REPORTABLE

CASE NO.: SA 17/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE MINISTER OF JUSTICE **APPELLANT**

and

THE MAGISTRATES COMMISSION **FIRST RESPONDENT**

MAGISTRATE SHAANIKA **SECOND RESPONDENT**

Coram: Strydom AJA, Langa AJA *et* O'Regan AJA

Heard on: 06/04/2011

Delivered on: 21/06/2012

APPEAL JUDGMENT

LANGA AJA:

Introduction

[1] This is an appeal by the Minister of Justice (Minister) from the judgment and orders of the High Court (Majara AJ) delivered on the 15 July 2010. It is concerned principally with the interpretation and application of three statutory provisions,

namely, sections 13, 21(3)(a) and 26(17)(ii) of the Magistrates Act No. 3 of 2003 (the Act). In particular, it is about the respective roles, functions and responsibilities of the Minister, on the one hand and the Commission on the other, in the dismissal of a magistrate on the grounds of misconduct.

[2] The matter commenced by way of a notice of motion in the High Court in which the Magistrates' Commission (Commission) applied for the following orders:

> "1. Declaring that the conduct of the Minister of Justice (Minister) in failing to take action or a decision with regard to the dismissal of the second respondent to be in conflict with her statutory duty under section 21(3)(a) of Act 3 of 2003;
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> 2. Directing that the Minister forthwith dismiss the second respondent from the position as a magistrate and by no later than 7 days from the order of this Court, failing which the sheriff is authorised to sign the necessary documentation to effect the dismissal of the second respondent from her aforesaid position.
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> 3. Directing that the Minister personally pay the costs of this application, alternatively, and in the event of opposition by the second respondent, directing that the respondents (the Minister and the 2nd Respondent) pay the costs of this application jointly and severally with the (Minister's) contribution to be made by herself personally."

Prayer 1 was granted by the High Court; prayer 2 was also granted, albeit in a modified form which read –

> "The 1st respondent is directed to dismiss the 2nd respondent from the position as a Magistrate by no later than fourteen (14) days from the order of this Court, failing

which the sheriff is authorised to sign the necessary documentation to effect the dismissal of the second respondent from her aforesaid position."

The Second Respondent (Magistrate) did not oppose the application and did not take part in either the High Court proceedings or on appeal before us. In the course of the proceedings in the Court *a quo*, the Commission abandoned its prayer for costs; consequently none were ordered.

Factual background

[3] On 11 April 2005 the Commission charged the Magistrate, in terms of section 26 of the Act, with six counts of misconduct, particulars of which are listed below.

"Count 1: alleged use of derogatory language towards a staff member (Ms Amupanda) and assaulting her;

Count 2: alleged insults and use of derogatory language towards Mr Amunyela;

Count 3: alleged refusal to handle a civil matter brought by Mr B. Pfeiffer, a legal practitioner;

Count 4: alleged misuse of her position as magistrate and threatening Ms L. Mupetami;

Count 5: advertising and selling lunch boxes at the Mungunda Street Magistrate's Court, Katutura;

Count 6: the alleged misuse of her position, interlinked with Count 4 involving threats made towards Ms M Anthonissen and Ms M Van Dyk."

[4] After a number of postponements and delays, which were all at the instance of the Magistrate, the misconduct proceedings commenced in December 2006. A presiding officer and an investigating officer had been appointed by the

Commission to conduct the inquiry. Further delays occurred which, in the result, caused the inquiry to drag on for considerably much longer than it should have. The hearing of evidence eventually proceeded on 26 October 2007. On that day, the Magistrate walked out and left the hearing and it proceeded and was concluded in her absence on 27 October 2007. The Magistrate was found guilty on the six charges of misconduct and was then invited to present mitigating factors. She declined to make any representations. The presiding officer thereupon submitted to the Commission the record of proceedings and his written statement of findings and the reasons therefor, as well as his recommendation for the dismissal of the Magistrate.

[5] In his founding affidavit instituting the action in the High Court, the Chairperson of the Commission, Mr Justice Mainga, then a Judge of the High Court, details the steps that were taken by the Commission following the report to it by the presiding officer. He states that after consideration of the record submitted by the presiding officer, including his findings and recommendations, the Commission was satisfied that the Magistrate had been found guilty of misconduct and was in fact guilty of misconduct. By reason of the nature of the misconduct, the Commission was further satisfied that she is no longer fit to hold office as a magistrate. The Commission then proceeded to take the steps prescribed in the Act, in particular, section 26(17).[1] It notified the magistrate in writing of its decision and afforded her the opportunity to resign within 14 days of receipt of the notice.

