspend that Magistrate from office or if the Magistrate is at that stage provisionally suspended in terms of the Act, confirm the suspension.

11. The Commission considered the following documents as required by regulation 26(22) read with regulation 26(19) of the Regulations for Judicial Officers in Lower Courts, 1994, a copy of which is attached:

- a copy of the charge sheet in respect of the misconduct inquiry, the presiding officer's findings in relation to the charges and the reasons therefore, which includes his findings in relation to the aggravating and mitigating factors;

- the presiding officer's recommendation in terms of regulation 26(17) (b) of the Regulations and the reasons therefore.

- Ms Ndamase's representations in terms of regulation 26(20) of the Regulations dated 12 May 2012 and received on 14 May 2012.

Annexure A

A.

MAGISTRATES COMMISSION **LANDDROSTE-KOMMISSIE**

P O BOX 9096, PRETORIA, 0001 (012) 325 3951 FAX (012) 326 0094

Ms N E Ndamase
The Chief Magistrate
Private Bag X61
PRETORIA
0001

Reference: 6/5/5/2 (117/08) (JM)
Enquiries: Ms G J Pretorius
Date: 16 November 2009

Dear Ms Ndamase

CHARGE OF MISCONDUCT

You, **Ndileka Ndamase**, at all relevant times a magistrate in accordance with Act 90 of 1993 as amended read with Act 85 of 1995, in respect of whom the Magistrates Commission has jurisdiction, **are being charged with:**

As Amended on 8/12/2011

COUNT 1:

You are guilty of contravening regulation 25(j) of the Regulations for Judicial Officers in Lower Courts, 1994 (hereinafter the Regulations), in that on ~~01.12.2008~~ 28.11.2008 you failed to execute a lawful order, namely that you failed to preside in the section 65 Act 32 of 1944 court in accordance with a roster given to you on 20.11.2008. *(See affidavit D Nair dated 04.12.2008)*

COUNT 2:

You are guilty of contravening regulation 25(j) of the Regulations in that on 01.12.2008 you refused to go to the office of the Chief Magistrate of Pretoria, Mr Desmond Nair, when requested to do so by the latter. *(See affidavit D Nair dated 04.12.2008)*

COUNT 3:

You are guilty of contravening regulation 25(j) of the Regulations in that on 02.12.2008, you refused to attend a scheduled meeting at the office of the above-mentioned Chief Magistrate, as you were informed by Ms M Horn, acting secretary of the said Chief Magistrate. *(See above-mentioned affidavit)*

COUNT 9:

You are guilty of contravening regulation 25(h) of the Regulations in that during August 2008 you were absent from your office without valid cause in that the attorneys could not get hold of you regarding a judgment. *(See e-mail F van Reiche dated 28.08.08)*

COUNT 10:

You are guilty of contravening regulation 25(j) of the Regulations in that for the period 16.02.2009 to 04.03.2009, you failed to execute a lawful order, namely, you submitted, contrary to a specific request not to do so, your admission of guilt statistics on the civil court statistics form. *(Letter from Mr D Nair dated 04.03.2009)*

COUNT 11:

You are guilty of contravening regulation 25(j) of the Regulations in that on 09.02.2009 you refused to execute a lawful order from the Chief Magistrate (Pretoria) in that you refused to assume duty at the criminal section. *(See letter D Nair 09.02.2009 and your response 09.02.2009)*

COUNT 12:

You are guilty of contravening regulation 25(j) of the Regulations in that on 30.01.2009 you failed to execute a lawful order, in that you refused to sign for a letter from the office of the Chief Magistrate. *(See letter of Mr Nair dated 03.02.2009)*

COUNT 13:

You are guilty of contravening regulation 25(j) of the Regulations in that for the period 05.03.2009 to 07.04.2009 you continued, despite previous requests, not to adhere to a lawful order, namely that you continued to submit your statistics on the wrong form. *(See letter: Mrs M Mamosebo dated 07.04.2009)*

COUNT 14:

You are guilty of contravening regulation 25(d) of the Regulations in that you exercised your duties in a negligent/indolent manner by submitting your statistics for March 2009 late, to wit only as on 06.04.2009. *(See letter Mrs M Mamosebo 07.04.2009 to Mr D Nair)*

of justice by declaring to Mr P van Vuuren that you refuse to adhere to the authority of Ms Mamosebo or the said Mr Van Vuuren.

COUNT 21: (6) Amended with consent on 8/3/2011

You are guilty of contravening regulation 25(j) of the Regulations to execute a lawful order, in that you refused to carry out a lawful order, namely that on 06.04.2009 (03) (6) you submitted your leave application contrary to written instruction, to the Office of the Chief Magistrate, instead of to the Office of the Senior Magistrate, Ms M Mamosebo. *(See letter D Nair dated 06.04.2009)*

COUNT 22:

You are guilty of contravening regulation 25(h) of the Regulations, in that for the period 30.03.2009 – 03.04.2009, you were absent from your office/duty without leave or valid cause. *(See letter: Mrs M Mamosebo dated 03.04.2009)*

COUNT 23:

You are guilty of contravening regulation 25(j) of the Regulations, in that on 30.01.2009, you refused to sign acknowledgement of receipt of two letters from the Office of the Chief Magistrate, Pretoria. *(See statement: Ms M Horn dated 03.02.2009)*

COUNT 24:

You are guilty of contravening regulation 25(d) of the Regulations, in that on 24.11.2008 you executed your duties negligent/indolent in that Mrs S Windell, a Clerk, Pretoria Magistrate's Office, could not give you your weekly quota on default judgments due to the fact that you did not finalize the quota of the previous week. *(See statement S Windell dated 03.12.2008)*

COUNT 25:

You are guilty of contravening regulation 25(d) of the Regulations, in that you exercised your duties negligently/indolently, in that on 17.10.2008 a day before you went on leave, you returned ± 120 default judgments to Mrs S Windell which you did not finalize as requested. *(See above-mentioned statement, Count 24)*

COUNT 31:

You are guilty of contravening regulation 25(d) of the Regulations, in that you carried out your duties negligently by submitting incomplete statistics for November 2008 *(See letter D Nair dated 02.12.2008)*

COUNT 32:

You are guilty of contravening regulation 25(d) of the Regulations, in that you carried out your duties negligently/indolently by seldom granting default judgments and sending them back to the legal representatives with unfound queries *(See affidavit A Rademan dated 03.12.2008, paragraph 5)*

COUNT 33:

You are guilty of contravening regulation 25(c) of the Regulations, read with paragraph 1 of the Code of Conduct , in that you breached the Code of Conduct for Magistrates, relating to the integrity of a magistrate by being rude, abusive and insulting towards your Senior Magistrate, Ms A Rademan. *(See affidavit A Rademan dated 03.12.2008)*

COUNT 34:

You are guilty of contravening regulation 25(c) of the Regulations, read with the Code of Conduct (paragraphs 3 and/or 4 and/or 16), in that your demeanour, attitude and competency in the Civil Court, Pretoria Magistrate's Office, was of such a nature that legal representatives do not want to appear before you, resulting in your colleagues being burdened with your work, or matters being postponed/settled which ultimately impacted on the good name, dignity and esteem of the Office of magistrate and the administration of justice. *(See affidavit of A Myambo dated 03.12.2008 and affidavit of A Rademan 04.12.2008)*

COUNT 35:

You are guilty of contravening regulation 25(c) of the Regulations, read with paragraph 3 of the Code of Conduct in that you did not act with dignity, courtesy and self-control in the following circumstances:

(a) on 27.11.2008: You told Ms Sonika Windell that "God is watching her and He will triumph".

(b) on 17.01.2007: You shouted at F V A von Reiche "Can't you see I have my gown on"!.

(c) December 2008: You screamed at Ms Rademan whilst attorneys were outside your office and the office door was open.

COUNT 41:

You are guilty of contravening regulation 25(j) of the Regulations, in that you failed to execute a lawful order, in that during May 2008 you failed to hand over the key of the office you occupied at Atteridgeville as instructed by your senior, Ms S Raphalelo. *(See e-mails dated May 2008 and letter A Rademan dated 22.05.2008)*

COUNT 42:

You are guilty of contravening regulation 25(j) of the Regulations, in that during October 2008 you refused to receive any default judgments from the clerk of the court and refused to assist attorneys with ***ex parte*** applications. *(See letter A Rademan dated 14.10.2008)*

You are invited in terms of regulation 26(5) of the Regulations for Judicial Officers in Lower Courts, 1994 to send or deliver a written explanation regarding the misconduct with which you are charged in order to establish which allegations are admitted and which allegations are disputed within ten (10) days after receiving this charge. Such explanation is to be made to the Secretary, Magistrates Commission, Pretoria.

GIVEN UNDER MY HAND AT PRETORIA THIS 16TH **DAY OF** NOVEMBER **2009.**

B M NGOEPE
CHAIRPERSON: MAGISTRATES COMMISSION
JUDGE PRESIDENT OF THE SOUTH AND NORTH GAUTENG HIGH COURTS

Acknowledge receipt of charge sheet on 16/11/2009 at 15h10

Received on

13, 18, 20 26, 29, 30, 33, 36, 39, 40 and 42). The application for discharge also succeeded partially in so far as count 35 [(c) and (d)] is concerned.

The charge sheet was served personally on Magistrate Ndamase on the 16th of November 2009. The Magistrate made use of the invitation as out set in the charge sheet as provided for in regulation 26(5) of the regulations and she delivered a written explanation regarding the misconduct with which she is charged. During her points *in lumine* as well as during her application for discharge the Magistrate argued that she did not had an opportunity to respond before a decision was taken to charge her with misconduct. Magistrate Ndamase in writing placed all 42 counts in dispute.

Mrs. G J Pretorius, Senior Magistrate, Brits has been appointed to lead the evidence in this matter. Magistrate Ndamase appears in person. Attorney Kedibone Molema of the firm Kedibone Molema Attorneys was supposed to appear on behalf of the Magistrate when the actual hearing started on the 7th of February 2011. However, she did not appear as pre-arranged in writing with the Magistrate who leads the evidence and she also did not inform this forum that she no longer represents Magistrate Ndamase. The Magistrate therefore decided to take care of her own defence and Presiding Officer dealt with the dishonorable practice of the attorney separately as prescribed by section 23 of the Magistrates' Courts act 1944 (act 32 of 1944). The matter was reported to the Law Society of the Northern Provinces and the Law Society subsequently decided to issue Ms. Molema with a warning for her unprofessional conduct.

For various reasons we battled more for than a year to start with the actual hearing. It is not necessary to go into detail in this

started, was absent during the actual hearing because the way that both Magistrates conduct themselves when the heat and pressure were turned on, definitely does not uphold and protects the good name, dignity and esteem of the office of Magistrate and the administration of justice.

Both Magistrates at some stage showed disrespect towards each other by shouting at each other to such an extend that presiding officer had to firmly stop both of them while they were fighting like kids. If these incidents had to be reported in the newspapers of the day it would have definitely harm the image of the magistracy in particular and that would left all of us ashamed. Their conduct in this regard is not conducive of a Magistrate and it does not matter who provoked whom. One can only wonder what happens and what happened in the past during their day-to-day interaction in their workplace.

It is sincerely hoped that a reflection on this judgment will serve to sensitise these two Magistrates who administer justice so as to prevent where possible in the future, behaviour as have occurred during the hearing in this matter.

It is quite obvious that there is at this stage a personality clash between these two Magistrates which flows to a great extend directly from the attitude of Magistrate Ndamase towards her seniors and in particular towards Mr. Nair who is the Judicial Head of the office. Although she had in some instances valid explanations for her conduct in respect of some of the charges against her, she however in other instances totally overstepped her boundaries which gave rise to conflict and frustration in the office.

During cross-examination of the witnesses the Magistrate did not

during the hearing but according to the evidence before me also in the workplace where she more than once refused to execute lawful orders, even when it was given to her in writing. The conflict in the office reached a certain stage where it to certain extends disrupted the day-to-day functioning of both the civil and criminal sections in the office which is detrimental to proper court and case flow management. Service delivery was also affected negatively which gave rise to complaints by some of her colleagues as well as by attorneys. All these incidents impact negatively on the discipline and the efficiency of the administration of justice in the Pretoria Magistrate's office.

On the other hand, the Judicial Head of the Office, according the evidence before us, inherited an office in which there was a history of racial conflict while the use of Afrikaans was also a burning issue together with other issues such as the rotation of Magistrates to different sections in the office, exposure in the Regional court etc. The office was in the past also flooded with disciplinary steps and misconduct issues. Then he also had to deal with complaints which were lodged against Mrs. Ndamase.

The Judicial Head tried his utmost to manage all these different difficult and most of the time sensitive issues in the office. He tried his best to solve these issues and the problems that he experienced with Mrs. Ndamase internally without involving the Magistrates Commission. However, at some stage he reached a point where he said to himself: *"enough is enough."* His frustration with the Magistrate reached such a high level that he could not take it any longer. When he reached the end of his tether he reported the matter in person to the Magistrates Commission on the 4th of December 2008 and from there the decision that the Magistrate must be charged with misconduct.

Magistrates at the Pretoria Magistrate's office while all the complainants in this matter, except for the present Chief Magistrate who is an Indian, are *"white people."* (Transcribed record paragraph 1 page 12). This statement turns out to be incorrect. She was further annoyed by the fact that: *"the members of the ethics committee ... were all white officials..."* (Transcribed record paragraph 10 page 10) who received a complaint against her and who decided to charge her with misconduct. This statement is also not true. The Magistrate therefore requested that both of us recuse ourselves from this matter because: *"... my problem is you are white people and Afrikaans speaking."* (Transcribed record paragraph 20 page 13) and: *"I honestly believe that there are competent black African Magistrates who can preside over these proceedings."* (Transcribed record paragraph 1 page 14).

With reference to section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996 the Magistrate argued: *"... that I have a right to a fair hearing or fair trial ... and I am convinced that I will not get a fair hearing at all before you."*

For the reasons as set out on pages 17 to 21 of the transcribed record of 8/2/2010 the application was dismissed. The Magistrate, for reasons of her own, decided not to take my decision in this regard to the High court for review.

Since my refusal to recuse myself and while preparing this judgment I came across two High Court decisions which I need to mention.

In S v Collier 1995 (2) SACR 648 (C) the accused requested the recusal of the Presiding Magistrate on the basis that he, the Magistrate was white and so, like Mrs. Ndamase, he argued would

those persons or categories who were disadvantaged by unfair discrimination in the past should be advanced in order to redress the inequities of the past, and no more. ***The section does not, in my view, give an accused the right to insist upon a judicial officer recusing himself on account of his race. Otherwise that would run counter to the spirit of national reconciliation enshrined in the Constitution.***" (At 651A - B)

On the further argument on behalf of the appellant that a recusal was necessary in view of the provisions of section 25(3) of the Constitution which deals with **the right of every accused person to have a fair trial**, the Honourable Judge added as follows:

> ***"It could never have been the intention of the Legislature that the right to a fair trial*** *which is enshrined by this section* ***should include the right of the accused to be tried by a magistrate 'who is representative of the society from which the appellant comes'.*** *That contention cannot hold water.* ***It can only breed unnecessary racial tension in the system of administration of justice. All Judges would have to recuse themselves at one point or another, for they all belong to different 'races'. Where will it all end? No constitution, in my view, could ever intend absurd results.***
>
> ***For the reasons given above, I would dismiss the appeal as being altogether without merit.*** (At 651C- D)

Fagan AJP concurred.

In the second case, which is a Canadian case R v S *(RD)* [1997] 3

Afrikaans language as motivation for her application for recusal. I am however fully aware that I, like any other Judicial Officer, am required to maintain high standards of conduct in both my professional and personal capacities and especially as Presiding Officer in the adjudication of the matter before me. I am also aware that justice should not only be done , but must manifestly and undoubtedly be seen to be done – R v Sussex Justices, Ex Parte McCarthy [1924] 1 KB 256 (per Lord Hewart).

In the Collier – matter Judge Hlope also said the following:

> *"**The grounds of appeal** are, inter alia, that the magistrate erred in finding that the appellant's application to have a magistrate who is more representative of the society from which he comes, being the previously disenfranchised majority, **was tantamount to racism on the part of the appellant and accordingly in contravention of the Constitution of the Republic of South Africa 1993.**"*

I however did not take Mrs. Ndamase's application personal. I received her application, dealt with it to the best of my abilities and proceeded with the matter. Over and done. The Magistrate can be assured of my impartiality. I place a high value on the oath that I took as Magistrate and my integrity is non-negotiable. Therefore I tried my utmost to give her a fair hearing. The rest of my judgment will speak for itself.

Before the hearing could start the Magistrate also took the following *points in limine:*

(i) With reference to the provisions of Reg. 26(1) which prescribes that: *"if the Commission is of the opinion that there is*

first point *in lumine* (regulation 26(1)) was also further dealt with during my ruling on the application for discharge.

In so far as the objection against certain charges in the charge sheet is concerned Claassen J in the *Klein* – case *supra* at Paragraph 35 referring to *Fisher v SA Bookmakers Assosiation* 1940 WLD 88 on 91, said:

> *"It is a principle of natural justice that the accused is entitled to have the charge clearly formulated with sufficient particularity in such a manner as will leave him/her under no misapprehension as to the specific act or conduct proposed to be investigated. The charge sheet must also clearly indicate the nature of the offence although it need not set out the same detail and precision as required in a criminal indictment."*

In the case of Incorporated Law Society of the Orange Free State v H 1953 (2) SA 263 (O) Horwitz J remarked in this regard at page 265 as follows:

> *"....when a complaint of unprofessional conduct is brought by a Law Society against a practitioner, the 'charge' should be distinctly formulated and the inquiry should be restricted to the complaint so formulated. With respect, I do not think it was intended to lay down that in proceedings of the nature referred to the Law Society must necessarily state the complaint with the formality, in the precise legal terms and with the technical particularity of a criminal charge or indictment. The decisions cited were, rather, intended to lay down and enforce a practice whereby the specific act of misconduct complained of is set out clearly and distinctly so*

Commission. In my ruling I responded as follows in this regard:

> *"The question whether or not the Presiding Officer was biased against Mrs. Ndamase must be decided by the High court. The record speaks for itself and there is no reason for me to recuse myself. I will if necessary at a later stage respond to the accusations of bias."*

Mrs. Ndamase in the first paragraph of paragraph 5 again starts her argument that I was biased *inter alia* because I refused to recuse myself despite the fact that I am white and according to her, this case is *"race-based."* I already dealt with this issue more than once. I will now deal with the further arguments why Mrs. Ndamase alleges in her Heads of Argument that I was biased.

Ad Paragraph 5 (1)

The issues in this paragraph relates to the application during Mrs. Ndamase's point *in lumine* that certain of the charges had to be scrapped from the charge sheet because it was not covered by the Magistrates Commission's decision on 4 December 2008 to charge her with misconduct and also that a preliminary investigation was not instituted before the decision was taken to charge her with misconduct. I already dealt with these issues in detail - see for instance my ruling on the points *in lumine*, which is on record. I am still of the opinion that this forum does not have the power to review the decision of the Magistrates Commission and that Mrs. Ndamase is the one who must take the Magistrates Commission's decision and/or my refusal to review the decision of the Magistrates Commission on review. I never mentioned a period of seven days as alleged in this paragraph by Mrs. Ndamase. In my ruling on the application for discharge, I said the following with regard to a review of the decision of the Magistrates Commission:

"fast asleep. I incorrectly heard only "asleep" and when this matter came to light, I admitted that I incorrectly missed the word "fast" when Mr. von Reiche read from the document that the Magistrate was *"fast asleep."*

For completeness sake I quote the relevant line of cross-examination which can be found on pages 85 and 86 lines 11- 25 and lines 1 -21 of the transcribed record of 03/05/2011:

> *"MS NDAMASE: And you are further said in your testimony that you and Mr Viljoen realised that I was fast asleep during the proceedings.*
> *CHAIRERSON: He did not say fast asleep. He never said fast asleep.*
> *MS NDAMASE: There is a letter here, did you not say during your Mr von Reiche, you ... (intervenes)*
> *CHAIRPERSON: Well this morning in his evidence before me he did not say fast asleep.*
> *MS NDAMASE: I have got a letter here where he said I was fast asleep.*
> *CHAIRPERSON: Okay, which exhibit is that?*
> *MS NDAMASE: I do not know the exhibit. That is a letter that was dated or to he read it into the record to Mr Wolmarans. You said that I was fast asleep. That is what they realised. Fast asleep.*
> *CHAIRPERSON: Okay, is that the letter to the ... (intervenes)*
> *MS NDAMASE: And he read it into the record.*
> *CHAIRPERSON: 5 October?*
> *INTERPRETER: Yes.*
> *CHAIRPERSON: Is that part of exhibit ABR?*
> *ME PRETORIUS: Bladsy 8.*
> *MS NDAMASE: Do you see that part, it is paragraph 2. --- It is quite correct that the words were used.*

Mrs. Ndamase. I also could have asked this question during the evidence in chief or even after cross-examination or I could even just have made a note on the record that from my observance the witness is not a white person. The effect would be the same. Mrs. Ndamase during her cross-examination of this witness put it to the witness: *"I can see that you are not white."* There is no bias on my side. This was a *bona fide* and relevant question at that point of time. I was at no time: *"...both prosecutor and...presiding officer"* as alleged by Mrs. Ndamase.

Ad Paragraph 5 (v)

The Magistrate in this paragraph indicates that I just follow the *"prosecutor"* and that I did not furnish reasons why her application for a discharge at the end of the case for the Commission did not succeed. I personally typed my 13 page ruling in this regard and I e-mailed it to Mrs. Ndamase and as well as to Mrs. Pretorius on request of Mrs. Ndamase after it was read into the record. Mrs. Ndamase could not wait for the official transcribed record in order to decide on her way forward. I went out of my way to furnish her with a copy of my ruling which I first had to type myself because of my terrible handwriting. Everything is on record.

Mrs. Ndamase makes the following wild and unfounded statement in the last sentence of this paragraph:

> *"This indicate a form of discussion of the matter between the two, the chairperson and the prosecutor."*

I took an oath as a Magistrate and there is no way that I will sacrifice my career and my conscience which are very precious to me. My integrity is non-negotiable. Mrs. Pretorius throughout these proceedings acted in a professional manner despite the fact

Mrs. Ndamase and we chatted together. We did not discuss the case. Mrs. Pretorius did not complain. Throughout the hearing I tried my utmost to accommodate everyone and I tried to treat everyone with respect and in a professional manner. Many times Mrs. Ndamase and the interpreters were also alone and a lot of talking took place. At no stage I discussed the case with one of the parties off-record. I always tried my utmost not to be alone with one of the parties, but that was not always possible. One can however test the contents of the record against my judgment and against the evidence which is on record. The fact that Mrs. Ndamase is the one who throughout the trial did not trust both Mrs. Pretorius and I do not take away our integrity.

The incident of the so-called interview with one of the witnesses in my presence was dealt with on record. Mrs. Ndamase was also in the conference room. Mrs. Pretorius asked for indulgence when one of her witness arrived. At this stage I cannot recall who the witness was. I think it was one of the attorneys who testified in the hearing. It was, if I remember correctly, only a short break and there was no need for anyone of us to leave the conference room. Mrs. Pretorius and the witness were busy at one side talking softly while Mrs. Ndamase and I were busy with our own things. In any event, at no stage was I interested or able to hear what the two of them were discussing and after the short break we proceeded with the hearing. Throughout the hearing I treated all the roll players with respect and I tried my utmost to ensure that no finger can be pointed to me.

At no stage during the hearing I was present at discussions or close enough to hear what was said when Mrs. Pretorius either interviewed or had discussions with anyone of her other witnesses. These allegations of Mrs. Ndamase are absurd. Mrs. Ndamase now

that is supposed to be followed.

Second aspect or issue I would I know that maybe there is some of the evidence that has been raised? The second aspect that since we were not present we were outside if maybe she was coached or maybe you were informed how you are supposed to answer the question, and now I discovered or found out the Chairperson had a problem with the machine, he could not maybe even turn it back where it was supposed to be, that is my problem.

CHAIRPERSON: Okay before Ms Pretorius answers while we were on lunch she requested the (to) listen to the tape, I poured myself a cup of tea and then I left and when I came back, you know when I came back. u Wou gesê het?

ME PRETORIUS: Goed ek bevestig ek het wel vir u versoek dat ek na die band opname wil luister, u was nie in 'n posisie om vir my te wys hoe ek na die opname kan luister nie want ek weet nie hoe werk die masjien werk nie. Mnr Danie Schoeman is toe genader om aan te dui hoe werk die masjien.

Hy het toe vir my gewys watter knopies ek moet druk om na die opname te luister nadat hy self gesukkel het dat die klank hoorbaar kan wees. Mnr Schoeman het toe die vertrek verlaat, dit is korrek so u het vir u self 'n koppie tee of iets te drinke gemaak en u is toe ook uit die vertrek uit.

Ek en Mev Lineveldt het alleen agter gebly in die konferensie kamer, ek het in haar teenwoordigheid broksgewys na die opname van vanoggend geluister, ek was opsoek na 'n spesifieke gedeelte wat ek later aan u sal openbaar.

Op u ('n) stadium het u by die deur wat nou agter my rug is het u net ingekom en gesê mens hoor die opname tot wie weet waar iets tot die effek en u het toe die deur toegemaak, ek en Mev Lineveldt het nog steeds alleen agter gebly.

Die deur wat ek nou van aangesig tot aangesig is was deurentyd oop gewees, daar was geen poging om na hierdie opname in die geheim te luister nie. En ek wil ook net byvoeg

op rekord plaas wil ek eers na die opname luister om myself te gewis (vergewis) dat dit wel plaasgevind het ook vir haar gesê die moontlikheid bestaan as Mev Ndamase se mikrofoon nie aan was nie dat dit dalk nou nie opgeneem sal wees nie.

By lesing 1:35:18/20 verskuim(verskyn) hierdie sin, "Do not shake your head I will get you one by one", deur Mev Ndamase gesê. Nou as 'n mens alleenlik na haar stemtoon luister en dit nou koppel aan die woorde wat gesê is ervaar ek dit ook definitief as 'n dreigement en is ek ook nou nie seker of sy hierdie dreigement teenoor my bedoel nie, en dit is die rede hoekom ek na die opname geluister het sodat ek myself net kan gewis(vergewis) van die feite voor ek dit onder u aandag bring.

