**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION)**

Case No.: 1371/2000
Date delivered:

In the matter between

**N J NTSWAHLANA AND 252 OTHERS** Applicants

and

**THE CHAIRMAN OF THE WHITE COMMISSION** First Respondent

**THE MINISTER OF SAFETY AND SECURITY** Second Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** Third Respondent

**GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA** Fourth Respondent

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**J U D G M E N T**

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**LEACH, J:**

On 1 February 1995, the President appointed a commission in terms of s. 236 (6) of the Interim Constitution, Act No. 200 of 1993. Consisting of six persons with Mr Acting Justice Browde as chairperson, this commission was empowered by Government Notice R207 of 10 February 1995:

> "(to review) any of the following matters which occurred **between 27 April 1993 and 30 September 1994** in respect of any person or class of persons in the former public services of the RSA, the TBVC States and the Self-governing Territories as well as the present Public Service:
>
> - ► *The conclusion or amendment of a contract.*
> - ► *Any appointment or promotion.*
> - ► *The award of any term of condition of service or other benefit.*

> Should the Commission find that any action of the sort indicated above was not proper or justifiable in the circumstances of the case, it may reverse or alter the contract, appointment, promotion or award."

In March 1996, Mr Acting Justice Browde was replaced as chairman of this commission by the first respondent, a judge of the Ciskei Provincial Division of the High Court, and the commission thereafter became commonly known as "the White Commission". For convenience, I shall merely refer to it as "the Commission".

On 26 July 1995, at a time when the Commission was still under the chairpersonship of Mr Acting Justice Browde, the second respondent, the Minister for Safety and Security, complained to it about alleged irregular promotions in the various police agencies, including the Ciskeian Police, which had since been rationalised into the South African Police Services.

The 253 applicants in this case are all former members of the Ciskei Police who became members of the South African Police Services upon the re-incorporation of Ciskei into South Africa. Just before the merger of the two police forces, 784 members of the Ciskeian police, including all the applicants, received promotions and, upon the merger of the two services almost immediately thereafter, therefore became members of the South African Police Services at higher ranks than those they had been holding shortly before. Their promotions were considered as possibly being irregular and were investigated by the Commission pursuant to the Second Respondent's complaint. On 23 June 1998 the

investigation culminated in a hearing into these allegedly irregular promotions before the Commission under the chairpersonship of the first respondent at the Osner Hotel in East London, it being described in the documents as "hearing no. 144". The proceedings concluded with a finding that a large number of former members of the Ciskeian Police, including the present 253 applicants, had been improperly promoted shortly before amalgamation of the two police services. In terms of the powers bestowed upon it (quoted above) the Commission set aside the promotions although, as I understand the position, it in fact directed the promotions to be effective from a later date (whether it acted within its powers in doing so may be somewhat questionable, but it is not necessary to deal with that issue in this judgment).

Although the Commission's findings are dated 2 July 1998, the respondents were only informed of the decision against them some 18 months later, an aspect to which I shall return later in this judgment. In any event, pursuant to this decision the applicants, in due course, instituted these proceedings by way of a notice of motion dated 27 October 2000. The relief they sought was amended at the hearing (without opposition from the respondents) and the notice of motion, as amended, reads as follows:

> "1. Declaring the provisions of Section 236(6)(b) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) unconstitutional, invalid and of no force and effect;
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> 2. Declaring the appointment of Judge White as the chairperson and a member of the First Respondent unconstitutional, invalid and of no force and effect;
>
> 3. Declaring the decision of the Second Respondent, referring the matter of the

promotion of the Applicants to the First Respondent an unfair labour practice, unconstitutional and invalid;

4. Reviewing and setting aside the decision of the First Respondent in Hearing 144, finding the promotions of the Applicants irregular ……;

5. Interdicting and restraining the Second and Fourth Respondents from implementing the aforesaid decision of the First Respondent;

6. Directing the Respondents to pay the costs of this application jointly and severally the one paying the other to be absolved."