[1] See para [26] *infra.*

[6] The Magistrate did not resign. On 24 January 2008, the Commission submitted its recommendation to the Minister in writing that the Magistrate be dismissed from office in terms of section 21(3)(a)[2] with effect from 1 February 2008. According to Annexure SSM1 which is part of the appeal record, the Commission attached to the recommendation, the record and all the documents that, in terms of section 26(17)[3] had to accompany the recommendation, as well as a draft letter of dismissal for the Minister's approval. The Minister, however, failed to respond to the Commission's recommendation and to its communication to her. What then followed was an exchange of letters between the Commission and the Minister which, to some extent, give an insight into the nature of the dispute before us.

Commission's correspondence with the Minister

[7] The Commission sent follow up letters to the Minister on 5 February 2008, 7 March 2008 and 20 March 2008 but they likewise elicited neither acknowledgement nor any kind of response. In the last letter the Commission suggested a meeting with the Minister before the end of March 2008 to resolve the impasse. Still, there was no answer from the Minister.

[8] On 25 June 2008 the Commission received a letter from the Minister bearing the date 25 April 2008. In it the Minister apologised for the delay in responding and gave as a reason the fact that she considered that she had to give the Magistrate the opportunity to present mitigating factors pursuant to the

[2] See para [25] *infra.*
[3] See para [26] *infra.*

provisions of section 26(11)(a).[4] She asked for the "suspension" of the Magistrate to be stayed as she, the Minister, was busy conducting an investigation to determine whether to concur with the Commission's recommendation. The Commission responded by letter of 26 June 2008 disputing that the Minister was entitled to grant the Magistrate the opportunity to present mitigating factors to her. It pointed out that sections 26(17)[5] read with 21(3)(a)[6] are peremptory provisions and all she was required to do was to follow the recommendation and dismiss the Magistrate. The letter also stressed that speedy action was crucial for the credibility of the entire system relating to disciplinary proceedings under the Act. The Commission followed this up with another letter, dated 24 July 2008 in which it pointed out that the Minister's inaction had by then been unreasonably long in duration and served to frustrate the disciplinary hearing, the Commission and its recommendation. This communication gave the Minister until 30 July 2008 to act failing which the Commission would have to decide what further action to take. Clearly, the Commission had by this time been driven to desperation.

[9] The Minister's reply was received by the Commission on 1 August 2008. It stated that the process of dealing with the matter pertaining to the Magistrate commenced in April 2008. This, of course, is not correct, ignoring as it does the fact that the Commission's recommendation was sent to the Minister on 24

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[4] 26(11)(a) requires that at the conclusion of the investigation,

> "... the presiding officer must make a finding on the charge and inform the magistrate concerned whether he or she is guilty or not guilty of misconduct as charged and, in the case of a finding of guilty, afford that magistrate an opportunity to –
>
> (a) state any mitigating factors;
>
> (b) ... "

[5] See para [17] *infra.*

[6] See para [25] *infra.*

January 2008 and not in April 2008 and also that there had been subsequent correspondence by way of follow-up. The Minister goes on to express "whole-hearted understanding" with the Commission's frustration with the delay, regretted it and promised to get back to the Commission as soon as possible. Nothing happened in the three months that followed. The next communication from the Minister, dated 21 October 2008, was received by the Commission on 26 November 2008. She again apologised for the delay which, she stated, was occasioned by her office's reading of the documents submitted to her. She repeated that she considered that she had to give the Magistrate the opportunity to present mitigating factors to her. She said that it was her encounter with the Magistrate that prompted her to peruse the Commission's report; and having done so, she was requesting further documentation and information. In a reply dated 9 February 2009, the Commission pointed out that all the necessary documentation had been sent with the recommendation in the first place. It stated that the record of the proceedings contains the charges and the evidence of the persons who had complained. It stated that in the circumstances, it failed to see the relevance of submitting the actual complaints filed against the Magistrate or the details of the investigation conducted against her. However, in an attempt to bring the matter to finality, *ex abundante cautela* as the Commission put it, the further documents asked for by the Minister were attached to the reply.