CHAIRPERSON: Dankie.

MS NDAMASE: That was my problem if there was something maybe that we had a problem with why were you listening alone without waiting for us to come back so that we can listen together, and another thing is that what I forgot is you had a paper, you were writing everything, you were writing down whatever was recorded or said there through the machine, I forgot to mention that, and I will regard take it as if you were drilling the witness as to how to coach the witness to answer to the questions.

What I do not get is that when you said that when we adjourned I just stood up and went out quickly that is not true, people were already out, there were interpreters who were already out, I remained inside then collecting my documents and papers.

At this stage of the proceedings I do not have time to intimidate people, people they have testified here telling things, serious things about the allegations, I will not be disturbed by what has been said by the witness.

I will say to Lize Botha she must stop shaking her head, I will take you one by one categorically through questions, so I do

Pretorius unsuccessfully tried to get permission to amend the charge sheet in so far as count 20 is concerned. The application to amend the charge sheet at that stage in any event does not relate to the incident under discussion and was based on what the two witnesses had testified in respect of that charge contrary to what is alleged in the charge sheet. That was also my concern at the end of the case for the Magistrates Commission. If it was my intention to assist Mrs Pretorius then a verdict of *"not guilty and discharged"* in so far as count 20 is concerned would not have followed at the end of the case for the Magistrates Commission.

After every session Mrs Ndamase as indicated above, received a Cd with the recordings as well as a hard copy of the transcription for her personal use. Mrs Pretorius on the other hand, as far as I know, never received a Cd with the recordings. So, Mrs Ndamase is not prejudiced in any way and up to date she could not indicate that there was a tampering with any of the recordings. Throughout the hearing there was transparency and nothing was hiden from Mrs Ndamase.

Paragraphs 5 (viii) to (x) of Mrs. Ndamase's Heads of Argument do not contain allegations of bias by Presiding Officer.

In the Constitutional Court case of Arnold Michael Stainbank and South African Apartheid Museum at Freedom Park and another respondent case number CCT 70/10 decided on 9 June 2011 the following applicable principles in respect of an apprehension of bias were laid down by the Honourable Judge Khampepe:

> *"[35] Our jurisprudence in this regard is now well developed.* ***The test for recusal*** *is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that a judge has not or will not bring an impartial*

167/09 the Zimbabwe High Court finds that in an application for recusal on the grounds of bias there is a need for the applicant to show a reasonable possibility of bias and to prove facts from which such possibility may be inferred. The court warns that where bias is alleged, the judicial officer should bear in mind the possibility of lack of *bona fides* on the part of the applicant. Above all, it should be borne in mind that the applicant bears a weighty onus in proving not only his reasonableness but that of his apprehension.

In the case of Mahlangu v Dowa & others [2011] JOL 27233 (ZH), case number HC 5369/09 it was said that the reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour, and their ability to carry out that oath by reason of training and experience.

I am respectfully of the opinion that the record of the proceedings as a whole as well as this judgment speaks for itself and that Mrs. Ndamase did not succeed in her attempt to proof that Presiding Officer was biased in any way. I dealt with Mrs. Ndamase's allegations of bias on my side in a manner which is required by law and I do not take it as an affront.

Let me now turn to the merits of the case before me.

Background

It is common cause that Mrs. Ndamase is a Magistrate who serves as an additional Magistrate on the establishment of the office of the Chief Magistrate of Pretoria. According to an affidavit by her, which was handed in as **exhibit ae,** she was appointed as a Magistrate since the 2nd of February 1999. However, on 27/02/2012 she

of November 2006 but he only assumed his duties at the Pretoria Magistrate's office on the 15th of January 2007.
I am satisfied that Mr. Nair was a reliable witness.

The purpose of Mr. Nair's evidence, as indicated by Mrs. Pretorius at the beginning of the hearing, was firstly to sketch an overall picture for this forum in respect of all the charges laid against Magistrate Ndamase and then, in addition to the other witness who testified at a later stage, to furnish more detail on specific charges and/or incidents. His task before this forum was similar as to one taking out a box containing a 42 piece-puzzle and first place the picture on the table so that one can see the whole picture before taking the 42 pieces out and start building the puzzle piece by piece in order to complete the picture as indicated on the box.

As Chief Magistrate and Judicial Head of Pretoria, Mr. Nair painted an overall picture of what exactly transpired in his office with regard to the 42 charges placed before us.

When he assumed duties at his office, Magistrate Ndamase was utilised as a Magistrate in the civil section. She had, before his appointment as Chief Magistrate at Pretoria, requested to be rotated to that section in order that transformation is addressed amongst other things.

The civil section was at the time of the commencement of this hearing headed by Senior Magistrate Mrs. Annette Rademan and there are presently 9 Magistrates in the section. On 6 February 2012 we were informed by Mrs. Pretorius that Mrs. Rademan is no longer in the employment of the Department.

Initially, after Mr. Nair assumed duties at the Pretoria Magistrates

business could be handed in as exhibits. I am therefore satisfied that these data messages which were handed in by Mr. Nair complies with the four requirements for a data message to be afforded due evidential weight as set out in section 15(3) of the Electronic Communications and Transactions Act, 2002 (Act no 25 of 2002) to wit:

(i) the reliability of the manner in which the data messages were generated, stored or communicated

(ii) the reliability in which the integrity of the data message was maintained

(iii) the manner in which it's originator was identified, and

(iv) any relevant factor.

None of these issues were in dispute. However, at a later stage during the hearing when Mrs. Ndamase was cross-examined about some of the exhibits before us, she tried to create the impression that any person can create, print and produce an e-mail as evidence. She however just made this allegation without laying a foundation upon which these e-mails must be rejected as evidence.

The written communication was to such an extend that Mr. Nair as Head of the Office wondered where did Magistrate Ndamase get all the time to write all these letters. According to him more time were spent by Mrs. Ndamase on writing letters than time spent on booking her statistics.

The Magistrate has according to Mr. Nair, conducted herself in an insubordinate manner. She ignored lawful orders, did not attend meetings as instructed and over a long period she failed to report at the Criminal section after she was at least at two occasions officially instructed in writing by Mr. Nair to report to that section. During

with the request that the Magistrate be charged with misconduct, which recommendation was endorsed by the Commission on the 4th of December 2008. He did not take part in the decision that she must be charged with misconduct.

According to Mr. Nair all his efforts to contain issues within the office and to solve same as well as his counseling of Mrs. Ndamase in the spirit of resolving differences and in line with corrective measures were in vain. Mrs. Ndamase however does not see all these efforts as counseling and she accused Mr. Nair that he constantly was breaking her off emotionally and psychologically. Mr. Nair denies that he ever treated her unfairly or that he broke her off emotionally or psychologically. He testified that the last resort was intervention by the Magistrates Commission. Mr. Nair testified that the repetitive nature of Mrs. Ndamase's shortcomings and her conduct brought him to the point of frustration that he had no choice. By that time he was fed up (pages 66 – 69 transcribed record of 8/3/2011).

Mrs. Ndamase has laid a criminal charge at the Pretoria Central Police station against Mr. Nair with regard to the affidavit which Mr. Nair made and submitted to the Ethics Committee of the Magistrates Commission – **exhibit ar.** No prosecution flowed from the complaint that was laid against him. Without the need to discuss count 1 in detail because the Magistrate was already discharged on that count, it is at this point and time necessary to also refer to the following facts in this regard.

During the testimony of Mr. Nair, it was discovered that in his affidavit to the Magistrates Commission (paragraph **23 exhibit ar**) he made a *bona fide* mistake with the date which relates to count 1. An amendment of the charge sheet in so far as the date in count 1

judicial head of the office. In any event, the Magistrate also started to refuse to accept letters from Mr. Nair's office. On 3/2/2009 Mr. Nair informed the Magistrates Commission in this regard as follows:

> *"As Chief Magistrate and head of office I'm no longer able to communicate sensibly with Mrs. Ndamase. Her conduct has reached a stage where it is causing a tremendous negative impact on the operation of the Court and causing great embarrassment to the judiciary."* **exhibit ao** page 2 paragraph 6.

Mr. Nair therefore started directing the further complaints which he, after December 2008 still constantly received against the Magistrate, directly to the Magistrates Commission so that they could further deal with the matter, and it is these further complaints, some of which also found their way to the charge sheet before us, that the Magistrate argued must be scrapped from the charge sheet because these charges according to her did not serve before the Commission as such and therefore, she argued, there was no decision taken by the Magistrates Commission in terms of *Regulation 26(1)(b)* that she must also be charged with misconduct in respect of these charges in particular. This argument was dismissed for the reasons as indicated *supra* and also for the reason that further charges were allowed up to the stage that the charge sheet was officially signed by the honourable Judge Ngoepe, the then Chairperson of the Magistrates Commission. Technically speaking the Magistrate's argument on this point has merits, but it was according to me quite correctly argued by Mrs. Pretorius on behalf of the Magistrates Commission that she received all these complaints from the Magistrates Commission and on that basis she compiled the charge sheet according to her mandate and letter of appointment (**exhibit D**) issued to her in terms of *regulation*

Honourable B M Ngoepe, the then Chairperson of the Magistrates Commission and Judge President of the South and North Gauteng High courts.

In absence of any evidence to the contrary placed before me, I must accept that the further complaints forwarded to the Magistrates Commission after the 4th of December 2008 were dealt with properly and according to what is required by law.

It is not my task to question the procedure followed after the decision was taken by the Magistrates Commission that the Magistrate must be charged with misconduct. I do not know if the full Commission or the Ethics Committee or whoever dealt with the further complaints which were received after early December 2008.

On 17 May 2011 the High Court in the unreported matter of P Rawheath, A.N Dlamini and ARMSA v Chairperson of the Magistrates Commission and 2 Others in case number 14333/06 decided that the Magistrates Commission has the power to delegate. On page 5 of the judgment Preller J made the following finding in this regard:

> *"... The power to delegate is clearly implied into regulations 26 and 27 by the express provisions of the act and the other provisions of the regulations."*

The Honourable Judge therefore rejected the argument of the applicant in the Rawheath case that the Ethics Committee of the Magistrates Commission had no power to institute preliminary disciplinary investigations.

In the matter before me it was placed on record that all these complaints mentioned in the charge sheet were forwarded to Mrs.

"decided to provisionally suspend (her) from office pending the inquiry into (her) fitness to hold office as Magistrate with immediate effect." (See **exhibit u**). However, we heard the evidence that this suspension was later uplifted.

It is common cause that no Magistrate or any other person was designated by the Magistrates Commission to conduct an investigation into the Magistrate's alleged incapacity as required by Regulation 27(2). The procedure prescribed for such an investigation as prescribed in part VI of the Regulations also differs from the procedure prescribed for misconduct investigations and misconduct hearings. I therefore have no mandate to make a finding whether or not the Magistrate is fit to hold office as a Magistrate because of incapacity. I am only bound to make a finding on a balance of probabilities based on the evidence before me in so far as the allegations of misconduct are concerned, and if such a finding is positive to impose a sanction as prescribed by Regulation 26(17) which can include a recommendation of removal from office as contemplated in section 13 but then it must be based on misconduct and not on incapacity as such.

One can quite correctly pose the question what was the relevance and the admissibility then of the evidence tendered during this hearing regarding the Magistrates competency as a Magistrate. Here I refer to the evidence for instance by Mr. Nair and attorney Kirchner in particular and also the evidence of other attorneys who testified. I feel myself obliged to first deal with this evidence placed before me before I proceed any further.

The evidence by Mrs. Kirchner regarding the Magistrate's competency in the *section 65* courts and the Magistrate's knowledge of *section 65* and how to apply it in practice is clearly opinion

Nor did I allow this evidence to "review" the judicial work rendered by the Magistrate because I have no review powers and I am not allowed to interfere with the Magistrate's judicial independence. I allowed this evidence which is evidence about a fact in issue namely for the sole purpose of corroboration of the evidence by Chief Magistrate Nair that he received a lot of complaints from inside and from outside the office regarding the Magistrate's performance in the Civil section. The *nexus* was laid before me and the latter evidence together with the further evidence in this regard quite clearly shows that this was only one of the reasons why a decision was taken to move the Magistrate to the Criminal section where she could still render services in her capacity as a Magistrate. This step can not be seen as an interference with her judicial independence. This was a step that was taken not only in the interest of the office in particular but also in the interest of good judicial management in general, in order to address the number of complaints that were received in the office. This evidence is also relevant with regard to count 34 and in particular paragraph 3 of the Code of Conduct which prescribes that a Magistrate must also execute his or her official duties competently. I will take this discussion further when I deal with count 34 in particular.

Law of evidence

While on the topic of the law of evidence it is necessary to first deal with the documentary evidence which relates to Mrs. Rademan. During the hearing a number of data and/or other documents created by Mrs. Rademan were handed in which were provisionally admitted in terms of *section 3 (1) (b)* Law of Evidence Amendment Act, 1988 because we were informed by Mrs. Pretorius that Mrs. Rademan upon whose credibility the probative value of this evidence depends, would testify herself in the proceedings before us. However on the 11th of January 2012 we were informed by Mrs.

"Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection." (My insertion)

Presiding officer then, on 13 February 2012, after the evidence of Miss Zeelie and after allowing both parties to address me on this issue, ruled that the documents referred to in the list named "***List of documents removed and ruled not admissible***" which forms part of the record of proceedings, as well as the *viva voce* hearsay evidence by Mr. Nair in so far as it refers to the contents of the reports and/or complaints which he received from Mrs. Rademan, and which are mentioned in the "***List of documents removed and ruled not admissible***", be ignored as hearsay evidence in so far as the probative value of these parts of his evidence depends on the credibility of Mrs. Rademan who did not testify. I however ruled that the fact that these reports and/or complaints were made to Mr. Nair is admissible but that the truth of the contents of the complaints of what was written and spoken to him by Mrs. Rademan is hearsay evidence and as such is inadmissible. This is also in line with the principles laid down on pages 189H to 190B in the case of **Mdani v Allianz Insurance Ltd** 1991 (1) SA 184 (A).

The same applies to the hearsay evidence by Mrs. Myambo that Mrs. Rademan told her that Mrs. Ndamase complained to her that Mrs. Myambo was giving her wrong advice.

Mrs. Marques also did not testify and therefore the e-mail of Mrs. Marques which forms part of **exhibit abg** which was handed in by Mr. Nair, is also hearsay evidence. However, this exhibit was during the trial handed in with consent of Mrs. Ndamase and is therefore

Ndamase also tried to convince me that Mr. Nair was conspiring against her by collecting complaints from different white attorneys and advocates in order to build a case against her and to ruin her career. However, it is clear from the evidence of the legal representatives who testified before us that they are the people who, out of their own, reported some problems to either Mr. Nair or Mrs. Rademan, as a matter of concern. It was also not only white attorneys who lodged complaints. Mrs. Tamara Kirchner for instance is a coloured lady. However, Mrs. Ndamase denies that Mrs. Kirchner appeared before her in court and she alleges that the only reason why this coloured attorney was called as a witness was in order to cover up racism in the office. The evidence however quite clearly shows that this allegation is not true.

Mrs. Ndamase testified that Mr. Nair and others conspired against her in order to ruin her career. She however confirmed that Mr. Nair gave her the opportunity to respond to the complaints that he received from inside and outside the office. Later she refused to accept any letters from his office because it had a negative impact on her health. I am satisfied that Mr. Nair received certain complaints against Mrs. Ndamase and in his capacity of Judicial Head of the office, he promptly dealt with these complaints according to what is expected from him under these circumstances. It is unfair ~~from~~ for Mrs. Ndamase to take these actions by Mr. Nair as a personal vendetta against her. No Judicial Head of office will know when and under what circumstances he or she will receive a complaint against a Magistrate on his staff and when you receive a complaint it must be investigated and sorted out. Therefore it is practice and fair to give the Magistrate involved the opportunity to respond. There is nothing personal therein. Mrs. Ndamase laid no basis for her assumption that these actions by Mr. Nair was a personal vendetta or plot against her.

was told by Mrs. Ndamase to stay out of the case. She implied through her cross-examination that Mr. Sethlabi was only doing this so that he could get exposure to the Regional court.

I get the impression from the evidence before me that Mrs. Ndamase is hard to get along with in the workplace, that she is easily offended, uptight and negative. She does not care what she says to others, including to me as presiding officer as well as to Mrs. Pretorius who led the evidence and also in particular to her Judicial Head of office as well as her supervisors. At one stage she said to me: *"You are not God to me"* and she more than once accused me that I sided with the Magistrate who was leading the evidence on behalf of the Magistrates Commission. I never tried to be God to Mrs. Ndamase. These type of remarks by Mrs. Ndamase is unfortunate.

At present Mrs. Ndamase still over-emphasise the issue of racism in so far as whites and the Afrikaans language are concerned. For her it is a burning issue which unfortunately clouds her objective dealing with issues in the workplace and which most certainly had a negative impact on, not only the management of the office, but also on the interest of justice. Throughout the hearing she was constantly harping on the race issue. She makes assumptions which she generalises without a solid basis or ground and then she accepts that those assumptions are true. I will accept that after 1994 in certain areas of our society there were still incidents of apartheid and racism that had to be dealt with. Mr. Nair also, as already indicated *supra* inherited an office where he had to address *inter alia* racial issues but with reference to Mrs. Ndamase in particular, it is clear that after a period of nearly 18 years of our democratic society she still struggles with issues of racism which clouds her mind to such an extent that she find it very difficult to

witnesses or pleadings are drafted in Afrikaans and request the allocation of a Magistrate who reads that language.

It has been my experience that attorneys, mainly white, are reluctant to have their matters heard by a black magistrate. Once a black magistrate has been allocated to their matter, they either postpone or settle the matter. This leads to black magistrates not having trial matters to proceed with. This might not be something the senior magistrate would have any control over."

Mrs. Ndamase in her evidence quoted this part of the evidence and what is contained in the response by Mrs. Myambo in this regard totally out of context.

During cross-examination by Mrs. Pretorius Mrs. Ndamase was many times evasive and by times argumentative. She more than once tried to side-step and to avoid answering questions and sometimes she blatantly refused to answer questions, e.g pages 649 line 1 - 12 and 691 line 13 and further transcribed record dated 1/3/2012. The reason for Mrs. Ndamase's objection to answer certain questions was that, according to her, Mrs. Pretorius during cross-examination was *"investigating"* the complaints against her which, she argued, was supposed to be done by the Magistrates Commission before they decided to charge her with misconduct. It is quite clear that the Magistrate blatantly refused to accept my earlier ruling during the points raised *in lumine* as well as during her application for a discharge at the end of the case for the Magistrates Commission in this regard. Mrs. Ndamase also time and again objected and said that she was not prepared to answer certain questions which, according to her, relates to charges which fall outside the resolution of the Magistrates Commission taken on 4

either Mrs. Pretorius or by myself. It seems as if she did not care about that and that she expected that it was the duty of Mrs. Pretorius to provide her with everything on a plate. Her excuse was that she could not carry all the exhibits from the Magistrates office where she parked, to the venue of the hearing. I went out of my way to accommodate Mrs. Ndamase and to assist her in this regard by arranging parking for her at the venue, which she refused to accept and until the end of the hearing she did not bring all the relevant exhibits with her. It is obvious that this attitude by Mrs. Ndamase in a certain sense hampered the easy flow of the hearing.

There are material differences between what the witnesses for the Magistrates Commission had testified regarding the individual charges and the evidence of Mrs. Ndamase. Most of them, like Mrs. Ndamase, were single witnesses. However, I am of the view, for reasons that follow, that the version of the Commission's witnesses must, except where I will indicate to the contrary, be preferred above that of Magistrate Ndamase. All the witnesses, especially Mr. Nair and Mrs. Mamosebo were subjected to lengthy and intense cross-examination by Mrs. Ndamase. Most of the witnesses had been accused by Mrs. Ndamase that they were lying. They however remained cautious and patient, especially the attorneys who testified. The Magistrates who testified however took strong exception when they were accused by Mrs. Ndamase that they were lying. Apart for a few minor issues, which I will deal with where necessary, no material conflicts or variances were established in respect of the testimony of the witnesses called by Mrs. Pretorius. Their demeanour in court gives the impression that they were sincere and honest, especially the attorneys, with one exception which I will point out later.

Mrs. Ndamase tried to convince me that all nineteen witnesses who

I will deal with further examples later on where and when necessary.

Mrs. Pretorius in her Heads of Argument, made the following general submissions:

> *"I experienced Mrs. Ndamase's cross-examination of the witnesses as confusing. She was confused as to the true state of affairs and at whim put 'defences' to the witnesses. She confused her dates and true facts. She writes letters which are exhibits before this court, and then in cross-examination wants us to believe that is 'not what she meant' or it 'was a mistake.' Mrs. Ndamase is not illiterate. As a Magistrate she knows the power of the written and spoken word. The attorneys who testified are all operating independently from each other and the dates of the letters vary from 2007 and onwards. These witnesses had nothing in common. They wrote and testified from their own experiences. It was not petty or isolated complaints. Mrs. Kirchner put her hand to paper after several court appearances, Mrs. Le Roux became frustrated because a judgment was not forthcoming, Mr. van Rensburg became embarrassed for the same reason as he was acting for a correspondent in another Province, Mr. van der Merwe was representing big corporate clients (banks) and was similarly put into a position that he appeared as a professional person incompetent. Mr. D von Reiche lodged a complaint, did not receive an answer and did not follow it up. There is no basis for Mrs. Ndamase's allegations of 'white conspiracies.' The evidence shows the contrary. Nobody benefitted or gained from this. All of them experienced at a stage a problem with*

regard.

Mrs. Ndamase in her Heads of Argument refers to her reasons which she supplied when she applied for her *"absolution"* (discharge) and requested that those reasons must also be taken into account for purposes of her Heads of Argument. I already at the end of the case for the Magistrates Commission fully dealt with the reasons that Mrs. Ndamase referred to and will where and when necessary further comment on issues raised in her application for discharge.

In her Heads of Argument Mrs. Ndamase again sketched the historical background in the Pretoria Magistrate's Office. She starts far back in the days of Mr. Moldenhauer who was the previous Chief Magistrate before Mr. Nair, and again she complains about non-exposure in the Regional court, discrimination against black Magistrates who were: *"...strictly bound to the criminal section."* She also refers to the Afrikaans language which was used in the civil section as well as rotation of black Magistrates to the civil section.

Mrs. Ndamase also refers to her: *"days of torment and the facts pertaining to matters based on the resolution of the 04/12/2008."* She describes the year 2008 which was a very bad year for her, *inter alia* as follows:

> *"Words coupled with open actions of destroying my self-esteem, dignity and reputation as a Magistrate were imposed to me by Mr. Nair. I was belittled, humiliated and downgraded to the level of being seen as unfit and improper as a Magistrate. This was an ill-treatment I got from him and his cohorts, the white people who falsely accused me about anything they could think of..."*

during my judgment regarding the points *in lumine* and where applicable also during my ruling in so far as the application for discharge at the end of the case for the Magistrates Commission is concerned. My rulings are available and are on record.

Mrs. Ndamase in her Heads of Argument as already indicated, still dwells on her view that I as presiding officer was biased and that I was supposed to send the matter back to the Magistrates Commission.

In analysing the evidence of the Magistrates Commission Mrs. Ndamase argued that two of the witnesses, namely Mrs. Anita Myambo and Mrs. Raphalelo: *"...did not testify as was expected."* I will deal with the evidence of the two witnesses when I discuss the individual charges concerned.

Mrs. Ndamase also complains about the allegation of incompetence and that no files were given to her in order to proof that she made mistakes. I already dealt with incompetence and the purpose of the hearing before me.

I will now deal with those counts and the evidence which relates to the counts in respect of which a discharge was not granted at the end of the Commission's case, and I will where and when necessary comment on the submissions made by Mrs. Pretorius and Mrs. Ndamase.

Count 2

Contravention Regulation 25(j) – Refused to execute a lawful order on **01.12.08** in that the Magistrate **refused to go to the office of the Chief Magistrate Mr. D Nair when requested to do so by him.** *(Affidavit D Nair dated 04.12.08* ***exhibit ad)***

about a meeting at 14h00 and also that I arrived at 14h10. I met Mrs. Rademan on her way to her office. I was late. I am not sure that this is insubordination."

According to an affidavit by Mrs. Ndamase dated 17.02.09 (perjury complaint), which was handed in as **exhibit ae,** the Magistrate confirms in paragraph 9 that there was this scheduled meeting as indicated and she added: *"I never went out for lunch as I was busy with the default judgments. I worked through my lunch hour and without checking the time I happened to work until after 14:00. I realised that I had missed the scheduled time. So I went to Mrs. Horn's office to inform her that I was late. I was told that the meeting was rescheduled for 8:00 the following day...."*

Initially I thought that this was a valid and honest excuse for being 10 minute late. However, during cross-examination Mrs. Ndamase put the following facts to Mr. Nair: *"Did I not explain myself to you, and told you that during the lunch hour I went to the bank and I was delayed there, and you told me yourself that it was okay because the meeting was rescheduled for this following day?"* (Transcribed record p 154). Mr. Nair responded that he could not remember the conversation about the bank or that he himself informed the Magistrate that the meeting was rescheduled for the next day. Mrs. Ndamase also put it to Mrs. Horn that she went to the bank and when she came back the meeting was already rescheduled for the next morning.

Initially during cross-examination Mrs. Ndamase denied that she ever said that she was busy with default judgments during the lunch hour – see Transcribed record 27/02/2012 at page 503 line 16:

was late for the meeting.