The constitutional issues raised by the relief sought in prayers 1, 2 and 3 quoted above are certainly interesting, particularly in the light of the judgment of the Constitutional Court in *South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (CC). However, it is now well established that a court should only decide constitutional issues where they are necessarily determinative of a case under consideration and that, where it is possible to decide a case without reaching a constitutional issue, that is the course which should be followed – see *Greathead v S.A. Commercial Catering & Allied Workers Union* 2001 (3) SA 464 (SCA) at 468 B – C and the cases there cited. In my view, for the reasons set out below, the present case can be decided without attempting to resolve the constitutional issues which were raised in argument and upon which no more need therefore be said.

I accordingly turn to consider the relief set out in prayer 4 of the notice of motion, namely, whether the first respondent's decision against the applicants should be reviewed and set aside. Before dealing with the merits of the review, it is necessary at the outset to consider a number of *in limine* defences raised by the

respondents in respect of the review.

Firstly, it was contended that the applicants had made themselves guilty of an unreasonable delay in instituting these proceedings and, relying upon the rule enunciated in cases such as *Wolgroeiers Afslaers v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) at 39 to 41 and *Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkomissie* 1986 (2) SA 57 (A) at 86 to the effect that a court may refuse to entertain a review after an unreasonable delay, the respondents submitted that this Court should refuse to consider the merits of the review.

The two principal reasons for a court having the power to refuse to consider a review are that an unreasonable delay may cause prejudice to the other parties and that it is both desirable and important in respect of judicial and administrative decisions for finality to be reached within a reasonable time – see *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 798. In considering whether to debar a review because of delay, a court is called upon to conduct two enquiries – firstly, whether, in the light of all the relevant circumstances, the lapse of time was unreasonable and, secondly, if the delay is found to have been unreasonable, whether in the light of all the relevant circumstances it should be condoned. The first enquiry is purely factual while the second entails the exercise of a judicial discretion – see *Liberty Life Association of Africa v Kachelhoffer NO & Others* 2001 (3) SA 1094 (C) at 1112

D – F and the cases there cited. Of course, it is only necessary to consider the question of condonation once the Court is persuaded that the delay in bringing proceedings has been unreasonable and it is therefore necessary to deal, firstly, with whether there has been such a delay.

In the present case, although the second respondent complained to the Commission on 26 July 1995, it was only after the lapse of some three years that the Commission sat at the Osner Hotel in East London on 23 June 1998. During the course of this period, the members of the police about whom the second respondent had complained had continued working in their positions of elevated rank. The Commission reached its finding and took its decision to effectively demote the respondents on 2 July 1998. Almost three weeks elapsed before the first respondent wrote to the National Commissioner of the South African Police on 22 July 1998, enclosing a copy of the findings together with letters addressed to the respondents informing them of the findings, and asking if the National Commissioner would ensure that the respondents received such letters. Notwithstanding this request, more than a year passed before the respondents were ultimately informed of their demotions, although precisely when this occurred is not clear. In his founding affidavit, the first applicant stated that the findings were only brought to the respondents' attention in "late 1999". However, in proof of this averment he attached a letter addressed to one of his co-applicants (one N Nkamane) in which the latter was informed of the Commission's adverse finding against him and was called upon to make representations against the decision to revoke his promotion within 21 days.

Although certain other documents dated late 1999 are attached to this letter (the effect of which was to inform him that due to his irregular promotion he had been overpaid and that such overpayments would be recovered from him) the letter is dated 13 January 2000 and, consequently, it seems that it was only early in the year 2000 that Nkamane became aware of the decision that the Commission had been taken against.

Be that as it may, the first applicant described the events which occurred after the finding had been conveyed to the applicants as follows:

> "We then struggled to get a copy of the finding. At that stage the First Respondent had completed its work and it had no office. We managed to get a breakthrough when our Counsel approached the offices of Judge White in Bisho wherein he was given a telephone number to call in Pretoria. It was then another struggle to have the proceedings transcribed. In the circumstances we did everything in our power to have this application expedited. The delay was caused by factors beyond our power. In the premises I say that in view of the circumstances of this case the delay in instituting these proceedings is not unreasonable . . . ".