[10] I have gone through the above chronology of correspondence in some detail because of its implications on the submissions made at both the High Court and this Court on appeal. In the first place, it should be noted that no explanation,

reasonable or otherwise, is given by the Minister for the delay to comply with the Commission's recommendation or to give the Commission any response to the letters written to her during the period from 24 January 2008 to 25 April 2008. That was a critical period in light of the Commission's recommendation that the Magistrate be dismissed with effect from 1 February 2008. Instead, nothing happened; the recommendation and follow-up letters in this period evidently received no attention at all. In her answering affidavit, the Minister has this to say about this period: while admitting that the Commission had submitted its recommendation on 24 January 2008, it was received by her office "during that time of the year when many people were still on holiday" and she, herself, did not have a secretary and was "probably" on leave. She states that she only saw it after she had held a meeting with the Magistrate on 25 April 2008 at the latter's request. This is, to say the least, a disappointing and unsatisfactory response to what is an extremely important matter affecting the administration of justice. During the period May to end of June 2008, according to the Minister, she had suffered a family bereavement and any inactivity during that period can be explained away on the basis of an understandable leave period. There is nothing, however to explain why the Commission's recommendation had not been carried out timeously. From the perspective of an effective disciplinary process, the disclosure that for a period of some three months the Ministry and Government offices were in a state of virtual limbo, awaiting the time when people would have returned from holiday, is simply unacceptable. Ministries and Government offices simply do not operate on that basis.

[11] The picture however gets worse. In her letter dated 21 October 2008 received by the Commission on 26 November 2008, the Minister ascribes the delay, presumably she means the further delay beyond the end of June 2008, to the fact that her office was busy reading the documents submitted to her in terms of the Act and that she was conducting an investigation to determine whether or not to concur with the Commission's recommendation. In her answering affidavit in the High Court, she also states that she is not to blame for the delay and blames the Commission for having failed to furnish her with all the documents that she required to address the issue before her. It will be recalled that mention of further documents required by the Minister was not made in her earlier letters to the Commission in particular, in her letter dated 25 April 2008 and received by the Commission on 25 June 2008.

[12] First mention of the absence of further documents the Minister might require was made by letter dated 1st August 2008, some seven months down the line. Elsewhere she states that on 1 July 2008 she instructed a legal officer attached to the Ministry of Justice's Directorate of Legal Advice, to request all documents relating to the dismissal of the Magistrate from the Commission's secretary. She instructed him to scrutinize the documents. It is not clear why she gave this instruction. She states that the legal officer requested from the Commission's secretary "the full record of the disciplinary hearing and all relevant documents excluding those that had already been submitted" to her. She states that the transcript of the record of proceedings at the investigation and copies of the documents that were submitted together with the recommendation were

furnished following the legal officer's request. What seems obvious from all this is that as the weeks and months went by without action by the Minister on the Commission's recommendation, she already had much more documentation on the investigation and the inquiry into the Magistrate's misconduct than she was entitled to in terms of section 26(17)(b)(ii). That provision relates to a function given to the Commission and not to the Minister. The documents would have been irrelevant for the purposes pertaining to the role and function the Minister was required to fulfil.

[13] Finally, if the documents that had allegedly not been submitted were a factor at all, the Minister would reasonably have been expected to mention that fact immediately after receiving the Commission's recommendation. The revelation that there are documents which had not been included, and which caused a delay in responding to the recommendation is further not consistent with the apology the Minister had already offered to the Commission for the delay, and the admission that she had at that time "mistakenly" believed that the Magistrate had to be given an opportunity to make representations. It also transpires that after the requested documents had been submitted to the Minister, she had still not complied with the Commission's recommendation at the time of the hearing of the application in the High Court, on 19 April 2010, and hence the application for a *mandamus*. This translates into a more than considerable delay which remains unexplained, at any rate satisfactorily, on the record.

[14] All this prompted counsel for the Commission to describe the request for further documents as merely a "shifting of responses". It disputed the Minister's contentions that section 13(1) confers on the Minister the power to hold a re-hearing of the inquiry or to review the findings of the Commission, or that it was the cause of the delay in reaching finality of the matter. The High Court, noting the inconsistencies in these requests and explanations, quite correctly in my view, rejected them as a lame excuse or red herring to "further delay the inevitable outcome". I agree with the observation in the Commission's last letter of 9 February 2009 that it is disturbing that up to that time a whole year had elapsed since its recommendation should have taken effect. By that time the Minister had expressed her apologies several times without doing anything about it.

[15] The inordinate delay gives, in my view, a clue as to the real reason why the Minister has failed to act in terms of the Commission's recommendation. It all has to do with her understanding of her role and functions in the dismissal of a magistrate. It is to that aspect that I now turn.