The Magistrate on the other hand quite correctly posed the question: *"I am not sure that this is insubordination."*

Due to the fact that the Magistrate was not honest with us and that she contradicts herself in this regard, it is very difficult to be satisfied, even on a balance of probabilities that the Magistrate right from the outset raised a reasonable explanation for her failure to arrive in time for the scheduled meeting. It might be so that the late coming frustrated her supervisors but in all fairness to the Magistrate concerned, and despite this contradiction, there is no evidence before me that the Magistrate actually ***"refused"*** to attend the meeting and that she therefore ***refused to execute a lawful*** *order* as envisaged in regulation 25(j). ***She was just ten minutes late*** whatever the reasons may be and how suspicious her conflicting versions also may sound. However, it is significant that the Magistrate during cross-examination testified that she was not prepared to meet with Mr. Nair on that particular day and that it was her intention to go to the meeting and then to request that an attorney or colleague should be present. It is strange that she only the following morning informed the secretary that she will meet with the Chief Magistrate only if someone else accompany her. When she had the opportunity on the 1st of December when she saw Mr. Nair she did not inform him of her intentions. Her excuse was that she: ":... *never thought of that at that time."* (Transcribed record page 507 line 1 on 27/02/2012)

The fact that the meeting was re-scheduled was the correct approach but to hold her late-coming under these circumstances as misconduct is definitely not fair. I doubt whether or not it was the intention of the legislature that petty oversights like late coming for

8:00 on the 2nd of December 2008 and that she did not attend. This was confirmed by Mrs. Horn whose evidence was also in line with what Mrs. Ndamase herself states in paragraph 9 of her affidavit **exhibit ae** *supra* -see Transcribed record 25/07/2011 lines 2 – 20 evidence Mrs. Horn:

> *"MRS. NDAMASE: So when I arrived in the office you told me that because I was late the meeting was rescheduled for 8:00 the following day. Do you still remember that one? --- Ek onthou dit.*
>
> *On the following day at 08:00 or a little bit after 08:00, you contacted me using the telephone and I told you that I was not going to attend that meeting without a person to represent me. Do you still remember that? --- Ek onthou dat ek u na agt geskakel het omdat u toe nie by die, by Mnr. Nair se kantoor was vir die vergadering soos u ingelig is die vorige dag nie en u het aan my gesê u wil 'n regsverteenwoordiger teenwoordig hê tydens die vergadering.*
>
> *No madam,* ***you phoned me to remind me about it.*** *Then I gave you that reply --- Ek het gesê dat ek Mevrou Ndamase geskakel het om te hoor waarom sy nog nie by die kantoor van Mnr Nair is sodat die vergadering kan begin nie. Ek het haar geskakel om te hoor wanneer sou sy daar wees.*
>
> *Thank you Michelle. I am so glad that you always speak the truth here...."* (My emphasis)

However, when she testified and was cross-examined Mrs. Ndamase made a U-turn and she placed the notification of the rescheduled meeting into dispute. According to her she was not informed on 1 December 2008 that the meeting was rescheduled: *"for 8h00 the following day"* as stated by herself in her affidavit **exhibit ae**.

During cross-examination Mrs. Ndamase put the following facts to

to tell Mr. Nair: "... *that I (she) need(s) legal representation in each and every meeting in this office because I (she) was tired of being harassed and humiliated by him and Mrs. Rademan. My letter dated 03/12/2008 has reference."* (my insertion).

In paragraph 2 of the said letter dated 03.12.08 (**exhibit aa**), Mrs. Ndamase responded to Mr. Nair in this regard, as follows:

> *"It is further correct that Ms. Horn told me that the meeting was rescheduled to 8h00 on 2 December 2008. Before 08h00 yesterday I phoned Ms. Horn and requested her to convey a message to you that I want to be legally represented in that meeting. The reason for this is that I remembered what you always told me when we, on previous occasions, held meetings of this nature. I do not want to be victimised by you two anymore."*

Mrs. Horn confirmed that Mrs. Ndamase on 2.12.08 told her that she was not going to attend the meeting unless she was represented by someone.

During cross-examination Mr. Nair denied any form of victimisation or humiliation of Mrs. Ndamase by him. Mrs. Ndamase put it to Mr. Nair that she expected from him to again re-schedule the meeting and she wanted to know why it was not done. Mr. Nair responded as follows:

> *"I did not do that because as the head of the office, you know, I had requested you to attend a meeting, following on a report to me that you failed to carry out an instruction and to carry out your duties. I set one meeting, you did not pitch at the time of the meeting, you come after the meeting. I have*

office. To require the assistance of a legal advisor at each and every meeting as alleged by Mrs. Ndamase is not only impractical but it will also constantly hamper the day-to-day management of the office.

Surely Mrs. Ndamase is entitled to seek legal advice when circumstances permit but by refusing blatantly to attend a scheduled meeting without first attending the meeting and seeking a postponement at that meeting in order to enable her to seek legal advice before the meeting takes place, if this was her intention, is clearly misconduct because the Magistrate by staying away refused to execute a lawful order as envisaged in regulation 25(j). I am satisfied that misconduct by Mrs. Ndamase under these circumstances was proved on a balance of probabilities.

Count 4

Contravention of Regulation 25(c) read with the code of conduct for Magistrates in that on **03.02.09** the Magistrate **acted towards Vibha Neerahoo,** an **administration officer** employed at the Pretoria Magistrate's Office **in a manner that constituted a breach of par 3** of the code of conduct for Magistrates, **by raising the tone of her voice towards her and by throwing a letter in a sealed envelope at her.** *(Affidavit V Neerahoo dated 03.02.09* ***exhibit acm****)*

In terms of **Regulation 25:**

> *"A Magistrate may be accused of misconduct if he-*
> ...
> *(c) contravenes the Code of Conduct...."*

In the preamble of the Code of Conduct it is stated that:

they go and whatever they do, that they maintain the dignity required from them. Therefore a Magistrate must strive to never lose his or her temper.

It is required from a Magistrate to walk circumspectly and with great care so that no one can point a finger to him or her.

Mr. Nair testified that he received a complaint that the Magistrate threw a letter in a sealed envelope at Vibha Neerahoo an administrative Officer in his office.

During cross-examination on 8 March 2011 (page 96 and further) Mrs. Ndamase put it to Mr. Nair that Mr. Choma had a letter and he asked her to sign for it which she refused to do. Mr. Nair confirmed that Mr. Choma at some stage was involved in bringing and serving of documents at Mrs. Ndamase's office.

According to the Magistrate, Mr. Choma, Vibha and Mrs. Horn came to her office with the letter. She said she refused to take the letter from Mr. Choma because: *"these letters .... they make me sick..."* She put it to Mr. Nair that Mr. Choma refused to take the letter from her and then she gave it to Mrs. Horn. She denied that she threw the letter and according to her she did no give the letter to Vibha Neerahoo because she did not know her and she did not know that she was one of the employees in the office. Therefore she had no reason to throw the letter at her and she gave it to Mrs. Horn. The Magistrate however upset Mr. Nair with her statement that Vibha was: *"one of the Indians coming in and out of his office."*

As Mrs. Pretorius correctly pointed out Mrs. Ndamase's version however conflicts with that of Miss Neerahoo and Mrs. Horn. I just wonder why and what happened to the cross-examination of Mrs.

Mrs. Horn confirmed that there was a second visit on another date when she and Mr. Choma accompanied Ms. Neerahoo to Mrs. Ndamase's office to deliver letters to her. She was not sure if the same letter was involved or if other letters were also involved. She also testified that she was not present during the first incident but that Ms. Neerahoo came back and reported to her what had happened. At that stage she was anxious. She was crying, frightened and upset. With the second visit Mr. Choma who was a more senior person accompanied them. Ms. Neerahoo was afraid to go back to Mrs. Ndamase's office alone and therefore she also accompanied them. She denies that Mrs. Ndamase handed the letter back to her.

In her affidavit **exhibit acp,** which was handed in by her when she testified, she states that subsequent to she being informed by Ms. Neerahoo that Magistrate Ndamase had thrown the letter to her on 3 February 2009, she received a telephone call from Mrs. Ndamase at ± 9:20. Mrs. Ndamase requested her to resend the scanned copy of the letter under discussion. Later she requested a hard copy of the letter. At ± 10:20 the Magistrate entered her office with a letter addressed to Mr. Nair. She said that she found the scanned letter which was previously e-mailed to her, and that the letter handed to her was a response to the letter dated 3 February 2009 addressed to her.

Although Me. Neerahoo is a single witness there is no reason not to believe her. At the time of this incident she was in her first month of employment at the Pretoria Magistrate's office. She previously met Mrs. Ndamase. She had a great shock with this incident and this fact was corroborated by Mrs. Horn who also testified. Mrs. Horn also confirmed Me. Neerahoo's evidence to the fact that there

As mentioned earlier on **Regulation 25** prescribes that:

> *"A Magistrate may be accused of misconduct if he-*
> ...
> *(j) refuses to execute a lawful order."*

This charge flows from the previous charge. Mr. Nair testified in this regard that because of the Magistrate's refusal to assume duties at the criminal section on the 2nd of February 2009 an attempt was unsuccessfully made to serve a letter on Mrs. Ndamase on the 3rd of February 2009. She refused to accept the letter requesting reasons and threw same back at his assistant – see **exhibit ao** although the said letter which is marked as **annexure C to exhibit ao** was not handed in by Mr. Nair. The Magistrate has then subsequent to throwing the letter at Ms. Neerahoo sent a sms to his cell phone which reads as follows:

> *"Mr. Nair please channel all my letters from you to my attorney K P Seabi Cnr Paul Kruger and Pretorius streets 3rd floor blding office 310 or to my advocate. Kindly be advised that I am at work and need work to do in the Civil section. Magistrate Ndamase."*

During Mr. Nair's testimony a copy of an affidavit by Mrs. Rademan dated 3 February 2009 was also handed in as part of **exhibit ab.** However, the contents of this affidavit must also be regarded as hearsay and it forms part of the list of documents that were removed and regarded as inadmissible for the purpose of this hearing.

Miss Neerahoo also testified as already indicated. She confirmed that on the 3rd of February 2009 Mrs. Ndamase refused to accept a

So then, it is quite correct, you did not physically take possession of those two letters, is that correct? --- Correct
Was there a later attempt to give you these two letters? --- No
To this day you do not know what the contents of the two letters were about, is that correct? --- I think so."

Mrs. Pretorius argued that Mrs. Ndamase's reasons for refusing to take correspondence from Mr. Nair does not hold water because there is no evidence on record of the alleged harassment, intimidation or mockery. The exhibits indicate the contrary. Mr. Nair adhered to the *audi alterem partem* – rule. He was accommodating towards Mrs. Ndamase and he gave her the necessary warnings in terms of disciplinary procedures. I agree. We have only Mrs. Ndamase's evidence to the contrary in this regard before us and her evidence was not always reliable as already indicated.

It is however not in dispute that the Magistrate on 3/2/09 refused to accept written correspondence from the Chief Magistrate. I agree with Mrs. Pretorius that the refusal to take correspondence from the Chief Magistrate obviously frustrates the general management of the office as well as the administration of justice. As Judicial Head of the Office, Mr. Nair is entitled to communicate directly with Mrs. Ndamase, especially in the light of Mrs. Ndamase's version that her relationship with the Senior Magistrates, except with Mrs. Raphalelo to a certain extent, were also not up to standard. On a balance of probabilities it is clear that the Magistrate refused to execute a lawful order in this regard.

Count 6

Contravention Regulation 25(j) – Refused to execute a lawful order on **02.02.09** in that the Magistrate **refused to report to Ms**

(paragraph 20) and 65 (line 1).

There is overwhelming evidence to the effect the Magistrate did not report to the Criminal section on the 2nd of February 2009 and according to Mr. Nair she also indicated in writing that she elected not to report to the Senior Magistrate: criminal section, despite his instruction. Mr. Nair thefore requested Mrs. Ndamase's response for her failure to report to the Senior Magistrate in the Criminal section and he also warned her that her conduct amounts to the refusal to execute a lawful order as envisaged in Regulation 25(j) – **exhibit an** dated 2 February 2009.

The Magistrate responded the same day in writing – **exhibit aaa** and in this regard she *inter alia* responded as follows:

> *"Third, it is unfortunate to tell you that I am not going to report in the Criminal section at all..."* (page 2 first paragraph – line 1 and 2), and further
>
> *"I am not going to report in any other section except the Civil section..."* (page 2 first paragraph lines 11 and 12)

Despite this written refusal by Mrs. Ndamase she tried to convince me that she on the 2nd of February 2009 indeed reported to Mrs. Mamosebo at the criminal section. Mrs. Mamosebo is however adamant that Mrs. Ndamase did not report to her on the due date. Mrs. Ndamase later even went further and testified that while she was still in the civil section she went to Mrs. Mamosebo after Mr. Nair indicated to her that he intended to move her to the criminal section, and she asked Mrs. Mamosebo if she was aware of this move.

On the 9th of February 2009 further communication in this regard took place and out of this, a further charge regarding her failure to report to the criminal section (count 11) was formulated. Count 11 will be discussed later.

During cross-examination the Magistrate put it to Mr. Nair that after he wrote to her informing her to report at the Criminal section she wrote back to him and requested that they must wait with the instruction to report at the Criminal section until the Magistrates Commission has decided over the matter. Mr. Nair stated that he does not remember the letter but that it could be possible. He also confirmed that it is possible that he forwarded Mrs. Ndamase's letter in this regard to the Magistrates Commission because at that stage he already reported the Magistrate to the Magistrates Commission and after that he forwarded everything regarding Mrs. Ndamase's conduct to the Commission. He however referred to an e-mail dated the 2nd of February 2009 (**exhibit aas**) in which Mrs. Mamosebo confirms that Mrs. Ndamase on 2 February 2009 has not reported in the Criminal section as per Mr. Nair's directive. This was confirmed by Mrs. Mamosebo when she testified. She handed in a copy of the same e-mail but under reference of **exhibit acw** (page 3)

Mrs. Ndamase also indicated to Mr. Nair that after she requested that the Magistrates Commission must first decide on the issue before she reports to the Criminal section, she went to Mrs. Mamosebo at the Criminal section and requested her to give her some work to do. Mrs. Mamosebo then gave her Admission of Guilt cases to attend to. However, Mrs. Mamosebo denies this. She testified that she is the one who gave Mrs. Ndamase the Admission of Guilt work to do. Mr. Nair stated that at some stage he became aware that Mrs. Ndamase was doing Admission of Guilt fines and

e-mailed the criminal stats form to Mrs. Ndamase. However Mrs. Ndamase denies that she received this e-mail.

Mrs. Mamosebo testified that one Magistrate is supposed to do the admission of guilt work on a daily basis. However, when Mrs. Ndamase was supposed to start in the criminal section she was not there and therefore she had to allocate Mrs. Ndamase's work to the other Magistrates. They had to attend to their courts as well as to the admission of guilt work. From the statistics which was handed in as **exhibit av** it is clear that Mrs. Ndamase only on the 16th of February 2009 started to attend to admission of guilt work while she physically remained in the civil section. She has also for a long time not recognised Mrs. Mamosebo as her supervisor.

During Mrs. Mamosebo's evidence in chief we were still struggling to find out when exactly Mrs. Nadamase started in the criminal section. Mrs. Ndamase then placed on record: *"I started in the criminal section on 2 February 2009"* and *"they gave me (a) court when I was from suspension in, was it December 2009, if not January and I was doing court F. I think it was in December..."*

However, from the evidence it is clear that the Magistrate did not start in the criminal section on the 2nd of February 2009. She stayed for a long time in the civil section and only on the 16th of February 2009, as indicated above she started attending to admission of Guilt cases just to cover herself. In her own words: *"I am doing admission of guilt fines to avoid staying in the office doing nothing."* (Transcribed record dated 11/8/2011 line 10 and 11 and letter Mrs. Ndamase to Mrs. Mamosebo dated 7 April 2009.)

In the last mentioned letter which forms part of **exhibit acw** (page 26) Mrs. Ndamase so late as 7 April 2009 *inter* alia also responded

as follows upon a request by Mrs. Mamosebo to Mrs. Ndamase to vacate the office that she was occupying at the civil section:

> *"As far as I know I am in the Civil section until a contrary decision is taken by the Magistrates Commission to which the matter akin to this rotation issue has been referred."* (Paragraph 2), and
>
> *"... Thus, I am not going to vacate my office until I am heard by an independent body..."*

There is sufficient evidence that the Magistrate at least up to 19 June 2009 still did not regard Mrs. Mamosebo as her supervisor. On 3 October 2011 when Mrs. Mamosebo testified she indicated at one stage that Mrs. Ndamase at that stage still does not recognise her as her supervisor.

Before I proceed I deem it necessary to refer to one line of cross-examination of Mrs. Mamosebo by the Mrs. Ndamase. This line of cross-examination was aimed to get a concession from the witness that the Magistrate indeed reported to her at the Criminal Section on the 2nd of February 2009. This extract from Mrs. Mamosebo's evidence must however be evaluated in context of Mrs. Mamosebo's evidence as well as the other evidence before us as a whole.

On page 49 line 16 and further the following was recorded on the 3rd of October 2011:

> *"MRS NDAMASE: Mrs Mamasebo, you know that on 2 February 2009 I came to your office and told you that in fact I put it in a question form. I said were you aware that I was rotated back to the criminal section and I also told you that I*

because you were not recognising me as your senior.

I am coming to that. ***My intention here is to show that on 2 February 2009 I came to your office and I reported to you and I also told you that Mr Nair said you did not want to work with me.*** *Not about any other, I never told you about any other issues at that time. ---* ***Madam, you took some time, it is just that I cannot measure the time. But you spoke for some time with me.*** *I cannot say 5, 10 or 15 minutes, but it was quite some time that you stood there and you briefed me in confidence. That is why even now I am not divulging exactly what was said and after you said that, I said to you go speak to the chief. I said it to you. Speak to him, because you were yes I confirm you were aggrieved by the fact that you were moved from civil to criminal and you did not want to come back. You did not want to be removed from civil. That is why I said to you why do you not set up an appointment and speak to him directly and address the issue."*

Later on, also during cross-examination, the following conversation took place:

Page 69 and further (3 October 2011):

"MRS NDAMASE: I said in February 2009, there was a period where you said you did not know my whereabouts. I was absent from work, you even went to my office and you found it locked and the lights were off. Is that correct? --- That is the ACW exhibit that I was referring to.

Is that correct?

CHAIRPERSON: Ja, but is it February or later? --- No, it is later because my letter is dated 3 April 2009.

MRS NDAMASE: Which means you had no problem with my absence in February. --- No madam, ***in February you did***

upon your return you were communicating directly with the chief's office from submission of stats to submission of the leave forms. So I was not certain yet of your exact return. That is what I said in the evidence in chief.

Mrs Mamasebo, on 2 February you agreed that I was in your office and we talked much. *That is how you put it. We talked for a lengthy period. ---* ***I said to you I am glad you remember the date. I did not say on 2 February you came, because you did not report immediately upon your transfer from civil to criminal. You did not report immediately.***

That is what I did, as far as I know and I also adopted the policy of writing to the chief magistrate and challenging my rotation at the same time. I reported and I was also busy with the chief magistrate. I have already addressed that one. I am through with it. Now I am coming to the question of you not knowing my whereabouts. Whether I was sick or I just left my office. In February 2009. --- ***You did not report to me madam. I am still saying you did not report to me.***

Let me leave that one. ***So in other words what you are saying from 2 February until 6 February I did not report to you and you did not know where I was? --- You did not report.***

Well, I put it to you that at that time I reported, thereafter I did not come to work because I was sick with stress problems. Do you remember that? --- You did not even communicate your sick leave through my office. I did not know about your absence. I am still saying I did not know about your absence, I did not know about your whereabouts. You chose not to communicate with me. "

(My emphasis)

This concession by the witness that Mrs. Ndamase reported to the Criminal section on the 2nd of February 2009, if one can call it a

is clear that the Magistrate refused to execute a lawful order by Mr. Nair in this regard despite a second written order in this regard (see count 11). This is pure willfulness and an undermining of the authority of the Chief Magistrate which makes it very difficult to manage an office properly. Nr. Nair described the situation as follows:

> *"... now the one senior magistrate is prepared to carry out my order, you will take control and manage the magistrate then the person does not want to go there. The other senior magistrate now has for all intense and purpose cannot work with the magistrate, she knows it is told that the magistrate is going to another section, who must now manage that."* (Transcript record page 68)

One would expect a Magistrate to act professional and adhere to his or her superior's lawful instructions. A Magistrate cannot work in a certain section of the office on his or her own terms. A Magistrate must adhere to the lawful orders of his or her supervisor whether or not he or she likes or dislikes these changes in the workplace. Mrs. Ndamase's conduct in this regard is nothing less than misconduct.

In this regard I find on a balance of probabilities that the Magistrate concerned on 2 February 2012 refused to execute a lawful order in that she refused to report to Mrs. Mamosebo at the criminal section as instructed by the Chief Magistrate, Mr. Nair

Count 7

Contravention Regulation 25(c) read with **paragraphs 2 and/or 3 of the Code of Conduct** in that on **02.02.09 in her letter to Mr. D Nair** the Magistrate **contravened the Code of Conduct for Magistrates, by the tone of the said letter, being**

control and thereby make employment of such person intolerable. When you read any provision of the Act please learn and not read it in isolation..."

"...you have already taken a decision to move me out of the civil section basing your ill advised decision on the petty complaints...and a decision of the Magistrates Commission to charge me with misconduct, so why do you ask me to comment on the letter written by the attorney about me?..."

"...you have put the cart before the horse..."

"... you are desperately raking any information or gossip that you can come across in order to taint my reputation as the magistrate..."

"I am not going to report in the Criminal section at all."

"...you want to correct and justify your ridiculous mistakes by rotating me to another section..."

"...your insidious style of psychological attracts on me..."

"...I am not going to report in any other section except the civil section..."

"...Mrs Rademan...in cahoots with you in all the attacks you decided to level against me. I am not going to give you a slight chance to humiliate me any further. Report this as an act of insubordination to the Magistrates Commission and thereafter loose your hold over my life and health..."

Mrs. Pretorius described the tone of the Magistrate's letter as: *"strong and harsh words"* with which Mr. Nair agrees.

Mr. Nair explained the accusation of psychological attacks referred to by Mrs. Ndamase as follows:

> *"All I did was carry out my function, if there was a complaint against the magistrate, a written complaint from inside or outside the office, my function is to write to the magistrate and say can I have your response? I never got the satisfactory response. .In return I got you know, harshly throne (must be tone) letters that impacted on my ability or rather insulted my ability as head of office."*
> (Transcribed record pages 101 and 102).

Mr. Nair denies all the allegations made against him in this letter.

I must agree with Mr. Nair that the tone of this letter is such that it impacts on his ability and that the Magistrate indeed insulted his ability as Head of the Office. The letter is an example of the Magistrate's total disrespect for her Judicial Head of Office.

I am of the opinion that the Magistrates Commission has proved on a balance of probabilities that the Magistrate in the writing of this letter was insulting, contemptuous, sarcastic and disrespectful towards Mr. Nair, her senior and that this is a contravention of Regulation 25(c) read with paragraph 3 of the Code of Conduct.

Count 10

Contravention Regulation 25(j) in that for the **period 16.02.2009 to 04.03.2009** the Magistrate **failed to execute a**

On page 61 (line 10) of the transcribed record of the proceedings of the 8th of March 2011 Mrs. Ndamase put it to Mr. Nair during cross-examination: "... *I do not deny that I used the wrong stats form.*" She put it further to Mr. Nair that she kept on using the wrong stats form because she went to Senior Magistrate Mamosebo for three or four times to ask for the correct stats form but she always found her busy with her computer and then she always said: "... *Mrs. Ndamase I am going to help you but I am busy. ...*" (transcribed record 8/3/2011 at page 61).

Mr. Nair then wanted to know from the Magistrate why did she not go back at the appropriate time or why did she not ask the correct form from one of her colleagues in the Criminal section. Mrs. Ndamase's excuse was that these colleagues of her were not greeting her so she could not go to them. Mr. Nair's response was that she could have asked the secretary for a form or she could go to Mr. Van Vuuren who was at some stage acting as a Senior Magistrate in the Criminal section. According to Mr. Nair not all the colleagues of Mrs. Ndamase who were in the criminal section are her enemies. She also could have approached Mr. Choma, Mr. Sethlabi and others. The Magistrate then starts accusing Mr. Nair that he is protecting Mrs. Mamosebo.

Mr. van Vuuren also testified that the correct stats form was freely available in the office. He also during the course of his duties noticed that the admission of guilt stats, which is criminal court work, was wrongly recorded on the civil stats form which hampered the efficient management in the criminal section.

It is strange that the Magistrate always shifts the blame to others.

the period of 5 March 2009 until the 7th of April 2009. Reference was made in the charge sheet to Mrs. Mamosebo's letter dated 7 April 2009 which forms part of **exhibit ay**. For the reasons set out below, I also have to deal with count 13 at this stage.

Regulation 25(j) is also applicable to count 13 namely a possible accusation/charge of misconduct if there is a refusal to execute a lawful order. The period mentioned in the charge sheet in so far as count 13 is concerned is however not correct. The evidence shows that it must be 5 March 2009 until 18 March 2009 because it appears that the Magistrate was for the rest of March 2009 up to the 3rd of April 2009 booked off on sick leave see **exhibit ABF**. The misunderstanding came in because of the fact that, according to Mrs. Mamosebo, the sick leave was not communicated to her by the Magistrate.

Mr. Nair testified and handed in **exhibit ay** *inter alia* to the effect that the matter was reported to him by Mrs. Mamosebo on the 7th of April 2009. Mrs. Mamosebo's letter forms part of **exhibit ay** and the relevant portions read as follows:

> *"This office has received daily stats from Ms. Ndamase for the period 02 March 2009 to 18 March 2009 on 6 April 2009. The following concerns are raised in this regard:*
>
> ...
>
> *(ii) A wrong stat form is utilised even after a request to use the form was made to the magistrate and electronically made available to her. ...*
>
> *This office has written a letter to Ms. Ndamase requesting her to separate the daily reporting for the two sections and to observe the submission time...."*

Mrs. Ndamase's explanation for her failure to submit her criminal statistics on the correct form is not acceptable or reasonable. It is therefore clear that it was proved on a balance of probabilities that during the period 16 February 2009 until the 18th of March 2009, the Magistrate failed to execute a lawful order namely to submit her statistics on the prescribed criminal stats form.

Count 11

Contravention Regulation 25(j) – Refused to execute a lawful order on **09.02.09** in that the Magistrate **refused to assume duty at the criminal section** as instructed by the Chief Magistrate *(Letter D Nair dated 09.02.2009* ***exhibit ap*** *and Mrs. Ndamase's letter dated 02.02.09* ***exhibit aaa****)*

This charge flows from count 6 and is **a second refusal by the Magistrate to assume duties in the Criminal section despite a further written instruction** by the Judicial Head in this regard.