In opposing the application, the respondents relied solely upon the answering affidavit of the first respondent who merely stated that he had no personal knowledge of these allegations. Terse though they may be, the first applicant's above allegations must therefore be regarded as undisputed, even if we have been left somewhat in the dark as to when the various steps were taken and the record of the proceedings before the Commission eventually came to hand.

In the course of argument, counsel for the respondents submitted that there was no reason why the applicants could not have launched this application in terms of

Rule 53 shortly after they had been notified of the findings. However Rule 53 (2) requires the notice of motion in a review to be supported by affidavits setting out the grounds of review as well as the facts and circumstances upon which reliance is placed to have the decision or proceedings set aside or corrected. It is difficult to envisage how it would have been possible for the applicants to have complied with this sub-rule until such time as they were in possession of the record and the Commission's findings. Although the applicants are somewhat vague as to when the findings came to hand, for the reasons set out below they could only have received the record after 5 May 2000. As it is also clear that they only saw the findings of the Commission after some delay, there accordingly seems to be no merit in the argument that the applicants were in a position to launch proceedings under Rule 53 shortly after the decision of the Commission had come to their attention.

It was further submitted by the respondents that the applicants could have contacted the National Commissioner of Police for the information they sought as soon as they received the letters in which they were informed of the decision against them. However this was not an issue raised by the respondents in opposing the application and, if it had been raised, the applicants may well have had an answer thereto. It is interesting to note that in his letter of 22 July 1998, the first respondent asked the National Commissioner of the South African Police to make the full text of the finding available to the members affected by its decision should they wish to see it. In the letter addressed to Nkamane informing him of the decision, no reference is made to a copy of the findings

being available if he wished to see it and one must presume that that was also the case for the other applicants. The failure to inform the applicants of the availability of a copy of the finding should they require it might well be the ready explanation for them not having sought this information but, as I have said, the issue is not one raised on the papers and no more need to be said about it.

What does appear in the papers is the unchallenged allegation by the first applicant that the applicants had done everything in their power to expedite the application and that they had struggled to have the proceedings transcribed. Although, as I have said, the applicants have failed to clearly spell out the precise history of events from the time they were first informed of the decision until the institution of these proceedings 10 months later, it is of some importance to note that the transcriber's certificate of the proceedings before the Commission is dated 5 May 2000, from which it can be inferred that the record only became available to the applicants on a date thereafter, a factor relevant to whether there was an unreasonable delay before proceedings were launched in October 2000.

What is a reasonable time in any given case depends, of course, upon the peculiar facts and circumstances of that particular case and, as was pointed out by Hefer JA in the *Setsokosane* case, *supra* at 86 G, little can be achieved by having regard to the circumstances of other cases. In considering the issue in the *Radebe* case, *supra* at 799 Booysen J (in a passage, the first two paragraphs of which were referred to with approval in *Liberty Life Association of Africa v*

*Kachelhoffer NO & Others* 2001 (3) SA 1094 (C) at 1112 G – 1113 A) said the following:

> "When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigation (*Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1192); to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.
>
> When considering whether the time taken to prepare the necessary papers was reasonable or unreasonable, allowances have to be made for the differences in skill and ability between various attorneys and advocates.
>
> It must furthermore be borne in mind that no time has in fact been laid down for the institution of such proceedings and it cannot be expected of a litigant or his legal representatives that they should act in an overhasty manner, particularly where the opposing party or parties have been notified timeously of the fact that review proceedings were in the offing. (*Setsokosane's* case, *supra* at 87G-H.)"

*In casu*, of course, it was a wise and reasonable caution for all the applicants to have joined together in these proceedings rather than them launching a vast array of individual applications. The necessity to obtain instructions from applicants who are stationed at different places and for the applicants to then agree upon a common strategy relating to the bringing of an application and the provision of funds to do so, is likely to have led to some delay. Bearing in mind that the record of the proceedings could only have come to hand, at the earliest, some 5 months or so before the proceedings were instituted and that advice from busy practitioners would presumably then have had to be obtained, and taking account of the factors mentioned in the *Radebe* case and the first applicant's

unchallenged allegation that the applicants had done everything in their power to have the application expedited, I am not persuaded that it can be said that there was an unreasonable delay on the part of the applicants from when they heard of the decision given against them until they launched these proceedings in October 2000.