The dispute

[16] The essence of the dispute concerns the manner in which the Minister and the Commission see their respective roles, responsibilities and functions, in particular, in the dismissal of a magistrate on grounds of misconduct. The Commission contend that the provisions of section 26(17)(11)[7] read with section

[7] See para [22] *infra.*

21(3)(a)[8] are mandatory. It has been consistent in it disputing the Minister's contentions that section 13(1) confers on the Minister the power to hold a re-hearing of the inquiry or to review the findings of the Commission, or that it was the cause of the delay in reaching finality of the matter. It contends, as it has done from the beginning, that following its recommendation that the Magistrate who has been found guilty of misconduct must be dismissed, the Minister has no discretion but must dismiss the Magistrate. In this case the Minister had failed to carry out the Commission's recommendation, hence the approach to the High Court for an order compelling her to do so.

[17] The contention advanced on behalf of the Minister is that section 21(3)(a)[9] requires her to apply her mind to the matter to determine whether or not the Magistrate is guilty of the allegations of misconduct for which she was charged. Accordingly, the Minister is entitled to re-consider the charges against the Magistrate before agreeing to dismiss her. Her role is not a purely mechanical one, to simply rubber–stamp the recommendation of the Commission but to actively participate in the decision whether the magistrate should be dismissed or not. That is why the Commission is required to submit, together with its recommendation, the record of its proceedings at the investigation, and all comments and representations made in terms of section 26(11)(b)[10], (14)[11] or

[8] See para [22] *infra.*
[9] See para [22] *infra.*
[10] See para [26] *infra..*
[11] Section 26(14) provides –

> "A magistrate found guilty of misconduct who feels aggrieved by the finding of the presiding officer may, within 14 days of receipt of a copy of the record, statement, reasons and recommendation in terms of subsection 13, make written representations to the Commission, and must, when so making representations, also transmit a copy thereof to the presiding officer."

(15)[12], as well as all aggravating or mitigating factors. While the Act does not expressly authorise her to conduct an investigation to determine whether or not to agree with the Commission's recommendation, there is no express prohibition against the Minister from doing so in order to satisfy herself "about the lawfulness, validity and regularity of the recommendation". This line of thinking explains why the Minister took it upon herself to grant the Magistrate an interview on 25 April 2008, unilaterally, and in the absence of the Commission, to afford the Magistrate an opportunity to make representations to her.

[18] Citing the decision in *Masetlha v President of the Republic of South Africa and Another*[13] (*Masetlha*) as authority, it was argued that in terms of the common law, whenever a statute expressly confers powers on the executive authority to appoint a public functionary but is silent or ambiguous as to the dismissal of such functionary, the power to appoint necessarily implies the power to dismiss. The proposition advanced was that inasmuch as section 13(1) of the Act confers the power to appoint magistrates on the Minister, it follows that she is also clothed with the power to make the decision to dismiss them.

[19] In light of the above, the issue before this Court is to determine the proper demarcation of the roles, powers, responsibilities and functions of the Minister on the one hand and the Commission's on the other. It will accordingly be convenient

[12] Section 26(15) states –

"On receipt of a copy of the representations in terms of subsection (14), the presiding officer must promptly furnish the Commission with his or her comments thereon."

[13] 2008 (1) BCLR (CC) 1.

to examine the dispute against the background of its legislative and constitutional setting.

The statutory and constitutional setting

[20] The purpose of the Act is reflected in its preamble as being –

> "... to provide for the establishment, objects, functions and constitution of a Magistrates Commission; to provide for the establishment of a magistracy outside of the Public Service; to further regulate the appointment, qualifications, remuneration and other conditions of service of, and retirement and vacation of office by magistrates; ..."

The establishment of the magistracy outside of the Public Service is consistent with and is in furtherance of the principle of the independence of the judiciary which is enshrined in Article 78 of the Namibian Constitution.[14] The Act came about following the judgment of this Court in *Mostert v Minister of Justice* 2003 NR 11 (SC) (*Mostert*) wherein it was held, in effect, that the pre-independence situation regarding the power to appoint, transfer and dismiss magistrates, which had been vested in the Minister, has been removed. This change ensures that the independence of the judiciary, in this case the institution of the magistracy, is enhanced and brought into line with the Constitutional ideal. As was held by Chaskalson CJ in *Van Rooyen and others v The State and Others*, 2002(5) SA 246 (ZACC/2002/8) (*Van Rooyen*), "[j]udicial officers must act independently and