According to the evidence the Magistrate was at work on 2 and 3 February 2009 but she did not report to the Criminal sections as instructed by the Judicial Head of the office. On 4 – 6 February 2009 (Wednesday – Friday) she was absent with sick leave but, as already indicated, she did not communicate with the Senior Magistrate Mrs. Mamosebo in this regard. When she returned to work on Monday the 9th of February 2009 she again refused to report at the Criminal section of the office. On this particular day the Magistrate send the following letter per e-mail **exhibit al** to Mr. Nair:

> *"This is to inform you that I have reported at work to day and I am in the civil section where I am stationed. My request to*

decision is taken by the Magistrates Commission..."

It is significant that Mrs. Ndamase also signed her letter as *"Additional Magistrate, Civil section, Pretoria."*

Mr. Nair also testified that at the beginning of March 2009 Mr. Sethlabi, one of Mrs. Ndamase's colleagues advised him that he has entertained discussions with Ms. Ndamase and that he approached Mr. Nair's office with the view to mediate in the matter. He also advised Mr. Nair that Mrs. Ndamase stated that he should convey to him that in the event he is prepared to withdraw everything in this matter she would then carry out the instruction to be placed in the Criminal section.

Mr. Nair declined this offer and he indicated to Mr. Sethlabi that he questions any mandate that he has to entertain such discussions and further that Ms. Ndamase should reduce to writing whatever it is she wished to say and then he would be in a position to determine the way forward. See also **exhibit au** dated 4 March 2008 in this regard.

The Magistrate initially did not deny this evidence produced by Mr. Nair. She only questioned him about the identity of the Magistrate (Mr. Sethlabi), who approached him. Later she put it to Mr. Nair that she never gave Mr. Sethlabi the go-ahead to approach Mr. Nair. When Mr. Sethlabi approached her to obtain her blessing to talk to Mr. Nair she refused and told him to stay out of this and if he wants to be exposed to the Regional Court he must leave her name out of this.

Mr. Sethlabi was not called by any of the parties and therefore this part of the evidence which is in any event disputed by Mrs.

Mr. Nair during his testimony handed in a complaint which he received from Senior Magistrate Mamosebo **exhibit ay** in which she reported to him that she received the daily stats forms from the Magistrate for the period 02 March 2009 to 18 march 2009 on 06 April 2009 and that: *"the stats are submitted very late contrary to the practice and norm of daily submission."*

Mr. Nair referred the matter back to the Senior Magistrate with the request that the concerns raised in her letter to him, must be drawn to the attention of the Magistrate with a request to address same.

Mr. Nair confirmed that there is a system in place in his office to follow up that all the Magistrates in fact submit all their statistics on a daily basis and that if Mrs. Ndamase for instance failed to submit her stats on a particular day, then the supervisor or someone else would be able to pick it up either on a daily or at least weekly basis. We must however take in consideration that Mrs. Mamosebo testified that that Mrs. Ndamase was not communicating with her and therefore she was not aware that the Magistrate was, as I will point out later, on sick leave.

I drew Mr. Nair's attention to paragraph 59 of the Judicial Manual which was approved by a former Minister of Justice and in which the guidelines with regard to misconduct is set out as follows:

> *"**Disciplinary steps***
> *59.1 **District Heads are encouraged to deal with conduct which deviates from the norm** by means of **appropriate disciplinary steps rather than to report it as misconduct.** Where, however, this misconduct has given rise to a complaint in terms of the Regulations the procedure there prescribed is to be followed.*

supervisor? I do not think so, especially also because Mr. Nair admitted that some of the other Magistrates also from time to time submit their statistics late and none of them was charged with misconduct. There is also no other charge before me which indicates that after this discrepancy was identified that there was a recurrence of submitting stats late.

Such a finding will also be in line with the guidelines in the *Judicial Manual* as afore mentioned namely that District Heads are encouraged to deal with conduct which deviates from the norm by means of appropriate disciplinary steps rather than to report it as misconduct. These issues (**counts 14, 15, 16 and 31**) were initially treated internally as **minor misconduct** which **was supposed to be resolved** by means of discussions with the Magistrate concerned. No written warning or other more drastic steps were deemed necessary at that stage and to charge the Magistrate now for misconduct in so far as these issues under discussion is concerned goes against the grain of fairness as one of the pillars of the rules of natural justice.

See also Sondlo/University of Fort Hare *supra* where, as already indicated, the principle was applied that ***it was unfair to rehash*** matters that were already dealt with.

I agree.

One must also bear in mind that the evidence revealed that the Magistrate was booked off on sick leave from 18 March 2009 until 3 April 2009 which was a Friday. On the first working day after her sick leave Mrs. Ndamase handed in her outstanding statistics, which I assume was her month-end statistics.

submitting her **statistics for 03.03.09 incorrectly** see the above-mentioned letter Count 14 *(Letter Mrs. M Mamosebo dated 07.04.2009 part of **exhibit ay**)*

As already indicated the Code of Conduct (Schedule E Regulation 54A) reads as follows:

> *"25. A Magistrate may be accused of **misconduct if he-***
>
> ...
>
> *(d) is **negligent or indolent in the carrying of his duties"***

This count relates to the previous two counts.

Mrs. Pretorius in her Heads of Arguments asks for a conviction on both this count and on the next count. She submits that the said statistics are submitted incorrectly on the following grounds:

(a) A civil statistic form was used for criminal court work.

(b) Mrs. Ndamase did not record any civil work on the two days.

(c) It creates confusions as to the true reflection of the statistics.

(d) It is unclear what the research was for as well as the reasons.

(e) The statistics is not submitted within the time limit as as dictated by the office policy, i.e.

- at the close of business, or
- alternatively before 8:30 the next day – see **exhibit ac** paragraph 3 and testimony of D Nair and Mamosebo

That is however not how I understand this charge against Mrs. Ndamase. Mrs. Mamosebo was complaining to Mr.Nair about the

back to the Senior Magistrate with the request that the concerns raised in her letter to him, must be drawn to the attention of the Magistrate with a request to address same which was, as previously indicated, not done by her.

Again, when this matter was identified Mr. Nair at that stage also did not regard this particular shortcoming as misconduct. Statistics for other days was also handed in during the hearing in order to proof some of the other charges and although some of these statistics *inter alia* shows that other statistics was also not correct, the latter evidence as well as the arguments by Mrs. Pretorius cannot take this point any further. Mrs. Pretorius time and again said that she must *"spread the net wide"* and that she wanted to proof a pattern, but we cannot use that evidence to go beyond the charge sheet. Presiding Officer could in all fairness to the Magistrate concerned not allow that this hearing becomes a *"fishing expedition."* What is important is that we must stick to the allegations in the charge sheet and the charges before us. One must also remember that the Magistrate in this particular charge is charged that she on only one day, namely on 3 March 2009 submitted her statistics incorrectly. Why must she now for only one oversight, **which was identified but not addressed with her**, be charged with misconduct? This sounds not fair.

In the case of The Law Society of the Cape of Good Hope and Heinrich Nel delivered on 23 November 2011 (Supreme Court of Appeal case number 054/2011) it was decided that disciplinary proceedings, like the case before us, are not ordinary civil proceedings, but are rather *sui generis* in nature and with reference to the case of Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop 1994(1) SA 359 (A) at 368C – H the court finds that:

regarded as misconduct.

Count 16

Contravention Regulation 25(d) in that the Magistrate **exercised** her **duties in a negligent/indolent manner** by **submitting** her **statistics for 04.03.09 incorrectly** see the above-mentioned letter Count 14 *(Letter Mrs. M Mamosebo dated 07.04.2009 part of **exhibit ay**)*

This count relates to the previous three 3 counts with specific reference to count 15.

What I pointed out in the discussion in respect of the previous charge is also applicable to this charge. Both charges are the same except the dates mentioned in the charge sheet. Neither can this be regarded as misconduct.

Count 17

Contravention Regulation 25(j) – in that on **25.05.2009** the Magistrate submitted her application for leave directly to the Office of the Chief Magistrate, **contrary to previous requests** that the said leave applications must be submitted to the relevant Senior Magistrate. *(Letter Mr. D Nair dated 04.06.2009 – **exhibit abg**)*

Regulation 25(j) as already indicated deals with a possible accusation/charge of misconduct if there is a **refusal to execute a lawful order.**

This charge relates to Mrs. Ndamase's application for vacation leave for the period 8 June 2009 until 12 June 2009. The charge also links with count 19 which deals with a sick leave application for the

According to my notes the last sentence is a typing error. The Magistrate actually said: *"I think **I sent it to Mr. Nair's office.**"*

According to the evidence placed before me the Magistrate, despite previous requests and despite a written instruction on the 18th of March 2009 (**exhibit abi)** after she also submitted another leave application and her stats directly to Mr. Nair's office (see discussion under count 21), and the Judicial Head of the office then instructed her to submit her leave and stats forms to the Senior Magistrate at the criminal section, Mrs. Ndamase blatantly refused to comply with this order and two months later on the 25th of May 2009 she again handed this leave application under discussion directly to Mr. Nair's office - see **exhibits abf** – letter Mr. Nair dated 4.6.2009 and **abg** – letter Mr. Nair to the Magistrates Commission dated 6.4.2009 and also the evidence of Mr. Nair on page 84 and further (transcribed record dated 8/3/2011). See also **exhibit abi** – matter was discussed with Mrs. Ndamase and she refused to adhere to his instructions. On 25 May 2009 Mrs. Amanda Marques send the following e-mail which forms part of **exhibit abg** to Vibhja Neerahoo:

> *"Ms. Ndamase brought her leave forms this morning to our office. I was here and she gave it to me. I requested her to get her senior to sign and she responded that there is 'no one to sign there.' She then just dropped it into my hands and turned around. On your computer are the forms."*

Although the contents of Mrs. Marque's e-mail is hearsay evidence because Mrs. Marques did not testify, Mrs. Ndamase through her cross-examination placed it on record that she indeed submitted this leave application as well as her stats forms directly to Mr. Nair's office. Mrs. Ndamase also had no objection that this document

Nair. ***Then I stopped taking those forms to his office after realising or after I have discovered that he does not like this thing of taking leaves to his office."***
(Transcribed record 25/01/2012 at lines 5 - 12) page 209

However, when Mrs. Ndamase testified she said in her evidence in chief that during August/September 2008 she was informed by Mrs. Rademan that she must submit her sick leave directly to Mr. Nair's office. She then constantly submitted her leave applications and her statistics directly to Mr. Nair's office: *"and he never complained."* She added: *"He also never instructed me to stop."* The evidence however quite clearly shows that this was not the case. Mrs. Ndamase kept on submitting these documents to Mr. Nair's office because she failed to acknowledge Mrs. Mamosebo and Mr. van Vuuren as her seniors while the charges against her were still pending. The evidence is clear that on 18 March 2009 Mr. Nair informed Mrs. Ndamase per letter **exhibit abi** as follows:

"I have been advised that despite your attention being drawn to the procedures for submissions in respect of leave forms and statistics, you have indicated that you ***will*** *continue to submit leave forms and statistics forms directly to my office.*

Please be advised that as per instruction that you commence duty in the Criminal section, it is expected that you submit your leave and stats forms to the Senior Magistrate of that section.

Your persistence is an act of insubordination and amounts to the refusal to execute a lawful order. (Vide Regulation for Judicial Officers in the Lower Courts part V Reg. 25(j)).

2009 to discuss the contents of your letter as well as procedures for submission. She has indicated to this office that she will continue to submit same directly to your office as well as the judicial returns for reasons disclosed to you and until the dispute surrounding her matter has been disposed off by the Magistrates Commission."

Mrs. Ndamase has expressly indicated that she refuses to acknowledge that she falls under the Senior Magistrate Criminal Courts and has indicated that she would persist with such conduct, as the matter is pending before the Commission. This is a total insubordination and the authority of the Judicial Head was totally disregarded.

Mrs. Pretorius argued that Mrs. Ndamase's averment that Mr. Nair asked her to submit her leave applications and her statistics directly to him is highly improbable as such an arrangement would make the daily functioning of the three sections impossible. The seniors would not know what was happening in their sections and they would not be able to do planning and proper management in their sections. She also referred to **exhibit ac** in which Mr. Nair on 2 December 2008 *inter alia* informed Mrs. Ndamase as follows:

"*... You are requested to ensure that all daily statistics forms are submitted to the office of the Senior Magistrate* ***or my clerk Ms. E Lange on or before 08h30 of each day.***" (Paragraph 3) My emphasis.

However, on 18 March 2009 there was a direct written instruction from Mr. Nair to Mrs. Ndamase as discussed above **(exhibit abi)** that it is expected from her to submit her leave and stats forms to

Ndamase refused and indicated that Ms. Mamosebo is not her senior and it includes me as well. She indicated telephonically to Ms. L Lineveldt that she only reports to the Magistrates Commission. You are requested to deal with the matter."

Mrs. Ndamase denies this telephone conversation or that she received the e-mail as stated above.

Mr. Nair testified that the Magistrate refused to submit the leave applications to Mr. van Vuuren and that she submitted it directly to his office. Mr. van Vuuren as well as Mrs. Lineveldt who during that period acted as secretary in the criminal section also testified and they confirmed that the leave form was not handed in at the Criminal section. Mrs. Ndamase during cross-examination also confirmed that she handed this leave application directly to Mr. Nair's office. See my discussion in this regard under count 17.

Despite previous instructions in this regard she indicated that she will still submit the leave and stats forms directly to Mr. Nair's office. Mr. Nair again instructed the Magistrate in writing to comply with his directives – **exhibit abi.** See discussions under count 17 and 21.

This attitude of the Magistrate makes it very difficult for the Judicial Head of the office as well as the Senior Magistrates in the different sections to manage the office properly. It is clear that the Magistrate failed to adhere to an order by Mr. Nair not to submit her leave applications directly to his office. This was a lawful order in order to enable the Senior Magistrates to keep proper control and to plan ahead with absentees in their sections and to recommend leave applications which must be approved by the Judicial Head of the Office. Misconduct has been proved on a balance of

Kindly convey the acceptable procedure to Ms. Ndamase."

- Letter dated 10 March 2009 in which Mrs. Mamosebo responded to Mr. Nair's letter in which she informed the Chief Magistrate that she was not in a position to respond earlier due to the absence of Mrs. Ndamase due to ill health. She then informed Mr. Nair as follows:

  "Ms. Ndamase was called into this office on 09 March 2009 to discuss the contents of your letter as well as procedures for submission. She has indicated to this office that she will continue to submit same directly to your office as well as the judicial returns for reasons disclosed to you and until the dispute surrounding her matter has been disposed off by the Magistrates Commission."

- Letter dated 18 March 2009 in which Mr. Nair informed Mrs. Ndamase as follows:

  "I have been advised that despite your attention being drawn to the procedures for submissions in respect of leave forms and statistics, you have indicated that you ***will*** *continue to submit leave forms and statistics forms directly to my office.*

  Please be advised that as per instruction that you commence duty in the Criminal section, it is expected that you submit your leave and stats forms to the Senior Magistrate of that section.

applications and her daily stats through her Senior Magistrate as well as **exhibit abf** dated **6 April 2009** referred to in the charge sheet in so far as this charge under discussion is concerned, are clearly **written and dated after the date of the alleged misconduct** referred to in this charge, namely **6 March 2009.** The charge reads that the Magistrate on the 6th of March 2009 submitted her leave application **contrary to written instruction** to the office of the Chief Magistrate instead of to the Office of the Senior Magistrate Ms. Mamosebo. As indicated *supra* Mrs. Mamosebo discussed this issue with Mrs. Ndamase only **on the 9th of March 2009,** in other words, after the leave application was already submitted on the **6th of March 2009.**

Mrs., Pretorius asked for a conviction on this count. She argued that Mrs. Ndamase did not communicate with Mrs. Mamosebo about her ill health. Mrs. Pretorius also referred to **exhibit acw** pages 7 and 8 as well as **exhibit abi.**

The evidence before me however does not show that the Magistrate on 6 March 2009 submitted her leave application, **contrary to a previous written instruction by her Judicial Head of office,** directly to the office of the Chief Magistrate instead of to the office of the Senior Magistrate Mrs. Mamosebo. Misconduct has not been proved.

Count 22

Contravening regulation 25(h) of the Regulations, in that for the period **30.03.2009 – 03.04.2009,** she was **absent from her office/duty without leave or valid cause.** *(See letter: Mrs M Mamosebo dated 03.04.2009 page 5 and 6* ***exhibit acw****)*

writing, for leave and has been advised that the leave application has been approved."

According to the evidence before us Mrs. Ndamase was allocated to the criminal section from the 2nd of February 2009. As already discussed under counts 6 and 11 she however for a long period failed to report to her supervisor in the criminal section. The evidence before me showed that Mrs. Ndamase was booked off on sick leave during the period mentioned in the charge sheet and that she submitted her leave application when she returned to work. She however did not inform her supervisor when she could not report for work. I have no evidence before me whether or not Mrs. Ndamase was: *"prevented by sudden illness"* which caused that she was not able to apply for sick leave before she left the office. Mrs. Ndamase was also not cross-examined by Mrs. Pretorius to that effect. All I have before me is an application for sick leave substantiated by a medical certificate that she indeed was booked off by a medical doctor.

On 3 April 2009 the supervisor Senior Magistrate Mamosebo reported per letter (**exhibit acw** pages 5 and 6) to the Judicial Head of office that for the period 30 March 2009 up to 3 April 2009 she was not able to get hold of Mrs. Ndamase, neither in person or on her cell phone. On 3 April 2009 at 10:45 a last attempt to locate the Magistrate was made at her office door of room 1.12. However, the door was locked and the lights were dark. As her supervisor, she had not been informed of Mrs. Ndamase's whereabouts either by herself or any of her colleagues or relatives. Nor has she been placed in a position to account for Mrs. Ndamase's daily and monthly stats for the month of March 2009. With reference to count 14 these stats were only submitted on 6 April 2009. Mrs. Mamosebo also reported that during this period she was also not

3/4/2009, which was the amended period of sick leave in addition to her initial sick period up to 26 March 2009, she was absent from office or duty ***"without leave or valid cause"***. However, according to the evidence before me the Magistrate was **on sick leave substantiated by a valid medical certificate** and therefore she **was absent with a valid cause**. Regulation 25(h) uses the word "or" and not "and" in other words, the one or the other. The fact that the absence on sick leave was not communicated by the Magistrate with her supervisor clearly frustrated the head of the office as well as the Senior Magistrate, but the Magistrate is not charged with that, nor was she directly charged with a count that she failed to submit herself to the authority of her supervisors. The closes that we can get to that is count 20 (declaring to Mr. van Vuuren that she refuses to adhere to the authority of her seniors) on which count, for the reasons as set out under my discussion of count 20, she however already was find not guilty and discharged. We must stick to the charge sheet to determine whether or not the Magistrates Commission on a balance of probabilities proved what is alleged in each and every count in particular. In so far as this count is concerned there are therefore no grounds for a finding of misconduct.

Count 23

Contravening regulation 25(j) of the Regulations, in that on **30.01.2009**, she **refused to sign acknowledgement of receipt of two letters from the Office of the Chief Magistrate, Pretoria.** *(See statement: Ms M Horn dated 03.02.2009* ***exhibit acn****)*

Regulation 25(j) is also applicable to this charge namely a possible accusation/charge of misconduct if there is a refusal to

v Outhing Construction & developers CK [2007] JOL 19754 (CCMA) and argued that the following principles are enunciated in this case:

- There is no law that provides that a person can be charged with *"attitude."* This means that attitude does constitute neither insubordination nor disrespect nor defiance in the form of refusing to take letters delivered to a person.
- Thus a refusal to sign for any document or letter is not an offence

What Mrs. Ndamase does not understand is that the Moloi-case that she referred to in the first instance deals with a respondent who was an **employee** in terms of the Labour Relations Act 66 of 1995. This act is not applicable to Magistrates. Magistrates should not be regarded as State employees for purposes of the Labour Relations Act, 1995 in view of the independence of the courts in terms of Section 165 of the Constitution. See Van Rooyen and Others v The State and Others CCT 21/01 dated 11 June 2002 at page 13 paragraph 18. See also Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 466 (TkH) at page 452 which deals with the relationship between organs of the State and the courts as referred to in subsections (4) and (5) of section 165 of the Constitution. For a further discussion of an employer-employee relationship see the case of Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at page 60 - 61 and Hanna v Government of the Republic of Namibia 2006(4) SA 940 (NmLc) at page 954-946. Judicial Officers are not accountable to the government, they are accountable to the Constitution and the Law and to the courts as independent institutions. For purposes of this judgment there is no need to discuss these issues in detail.

Secondly, in the Moloi-case the respondent **was wrongly charged.**

Mrs. Windell also testified. It was obvious that she was very tense and scared when she testified. She is an administrative clerk in the civil section in Pretoria since the 3rd of March 1998. As such it is her duty to distribute the weekly quota of 60 to 30 or even up to 90 default judgments per Magistrate, to the Magistrates pending on how many applications she received. The distribution is done equally to the different civil court Magistrates. Only the Magistrate who is on motion court roll does not receive default judgments. Default judgments are distributed once a week and all Magistrates are supposed to finalise their weekly quota by the time when they receive their new applications for the following week which is normally on Mondays.

She testified that Mrs. Ndamase always finalised the previous week's work except for the week of 24/11/08. Later on (see discussion under next count) she testified that on 17/10/2008 the Magistrate brought 120 unattended default judgments back which were the cases for the previous two weeks. It happened only twice that the Magistrate did not finalise her quota of work for the previous week.

Mrs. Ndamase put it to the witness that more cases were allocated to her and to Mrs. Mafafo than to the other Magistrates. Mrs. Windell was not very clear in this respect.

According to Ms. Windell it was at the instance of Mrs. Rademan that Mrs. Ndamase was not allocated default judgments as indicated in this charge because Mrs. Ndamase did not finish the default judgments of the previous week. The Magistrate indicated to the witness that because of the workload all the Magistrates from time to time struggle to get through the workload.
Mrs. Ndamase does not deny that she brought default judgments

supposed to do. This work was the default judgments for the previous two weeks and she had to distribute this work between the other Magistrates in the civil section.

Mrs. Ndamase does not deny that she brought these judgments back to Miss Windell and she put it in cross-examination to the witness that all these cases contained documents which were drafted in Afrikaans which she could not understand. The witness responded that sometimes the application for default judgment is in English while the other documents are in Afrikaans. **According to the witness Mrs. Rademan in the past requested her to distribute files which contain process in English to the Magistrate.** She also confirmed that most of the time when the Magistrate brought default judgments back to her in applicable cases she wrote with a lead pencil or with red ink on the first page of the default judgment *"Afrikaans."*

It is common sense that a Magistrate is obliged to complete all unfinished work before he or she goes on leave. All unfinished work must receive proper attention in order to avoid a backlog. However, the witness did not clearly answer the question whether or not all these ± 120 applications for default judgment were in Afrikaans.

If it happens that circumstances lead to an unacceptable accumulation of default judgments there is a duty on the Magistrate to speak to the Head of the section about the situation before the delay has become a problem.

In Mrs. Ndamase's case this was however, except for the previous count, only a once-off incident. Is it really misconduct? The witness testified (line 10 transcription 25.07.2011 page 86) that

screened which placed a burden on somebody. I am not prepared to get involved in this argument which is an internal problem which must be addressed by the staff of the Pretoria Magistrates office. It seems as if there were indeed arrangements with the supervising Senior Magistrate in that section. I just wonder what would happen if Mrs. Pretorius and I were serving in the civil section and we have to deal with default judgments which contain process which are drawn up in Xhosa which is one of the official languages, but which none of us can understand.

I am not convinced that misconduct by Mrs. Ndamase was proved in respect of this charge.

Count 27

Contravention Regulation 25(d) in that **on 01.09.2008** the Magistrate **performed** her **functions in the section 65 court in a negligent and indolent manner** by **not listening to the legal representatives, refusing to postpone cases for review** as provided for in the relevant legislation and **being advised by one Lerato in the said court** *(Letter Van Zyl, Le Roux & Hurter, Inc. dated 27.01.2009* ***exhibit aaf****)*

As already indicated Regulation 25 reads as follows:

> *"25. A Magistrate may be accused of* ***misconduct if he-***
>
> ...
>
> *(d) is* ***negligent or indolent in the carrying of his duties"***

Attorney **Tamara Kirchner, a coloured Attorney** of the firm Van Zyl, Le Roux & Hurter, Incorporated and admitted as an attorney during January 2007 testified with regard to her written complaint

According to the complainant she tried to place the history of the case on record but the Magistrate refused to listen to her. The Magistrate did not care about the matter.

The witness did not refer to a specific case as such, but according to her this was a pattern that was followed by Mrs. Ndamase and she felt that the Magistrate did no follow the correct procedure in the section 65 court.

The complainant testified that she got the impression that the Magistrate's knowledge of the section 65 procedure is not up to standard because an Interpreter with the name of Lerato had to advice her what to do with these cases on the court roll. She testified that Lerato and the Magistrate used an African language. She could not understand the indigenous language used by them.

Here I must pause to say that the Magistrate during her cross-examination tried to make this also a racial issue. She put it to the witness that the witness used the word *"Native language"* during her evidence in chief and that the use of this word is not in line with section 6(5) of the Constitution of the Republic of South Africa. The witness quite correctly pointed out that she never used the word *"Native language"* during her evidence in chief and that it was Mrs. Ndamase who started to use these words. She then during cross-examination used that word in follow up on the questions that Mrs. Ndamase posed to her. It then seemed that Mrs. Ndamase quoted from her notes which she made during the evidence of this witness in chief and that she was the one who recorded *"Native language"* instead of *"African language."* The transcribed record however speaks for itself (09.02.2011 at line 10: *"Engels en 'n Afrika taal..."* However, the witness testified that the conversation between the

follows:

> *"Madam, I did not know at the time of me writing the letters that there were other complaints against you. This was my personal complaint against you, the letters I wrote."* Transcribed record 03/05/2011 at lines 17 – 19 page 4.

The witness on page 30 of the transcribed record of the 3rd of May 2011 testified that she does not even know who Mrs. Ndamase's accusers were and that she does not know Mr. Nair. She testified that she has never seen him and that she has never spoken to him.