I should mention that the first respondent, in contending that the applicants ought to be non-suited for inordinately delaying this application, submitted that the respondents had been caused considerable prejudice by the delay as the Commission had fulfilled its functions and ceased to operate during October 1998, that certain members of the Commission had since been elevated to the Bench in various divisions around the country, that certain officers of the Commission, including Brigadier Pienaar who had led the evidence against the applicants, had since retired and that it would therefore be logistically impossible to reopen the hearings without huge financial obligations being incurred. These factors, however, appear to me to be relevant only to the question of whether the delay should be condoned, an enquiry which, as I have said, only has to be addressed once this Court has determined that the delay was unreasonable. As I have concluded that it was not, the question of prejudice and condonation therefore do not arise. In my view, for the reasons set out above, there is no merit in this first objection *in limine*.

A second objection *in limine* raised by the respondents is the contention that

although the first applicant is properly before Court, the remaining 252 applicants have not joined the application in accordance with the Rules and are accordingly not entitled to relief. A list of the names of the 2nd to 253rd applicants is annexed to the first applicant's founding affidavit as annexure "A". The notice of motion reflects the matter as being one between the first applicant "**and the 252 whose names appear in annexure "A" hereto**" while, in his founding affidavit, the first applicant states that he has been "**duly authorised by the other Applicants to dispose to this affidavit for and on their behalf as well in support of an application brought by us jointly**".

It was argued on behalf of the respondents that each applicant should have filed a proper supporting affidavit setting out his or her name, occupation, place of residence and place of business as required by the Rules. As the 2nd to 253rd applicants had failed to place such affidavits before court, relying upon authorities such as *Kayamandi Town Committee v Mkhwaso & Others* 1991 (2) SA 630 (C) at 634H, respondents' counsel argued that their failure to do so would result in (a) this Court being unable to give an effective judgment either for or against them, and (b) the respondents being unable to execute in the event of them obtaining a costs order in their favour.

The simple answer to this is that the names of the applicants are reflected in annexure "A" and any further details needed to identity them can, if necessary, be gleaned from the record of the proceedings before the Commission which are

the subject of this review, the applicants being those persons whose names appear in annexure "A" and who were summoned to appear before the Commission which in turn made an adverse finding against them. It hardly lies in the mouth of the chairman of the Commission to say that he cannot identify the persons against whom he has made the decision which is the subject of these proceedings. The applicants can therefore clearly be identified by reading the annexure to the notice of motion with the record of the hearing before the Commission and its findings, and it would seem to me to be a wholly unnecessary exercise for each and every one of them to have to file a separate affidavit setting out his or her personal details and recording his or her support for the proceedings. In my view, there is there accordingly no merit in this second objection *in limine*.

A third objection *in limine* which has to be considered, but which was not taken on the papers, has as its *fons et origo* in s. 25 (1) of the Supreme Court Act 59 of 1959 which reads as follows:

> "s. 25 (1) Notwithstanding anything to the contrary in any law contained, no summons or subpoena against the Chief Justice, a judge of appeal or any other judge of the Supreme Court shall in any civil action be issued out of any court except with the consent of that court: Provided that no such summons or subpoena shall be issued out of an inferior court unless the provincial division which has jurisdiction to hear and determine an appeal in a civil action from such inferior court, has consented to the issuing thereof."

Respondents' counsel submitted that the requisite leave to sue the first respondent had not been obtained and that the applicants were accordingly precluded from proceeding against the first respondent. As against that, Mr *Gauntlett* argued for the applicants that the issue was not live for adjudication

and, stating that all lawyers “learn at our judicial mother’s knee” (I quote from counsel’s argument) that a litigant should set out his case in his papers, he relied upon authorities such as *Administrator Transvaal & Others v Theletsane & Others* 1991 (2) SA 192 (A) at 196 – 197 in submitting that the failure to raise the issue in the papers was fatal, that this Court was therefore not entitled to speculate on whether the necessary consent had been obtained and that, indeed, it would be improper to take this issue into account.