[14] Article 78(2) of the Constitution on Namibia provides that courts shall be independent, subject only to the Constitution and the Law. See also *Mostert v Minister of Justice* 2003 NR 11 (SC).

impartially in the discharge of their duties."[15] In *De Lange v Smuts NO and Others*, 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) O'Regan J, expanding on the same theme, points out that the courts in which magistrates hold office must exhibit institutional independence. That involves independence in the relationship between the courts and other arms of government.[16]

[21] In assessing institutional independence, however, it would be wise to heed the cautionary remarks of Chaskalson CJ in the *Van Rooyen*[17] matter referred to by Strydom CJ, in *Mostert* that –

> "Bearing in mind the diversity of our society this .... injunction is of particular importance .... The well informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts. Professor Tribe's comment on the separation of powers ... seems especially relevant in this regard:
>
> > 'What counts is not any abstract theory of separation of powers, but the actual separation of powers "operationally defined by the Constitution". Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our constitution's structure.'

[15] At paragraph 31.
[16] At paragraph 69.
[17] At p. 273 C-D

> This comment seems to be particularly appropriate when considering what the objective observer might conclude about the independence of the magistracy."

[22] Namibia is a constitutional democracy that upholds the doctrine of separation of powers[18] the rule of law[19] and the independence of the judiciary[20]. These principles presuppose a culture of mutual respect between the Executive, the Legislature and the Judiciary. Given the relationship between the judiciary and the Minister, she would be especially expected to accord such assistance as the judiciary might require to protect its independence, dignity and effectiveness.[21] It follows that the importance of treading carefully when dealing with the respective roles, powers and functions of the arms of the State, particularly in so far as they relate to and interact with one another cannot be over-emphasized. In this case, the Commission is not the judiciary but it is charged with specific functions in relation to the magistracy, an important part of the judiciary, to enhance and maintain its independence and effectiveness. The role and functions allocated to the Minister by the Constitution and any other law, particularly in so far as they have a bearing on the independence, dignity and effectiveness of the judiciary must accordingly be strictly complied with. Likewise, the functions and role of the Commission, in so far as they have a bearing on the judiciary's independence, dignity and effectiveness, must not be compromised.

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[18] See Article 1(3) of the Constitution.
[19] See Article 1.
[20] See Article 78(2).
[21] Article 78(3) of the Constitution states – "No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to this Constitution or any other law."

[23] The Commission is established pursuant to the provisions of section 2[22] of the Act. Section 3 provides that the objects of the Commission are –

> "(a) ... to ensure that the **appointment**, promotion, transfer **or dismissal** of, or disciplinary steps against magistrates take place without favour or prejudice ... (the emphasis is mine);
>
> (b) ... to ensure that no influencing or victimization of magistrates takes place; ..."

[24] Section 13 provides that –

> "(1) The Minister may, on the recommendation of the Commission but subject to subsection (2), appoint as many magistrates as there are posts on the permanent establishment of the magistracy.
>
> (2) No person may be appointed under subsection (1) as a magistrate unless such person –
>
> (a) ...
> (b) ...
> (c) is certified by the Commission to be in all respects suitable for appointment as a magistrate.
>
> (3) The appointment of every magistrate must be effected on such contract of employment, not being inconsistent with this Act, as the Minister may approve on the recommendation of the Commission."

[22] Section 2 provides: "There is established a commission, to be known as the Magistrates Commission, with the powers and duties conferred or imposed on the Commission by or under this Act or any other law."

[25] Section 21(3) states -

"If the Commission –

(a) In terms of section 26(17)(ii) recommends to the Minister that a magistrate be dismissed on the ground of misconduct; or

(b) ...

the Minister must dismiss the magistrate from office."

[26] Section 26(17) provides –

"If, after consideration of –

(a) the record of the proceedings at the investigation (including the finding and recommendation of the presiding officer) and all comments and representations made in terms of 11(b), (14) or (15), if any, as well as all aggravating or mitigating factors; or

(b) where applicable, any representations made under subsection (3)(a),

the Commission is satisfied that a magistrate found guilty of misconduct ... is in fact guilty of misconduct and that by reason of the nature of the misconduct in question that magistrate is no longer fit to hold office, the Commission must –

(i) notify the magistrate in writing of its decision and afford him or her an opportunity to resign within 14 days of receipt of the notice; and

(ii) if that magistrate refuses or fails to resign within the period mentioned in paragraph (i), make a written recommendation to the

> Minister that the magistrate be dismissed from office in terms of section 21(3)(a) and submit, together with the recommendation, such record, comments, representations and other relevant documents to the Minister."