Mrs. Kirchner testified that at that stage she new nothing about Mrs. Ndamase and her complaint was only based on what she experienced in court. She indicated that it is possible that the Magistrate confuses her with someone else because all the candidate attorneys were friends and they were always together and they were also talking with each other at court. It is however strange that Mrs. Ndamase when she testified, could not furnish the name of the white attorney who allegedly appeared before her. She tried to convince me that Mrs. Kirchner was only called because she is a person of colour and therefore Mrs. Pretorius tried to cover up racism in this case. Mrs. Pretorius argued that she finds it peculiar that, as indicated by Mrs. Ndamase, she confronted the gentleman outside the court regarding **exhibit aaf** but that she cannot remember his name. Similarly, it is very improbable that a file carrier will lodge a complaint but not the attorney, who is affected by what is happening in court. I am satisfied that it was proved on a balance of probabilities that it was indeed Mrs. Kirchner who appeared before Mrs. Ndamase in the section 65 court.

Mrs. Ndamase's version which was put to Mrs. Kirchner was that

right to demand interest on the purchase price a tempore morae..."
(at 695F) and further,

"The old authorities regarded interest a tempore morae as 'poenaal ende odieus', vide Utrechtsche Consultatien, 3, 63, p. 288. Such interest is not in these modern times regarded in that light. To-day interest is the life-blood of finance, and there is no reason to distinguish between interest ex contractu and interest ex mora. Milner's case is, as far as I have been able to ascertain, the only case which applied the old authorities, and in Johnston v Harrison, 1946 NPD 239 at p. 251, the Court was not slow in distinguishing that case. The question that now arises is whether we should apply the old Roman-Dutch Law to modern conditions where finance plays an entirely different role. I do not think we should. I think that we should take a more realistic view than in a matter such as this to have recourse to the old authorities..."
(at 695G and H and 69A)

According to the Magistrate she also removed these matters from the court roll because Mrs. Kirchner's firm brought these cases to court every month. This was denied by the witness.

Mrs. Pretorius argued that that Mrs. Ndamase got into the arena by being very sympathetic towards the debtors and that she accordingly was not acting within the ambit of section 65.

One must however keep in mind that not a single case was placed before me in order to proof what exactly happened in court. I also have no review powers in so far as a Magistrate's court and judicial work is concerned and more important, in terms of section 165 (2)

enquiry under sec. 65 the issue as to whether the judgment debtor still owes anything under the judgment debt is raised it is not only competent for, but encumbent upon the magistrate to decide that issue. To my mind it is akin to the raising of an issue of jurisdiction. A prerequisite to the trial on an issue by a court is that that court should have jurisdiction to hear the matter and this issue of jurisdiction is one which may be raised mero motu by the court. So in applications under sec. 65 it is a sine qua non of the magistrate's power to hold an enquiry or to make any order that there should in fact be an unsatisfied judgment debt in existence. It is the raison d'être for the enquiry." and further,

At 528E-F:

"...an enquiry in terms of sec. 65 is held by the court itself and it is reasonable to suppose that the court, i.e. the magistrate, is by necessary implication clothed with the power of deciding whether or not the machinery of sec. 65 has rightly been set in motion. This follows more particularly in view of the fact that no other provision is made in the magistrate's court to meet the case of a debtor who on being brought to court in terms of a notice under sec. 65 alleges that the judgment debt has in fact been discharged."

At 528G:

"... Insofar as Mr. de Wet's second contention is concerned, he may be correct in contending, as he did, that a magistrate who holds an enquiry into a debtor's financial position is at the conclusion of such an enquiry confined to making the orders set out in sec. 65 (7) but that restriction to my mind

that the debt has been discharged by payment or extinguished by waiver or abandonment, it is competent for the court and encumbent upon it to hear evidence in respect thereof and to determine the issue. The court decided, with reference to the Ferreira case, that where the defence of waiver or abandonment is raised at proceedings in terms of section 65D it is akin to the raising of an issue of jurisdiction.

At 231 the Honourable Judge remarks as follows:

> *"This being so it should be raised as an issue at the commencement of the proceedings and the Magistrate should then enquire into the matter and decide upon it before proceeding with the enquiry into the debtor's financial position, his ability to pay and failure to do so."*

In order to have the issue decided, each party should then be given the opportunity to lead evidence and present argument upon that issue. The matter can not be decided without a proper enquiry in this regard and the court therefore finds that:

> *"... in the absence of such an enquiry into the issue, the Magistrate could not properly decide the issue and he acted irregularly in doing so."* (at 232)

The complaint of Mrs. Kirchner is that the Magistrate failed to listen to the attorneys and that she refused postponements. Forget for a moment the Lerato-issue which will be further discussed later. The question which now arises is can this forum interfere and in what way? Is it misconduct or not? Was the Magistrate negligent or indolent? Is it ethical correct for an attorney to give an opinion on the competency of a Magistrate? With no cases placed before me

of Mr. Otto." (My emphasis)

I am of the opinion that the Honourable Judge is quite correct in this approach and that on the facts before me a review by the High Court would be the only appropriate legal way to follow otherwise this forum will incorrectly interfere with the Magistrate's judicial independence under these particular circumstances. The allegations in this hearing can be distinguished from the facts in the unreported case of P Rawheath, A N Dlamini and ARMSA v Chairperson of the Magistrates Commission and 2 others in case number 14333/06 decided on 17/5/2011 in the North Gauteng High Court in Pretoria where the Honourable Judge in his judgment *inter alia* distinguished between judicial independence and the conduct of a Magistrate in exercising his or her judicial functions. In the Rawheath case the High court find that it was not the outcome of the trial that prompted the preliminary misconduct investigation but the manner in which the Magistrate treated the unrepresented accused in arriving at the result. However, in the hearing before me, the complaint with regard to this particular charge is directly aimed at the outcome of the section 65 cases before Mrs. Ndamase, her refusal to postpone and her competency as a Magistrate which is being questioned. This is something different because it impacts on the Magistrate's judicial independence with which this forum can not interfere.

In so far as the complaint that Lerato was advising the Magistrate regarding what to do in these cases the matter cannot be taken further because, as already indicated, Lerato was not called to testify.

Mr. Nair in his evidence confirmed that he received complaints, including this complaint, from attorneys which reflect negatively on

prejudice or favour." (Paragraph2), and

"A ***magistrate executes his/her official duties*** *objectively, competently and* ***with dignity, courtesy and self-control***
(Paragraph 3)

The contents of the complaint letter **exhibit aaf** was confirmed by Ms. Tamara Kirchner, the attorney who testified with regard to the previous charge. According to Ms. Kirchner the Magistrate criticised her in open court before members of the public, court staff and other legal representatives and said that she placed too many cases on the court roll and that their firm enjoys putting so many cases on the court roll. In **exhibit aaf** she sets out the details as mentioned in the charge sheet.

The Magistrate did not place the first part of this particular allegation in dispute. During her cross-examination of this witness she put it to Mrs. Kirchner that on the day of the incident she brought a lot of cases to court – *"over 30"*. She said she complained about the fact that a lot of cases were placed on the court roll. The witness responded that it was true.

Was this misconduct? Was the open court the correct place to criticise the Attorney openly before other people present? I am honestly of the opinion that the open court was not the correct forum to address this problem, if it was a problem. This behaviour of the Magistrate obviously humiliated the complainant and does not speak of dignity and courtesy. The Magistrate could have discussed the matter with the attorney in chambers or in writing or she could have approached her seniors to discuss the matter at a case flow management meeting.

The complainant is adamant that the Magistrate was yawning and that she was about falling asleep. She testified that she had no vendetta against this Magistrate and that she was just complaining to what happened in court. I have no reason not to believe the witness. Her evidence was clear and honest in every material aspect.

In paragraph 4 page 10 Appendix 1 Codes of Conduct: Judicial Ethics in the Manual for Trainers "Ethical: Issues for Magistrates" by Franco and Miller, published by Law Race and Gender Research Unit, University of Cape Town and Justice College, Pretoria, the following is said:

> *"In conducting Judicial proceedings judges (and I include Magistrates) should themselves avoid and where necessary disassociate themselves from comments or conduct by any person subject to their control which are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution. In court and in chambers judges (and Magistrates) should also always act courteously and respect the dignity of all who have business there.*

In module 5 of the same work the following elements of judicial integrity that should be displayed in the courtroom is suggested:

> *"Dignity*
> *Respect and courtesy*
> *Patience and self-control*
> *Impartiality*
> *Competence*

In view of my finding in the paragraph that will follow there is no need to discuss the charge any further.

As already indicated in my discussion of count 14, Mr. Nair confirmed during his evidence that this particular count (count 31) was also initially treated internally as **minor misconduct** which **was resolved** by means of discussions with the Magistrate concerned. No written warning or other more drastic steps were deemed necessary at that stage while I also have no evidence before me which shows that there was a recurrence of submitting further incomplete statistics. To charge Mrs. Ndamase now for misconduct in so far as this issue under discussion is concerned is not fair.

COUNT 32:

Contravening of regulation 25(d) of the Regulations, in that she **carried out her duties negligently/indolently by seldom granting default judgments and sending them back to the legal representatives with unfound queries** *(See affidavit A Rademan dated 03.12.2008,* ***exhibits abc and abo)***

Regulation 25 prescribes that a Magistrate may be accused of **misconduct if he** or she is **negligent or indolent in the carrying out of his/her duties.**

Mr. Nair in his testimony referred to the contents of an affidavit (**exhibit abc)** and an e-mail (**exhibit abd**) which he received from Mrs. Rademan. These documents are not admissible as evidence and must be ignored.

Mr. Nair also referred to another e-mail dated 29 October 2008 a complaint from one Franco de Wet an attorney **exhibit abe** in

complaint **exhibit abe** as afore mentioned. He testified that on the said date he was attending to a motion court application in the Pretoria Magistrate's court. His office was situated at Randburg and he promised a colleague of him to enquire about his colleague's application for default judgment in the case under discussion. He confirmed what is stated above.

Mr. de Wet stated that when he received the unjustified query from the Magistrate in which she requested that they file a Notice of Bar even though this was a request for default judgment on a claim of damages and the attorney on record from their offices specifically stated in his affidavit that the defendant did not enter appearance to defend the matter, he decided not to discuss the matter with Mrs. Ndamase. Instead he went to the Senior Magistrate Mrs. Rademan and discussed the matter with her. Mrs. Rademan pointed out to him that the only outstanding issue which was necessary was a rule 12(4) affidavit in respect of the claim for damages which they failed to submit together with their application for default judgment. The Magistrate in her query did not ask for the prescribed affidavit. The witness could not say whether or not the Rule 12(4) affidavit was submitted because his colleague further dealt with the matter. Although the reference to what Mrs. Rademan indicated to the attorney is hearsay evidence it is common cause that an affidavit is by law required in respect of an application for default judgment based on a claim for damages.

During cross-examination he confirmed that Mrs. Ndamase did not know him and that she never received a complaint from him. He testified that he send his e-mail to Mrs. Rademan, not as a personal attack on her, but merely as a matter of raising his concerns on how the application for default judgment, which was a simple matter, was handled.

official letter head. On 12 May 2007 he send another letter to Mrs. Ndamase because he did not receive any response to his official letter dated the 19th of April 2007, and on 18 June 2007 when he still did not receive any response, he reported the matter to the Senior Magistrate Mrs. Rademan.

The claim in this matter was one for damages based on breach of an agreement and therefore an affidavit was filed together with the application for judgment as prescribed. The Magistrate however required information that was not relevant. The witness, although he disagrees with the necessity for the further information that the Magistrate required, responded to her query and he provided her with additional information and arguments.

Later it was discovered that while the attorney during June 2007 was still enquiring about the outcome of his application for judgment by default, that judgment was already granted by Mrs. Ndamase on the 22nd of May 2007.

During his testimony the witness responded with regard to the Magistrate's request for receipts etc. that she was within her right to ask for this information *ex abudante cautela.*

During her cross-examination of the witness, the Magistrate quite correctly stated that if she had an affidavit in the file regarding the claim for damages, then there was no need for her query. She quite correctly pointed out that the bundle of documents handed in by the witness (**exhibit acr**) was from Mr. van Rensburg's file and that the original affidavit was not placed before her. However, the query raised by her **exhibit acr** (page 4) is a photo copy of the query in her own handwriting, the contents of which was not disputed by her. It is clear from the query that the Magistrate did not address

with Mrs. Ndamase except for a number of applications of default judgments in respect of which he during ± August 2008 encountered a problem with and also when she on occasion refused to entertain *ex parte* applications when she was scheduled to be on duty as *ex parte* Magistrate.

He reported the matter to the Senior Civil Magistrate Mrs. Rademan on 21 November 2008 as per **exhibit act.** He stated that he did this: *"...as the various concerns with regard to Magistrate N Ndamase has become of such a nature that we fear the course of law would be, and is, severely prejudiced."*

According to Mr. van der Merwe the Magistrate refuses to entertain applications that are brought in Afrikaans, despite the fact that the said applications are brought in Afrikaans as either the parties or representatives are Afrikaans speaking. On one specific occasion he went to the court with motion applications. He saw on the court list that Magistrate Ndamase was the *ex parte* Magistrate for that particular day. He went to her office. The door was closed and he waited at her office until after 9:00 when she arrived. When he requested her to assist him with an *ex parte* application, she said that she did not have the time to assist him because it was already late. When she looked at the documents and saw that it was drafted in Afrikaans she told him to refer the application to a Magistrate who can speak Afrikaans.

It is practice in Pretoria that the *ex parte* Magistrates entertain *ex parte* applications between 8:00 and 9:00 and if this particular Magistrate also have to do a civil trial, then the attorneys must from 9:00 o'clock wait for the Magistrate to finish his or her civil trial. Mrs. Ndamase did not assist him and he therefore went from door to look for another Magistrate in order to seek help. He had four *ex*

each file and was also already served on all the debtors. He tried to discuss the query with the Magistrate in order to draw her attention to the fact that the required notices were already in the files. Mrs. Ndamase however informed him that she does not take verbal responses from attorneys and she requested him to respond in writing what he then did.

After a week or two he received these files together with other files back with another note by Mrs. Ndamase which reads as follows: *"Kindly proof that this court has jurisdiction."* Mr. van der Merwe said that he again tried to discuss the matter with Mrs. Ndamase because the query did not make sense in law due to the fact that paragraph 3 of the claim always makes provision for jurisdiction and contain particulars why it is alleged that the court has jurisdiction. It is therefore not something that needs to be proved. He then attached a note to the query: *"Sien die bepalings van die reëls van die Landdroshowe wet."* Those files after a few weeks again find their way back to their firm's pigeon hole with a note from the Magistrate which reads as follows: *"Plaintiffs claim does not comply with NCA."*

The witness then again tried to discuss the matter with the Magistrate but with no success. He therefore did not further respond to the Magistrate in writing and he then went to Mrs. Rademan who, except for one case, granted the default judgments in all the other 40 plus cases on the next day.

I must pose the question, was or is this really misconduct? Do we not overstep our boundaries, even if we disagree with the contents of the Magistrate's query, and now interfere with the Magistrate's legal discretion and her judicial independence as such? Was she not for instance over cautious before she granted the judgment in Mr.

learned judge states, correctly with respect, that 'geen landdros of ander amptenaar enige gesag het wat nie binne die vier hoekstene van die wetgewing en Reëls uiteengesit word nie', a magistrate granting judgment by default when it is clear that the court does not have jurisdiction to entertain the matter, would patently be acting ultra vires his powers. The only reasonable inference flowing from this, in my view, is that a magistrate, considering an application for judgment by default and faced with uncertainty as to whether or not the court has the necessary jurisdiction, must be entitled, and obliged, to call for the necessary proof and clarification before granting judgment." (Emphasis added)

On page 16 paragraph 38 the Honourable Judge in his finding came to the conclusion that the magistrate was entitled and indeed obliged, to raise the question as to whether or not the appellant had jurisdiction in that particular case in view of the provisions of section 28(1)(d) of the Magistrates' Courts Act, no 32 of 1944 (as amended).

The fact that Mrs Rademan did not testify makes it very difficult to make a proper finding in respect of this and other charges against the Magistrate. At this stage I have only the inadmissible hearsay evidence that Mrs Rademan alleged that the Magistrate *"seldom granted default judgments."* I can fully understand why Mrs Pretorius called the attorneys to testify. I am also satisfied that all these attorneys were very polite and honest. They raised their concerns because it was in the interest of justice that shortcomings at the civil section be addressed. However, we must be careful not to interfere with the independence of the Magistrate, even if we do not agree with the contents of some of the queries that she raised.

good name, dignity and esteem of the office of magistrate and the administration of justice."
(Paragraph 4)

"A magistrate ***shall not act to the detriment of the discipline or the efficiency of the administration of justice or allied activities."*** (Paragraph 16)

This charge flows from charge 30 – refused training. The Magistrate was however discharged on count 30 due to the fact that Mrs. Rademan did not testify.

Mr. Nair's hearsay evidence regarding Mrs. Rademan's complaint to him in so far as this charge under discussion is concerned must be ignored in view of the absence of Mrs. Rademan's evidence.

In **exhibit aan,** which was handed in by Mrs. Ndamase, Mrs. Myambo *inter alia* states as follows:

"Our section is busy. Our trial roll averages 130 cases per day. Every trial magistrate is needed to assist in finalising the roll. However ***when allocating matters during roll call I am apprehensive in sending a matter to Magistrate Ndamase. This results in the work load of other magistrates increasing and tension between magistrates.*** (Paragraph 13)

Mrs. Ndamase denies any incompetency or incorrect behaviour from her side and she put it to Mr. Nair and also to Mrs. Myambo that attorneys did not want to appear before her because of the fact she can not understand the Afrikaans language, and also because of racism and because of the fact that there were unfairly

Ndamase to be postponed was according to Mrs. Myambo not because of Mrs. Ndamase's race or her demeanour or attitude, but because of the fact that the process in these cases were drawn up in Afrikaans and the attorneys were afraid that the magistrate would not be able to understand the contents of these process.

Mrs. Kirchner, an attorney was called by Mrs. Pretorius and she confirmed that she as an attorney was reluctant to appear before the Magistrate due to her experience in the section 65 court when Mrs. Ndamase is the presiding officer. She questioned Mrs. Ndamase's knowledge of *section 65* procedures which are, according to her, not up to standard. The Magistrate also critisised her in open court that she places too many cases on the court roll. She testified that the Magistrate refuses to hear the attorneys properly and started to postpone the cases or to remove the cases from the court roll as advised by the interpreter Lerato. She said that the Magistrate yawned shamelessly in court and showed no interest in the cases – laying on the bench, one hand under her chin and the other hand on the bench. I have no reason not to believe this witness despite the denial by Mrs. Ndamase. This witness was very polite and did not contradict herself in any way.

No reference is made by Mrs. Kirchner that this was a racial issue. In fact, Mrs. Kirchner is also a person of colour.

We also have the testimony of other attorneys who complained about the Magistrate's demeanor in the civil section. Mr. van der Merwe who also testified with regard to count 34 complained that the Magistrate refuses to entertain attorneys in her chambers when such attorneys wish to address and discuss her queries which she raised when they apply for judgment by default. She continuously requests written answers to her queries which is an impossible task

on the merits of each case.

Mr. van der Merwe testified that he had to report the matter, not because he had anything personal against the Magistrate, but so that the work could flow and also to ensure that the other Magistrates could attend to their own work. He left Pretoria at the end of 2009.

Mr. von Reiche, additional Magistrate also testified in this regard. He also referred to page 2 of **exhibit acv** which was also handed in by Mr. Nair as **exhibit aaq,** and which is an e-mail that he wrote to the Senior Civil Magistrate Mrs. Rademan on the 28th of August 2008. In the first paragraph of his e-mail he reported as follows:

> *"On 26 August 2008 I phoned you and reported that two attorneys approached me for assistance. In the one matter I was informed that an unopposed rule 60(2) matter stood down since an interpreter was not available, and in the other matter an order in chambers was granted since a settlement agreement had to be drafted. In the first matter the attorney looked very desparate (desperate) and frustrated. Since I was not attending to the court I was hesitant to interfere but I decided in the interest of the administration of justice to assist both which I then did. I take full responsibility for my actions."*

Mr. von Reiche also referred to pages 5 and 6 of **exhibit acv**, which is a complaint by Van As attorneys dated 28 of August 2008 to Mrs. Rademan, in which they referred to the incident on the 26th of August 2008 when their candidate attorney miss L Zeelie had to approach Mr. von Reiche for assistance in a matter not attended to by Mrs. Ndamase in her court on that particular day.

unopposed role at 13:15. She then approached the Magistrate and informed her that her matter has not yet been dealt with. Mrs. Ndamase then informed her that she must wait because she must first deal with another matter which also stood down. This matter was originally called after number 19 and should not have preceded number 19.

A lady had entered the court that morning before the Magistrate and had been sitting in court throughout the mornings proceedings, handing over the court files to the Magistrate. Miss Zeelie approached her asking for advice on how her matter was to be handled. She said she did not know. The lady then approached the Magistrate and asked permission to leave for lunch.

The Magistrate gave an order to the matter before her and Miss Zeelie seized the opportunity and approached her again. The Magistrate informed her that the interpreter has just left for lunch and that she should come back at 14:00. She then realised that the interpreter was the lady who assisted the Magistrate during the morning, and that she was present when the first matter stood down earlier on. She does not know why the Magistrate did not make use of the interpreter when her first matter was called and had to stand down.

She returned at 14:00 just to find that the interpreter was not present. She was told by the Magistrate to wait. The matters on the opposed roll were then heard.

At 14:30 the interpreter had still not returned from lunch. At that stage her supervising attorney was already unhappy about the delay. She was frightened and in tears. She left the court room without her application being granted. She then approached

According to him he worked with Mrs. Ndamase in both the criminal and in the civil sections. He testified that on the 26th of August 2008, which is the same date that Mr. von Reiche and Miss Zeelie testified about, attorneys and advocates constantly came to his office for assistance with cases that were on the motion court roll. Mrs. Ndamase was the presiding officer in the motion court on that day. Because of the reports made to him by the legal representatives who approached him, he assisted them with their files up to a point during the afternoon where he had to attend to his own work. He testified that on the next day, the 27th of August 2008 after similar incidents or after he spoke to Mr. von Reiche about the problem, he then reported the matter to Mrs. Rademan as per **exhibit adb** so that the problem could be sorted out. It was not his intention to report Mrs. Ndamase or anyone. He just brought the problem to the attention of the senior Magistrate in the civil section. The impact of this problem was that he was burdened with Mrs. Ndamase's work while he also had his own workload to cope with for the day.

In so far as this count is concerned Mr. Swart did not testify that the attorneys do not want to appear before Mrs. Ndamase.. They just seek his assistance because they experienced problems in the motion court on that particular day.

Mr. Swart also referred to another incident where it was his task to call the trial roll and to allocate trial cases for the day. On that particular date, the date and case numbers which he cannot remember, attorneys in two cases later the day approached him for assistance because the Afrikaans language was involved in both cases and Mrs. Ndamase therefor did not attend to these cases. He then finalised the matters.

whether or not she must be blamed for the problems that she experienced to cope with the work and workload in the civil section.

When Magistrates take their oath of office, they bind themselves to a life dedicated to the administration of justice, which has implications beyond the bench and just like a politician a judicial officer is a public figure and is accountable to the public. (Manual for Trainers, *supra* Introduction page 4.)

In S v Mamabolo E TV and Others Intervening 2001 (3) SA 409 (CC) at 421, Kriegler J said the following:

> *"[It is] a constitutional imperative that public office-bearers such as judges [and magistrates] who wield great power... should be accountable to the public who appoint them and pay them. Indeed, if one takes into account that the Judiciary, unlike the other two pillars of state are not elected and are not subject to dismissal if the voters are unhappy with them, should not judges pre-eminently be subject to continuous and searching public scrutiny and criticism?"*

With regard to poor work performance by an employer, which also can relate to ***incompetency***, Grogan, in his work *"Workplace Law"*, ninth edition at 212 – 215 *inter alia* remarks as follows:

> ***"....Poor work performance that arises from misconduct or willful negligence and poor performance caused by circumstances beyond the employee's control may be treated differently. The former is a disciplinary issue; the latter requires different and more sympathetic treatment.***

be given an opportunity to explain the alleged deficiencies. *It has been held, however, that while a dismissal for poor work performance should be preceded by a fair hearing, the details of each complaint need not be put to the employee, since there was only one charge name, 'incapacity'.*

..... Where the employee's incompetence is such as to endanger fellow employees or the public, or seriously to hamper production, action is clearly necessary.

.... The case law indicates that before action is taken against an employee on the ground of incompetence, warnings should be issued and recorded. The employee's position is relevant; if the work is of vital strategic importance to the enterprise, counseling may be brief or dispensed with entirely...

In general, higher standards of competence and performance are expected of senior or managerial employees than of ordinary workers. While fair warning should be given in such cases, a court may conclude that a duty rested on a senior employee independently to assess his or her problems, and to take steps to improve. *It is sometimes difficult to determine whether a case of poor work performance involves misconduct or incapacity.* ***Where employees willfully neglect their duties, they can be held accountable for their conduct, and may therefore be charged with a misconduct. However, a charge of misconduct is clearly inappropriate when employees cannot be blamed for their defective performance."***

the charge. I agree.

Magistrate von Reiche was also called to testify with regard to part (b) of this charge and to some of the others charges. As already indicated he worked in the civil section of the Pretoria Magistrate's office from 1998 until the end of June 2011.

During January 2007 he was acting in the Senior Magistrate's post in the civil section while the Senior Magistrate Mrs. Rademan was on leave. On 19 January 2007 he spoke to Mrs. Ndamase in his office at about 8:00 and requested her to attend to the section 65 court in court 34 since he had to attend to the roll call of the trial matters in court 35. He was initially allocated to do the section 65 court but due to the workload he was not able to do both courts 34 and 35 and he had to make alternative arrangements. He said he got the impression that Mrs. Ndamase was not very keen to do the section 65 court as she indicated to him that she had other work to do. When she left his office he was however under the impression that despite her unwillingness, that she would attend to the section 65 court. While he was busy in court 35 at about 10:00 he noticed Me Celia Moloko a civil court clerk at the door of the court trying to draw his attention. He then stood down in court and the clerk informed him that the section 65 court in court 34 has not started yet and that the attorneys were enquiring about that court.

Mr. von Reiche testified that he went to Mrs. Ndamase's office and asked her why she was not in court. She looked discontented and answered in a loud and grim manner: *"Can't you see I have my gown on."* He then tried to avoid a confrontation and he left the office and he requested another Magistrate Mr. Bernard Swart to do the section 65 court. After 5 minutes Mr. Swart reported to him that Mrs. Ndamase started the section 65 court. He then excused

mate omgekrap omdat dit 'n wettige opdrag was." It is not necessary to take this point further.

Mrs Pretorius argued that she experienced Mr von Reiche as a soft spoken gentleman and that Mrs Ndamase's version is completely the opposite. She argued that various witnesses testified about Mrs Ndamase's abrasive unapproachable demeanour which was also experienced during the hearing. She therefore asked that Mr von Reiche's version be accepted and that Mrs Ndamase be convicted on count 35(b). I however already indicated that Mrs Ndamase's version can also be true but in what will follow there is no need to discuss this issue further.

In Sondlo/University of Fort Hare [2011] JOL 27047 (CCMA), the case also referred to during my discussion of count 14 where I did not provide the citation, the following was *inter alia* said:

> *"The Commissioner noted further that most of the complaints about the applicant's conduct had been revived after a number of years. The Respondent had not established that she was at fault in any of those cases.* ***In any event, it was unfair to rehash those matters..."*** (My emphasis)

I am of the opinion that in the same sense it is unfair to charge Mrs. Ndamase for old and finalised matters after no further steps were deemed necessary, and with specific reference to the incident before Mr. von Reiche, I find that it is unfair to revive the matter two years after the matter was dealt with by means of a written warning. Mr von Reiche was the Senior Magistrate in charge when this incident happened and he decided that a written warning would be suffice.

(**exhibit abw**). Letter dated 10 January 2008 (**exhibit aby**) is a letter addressed to another attorney Mr. Jerushlami. However this does not affect the charge sheet because the contents of the charge are clear.

Mrs. Salomé le Roux an attorney from the firm "*Salomé le Roux Prokureurs*" in Pretoria was called by Mrs. Pretorius in connection with this charge. Mrs. Le Roux was admitted as an attorney during 1997. She initially handed in **exhibits abw to acb** which were different letters which were drafted, signed and send by her in connection with this charge under discussion. During her testimony further exhibits were also handed in.

Before dealing with the evidence which was tendered with regard to this count in more detail I must point out that this witness was over confident. She accused Mrs. Ndamase of incompetence and she creates the impression that only she knows the law. However, she is not an expert. During her testimony she time and again started to argue and motivate instead of testifying. More than once she creates the impression that she, in so far as this count is concerned, tried to take over the task of the Senior Magistrate leading evidence by addressing this forum instead of just stating the facts. It is clear that she was not happy when the Magistrate in civil case 103602/06 in the Magistrate's court Pretoria ruled against her. Whether or not the Magistrate was right or wrong, is not for me to decide. Her unhappiness is illustrated by the fact that, according to her own evidence, she tried to follow the Magistrate from her court to her chambers after judgment was delivered in order to quarrel further on the judgment which was already delivered. Quite correctly the Magistrate refused to entertain her further. The witness was also frustrated when she could not get a copy of the court record and later the reasons for judgment and when they experienced

because the old recording machine which she used, during her play-back did not indicate that there was any recording on it.

However, this part of the evidence is disputed by the complainant and according to her the Magistrate was more than once requested to make sure that the recording machine was functioning properly but the Magistrate refused. Later when they tried to obtain a transcription of the recording with the view of a possible appeal in this matter, they discovered that no mechanical recording was available for 8 June 2007 and from there flows the charge that the Magistrate *inter alia* failed to: *"...record the proceedings and/or to keep notes."*

Different attempts were made in order to set up meetings with the Magistrate and the parties in order to reconstruct the record of the proceedings. It also resulted in a complaint which was submitted to the Senior Magistrate in the civil section and later the Judicial Head of Office was also involved. At a certain stage the Magistrate was also no longer working at the Main court and did she render services at Atteridgeville. The witness therefore experienced difficulty to make contact with the Magistrate.

Nearly a year after the initial date of hearing, the Magistrate on 28 July 2008 at a date arranged by the Clerk of the Court for the reconstruction of the court record, indicated to the parties that she did not see the need for a reconstruction of the record because according to her she kept notes during the trial and that she will look for it. It is common cause that no record by long hand was in the court file. On the 18th of August 2008, which was a second date for reconstruction of the record as per directive of Mr. Nair, Mrs. Ndamase cut the meeting short when she provided the parties with a typed version of her court notes which was later used together

use of the parties' notes as suggested by the witness during her testimony is not certain and I can not take this point any further. I also can not make a finding that the Magistrate must be blamed for the long time that expired before the parties were placed in possession of her typed notes in order to enable the plaintiff to prosecute his appeal. I have no evidence before me that the Magistrate before the first reconstruction date which she in any event denies that it was arranged with her, specifically was requested for a copy of the record. It is significant, as already pointed out, that the witness initially blamed the clerk of the court in this regard.

The first and second leg of this charge is that the Magistrate failed to give judgment upon request and that she also failed to give reasons for judgment upon request.

From the evidence before me it is clear that despite the lack of a court clerk who could operate the recording machine on the 8th of June 2007 the trial started and the evidence was finalised in the matter. Because of the strike the Magistrate was afraid to sit the whole day and the case was postponed for address and argument. The case was later again enrolled for the 9th of October 2007 on which date the Magistrate listened to the arguments by both parties and then she reserved her judgment and the matter was postponed *sine die*. The complainant who appeared with another legal representative for the Plaintiff was not happy with the postponement and according to her the Magistrate *"refused"* to give judgment as per prior arrangement. I disagree that this was a refusal to give judgment. A Magistrate must adjudicate the matter and has certainly the right to postpone a matter and reserve judgment after arguments if he or she is not immediately able to give judgment. This is the practice in many cases in order to make

indicates that judgment was indeed delivered on 14/12/2007. However judgment was delivered just a few days more than 2 months after closing arguments were heard, which is in view of the prescripts applicable to Magistrates that judgment must be delivered not later than two months after postponement, is fair. (Resolution taken by the Lower Courts Mangement Committee on 21 June 2006). This resolution is in view of the provisions of section 12(4) of the Magistrates' Courts Act, aforementioned, applicable to all district court Magistrates, including Mrs. Ndamase.

On page 142 of the transcribed record line 6 – 25 the witness highlighted the steps that had to be taken to procure judgment, as follows:

> *"Ek stel belang in daardie after steps had to be taken. Verduidelik vir my wat het daar gebeur? --- Die gespook het toe begin om te probeer vasstel wanneer die uitspraak moontlik verwag kan word en dit was in die briewe wisseling en die poging om 'n datum te probeer vasstel of om sekerheid te kry van wanneer dit sal gebeur, wat ons toe ook gesien en vasgestel het dat dit blyk nommer een dat die hof leier [leêr] nie in Pretoria landdros hof voorkom nie. Nommer twee dat landdros Ndamase die hoflêer saam met haar geneem het en hom verwyder het van die landdros hof. Nommer drie.*
>
> *Dat sy self nie meer hoofsaaklik by die landdros hof in Pretoria werksaam was nie, wat die detail daarvan onduidelik was want haar kantoor was nog in Pretoria ook en dit was toe nou waar die worsteling en die proses begin het om te probeer vasstel nommer een waar is die hoflêer en wat ons toe vasgestel het dat*

reconstruction of the record with the Magistrate concerned and whether or not notes were available. This hearsay evidence must also be ignored. Therefore this charge has no substance.

COUNT 38:

Contravening of regulation 25(d) of the Regulations, in that on **17.09.2007** the Magistrate **carried out** her **duties negligently/indolently** in that she **slept in court, did not follow the evidence, showed no interest in the case and failed to make notes and arrived late for continuation of the case on 22.11.2007** *(See letter Von Reiche Inc. dated 29.11.2007* ***exhibit abr)***

Mr. Daniel von Reiche an attorney from the firm Von Reiche Incorporated Attorneys/Conveyancers in Pretoria who has 34 years experience was called by Mr. Pretorius in connection with this charge.

This witness made a very good impression. Throughout his testimony as well as during cross-examination he was very polite, good mannered and he answered each and very question with dignity and self-control and in a courtesy manner. He not only gave evidence against the Magistrate but he also gave her credit where she deserves it. When he testified it was one of the lighter moments during this hearing because Mr. von Reiche avoided conflict in the polite manner in which he testified. He was an outstanding witness and I think even Mrs. Ndamase will give him credit for this despite the fact that she in respect of certain aspects differs from him. His evidence was to the point, honest and genuine and the documentary evidence that he prepared for this hearing was relevant and helpful.

pen in her hand. It was a serious civil matter and the total amount of the claims involved was ± R100, 000.00. After he cleared his throat once or twice then it seemed as if the Magistrate again paid attention.

The trial lasted until ± 15:30 when it was postponed to 22 November 2007 which was a date which suited both parties as well as the Magistrate. However, on the next trial date the Magistrate was absent. She only turned up at ± 10:30 after she was phoned by the senior staff and then the trial could commence. The case was only finalised during the following year and the Magistrate gave judgment in favour of the plaintiff.

According to Mr. von Reiche he received no response from the court regarding his complaint **abr.** However, at a later stage ± two years after his complaint, he learned from his Law Society that Magistrate Ndamase had laid a complaint against him and he then received copies of communication between the Chief Magistrate and Mrs. Ndamase which was never dispatched to his office. The complaint against him was with regard to an article which appeared in the Rapport newspaper on the 17th of December 2007 regarding what happened in court on 17 September 2007. He responded to the Law society and he denied any involvement with the placement of the article in Rapport or placing information on the internet. The Law Society did not take any steps against him.

At a later stage on 12 January 2010 Mrs. Ndamase sued him and Rapport in the High Court for an amount of R1, 000, 000.00 (One million Rand) for defamation – **exhibit abs.** The matter was defended.

Paragraph 9 of the claim reads as follows:

placed before her. She only indicated that after listening to the evidence placed before her, she was satisfied that the plaintiff proved his case and she awarded the plaintiff judgment in his favour with cost.

Mrs. Ndamase denies that she slept in court. She confirmed that she was not sick, nor that she was tired and because of the contents of the case before her in which a huge amount was involved she could not sleep and had to attend to the evidence before her.

Mrs. Ndamase handed in a part of the transcribed record for 17/9/2007 (volume 3: pages 201 - 237 – **exhibit abu**) in order to proof that she was awake and that she partake in the proceedings. Mr. von Reiche quite correctly pointed out that it appears from a few pages that she took part in the proceedings but for long periods there were no remarks by the court. Her excuse was that she could not interfere with his cross-examination. Mrs. Ndamase's explanation for the different handwritings was that when she became tired she used her other hand because she is able to write with both hands.

According to the Magistrate she indeed took notes during the trial on the 17th of September 2007. Mrs. Ndamase handed in a copy of her handwritten notes for 17 September 2007 – **exhibit abv**. Mr. von Reiche however took the wind out of her sails when he questioned the fact that these notes were recorded during the trial. He quite correctly pointed out that these notes were not a complete version of what transpired on that particular day and that the notes were in many respects a verbatim transcript of the transcription of the recordings which is not possible. He also pointed out that the handwriting differs from the middle of page 24 up to the end.

hereunder provided, ***they shall be made by the presiding judicial officer."*** (My emphasis)

The evidence that the Magistrate did not take notes during the trial is only relevant in so far as the evidence that she at times was fast asleep and that she then did not take part in the proceedings, is concerned.

Advocate Viljoen was also called by Mrs. Pretorius. Right from the beginning of his evidence it was clear that this witness was over-cautious and somewhat hesitant to definitely say that the Magistrate indeed slept in court. This despite the fact that Mr. von Reiche testified that during the trial both he and Mr. Viljoen realised that that Mrs. Ndamase was fast asleep.

Advocate Viljoen testified that he represented the defendant in the case that Mr. von Reiche testified about. Mr. von Reiche represented the plaintiff in this case.

Advocate Viljoen testified that during his cross-examination of the plaintiff in this case he got the impression that the Magistrate showed not much interest in the case. He got the impression from the Magistrates demeanor that she did not regard his cross-examination to carry much weight. The Magistrate at that stage also did not make any notes, although he was not prepared to say that she did not make any notes. There were times when she indeed made some notes, but during his cross-examination she did not make any notes.

Advocate Viljoen testified that the trial lasted for two days namely on 19/9/2007 and on 22/11/2007 and on one of these days Mr. von Reiche cross-examined his witness Mrs. van der Walt. On that date

Advocate Viljoen whether or not it was necessary to intervene while Mr. van Reiche was cross-examining his witness. He responded that according to him it was not necessary for her to intervene because he also should have objected if necessary.

On the evidence before me, if the Magistrate was fast asleep for periods of 5 – 10 minutes and the legal advisors as testified by Mr. von Reiche, during these periods were looking at each other and Mr. von Reiche had to wake the Magistrate up by clearing his throat, then it is strange that Advocate Viljoen did not also notice that the Magistrate was fast asleep. At that stage the cross-examination stopped and he had nothing to write down. A quiet period of 5 to 10 minutes in a court is a very long period if nothing is happening. Advocate Viljoen did not mention that he and Mr. von Reiche were looking at the Magistrate when everything was quit. If they all were in court from 10:00 am until 16:00 pm without an adjournment in between, which is a period of 6 hours, as Mrs. Ndamase put it to Advocate Viljoen and which he did not deny, then one would expect that Advocate Viljoen also would have noticed that the Magistrate was fast asleep. However, he saw nothing of this nature and only after the adjournment at the end of the day he was made aware of this. I am convinced that Mr. von Reiche gave an honest opinion that according to him the Magistrate was fast asleep while Mr. Viljoen for some or other reason was not prepared to commit himself in this regard.

According to the evidence of Mr. von Reiche his Professional Assistant attorney Mr. Riaan de Klerk was, as already indicated, since ± 11:00 also present in court. However, he was not called to clarify the matter. At this stage I have only the evidence of Mr. von Reiche and those of advocate Viljoen on record and their evidence differs totally on the crux of the charge before me. Therefore there

Raphalelo to Mrs. Rademan requesting her intervention because the Magistrate still failed to hand over the key to her as requested. This e-mail was also forwarded to Chief Magistrate Nair.

- **Exhibit S** dated **21 May 2008** an e-mail from Mrs. Raphalelo to Mr. Nair informing him that Mrs. Ndamase has still not handed over the key and she now seeks his intervention in this regard.

Mr. Nair testified (transcribed minutes 7/2/2010 at page 26 line 20) that he acted as a mediator between the two parties and that the problem was solved amicable.

During his cross-examination by Mrs. Ndamase Mr. Nair confirmed that he did not investigate the matter. He left it to the Senior Magistrates to sort out the problem and it was solved later.

The Magistrate put it Mr. Nair that that when Mrs. Rademan on 7 May 2008 requested her to hand over the keys in question she informed her that she never brought the keys with her. She never handed any key to Mrs. Rademan or to Mrs. Raphalelo because she never took the keys herself. The keys were with the cleaners on their request because they started their daily cleaning services at 7:00. She therefore handed her key to Ngwenya and she informed Mrs. Rademan accordingly as per handwritten letter **exhibt p** (keys with Mr. Moloka). Mr. Nair indicated that he only received the e-mails from the Senior Magistrates regarding the difficulty that they experienced to receive the keys from the Magistrate.

Mr. Nair also indicated that he did not see a single response by the Magistrate in an e-mail about the fact that she left the keys with the

reminder as per e-mail **exhibit abl** the contents of which reads asd follows:

> *"Pursuant to our discussion earlier on, I want to remind you that you were supposed to hand me the key to the Attrdgeville [Atteridgeville] office on Monday the 12 of May 2008 as requested in my previous e-mail to you. You are again reminded that there is an acute shortage of office space and no one officer should hold two offices at the same time. I am aware that you still have a few part heard maters [matters] at Attridgeville [Atteridgeville], but as promised you will given an office as and when there is a need. I therefore request you to hand me the key to that office before close of business tomorrow 16 May. This is my last reminder."*

This e-mail was again also cc'd to Mr. Nair and to Mrs. Rademan. She also send Mrs. Rademan a separate e-mail on the same date seeking her intervention to obtain the key from Mrs. Ndamase. Mrs. Rademan e-mailed back to her. However the contents of the e-mail are at this stage hearsay evidence which must be ignored.

Ms. Raphalelo testified that at that stage she was also working in the Pretoria office and Mrs. Ndamase could easily hand over the key to her but it never happened. Ultimately the key was handed to her but by whom and when she could not recall.

When Mrs. Ndamase during cross-examination put it to Mrs. Raphalelo that when Mrs. Rademan asked her about the key, she informed her that she left the key with Mr. Maluki, Ms. Raphalelo responded that she was not aware of that. The witness also responded to a question by Mrs. Ndamase that she informed Mrs. Rademan that she never brought the keys of Atteridgeville with her

3; 4; 5; 6; 7; 10 (period 16/02/2009 until 18/03/09);

11; 17; 19; 23 and 28;

and

{ X } NOT GUILTY of the misconduct as charged in Counts:

1; 2; 8; 9; 12 – 16; 18; 20 – 23; 24 – 27 and 29 - 42

That means that Mrs. Ndamase is found **guilty of 11 counts** to wit:

- **8 (eight) counts** (counts 3, 5, 6, 10 (guilty period 16/02/2009 until 18/03/09 – see count 13 – splitting of charges), 11, 17, 19 and 23) in respect of her **refusal to execute lawful orders** as contemplated in Regulation 25(j), and
- **3 (three) counts** (counts 4, 7 and 28) in respect of her **failing to execute her official duties objectively, competently and with dignity, courtesy and self-control** as contemplated in Regulation 25(c) read with paragraphs 2 and/or 3 of the code of conduct for Magistrates.

Mrs. Ndamase was found not guilty and she was discharged on all the other counts.

Judgment given at Pretoria on this 13th and 17th day of April 2012

D.C. VAN GREUNING
Presiding Officer
Senior Magistrate
17 April 2012

593

6 CONTRAVENTION Reg 25(j) – Refuse to execute lawful order	**Contravention Regulation 25(j) – Refused to execute a lawful order** on **02.02.09** in that the Magistrate **refused to report to Ms M Mamosebo at the criminal section** as instructed by the Chief Magistrate *(Letter D Nair dated 30.01.09* ***exhibit ag*** *and Mrs. Ndamase's letter dated 92.02.09* ***exhibit aaa****)*	**Guilty as charged**
7 CONTRAVENTION Reg 25(c) – Code of Conduct Schedule E Par 2 and 3 "SCHEDULE E" CODE OF CONDUCT FOR MAGISTRATES (Regulation 54A) 2. A magistrate **administers justice to all without fear, prejudice or favour.** 3. A **magistrate executes his/her official duties** objectively, competently and **with dignity, courtesy and self-control**	**Contravention Regulation 25(c)** read with **paragraphs 2 and/or 3 of the Code of Conduct** in that on **02.02.09 in her letter to Mr. D Nair** the Magistrate **contravened the Code of Conduct for Magistrates, by the tone of the said letter, being insulting, contemptuous, sarcastic and disrespectful to her senior, Mr. D Nair –** letter Mrs. Ndamase dated 02.02.09 **(exhibit aaa)**	**Guilty as charged**
8 CONTRAVENTION Reg 25(j) – Refuse to execute lawful order	Contravention Regulation 25(j) in that the Magistrate failed to execute a lawful order namely that she refused to attend to the admission of guilt work as allocated to her	NOT GUILTY AND DISCHARGED at end of case for the Magistrates Commission
9 CONTRAVENTION Reg 25(h) – Absented herself from office/ duty without leave or valid cause	Contravention Regulation 25(h) in that during August 2008 – the Magistrate was absent from her office without valid cause in that attorneys could not get hold of her regarding a judgment. *(E-mail from Reione dd 28.08.08* ***exhibits AAQ*** *and* ***AOV page*** *)*	NOT GUILTY AND DISCHARGED at end of case for the Magistrates Commission
10 CONTRAVENTION Reg 25(j) – Refuse to execute lawful order	**Contravention Regulation 25(j)** in that for the **period 16.02.2009 to 04.03.2009** the Magistrate **failed to execute a lawful order** namely, that she **submitted, contrary to a specific request not to do so, her Admission of Guilt statistics on the civil statistics form.** *(Letter from Mr. D Nair dated 04.03.2009* ***exhibit au****)*	**Guilty – period 16/02/2009 until 18/03/09 (See count 13 – splitting of charges)**

595

19 CONTRAVENTION Reg 25(j) – Refuse to execute lawful order	**Contravention Regulation 25(j) – in that on the Magistrate failed to execute a lawful order in that on 26.05.2009 Mrs. Ndamase refused to submit her sick leave forms to the acting Senior Magistrate, criminal courts, P van Vuuren** *(See Letter P van Vuuren dated 26.05.2009 exhibit abh)* – see also **abg**	**Guilty as charged**
20 CONTRAVENTION Reg 25(c) – Code of Conduct Schedule E Par 16 "SCHEDULE E CODE OF CONDUCT FOR MAGISTRATES (Regulation 54A) 16. A magistrate shall not act to the detriment of the discipline of the efficiency of the administration of justice or allied activities	**Contravening regulation 25(c) of the Regulations read with Schedule E (paragraph 16) of the Regulations, in that on 26.05.2009, Mrs. Ndamase acted to the detriment of the discipline/efficiency of the administration of justice by declaring to Mr P van Vuuren that she refuse to adhere to the authority of Ms Mamosebo or the said Mr Van Vuuren.**	**NOT GUILTY AND DISCHARGED** **at end of case for the Magistrates Commission**
21 CONTRAVENTION Reg 25(j) – Refuse to execute lawful order	**Contravening regulation 25(j) of the Regulations in that she refused to execute a lawful order, namely that on 06.03.2009 (as amended with consent) she submitted her leave application contrary to written instruction, to the Office of the Chief Magistrate, instead of to the Office of the Senior Magistrate, Ms M Mamosebo.** *(See letter D Nair dated 06.04.2009 – exhibit abf)*	**Not guilty and discharged**
22 CONTRAVENTION Reg 25(h) – Absented herself from office/ duty without leave or valid cause	**Contravening regulation 25(h) of the Regulations, in that for the period 30.03.2009 – 03.04.2009, she was absent from her office/duty without leave or valid cause.** *(See letter: Mrs M Mamosebo dated 03.04.2009 page 5 and 6 exhibit acw)*	**Not guilty and discharged**
23 CONTRAVENTION Reg 25(j) – Refuse to execute lawful order	**Contravening regulation 25(j) of the Regulations, in that on 30.01.2009, she refused to sign acknowledgement of receipt of two letters from the Office of the Chief Magistrate, Pretoria.** *(See statement: Ms M Horn dated 03.02.2009 exhibit acn)*	**Guilty as charged**
24 CONTRAVENTION	**Contravening regulation 25(d) of the Regulations, in that on 24.11.2008 she executed her duties negligent/indolent in**	**Not guilty and discharged**

597

29 **CONTRAVENTION** **Reg 25(c) –** **Code of Conduct** **Schedule E** **Par 1** **"SCHEDULE E"** **CODE OF CONDUCT** **FOR MAGISTRATES** **(Regulation 54A)** **1.** **A magistrate is a person of integrity and acts accordingly.** There are no degree of integrity. Integrity is absolute.	**Contravention Regulation 25(c)** of the Regulations, read with **paragraph 1 the Code of Conduct** in that on **03.02.2009** the Magistrate **acted contrary to the integrity expected** from a magistrate by **discussing her senior, Mr D Nair, with the Senior Magistrate, Ms A Rademan in an insubordinate and contemptuous manner** *(Paragraph 3 – affidavit Ms A Rademan dated 03.02.2009 – part of exhibit ab)*	**NOT GUILTY AND DISCHARGED** **at end of case for the Magistrates Commission**
30 **CONTRAVENTION** **Reg 25(c) –** **Code of Conduct** **Schedule E** **Par 16** **"SCHEDULE E"** **CODE OF CONDUCT** **FOR MAGISTRATES** **(Regulation 54A)** **16.** **A magistrate shall not act to the detriment of the discipline or the efficiency of the administration of justice** or allied activities.	**Contravention Regulation 25(c)** of the **Regulations, read with the Code of Conduct (paragraph 16)** by **acting detrimentally to the discipline/efficiency of the administration of justice** by refusing **to receive training/mentoring and by refusing to do work allocated to her,** with specific reference to Ms A Rademan and Ms Myambo *(See paragraph 3 affidavit – Ms A Rademan dated 03.02.2009- exhibits ab and abc)*	**NOT GUILTY AND DISCHARGED** **at end of case for the Magistrates Commission**
31 **CONTRAVENTION** **Reg 25(d) –** **Negligent/indolent in carrying out duties**	**Contravening regulation 25(d) of the Regulations,** in that the Magistrate **carried out** her **duties negligently by submitting incomplete statistics for November 2008** *(See letter D Nair dated 02.12.2008 exhibit ac)*	**Not guilty and discharged**
32 **CONTRAVENTION** **Reg 25(d) –** **Negligent/indolent in carrying out duties**	**Contravening of regulation 25(d)** of the Regulations, in that she **carried out her duties negligently/indolently by seldom granting default judgments and sending them back to the legal representatives with unfound queries** *(See affidavit A Rademan dated 03.12.2008, exhibits abc and abo)*	**Not guilty and discharged**