[27] The respective roles of the Minister and the Commission can be determined on a proper interpretation of the words "may" and "must" as used in sections 13 and 21(3)(a). In terms of what is commonly referred to as the cardinal rule of interpretation, where the words of a statute are clear, they must be given their ordinary, literal and grammatical meaning unless it is apparent that such an interpretation would lead to manifest absurdity, inconsistency or hardship or would be contrary to the intention of the legislature. In that instance, "... there is no room for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in the statute".[23]

[28] I proceed to apply the interpretive rule to the words of the statute. Section 13 provides for the appointment of magistrates. The recommendation or certification of the Commission is a condition precedent to the appointment of a magistrate by the Minister. The provision then clothes the Minister with a discretion through the use of the phrase “may appoint”. But the power to appoint in section 13, which is discretionary and subject to the Commission’s recommendation, in no way implies a similar discretion when the Minister is required to dismiss a magistrate on the grounds of misconduct. Section 21(3)(a) provides that on a recommendation by the Commission that the magistrate found guilty of

[23] Per Scott L.J. in *Croxford v Universal Insurance Co. Ltd* [1936] 2 K.B. 253 at 281.

misconduct be dismissed, the Minister **must** dismiss the magistrate from office. The words are, in my view, clear and unambiguous and should therefore be given their simple ordinary meaning. In its most basic meaning, the word **must** is obligatory and does not give the Minister a choice or a discretion not to dismiss.

[29] It is clear that the process established in the Act takes the decision to dismiss a magistrate out of the hands of the Minister. Her view that she has to, as it were, "rehear" the inquiry is misconceived and has no basis at all in law. She is not called upon to ”concur" or otherwise with the Commission’s recommendation. Removing this power from the Minister is consistent with the reasoning in *Mostert* and is in tune with the Constitutional ideal of judicial independence. It follows therefore that the power to determine whether a magistrate’s conduct constitutes a ground for dismissal now resides, in the first instance with the Commission. An appeal, at the instance of the aggrieved magistrate, lies to the High Court.

[30] The power of the Minister in terms of section 21(3) is very narrow. She does not have the power to disagree with the determination by the Commission and the High Court on the substantive question whether there are grounds for the removal of the Magistrate. That is an issue reserved first for the Commission and then the court. Her role is only to make sure that the decision referred to her is indeed a decision of the Commission. In order to perform this narrow power, the Act requires that the record, reasons, representations and comments are forwarded to her. The view that section 21(3)(a) provides for a dual decision-making process was accordingly correctly rejected by the High Court. Given that one of the tasks

of the Minister is to uphold the independence and integrity of the courts, she should exercise the powers conferred upon her by section 21(3) promptly and efficiently. In this she has failed.

[31] It is moreover not correct that this is an instance where a statute, having expressly conferred powers on the executive authority to appoint a public functionary, is silent or ambiguous as to the dismissal of such functionary. Invoking the decision in *Masetlha* is inappropriate; that case is clearly distinguishable on the facts. The Court in that case was dealing with a challenge to the dismissal by the President of the Republic of South Africa of the Director-General of the National Intelligence Agency. It was contended on behalf of the Director-General that, whilst the President had the power to appoint the public functionary, he did not have the power to dismiss him in terms of the Constitution. The Court however, held, by a majority, that the President indeed has the power to appoint[24] and then proceeded to read in the power to terminate the employment of the applicant in terms of section 209 of the Constitution read with section 3 of the Intelligence Services Act. The position here is different. In this case there is no silence or ambiguity of the legislation in providing for the dismissal of a public functionary. The Act states explicitly how the dismissal should take place, namely, that on the recommendation of the Commission to that effect, the Minister **must** dismiss the magistrate. The Court is therefore not called upon to read into the words of the Act an implied power to dismiss.

[24] Section 209(2) of the South African Constitution provides as follows:

> "The President as head of the national executive must appoint a woman or a man as head of each intelligence service established in terms of subsection (1), and must either assume political responsibility for the control and direction of any of those services, or designate a member of the Cabinet to assume that responsibility."

[32] I am accordingly unpersuaded that the judgment and orders given by the High Court are assailable. The Minister's appeal accordingly falls to be dismissed.

Order

[33] The appeal is dismissed.

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LANGA, AJA

I concur

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STRYDOM, AJA

I concur

_____
O'REGAN, AJA

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