599

(Regulation 54A) 3. A magistrate executes his/her official duties objectively, competently and with dignity, courtesy and self-control	(c) December 2008: she **screamed** at Ms Rademan whilst attorneys were outside your office and the office door was open. *(d)* 23.05.2008: she **wrote** to Ms Rademan in a letter "It is not your concern as to where my books are now" – *(See exhibit p in this regard)*	**shouted** at F V A von Reiche "Can't you see I have my gown on"I. **discharged** **(c)NOT GUILTY AND DISCHARGED at end of case for the Magistrates Commission** **(d) NOT GUILTY AND DISCHARGED at end of case for the Magistrates Commission**
36 **CONTRAVENTION Reg 25(d) – Negligent/indolent in carrying out duties**	**Contravening regulation 25(d)** of the Regulations, in that on **06.03.2008** the Magistrate **performed** her **duties negligently/indolently by not attending to the ex parte applications in court** *(See letter A Rademan dated 06.03.2008 exhibit aaf)*	**NOT GUILTY AND DISCHARGED at end of case for the Magistrates Commission**
37 **CONTRAVENTION Reg 25(d) – Negligent/indolent in carrying out duties**	**Contravening of regulation 25(d)** of the Regulations, in that the Magistrate **carried out her work in a negligent/indolent manner**, in that she **failed to give judgment upon request, failed to give reasons for judgment upon request and failed to record the proceeding and/or keep notes** *(See letter Salomé le Roux Attorneys dated 10.01.2008)*	**Not guilty and discharged**
38 **CONTRAVENTION Reg 25(d) – Negligent/indolent in carrying out duties**	**Contravening of regulation 25(d)** of the Regulations, in that on **17.09.2007** the Magistrate **carried out her duties negligently/indolently** in that she **slept in court, did not follow the evidence, showed no interest in the case and failed to make notes and arrived late for continuation of the case on 22.11.2007** *(See letter Von Reiche Inc. dated 29.11.2007 exhibit abr)*	**Not guilty and discharged**
39 **CONTRAVENTION Reg 25(j) – Refuse to execute lawful order**	**Contravening of regulation 25(j)** of the Regulations, in that she **failed to execute a lawful order** in that she **failed to provide a written response to the Chief Magistrate, Mr D Nair as requested on 12.02.2007.** *(See letters D Nair dated 12.12.2007 and 14.01.2008)*	**NOT GUILTY AND DISCHARGED at end of case for the Magistrates Commission**
40 **CONTRAVENTION Reg 25(d) – Negligent/indolent in carrying out duties**	**Contravening of regulation 25(d)** of the Regulations, in that on **03.04.2008** she **carried her duties out in a negligent manner** in that she **spoke in Xhosa to a Tswana/English speaking complainant and failed to inform the said applicant as to the outcome of her application** *(See letter Ms S Raphalelo dated 07.04.2009)*	**NOT GUILTY AND DISCHARGED at end of case for the Magistrates Commission**

601

Reg 25(c) – Code of Conduct Schedule E Par 2 and 3 **"SCHEDULE E" CODE OF CONDUCT FOR MAGISTRATES (Regulation 54A)** **2.** A magistrate **administers justice to all without fear, prejudice or favour.** **3.** A **magistrate executes his/her official duties** objectively, competently and **with dignity, courtesy and self-control**	**Mr. D Nair** the Magistrate **contravened the Code of Conduct for Magistrates, by the tone of the said letter, being insulting, contemptuous, sarcastic and disrespectful to her senior, Mr. D Nair** – letter Mrs. Ndamase dated 02.02.09 **(exhibit aaa)**	
10 **CONTRAVENTION Reg 25(j) – Refuse to execute lawful order**	**Contravention Regulation 25(j)** in that for the **period 16.02.2009 to 04.03.2009** the Magistrate **failed to execute a lawful order** namely, that she **submitted, contrary to a specific request not to do so, her Admission of Guilt statistics on the civil statistics form.** *(Letter from Mr. D Nair dated 04.03.2009 **exhibit au**)*	**Guilty – period 16/02/2009 until 18/03/09 (See count 13 – splitting of charges)**
11 **CONTRAVENTION Reg 25(j) – Refuse to execute lawful order**	**Contravention Regulation 25(j) – Refused to execute a lawful order** on **09.02.09** in that the Magistrate **refused to assume duty at the criminal section** as instructed by the Chief Magistrate *(Letter D Nair dated 09.02.2009 **exhibit ap** and Mrs. Ndamase's letter dated 09.02.09 **exhibit aaa**)*	**Guilty as charged**
17 **CONTRAVENTION Reg 25(j) – Refuse to execute lawful order**	**Contravention Regulation 25(j)** – in that on **25.05.2009** the Magistrate submitted her application for leave directly to the Office of the Chief Magistrate, **contrary to previous requests** that the said leave applications must be submitted to the relevant Senior Magistrate. *(Letter Mr. D Nair dated 04.06.2009 – **exhibit abg**)*	**Guilty as charged**
19 **CONTRAVENTION Reg 25(j) – Refuse to execute lawful order**	**Contravention Regulation 25(j)** – in that on the Magistrate **failed to execute a lawful order** in that on **26.05.2009** Mrs. Ndamase **refused to submit her sick leave forms to the acting Senior Magistrate, criminal courts, P van Vuuren** *(See Letter P van Vuuren dated 26.05.2009 **exhibit abh**)* – see also **abg**	**Guilty as charged**

SENTENCE

In terms of Regulation 26(16)(b) after considering the representations you are the following, I make the following finding in respect of aggravating and mitigating factors. I just want to place it on record before I deal with my reasons for my sanction or recommendation.

Aggravating factors: Mrs Ndamase shows a total disrespect towards her judicial head of office. She has been found guilty of eight counts of misconduct in respect of instances where she refused to execute lawful orders from her judicial head of office.

She has also been found guilty of another three counts in respect of her failing to execute her official duties competently and with dignity, courtesy and self control. Mrs Ndamase is very difficult to work with. She refuses to receive any further written communication from her judicial head of office. Mrs Ndamase has also no respect for her supervisors. Mrs Ndamase's behaviour in and outside the court from time to time lacks dignity, courtesy, her self control which is not in the interest of justice. Mrs Ndamase was not a reliable witness.

Mrs Ndamase's disrespect for her seniors impact negatively on the management of the magistrate office of Pretoria. Mrs Ndamase is impossible to work with and it is impossible to communicate sensibly with her. Mrs Ndamase wants to work on her own terms and conditions in her office, which hampers proper management in the office which is not in the interest of justice. Mrs

and that is the following. I am not going to take the latest, let me call it the Hatfield complaint into account, because it must still be investigated. Anything further before I impose my sanction?

MRS NDAMASE: I have forgotten but I thought of something when I was outside, but I have forgotten now.

CHAIRPERSON: It does not matter? From your side?

PRETORIUS: Nothing from me, thank you.

CHAIRPERSON: Okay. So the following are my reasons for the sanction or the recommendation. Coming to the imposing of a sanction or making a recommendation is the difficult part of these proceedings. I take into account what both Mrs Ndamase and Mrs Pretorius have placed on record this morning. I am not going to go into the evidence again, because I exhaustively dealt with it during my judgment in this hearing.

Both of them only addressed me in respect of mitigating and aggravating factors. Mrs Ndamase is a magistrate who serves as an additional magistrate on establishment of the office of the chief magistrate of Pretoria. As indicated in my judgment, Mrs Ndamase is in terms of Section 12(4) of the Magistrate Court's Act 1944 (32) of 1944 subject to the administrative control of Mr Nair, the chief magistrate of Pretoria. Arising from that comes the duty of subordination, which is expected of Mrs Ndamase towards Mr Nair as her supervisor.

See also the case of *Smit versus Workmen's Compensation* 1979 (1) SA 51A, (A). The case of *SA Broadcasting Corporation*

continued struggle for the legitimacy and the efficiency of the instruments of justice is substantially won or lost in the magistrates courts".

Therefore we cannot allow that any in-house fighting, insubordination, etcetera takes place on a continuous basis in a workplace like in this particular case, because it directly impacts negatively on our service delivery as public office bearers. The public will lose their confidence in the legal system, which is not good for administration of justice as a whole. The magistrate made it very difficult for the judicial head of office and the supervisors, and attitude is very frustrating because he does not accept authority.

She challenges and undermines the authority of her seniors and especially the head of the office. The evidence of Mr Nair as chief magistrate and judicial head of the office, speaks of the frustration that he experienced over a long period with Mrs Ndamase. According to the evidence before me, Mrs Ndamase is stubborn and also wants to do things her way. She blatantly refused to listen to her supervisor and she undermines her head of office.

The tone of her letters speak of insubordination and disrespect. This cannot be allowed any further. It is time that she starts enjoying her own day-to-day life and stop always blaming others. The evidence showed that Mrs Ndamase unfortunately had (indistinct) a tendency to blame everybody else for her own

Lubners Furnishers versus SASSASWU 1996 ILJ 660 LAC (labour appeal court) and in *Naesca (SA) Products Pty Ltd versus Zaderer* 1999 ILJ 549 C Van Jaarsveld and Van Eck in *principles of labour* law supra on page 95 pointed out the dismissal of an employee is justified when it appears that the relationship of trust between the parties has broken down irretrievably. Mrs Ndamase until the bitter end made it clear that the office must first change before she is prepared to change.

Well, what more can one say. In another handbook *dismissal, discrimination and unfair labour practices*, second addition by John Groban on pages 308 to 310 gives the following guidelines when dealing with insubordination in the workplace. Insubordination warrant dismissal only if it is deliberate, persistent and serious. See *Chemical Workers Industrial Union and another versus AECI Paints Natal (Pty) Ltd* 1988 (9) ILJ 1046 (IC) which stands for the industrial court, old industrial court before the labour court.

Also see also the case of *Humphreys and Jewel Pty Ltd versus Federal Council of Retail and Allied Workers Union and others* 1991 (12) ILJ 1032 (IC) and *Armitage Shanks (Pty) Ltd versus Manisi* 1995 (61) ILF (IC). With reference to *Numsa versus Temkay (Pty) Ltd* 1999 (5) BLLR 557 (CCMA), Van Jaarsveld and Van Eck on page 84 of the work Supra add that dismissal of an employee will be justified if insubordination is sustained and indicates an intention to defy or undermined the authority of the

long time refused to accept the authority of Mrs Mamasebo when she was moved to the criminal section.

Another guideline. Employees also take a grave risk if they seek to pressurise the employers by refusing to obey instructions until some grievance is remediate. That is exactly what Mrs Ndamase tried to do. She blatantly refused lawful orders before her grievance that she laid against Mr Nair in a certain sense as well as this misconduct hearing in particular were not finalised by the magistrate commission. In the case of *Johannes versus Polyoke Industries* 1998 (1) BLLR 18 (LAC) case the employee refused to complete certain quality check lists until the employer attended to her complaints. She admitted that this amounted to an offence, but claimed that the employer acted unfairly when he dismissed her because she had merely asked for a small indulgence.

The court was unimpressed saying that it must have been clear to the employee that (indistinct) would end in disaster. The employer could not reasonably expect her to endure such defiance. In the same sense, it was not reasonable for Mrs Ndamase to expect that Mr Nair was supposed to delay her transfer to the criminal section pending the outcome of the misconduct hearing while she experienced some difficulties in the civil section which gave rise to the complaints by attorneys.

Then the last guideline. The appeal court has made it clear that there are limits to the employee's right to refuse to comply with altered work procedures and practices. Two cases provide

with Mrs Ndamase but without any success. Here I refer to Mrs Ndamase's transfer to the criminal section, her submission of statistics and leave forms directly to Mr Nair's office, despite instructions to the contrary and her submission of the statistics on the wrong form.

I am quite aware that the case law and the guidelines from above emanates principally from tribunals established under the labour relations Act 28 of 1956 and its (indistinct) Act 66 of 1995, as well as the Basic Conditions of Rmployment Act of 1997 as amended and which are not applicable to magistrate as public office bearers, but these references are sole principles which one can also (indistinct) in this misconduct hearing.

In determining an appropriate sanction, regard must be had to the tried misconduct, the magistrate concerned and the good name, dignity and esteem of the office of magistrate and the administration of justice. The sanction must ultimately fit the nature and seriousness of the misconduct. This forum has to evaluate all the mitigating and aggravating factors. The mitigating factors in this case are and I am going to repeat what I placed on record for purposes of this motivation.

I accept that the period 2008 until today was a stressful period in her life. I also accept that Mrs Ndamase during this period experienced health problems. She also lost her daughter, which was and is still a traumatic experience for her. Mrs Ndamase started her career in Transkei in 1989 and in the department of

communicate sensibly with her. Mrs Ndamase wants to work on her own terms and conditions in her office, which hampers proper management in the office, which is not in the interest of justice. Mrs Ndamase does not care what she say and to whom, which is not always in the interest of justice. Mrs Ndamase refuses to accept the fact that she has some shortcomings in the civil section and she blatantly refused to accept further mentoring in order to assist her in this regard.

As Mrs Pretorius put it, she has not introspection of what she did wrong. Mrs Ndamase still shows no remorse. She still does not accept any of my rulings, which I have made during this hearing. It is clear that the aggravating factors far outweigh the mitigating factors. It is clear that the sanction as referred to in Regulation 26 (17) (A) (1 – 4) will serve no purpose. Mrs Ndamase quite clearly spelt out that, this morning, that she has done nothing wrong.

When a nature of the misconduct, namely eight counts of failing to execute lawful orders and three counts of failing to execute official duties (indistinct), competently and with dignity, courtesy and self-control, the personal circumstances of the magistrate concerned and a good name, dignity and esteem of the office of the magistrate and the administration of justice as well as the mitigating and aggravating factors are taken into account, I am satisfied that the recommendation to the magistrate commission that Mrs Ndamase be removed from office is the only appropriate type of sanction that could be imposed under this particular

Mrs Ndamase your attention is also drawn to the provisions of Regulation 26 (21) which reads as follows and I quote:

> *"Within 21 working days after receipt of the notice of the representations contemplated in sub regulation 20, the presiding officer may forward any additional reasons for his recommendation to the commission and the magistrate concerned".*

Do you understand this?

MRS NDAMASE: I do.

CHAIRPERSON: Ja.

MRS NDAMASE: I understand all what you have said. However, I intend to instruct an attorney to take these proceedings to be refuted by the high court.

CHAIRPERSON: I take note of that. It is your right to do that and we can take it further. Just adhere to the prescript as I (indistinct) and your rights that I have pointed out to you. Just make sure that you are within the time barrier and so on, if you want to make any representations to the commission. Okay.

A copy of the minutes of these proceedings will be supplied to the magistrate commission in fact I already supplied them with the proceedings until our last hearing, and then that is the end of our hearing. The proceedings are closed. You may be excused.

END OF RECORDING

IN THE DISCIPLINARY HEARING

(HELD AT PRETORIA)

In the matter between:-

MAGISTRATES COMMISSION **CLAIMANT**

And

NDILEKA NDAMASE **RESPONDENT**

RESPONDENT'S REPRESENTATIONS IN TERMS OF REGULATION 26(20) CONCERNING THE RECOMMENDED PENALTY

INTRODUCTION: HISTORICAL BACKGROUND

I arrived in Pretoria in the year 1998. What I observed was all confusion to me. Ever since I started working in the government service I have never seen an office where magistrates were fighting as it occurred in Pretoria Magistrates Court. Courts were specifically owned by white magistrates, and if the 'owner' would find you working in so called his or her court s/he would come straight to you and tell you that you have to get out of his or her own court. It happened to me. Ms Dawn Neethling came to court 34 and found me busy with a trial. An attorney was cross examining a witness. She came straight to me at the bench and told me to vacate that court because it was hers. I did not until we finished with what we were doing. The matter was reported to Ms Rademan and eventually it was somewhat resolved as other magistrates also reported frequent abuse and undermining behaviours of the same nature by white magistrates. I do not speak hearsay. In courts you would find white attorneys not respecting you at all if you are a black magistrate. Magistrates had to keep quiet because whatever you would say in contest of the system you would be reported to this Magistrates Commission if not challenged in the court of law. Naturally, I am quiet but that never saved men from being grouped to one of the two groups that were involved in a fight. The colour of

As a result he had to leave the court late in the evening because he had to deal with piles and piles of traffic fines that I did not do. Second he said that I left the office for a number of weeks without being known where I was by my senior. This matter came to the attention of the Magistrates Commission, which was considering which magistrates were to receive merit awards.

Pursuant to such bad report, the Magistrates commission sent Mr Raulinga who is now a judge and the late Ms Belinda Molamu to investigate me. That was a very traumatic experience; to be accused with something that you never did. In short, after that investigation the findings were that Mr Bernard swart falsely accused me of both things he said I did. After the decision, I wrote to the Magistrates Commission and made a request that Mr Swart had to be charged for lying in his merit award report. The Magistrates Commission responded to my request and told me that it was enough that Mr Bernard Swart did not get the merit award. Imagine such a glaring unfair discrimination! A white magistrate who attempted to defraud the government of its monies and in so doing lied about me had to go scot free. It is clear that racism is glaringly brewed right inside the Magistrates Commission and is made functional in our courts so as to target us black magistrates. If you check the statistics of what I am saying five if not more black magistrates have been cooked in a large cauldron by the Magistrates Commission through misconduct enquiries. If, I may mention their names just for the record:- They are Ms Mpho Monyemore; Mr Kennith Chauke; Mr Clifford Khoza, Ms Tebogo Mafafo, Ms Marupeng and Ms Ndileka Ndamase. White people are divinely protected. What is made worse is that arbitrary decisions to charge us with misconduct would be made without investigation yet the Commission knows very well of the problems we encounter in that office (see the Bashe-Kruger report being Annexture "B"). That is pure unfair differentiation.

If I may add on to what I call unfair discrimination that is practised by the Magistrates Commission, recently Mr Bernard Swart insulted a black lady, Ms Sophie Jiyane with F-words right inside the court room. The matter was reported to Ms Rademan, and Mr Nair and the Magistrates commission. It was turned down as if nothing happened. That is our Magistrates commission!

2. CRITICAL PROBLEMS IN THE CIVIL SECTION

623

allowed to be there for three months. If for some reason I cannot tell they happen to like that particular individual s/he would get 6 or 9 months to work there. Strange enough most black magistrates are allowed to do the bail court only whereas white magistrate were doing trials. That is Pretoria.

There was something peculiar that I noticed during my stay in the civil section and at the time before I went to Atteridgeville.; (i) white attorneys were seriously refusing to do their trial matters before us black magistrates, and (ii) if in court as a black magistrate and I would at the end of the matter/trial on a balance of probabilities found against a white attorney as led by the facts of the matter, some of those attorneys would confront me in the corridors and tell me that my judgement was wrong and that means that I was not fit to work in the civil section. I spoke about this to Ms Tebogo Mafafo and she used to tell me that the same thing happened to her. Her advice was that I had to try to learn my work quickly because it was hard even for Rademan to change them. They were like that; they undermined black magistrates. As those confrontations frequented, I decided to report to Ms Rademan. Ms Rademan told me that I was not the only one. It occurred to Ms Mafafo and to Mr Setlhabi whose sense of justice she did not understand herself at all. Later on white attorneys totally refused to appear before us. I used to inform Ms Rademan who would come down to the first floor and told some of those attorneys,: 'That Ms Ndamase was a magistrate like all other magistrates.' Wh at was strange was that instead of telling her the problems they had so that I could hear, they would speak with Ms Rademan in Afrikaans.' Thereafter she would call them to their office. She would never report back to me the problems and how she solved them; Black Magistrates would on the other side be contending saying the matter was allocated to this magistrate, referring to me and the magistrate is available to do the matter. Who cared for that! That is half picture of what occurred in Pretoria Magistrates Office. This was a bad experience which we had to endure so as to gain knowledge of our work. What I loved much was that freelance interpreters were available to assist every magistrate, black and white who had a language that s/he did not know. When it comes to black magistrates not knowing the Afrikaans language that is made the reason for incompetency to be charged with, what about white magistrates who do not know other languages that are also used in court? Are they regarded to be incompetent as they do not know the majority of our

section. Pursuant to the verbal reports that were made to him, an independent person, Ms Anita fourie-Myambo was requested to write a report of her own observations (see her letter dated the 15th June 2007 as annextre "C"). In paragraph 5 of her letter he says, **"It has been my experience that attorneys mainly white are reluctant to have their matters heard by black magistrates. Once black magistrates have been allocated to their matter, they either postpone or settle their matter. This leads to black magistrates not having trial matters to proceed with. This might not be something the senior magistrate would have any control over".** If you read para 6 of the same letter magistrate Myambo said:- **"Except for the incident involving Mr Burger, I am not aware of the other complaints or threats made against Ms Mafafo. In general attorneys and advocates are quick to criticize predominantly black magistrates be that with our colleagues or with the senior."** It is clear to this letter that complaints, threats and criticisms were made against us. I for one mentioned the confrontations I had not once but on several occasions by white people who wanted the cases to be decided in their favour even if facts do not agree.

In para 7 Ms Myambo went on to say:- **"The civil section is a difficult section to work in. This difficulty is compounded by the fact that only recently black magistrates were assigned to the section. Problems are to be expected."**The contents of this letter are succinctly indicative of the fact that whites do not accept black magistrates but only the people of their colour. If one checks who my complainants are, who can doubt the truth and correctness of Ms Myambo's letter. Racism is rife in Pretoria and whites can do everything in their power to see to it that a black magistrate is removed from where they do not want him/her or rather lose his or her job if it comes to a push as long as they get through to what they want. Am I not the victim of that? This victimisation happened to me and to Ms Tebogo Mafafo who lost her job because of the ill-treatment we got from these people and the chief magistrate cherished it. His oppression is far worse (see my mitigation factors). He failed us as he never made any attempt to transform the situation yet he was informed about it while still new in the office. Instead he associated himself with the group he knows is supported by the Magistrates Commission. In truism, their complaints were taken as they were and they were not investigated in order to clarify if they were not occasioned by the same reasons they knew before. A black person is always guilty. Ms Rademan at least tried to curb the wrath of the white people by making them to accept us as magistrate but did not get any support from Mr Nair. What I have realized is that the chairperson did not take into consideration of all what Ms Anita Myambo said to alert not only Mr Nair but other people who may read that

627

Google Search Engine of the Internet. When I produced my notes to show that I never slept in court and as a result I took my notes the chairperson changed the tune and attacked my notes. What right does he has to do that? He could not hold his peace at all. He frequently showed me how biased against me he was! There was a lot that these people wrote about me and in doing so not telling the truth; the same thing happened to Ms Tebogo Mafafo and to Mr Setlhabi. As letters of false accusations were written to us and we were expected to submit responses, Mr Nair was calling us to his office where he was verbally abusing us. I have included some of his words of abuse in my record for mitigation of sentence. We went through a terrible torment which I endured so that my employer should know the torture we went through. That is Mr Nair's style of management. He colluded with white people to make our lives miserable at work. Right throughout the disciplinary hearing I mentioned the unprofessional and unethical treatment that was imposed on us, the treatment that resulted to these charges against me. I remember on the day I saw Mr Von Reiche coming from Mr Nair's office; I met Mr Nair and he told me in a boasting way that his office door was open to every attorney who had complaints against me. The chairperson never cared about all these things as I placed on record. Instead he together with the prosecutor called me names in the defence of Mr Nair and the white people. This is the reason I made an application for his recusal from the beginning - our problem is race-based. He dismissed my application telling me that he had a mandate to hear the contents of the charge sheet. If one looks at the mandate he was holding on, it was not alone. It came with a package. In the civil section we were not only attacked by white attorneys, white advocates, we were exposed to the attacks by white clerks and our white colleagues. They came and testify in this disciplinary hearing and lied about us. Both the chairperson and the prosecutor did not seem deterred by that. They attacked me by all sorts of descriptive word that they could remember, attacking my character. The reason for that is simply that a white person cannot lie but a black person is always guilty. In my office particularly the civil section we black magistrates were unfairly discriminated against due to the race, colour and language. This was done mainly to cover the fact that white people did not want to do their trials before black magistrates and to encourage forum shopping. We went through a terrible experience, a very terrible experience. Little wonder Ms Tebogo Mafafo could not take it anymore and resigned. We were put in a very hot cauldron every day we were at work. Our chief magistrate, in addition to verbal abuse, called us with names like arrogant, indolent/negligent in the execution of our duties. When I asked him to produce files that I dealt with, the files that support the manner he described how I did my work he could

September 2007; the fact that white people did not want to appear before us black magistrates plus the confrontations I received from them when I got out of court the Magistrates Commission was duty bound to investigate the white people's complaints against me and Ms Tebogo Mafafo thoroughly and properly. It is unfair that black magistrates in Pretoria have to be bound to the criminal section or in some sections in the Family section. Even the section of Adoptions of children is done by the white people only. What is it that we blacks cannot do and where is the proof of the fact that we are failures as Parliamentarians are deliberately misled into thinking that we cannot make it to the top of our career? In the circumstances of this case the Magistrates Commission failed to investigate this matter and to do so by appointing an independent team to visit us. They would have heard more than what I have revealed so far.

4. CONSTITUTIONAL DUTY TO INVESTIGATE

(i) The Magistrates Commission knows very well the problems we black magistrates of Pretoria Magistrates Office encounter on daily basis under our white colleagues. Although they know the problems through an investigation that was conducted before, they failed to train or inform Mr Nair about them. As a resulted he dealt with everything with extreme exaggeration and humiliation he extended to us black magistrates. I have already referred it to the Bashe-Kruger report compiled in November 2007. Although I referred to this report for a number of times, I did not hand it in. At this time I hand in as part of these representations (see annexture B..) The Magistrates commission might have failed to perhaps apprise Mr Nair of the problems and see where we are now. Every bad thing he has done to us is receiving its appraisals and support. The Magistrates Commission was supposed, if it had interest in the welfare of the magistrates of all colour, to occasionally give guidance to the chief magistrate; to give frequent checks and supervision in order to see to it that there is balance in the smooth running of the office and in the relationship between white and black magistrates who had clashes that led to the investigation. It failed to do so and went for softer targets with the aim of covering racism.

Instead of doing this, black magistrates are the ones who are frequently charged with misconduct even in situations where there were no reasons for taking that route. I say this because Ms Mpho Monyemore, Messrs Musa Chauke, Clifford Khoza, Ms Tebogo Mafafo, Ms Marupeng and I were charged with Ms Conduct. White people even when they have committed serious

631

action may be taken. (the latter simple means hear the other party before taking a harsh decision to charge the person). That was not done to me and things became arbitrary worse when other matters or issues which happened in the year 2009 were never discussed by the Ethics committee and there was no resolution that I be charged with them was taken at all but I was prosecuted with them. I pointed that to the chairperson and he ignored me. As a result all the counts I am convicted with, they all fall in this category),

Under the **heading CONTENTS OF THE RULES OF "NATURAL JUSTICE"** Mr P Colyn says:- These rules are common law rules which have to be observed before any administrative action may be taken. The common law is that portion of South African law which has evolved from, amongst others, the Roman-Dutch law, and that is not South African statute law. These rules have crystallised in practice into the principles of *audi alteram partem* (literally: hears the other side) and *nemo judex in sua* cause (literally: no-one may be a judge in his own cause), and as developed by our courts, involve the following:

any person whose rights, privileges and liberties are affected by the action of an organ of state, must be given an opportunity to be heard on the matter;

any consideration which may count against a person affected by a decision must be communicated to such a person to enable the person to state his/her case;

an organ of state must be impartial and free from bias (in other words justice must not only be done, but must also be seen to be done).

This writer went on to explain the **PURPOSE OF THESE RULES** saying the following:- 'The observance of these rules takes place in principle before the decision is made (unless the matter is urgent), and serves three purposes:-

1. They facilitate accurate and informed decision-making;
2. They ensure that decisions are made in the public interest;
3. They cater for certain process values;

In conclusion, Mr Colyn says;- 'the above rules do not mean that a person is entitled to a decision in his/her favour. It means that it the rules of "natural justice' have not been observed, an aggrieved person can approach an appropriate court that will enforce the rules as a matter of policy. The court will normally refer the matter back to the organ of state concerned for reconsideration, instructing that the aggrieved person be heard.'

the matters that are not covered by any resolution and were never investigated too. I read the case of **Pellow No And Others v the Master Of The High Court & Others 2012 (2) SA 491**here the court dealt with new matters. On paragraph 39, the court said, **"While it may have been adequate to invite representations to be made in answer to specific charges, once new facts or issues arise, an opportunity must be afforded to the affected person to deal with them."** To repeat myself, I pointed out to the chairperson that there were very old matters in the charge sheet that needed to be struck off the charge sheet; I also said that even those matters that are covered by the resolution of the Commission dated the 04th December 2008 had to be removed from the charge sheet because the side of my story was not heard. I further said that the new matters, matters that are not covered by any resolution that I be charged with be struck off the charge sheet. They refused both of them. That is the reason I said my case was dealt with in a Kangaroo court style. The two people who heard my trial deliberately ignored the law. I expected this gross irregularity hence I raised also an objection in limine that the chairperson and the prosecutor had to recuse themselves from hearing the charge sheet. They refused. I also expected the end results of this case to be what they are, that I asked them to recuse themselves from these proceedings and I strongly mentioned the fact that my accusers are all white people and definitely this matter is race-based. All my objections in limine were dismissed.

5. PRIMA FACIE CASE AS REQUIRED BY REGULATION 26

I am charged under Regulation 26 which has a proviso that if the Magistrates Commission sees/finds that a prima facie case exist a magistrate can be charged with misconduct, there is no need for a preliminary investigation to be conducted before a magistrate can be charged. (I did not look at the exact words of this Regulation). However, my argument is, if one checks the terms of Regulation 26 against the provisions of section 33 of the Constitution, there is no doubt that this Regulation is inconsistent with the provisions of the Constitution and the Common law which is the foundation of our law. Although I knew the proviso to the Regulation I was charged in terms of, I wrote to the Magistrates commission and asked for the record of the proceedings of the 04th December 2008 plus what Mr Nair said when he briefed them about us (Ms Tebogo Mafafo and I). Remember that a blanket decision

635

Pretoria Magistrates Office; and (c) it is worse that new matters were simply added on without having been discussed or a resolution at least taken that I had to be charged with. What makes the worst of this case is that there is nowhere in the Extract of the Minutes dated 04/12/2008 that indicates that Mr Nair was excused before the decision to charge us with misconduct summarily was taken. That makes him the complainant and the decision maker, something which is unfair. It happens only in the Kangaroo courts at eKasi. At home we have two Tribal courts and there, those chiefs and headmen do adhere to the custom, tradition and culture that are practised in the locality. They would have done better in this case in following the procedure and I am sure of that from the experience I have. In short, the procedure that the law dictates and sanctions was not complied with. In the middle of this paper, I mentioned that I asked the chairperson and the initiator of the proceedings to recuse themselves from hearing this matter. I am now going to deal with how the disciplinary hearing were conducted and point out irregularities as I proceed in doing so.

7. SUBSTANTIVE FAIRNESS DISREGARDED

Another gross irregularity that the Magistrates Commission committed was to suspend me from office on the 18th of September 2009 without furnishing me with reasons for taking such drastic measures. What they did before removing me from the office was to write me a letter in which I was asked to furnish them with reasons why I could not be suspended. At that time I had not been given access to information concerning the complaints. Further I did not refresh my memory regarding what was expected of me according to the Magistrates Act 90 of 1993 and its Regulations. So I simply tell what Mr Nair was doing to us. That fell into deaf ears in that it was not considered relevantly. I applied for access to information and I received it. Shortly thereafter, the Commission wrote me and said that I received access to information and I had to give them reasons why they could not suspend me. In response to that I requested them to give me tangible reasons as to why they wanted to suspend me. I indicated to them that I read all the documents but there was no truth in them from which I could on my own pick up reasons why they wanted to suspend me. The Magistrates Commission never replied to that letter until today. The only thing that occurred was to get a letter of suspension on the 18/09/2009. They breached section 5(1) of the PAJA as I quoted it here above and section

attitude. I left him there because the word "attitude" is too wide. Besides that there is no law that allows a person to be charged for attitude. Mr Nair and all the +- 12 witnesses (white attorneys) that were called to testify on my alleged incompetency failed dismally to prove their allegations in this regard. The lady who mentored me for a year, Ms Anita Myambo also said that she had nothing that she could say I am incompetent. As the evidence in this first leg of the charge proves that I did my work as required, the chairperson who is glaringly biased against me still referred to incompetency as one of aggravating circumstances. He said 'even if it was not proved that you were incompetent but there were complaints against you, therefore "I have to recommend that you be removed from office." I take it that this is the reason he refused to recuse himself; he came with a mandate and its package.

Mr Dirk Van Greunen, the chairperson actively assisted the prosecutor in proving the case of the Magistrates commission. At the end of the case he does not feel ashamed of saying that I have to be removed from the office. I have to continue with what Mr Nair said about the alleged insubordination. First of all, while I was still in the civil section, I think it was in August 2008, Mr Nair gave a directive to Ms Rademan that I had to submit my daily statistics, my annual and sick leave form direct to his office. When I asked the reason for that from Ms Rademan, she told me that she did not know but it seemed that her authority over us was taken by Mr Nair. On that day I was in her office to submit my sick leave form. I there and then took it to Mr Nair's office. Since then I complied with his request of submitting direct to his office the annual, sick leave form and the daily statistics form. In this hearing Mr Nair never disputed that he gave that directive to Ms Rademan. The only thing he complained about was that I was going to one and the same doctor when I was sick. I did not challenge that with any questions because I did not see anything wrong in being treated by one doctor who knows the history of the type of elements that frequently attacked me especially at that time where we were tormented in our office. The work conditions we were subjected to work under at the time of Mr Nair were very bad. His oppression is the worst than all other types of oppression I had ever heard of or seen ever since I worked for the government. Little wonder Ms Tebogo Mafafo could not take it anymore and resigned her employment. Things were bad and very tough for us. We were falsely accused of every sort of things that white people could think of. The chairperson referred to my complaints of racism as water under the bridge or that racism was in my head. I have to be sent to a social context course. He is making a fool of me and in doing so is also indirectly insulting me.

He is the one who diverted the protocol and wrote direct to us and when we did the same, we failed to obey lawful orders. He is the one who requested that I have to be investigated in his letter dated the 24th June 2008 and also on the 04th December 2008. As a result of his deeds, I missed two advertised Regional court posts both in February 2009 and April 2012. I was not even shortlisted because of this disciplinary hearing. There is a lot of entrapment he committed against me using white people. The law says:- Entrapment occurs when the employer lures the employee into acts of misconduct, the employee would otherwise not perform without being ensnared by the employer. This is inducement and traps that are illegal.' I placed all these acts into the record but the chairperson with a 'mandate' ignored them all. Thus he failed to weigh up all the evidence that was presented to him. He totally failed to make an informed decision based only on the facts before him and targeted Ms Ndamase only.

What is more perturbing is to appear before an arbiter who takes sides. Mr Van Greunen never considered the fact that I submitted my daily stats forms, sick leave and annual leave forms direct to Mr Nair's office as per his directive. That is very unfair and shows how much biased he was towards me. I do not doubt the reason for him to refuse to recuse himself from this matter. I did not receive any fair treatment under him as envisaged by section 35(3) of the Constitution. The gentleman was too biased against me and by acting in that fashion he is aiming at misleading the Minister of Justice, Members of Parliament and mostly the members of public who expect to be served by a magistrate who is fit for judicial office and by the courts who are independent and impartial. As he has recommended that I be removed from office, I say I did not commit any gross irregularity or gross incompetence at all that can relate to his recommended sentence. The unfortunate part is that I appeared before him, a person who is too biased against me; a person who ignored to apply the law which is favourable to my case; and a person who singled out every bad thing that was said against me whether it is said under oath or is sent to him as a message. I say the latter because Mr Nair was called by the prosecutor to come and testify in aggravation towards sentence. The

643

refusing to answer some of the questions that were put to me by the prosecutor. He called me a "dishonest" person. He used this as an aggravating factor for his recommended sentence. It is hurting to appear before a partial presiding officer like Mr Van Greunen. The chairperson has been selective in his analysis of the evidence tendered in this disciplinary hearing. He kept on calling me names saying that I was dishonesty, not reliable and that I lied under oath. Let alone the fact that he dealt with this matter through the Newspapers where my reputation as a magistrate was under serious attack.

Let me first deal with the issue where he said I refused to answer some questions as the chairperson put it. It is correct that I refused to answer to repeat questions and I told him that I regarded repeating the same question three or four times as a waste of time. As far as I know, there is nothing wrong if a prosecutor asks a question and later on repeat it if that is done to test the credibility of the person who is under cross examination. That is allowed in law. However, in the instances of this case, the prosecutor asked me questions and she repeated the same questions three to four times each. That was not procedurally fair in that she was no longer testing my credibility but was undermining my integrity as a magistrate. The manner in which she did it was too humiliating and provocative. The chairperson never called the prosecutor to order as he was supposed to. In his reasons for judgment he said that I refused to answer questions and that means that I was dishonest. He did not indicate that unnecessary, humiliating repeat questions were imposed on me. This is another indicator that he was biased against me and also very selective in analysing the evidence before him. If one scrutinises his judgments, I am the only person who did wrong things and who is not to be trusted. Nothing is said about the witnesses who contradicted themselves and lied a lot in certain instances. Rather than picking up those instances, he turned against me and said I kept on saying that witnesses were lying although he cautioned me against using that word. He did not accept my explanation that different languages that we have in our country and cultures are not the same. I informed him that we do not have another word of saying a person is lying in the Xhosa language unless we use idiomatic

was yesterday's meeting which was rescheduled for that morning. I agreed. Immediately I phoned Ms Horn and asked her to tell Mr Nair that I could not attend that meeting without legal representation because I was tired of being victimised by him and Ms Rademan. Later on, on the 03/12/2008 I wrote a letter in response to the query from Mr Nair. In that letter he wanted to know the reason for not attending the meeting whereas I was informed about it by Ms Horn. I got a chance to put it in writing that I could not attend that meeting without a neutral person to represent me in that I was avoiding his verbal abuse (victimisation) which were meant to destroy my health.

However, in a statement I made later on to the Commission, I said that I did not attend the meeting of the 01/12/2008 because I was busy with default judgments throughout my lunch hour. I confused days in that statement. I made a supplementary statement to correct it. The chairperson and the prosecutor both said that I lied under oath. The chairperson further said that I am not reliable and I am dishonest. These two people worked in concert in labelling me with such unbecoming words without having checked whether or not I really made such a mistake under oath. As far as I know I never made such kind of statement under any oath. In this regard the chairperson failed to check and make sure that the statement he was referring to meet the requirement of the provisions of the **JUSTICE OF THE PEACE ANDCOMMISSIONER'S OF OATH ACT NO 16 OF 1963**. He was quick to call me names, something which is wrong. Before levelling me with such criticism he was supposed to ask himself a simple question: "What is a prescribed oath and its requirements?" Thus he had no legal basis to call me a dishonest and an unreliable person who lied under oath. That also shows that he refused to recuse himself from hearing the matter for the purpose of spoiling my good name as a magistrate in the defence of the Magistrates Commission which made grave errors of defying the rules of Natural justice whereas they know how black people are trampled down in Pretoria district courts by white people (I refer the reader to the Bashe-Kruger report). In addition to this the chairperson was quick to criticise me and call me names in order to cover the fact that he convicted me of the counts which fall beyond the resolution of the 04th

9. SUMMARY OF INSTANCES OF VERBAL ABUSE BY MR NAIR

I have to emphasise the fact that we were working under unbearable and unhealthy conditions under Mr Nair, who was warned about how the white people conduct themselves towards the black magistrates in the civil section. Instead of transforming the situation he chose to tremendously oppress us black magistrates himself. Regarding how Mr Nair verbally abused me, I refer the reader to page 6 to 8 of the document containing my mitigating factors which I handed in on the 02nd May 2012 (see Annexture "D"). Together with these representations I am also handing in the medical report from the psychologist, Professor Mokhuoane. (see Annexture "E"). The chairperson said by the words of mouth that he had taken consideration of that kind of abuse in his reasons for sentence. In actual fact it is transparent from his recommended penalty that he never took into consideration any of the things that Mr Nair did to us. His refusal to recuse himself is openly manifested in the kind of the recommended penalty. What comes as a solace to me is that I referred him to case law which states that if the case has an inclination of racism and the presiding officer is requested to recuse himself, his refusal nullifies the whole proceedings. The cases to support this principle and the obligation to observe the rules of Natural justice are stated fully in my application for absolution from the instance (see Annexture "F").

If I am not repeating myself, another peculiar manner I found to be too humiliating is the fact that the prosecutor announced that she would call Mr Nair in the aggravation of sentence. Mr Nair did not csome as expected but he sent a message that it had to be taken in consideration that Ms Ndamase is difficult to work with and is influencing other Magistrates in our office. This piece of evidence was placed on record by the prosecutor. She even added that Ms Ndamase is an island of her own; she wants to do things the way she likes in that office. What is crucial in all what Mr Nair said in his message is that it is not said under oath. I did not have any chance to test it under cross examination. Although so, the chairperson took it in a very serious light as if it is something true. He used it as an aggravating factor to substantiate his

649

For the purpose of clearing that cloud in his mind, I handed in a newspaper cutting from the Pretoria News dated the 17th August 2011 (Workplace) where the Labour Law analyst/specialist Mr Kevin Allardyce says the following:-

TRICKY TEST FOR BIAS CAN COMPLICATE HEARINGS

'When the chairperson represents the employer at the CCMA (in this case Magistrates Commission) you have to ask yourself just how impartial that chairman could have been in the first place? So what does the law say in this regard?

A presiding officer must be impartial and must weigh up all the evidence that is presented to him and make an informed decision based only on the facts before him. In theory, a chairman must refrain from showing bias or even a perception of bias until they have made their final decision. As a general rule, if an employee fails to raise bias during an inquiry, he may have a difficulty arguing it later. However, if facts arise after inquiry that suggest that the chairman was biased these may be argued at the arbitration (High Court) as a basis to challenge the fairness of the hearing.

The test for bias is a reasonable apprehension that the chairman will not act in an impartial manner. It's difficult to prove actual bias so the test is a perception of bias. This does not mean that it can simply be your opinion but there must be some factual basis for you to believe this. So what do you do if you believe that the chairperson of the enquiry which you have to attend is biased? ... It is easier to demonstrate if, during the hearing, the chairman makes remarks which suggest he has prejudged your case, or if the chairman takes over the role of the initiator during the proceedings or starts to cross-examine you. If that happens, you are entitled to ask the chairperson to recuse himself.' (In my case I asked the chairperson to recuse himself and also the prosecutor to do the same because I indicated that my accusers are all white people. Second, the chairperson forced it having no proof that Ms Kirshner, a coloured woman did a case before me yet she did not. He did not end there he took over the role of the initiator of the proceedings and asked Ms Kirshner what race she was. When she told him that she was coloured, the chairperson said, "I am asking this question because the allegation

651

my case. I had that apprehension on the date I was served with the charge sheet and especially that I knew the background of the charges I am facing. I quoted a lot of cases in my reasons for an absolution from the instance in order to support all this. I can just add the case of **KwaZulu Transport (PTY) Ltd V Mnguni & Others (2001) 7 BLLR 770 (LC)** where it was held that, regarding the test for bias, presiding officers are obliged to recuse themselves if the litigant proves a reasonable apprehension of bias. The application of the test, however, depends on the nature of the tribunal. To my mind, this test must be more stringently applied where the adjudicator is highly experienced.

The nature of my case called for the recusal of the chairperson. In addition to this he permitted the prosecutor and the witness under oath to listen to the evidence of the previous witness in my absence. That conduct is highly irregular. In the case of **Fransman / ALG Boerdery (PTY) Ltd (2006) 10 BALR 1011 (CCMA)** the applicant raised an issue where he said that he was sent out when the presiding officer caucused with the other party. In para 54 of that case the court said, "...I tend to agree with the applicant. Such type of clandestine conduct is not conducive of credible, transparent and fair decision making. It breeds suspicion of bias. In para 55 the court went on to quote a very old case of **R v Maharaj 1960 (4) SA 256 (N) at 258** where the Natal Provincial Division of the Supreme Court remarked as follows:

"It is a principle of justice as administered in this country that trials must take place in open court and that judicial officers must decide them solely upon evidence heard in open court in the presence of the accused. If that principle is violated, then, quite apart from the question as to whether the accused is manifestly guilty, the proceedings are bad because it might be supposed that justice was being administered in a secret manner instead of in open court. **It is elementary that a judicial officer should have no communication whatever with either party in a case before him except in the presence of the other, and no communication with any witness except in the presence of both parties."** In my case as indicated I caught the prosecutor and the witness Ms Lize Botha red-handed, listening to the evidence of Mr Van Vuuren. The chairperson admitted that he permitted them to listen to the

653

matters that are not covered by any resolution of the Ethics Committee that I had to be charged with; matters that were also never investigated; it took +- 12 months before I was served with the charge sheet, starting from the 04/12/2008 the date on which the resolution that we be charged with misconduct summarily was taken;

(d) As that right has been violated, that constitutes an unlawful administrative action in breach of section 33 of the Constitution, Act 108 of 1996;

(e) As the unlawful administrative action exist, this means that I have been prosecuted unlawfully; and

(f) Therefore, any adverse end results that are pursuant to this gross breach of law are also unlawful.

Compiled by: Magistrate N Ndamase
Date: 12 May 2012

the open door, stood there without saying a word. I also looked at him without saying a word. I realized that the incident might turn ugly. I placed on record what happened. I adjourned court and went to look for another court where I, proceeded.
I later reported the incident to the Chief Magistrate Desmond Nair. I told him I am merely informing him, not that he should do something about it because he may himself get hurt because of my complaint. The reason why I said he should not do something about it is because this was the same magistrate who at the height of the conflict, made a gun sign at me indicating he will shoot me.

17) There is countless number of incidents where our cases are perused for mistakes.
18) The office of the then Chief Justice was also asked for help. He replied that the matter be reported to the Magistrates Commission.
19) Unstill recently, black magistrates would not be allowed to call the roll in the civil section.

Compiled by: N Nagle N, N Lamaza
2018/05/14

4. During the hearing I dealt with the charges before me. I was not investigating and/or reviewing decisions taken by the Magistrates Commission as such.

AD PARAGRAPH 2: CRITICAL PROBLEMS IN THE CIVIL SECTION

5. Ms Rademan did not testify and therefore one must be cautious not to rely on hearsay evidence which is not admissible.

6. I dealt with the charges which were reported by Mr Nair. The facts which relate to Mr Moldenhauer are irrelevant because it does not relate to the charges before me.

7. The Regional Court issue is also irrelevant in so far as this hearing is concerned. It is not relevant to any of the charges against Mrs Ndamase.

8. The so-called refusing of white attorneys who refused to appear before the Black Magistrates and forum shopping were dealt with during my judgment in so far as it relates to the charges concerned – see for instance transcribed record of 13 April 2012 at page 906 and further.

9. The contents of paragraph 5 of Mrs Myambo's affidavit referred to on page 7 must not be quoted out of context. I fully dealt with Mrs Myambo's evidence during my judgment – transcribed record of 13 April 2012 at page 906 and further.

10. In paragraph 2 on page 7 Mrs Ndamase mentions that Ms Tebogo Mofafo *"lost her job because of ill-treatment ....."* According to the evidence before me Ms Mofafo resigned. See also page 9 of this representations in this regard.

659

and I attacked Mrs Nadamase's character as well as the insinuation that I made a finding that white people cannot lie but that a black person is always guilty, are far from the truth. When one reads the reasons for my judgment carefully it is clear that in some instances Mr Ndamase was found not guilty because of the fact that I could not rely on the evidence of some of the witnesses – see for instance my discussion of count 24 in my judgment on page 1000 and further of the transcribed record of 17 April 2012. In this instance the witness is a white lady.

16. Mrs Ndamase's allegation on page 10 (first paragraph) that I took a: *"clear stand to side with the Magistrate Commission instead of looking at the whole incident in a holistic manner"* is also far from the truth. I presided in this matter independently without interference by anyone and at least by the Magistrates Commission. If I decided to side with the Magistrates Commission why would I then convict Mrs Ndamase on only 11 of the 42 counts. I even differed from Ms Pretorius who led the evidence on behalf of the Magistrates Commission.

AD PARAGRAPH 4: CONSTITUTIONAL DUTY TO INVESTIGATE

17. Mrs Ndamase keeps hammering on the fact that only black Magistrates were charged with misconduct. I have no evidence in this regard and this cannot take the matter any further. In any event, these other investigations are irrelevant for the purpose of the enquiry under discussion. I dealt with specific charges of misconduct which was laid against Mrs Ndamase.

18. I fully dealt with all the issues mentioned in this paragraph during my reasons for my ruling on the points ***in limine,*** and also during Ms Ndamase's application for a discharge at the

23. During my reasons for judgment, I fully dealt with the evidence of all the witnesses in respect of each count separately and I have nothing further to add.

24. I also fully dealt with the so-called incompetency. I never made a finding of incompetency as such and Mrs Ndamase now tries to mislead the Commission in this regard. My reasons for my judgment speak for itself.

25. I also had no "mandate" to remove Mrs Ndamase from office. This independent decision was taken by me alone when I had to impose a sanction and this was done after I had considered all the evidence and arguments that were placed before me. I only applied what I was supposed to do as *inter alia* prescribed by Regulation 26 (17).

26. On page 20 of her representations Magistrate Ndamase made the wild and unfounded statement that: *"the prosecutor and the chairperson together, perhaps with a member of the Commission got this 192 pages document from Mr Nair and as a afterthought to cover him ...."* As Mr von Reiche (attorney) testified regarding something else (count 38) I also want to say in this regard – *"waar Mevrou Ndamase hieraan kom gaan my verstand te bowe."* I received only my letter of appointment and a copy of the charge sheet from the Magistrates Commission and it is very sad, as I already pointed out in my judgment, that Mrs Ndamase comes to all sorts of conclusions without any sufficient proof and then she accepts these unfounded conclusions as the truth. I worked with the evidence before me and I do not rely on unfounded speculations.

and that she could contact Mr Danie Schoeman in this regard. This was conveyed to Ms Ndamase when she called me and I promised to also send a typed copy of my reasons directly to her which I did. Mrs Ndamase is aware of the fact that that lady was present when I gave my reasons for my recommendation on our last day of the hearing and that she was making notes. At no stage did I say to Mrs Ndamase that any journalist was in my office or that I personally handed a copy of my reasons to a journalist. I did not hold any press conference and I did not provide anything to any journalist. I also never: *"dealt with this matter through the newspapers"* as alleged on page 25 of these representations.

30. The reference to a Sowetan Article on page 24 of Mrs Ndamase's representations has nothing to do with me and was also not initiated by me. The accusation by Mrs Ndamase that: *"all the reporting is done by Mr van Greunen"* is an absolute lie. I never spoke to any reporter of the Sowetan and Mrs Ndamase has no proof that I at any stage had any interaction with any of the journalists of the Sowetan. Mrs Ndamase is on thin ice with all these allegations which she now wants to use as a smokescreen to draw the attention away from the evidence which is on record. She knows what happened when she accused and summoned Mr von Reiche on similar false accusations. Those evidence is on record – see evidence of attorney von Reiche in respect of count 38.

AD PARAGRAPH 8: LYING UNDER OATH

31. On page 25 of her representations Ms Ndamase alleges that I never mentioned that some of the witnesses contradicted themselves and that I was selective with my findings. This is not true. My reasons for judgment speak for itself.

665

CONCLUSION

37. No annexures were attached to the representations forwarded to me.

38. These comments/additional reasons by me must be read together with my reasons which I furnished when I was dealing with Ms Ndamase's points ***in limine,*** my reasons as per application for discharge at the end of the case for the Magistrates Commission as well as my final Judgment at the end of the case, which judgment must be read as a whole and also my reasons for the recommendation which I have made.

Given at ROODEPOORT on this the 17th day of MAY 2012

D C VAN GREUNING
PRESIDING OFFICER
Senior Magistrate
17/05/2012

discussion. That is a very long process which can surely cause another delay in a matter that has taken 31/2 years to come to its conclusion in the forum of hearing. That is unfair;

5. I am not against the fact that internal remedies have to be observed. In fact let the law regarding that side take its course;
6. Nevertheless, I have suffered a lot and I have a strong feeling that both the convictions and recommended penalty are procedurally and substantively unfair (see all the documents I have submitted to-day). The issues that I need to be decided are whether the verdict of guilty reached in the disciplinary hearing are correct; if so, if the recommended penalty of removal from the office is appropriate; and finally whether the procedures followed by the claimant leading to the convictions are fair or not;
7. These are the things that I am personally concerned about. I intend to take an attorney immediately after I have heard from the Magistrates Commission in this regard as I am too exhausted to continue on my own. S/he may see things otherwise; and
8. As a result of the feelings I have about the case, I hereby make this application to be exempted from waiting for the internal remedies to be exhausted first before I take this matter to the High Court.

Thank you for your kind assistance and consideration of this matter in a manner that is highly favourable to me.

Yours faithfully
N Ndamase
Additional magistrate
Pretoria. 2014/05/14

669

I trust that you find this arrangement in order.

Yours faithfully

J. Meijer

^ SECRETARY: MAGISTRATES COMMISSION