As the question of the alleged failure to obtain consent was not canvassed in the papers, I my *prima facie* is view that Mr *Gauntlett* is probably correct in his contention that the respondents are precluded from relying thereon. However, even if I am incorrect in that conclusion, and even if adopting a robust, common sense approach one (as counsel for the respondents urged us to do) this Court could find that consent had not been obtained, the provisions of s. 25 (1), in my opinion, do not debar the matter proceeding.

Although there do not appear to be any reported previous decisions dealing with s. 25 (1), I agree with the observation of the learned author Erasmus in his work ***Superior Court Practice*** at A1 – 76 that it applies in the case of the issue of a summons or subpoena against a judge either in his personal capacity or in his capacity as a judicial officer i.e. where the summons or subpoena has regard to a matter which relates to the judge’s private affairs or to a matter in which the judge had acted in his judicial capacity. In the present case, however, the

proceedings relate neither to the first respondent's private affairs nor to a matter in which he had acted in his judicial capacity. Rather, the first respondent has been cited in his capacity as chairman and representative of the Commission and it is in that capacity, and in no other, that he was joined. There is therefore no merit in the suggestion that it was necessary to obtain leave to sue the first respondent under s. 25 (1) before proceedings could be instituted.

Having dealt with the respondents' opening fusillade of points *in* limine,I turn to deal with the merits of the review of the Commission's decision. Once more, although the parties, canvassed a wide range of points relevant to this issue, most of them do not have to be considered as the matter can be finally disposed of on a relatively narrow basis.

As a starting point, it is useful to take account of the relevant principles applicable to reviews of this nature. The incorporation of a right to administrative justice in the Constitution has radically changed the setting within which administrative law operates in South Africa – see *Fedsure Life Assurance Ltd. & Others v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 458 (CC) at para. [32] and *Pharmaceutical Manufacturers Association of S.A. & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 677 (CC) at 692 (E) para. 33 where Chaskalson P (as he then was) said:

> "33. Control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common-law

> constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts."

In the light of our present Constitution, in order for there to be a judicial review in the High Court it is accordingly necessary for the conduct to which objection is taken to constitute "administrative action" as envisaged in cases such as *Pennington v Friedgood & Others* 2002 (1) SA 251 (C) and the authorities there mentioned. (I should mention that the parties appeared to be *ad idem* that the Commission's decision constituted administrative action in this sense, and it was not suggested that the decision was not reviewable).

As s. 33 (1) of the Constitution provides for every person to have the right to administrative action which is "lawful, reasonable and procedurally fair" the principles and procedures which are adopted must in the particular set of circumstances in issue be reasonable, right, just and fair – *cf. Van Huyssteen & Others in NO v Minister of Environmental Affairs and Tourism & Others* 1996 (1) SA 283 (C) at 305 C – D and *Maharaj v Chairman, Liquor Board* 1997 (1) SA 273 (N) at 277 G (in which latter decision Nicholson J went on to state that the right to fair administrative action is more than just the application of the *audi alteram partem and nemo iudex in sua causa* rules). Somewhat understandably, the Courts to date have been somewhat loath to attempt an all-encompassing definition of what constitutes procedural fairness and have left the issue open to

be determined according to the circumstances of each particular case – see for e.g. *Janse van Rensburg NO v Minister of Trade and Industry* 2001 (1) SA 29 (CC) at 41 – 42 para. [24] – but in deciding the issue, the impact of the decision on those affected by it appears to be a factor to which one should have regard in considering the question of procedural fairness – see: *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others* 2001 (7) BCLR 652 (CC) at 680A para [102]. As the Commission's finding led to the applicants facing a reduction both in rank and salary and the prospect of repaying salary already received, it hardly needs to be said that the decision was one having far-reaching adverse consequence for them.

Ultimately, it seems to me, the Court is called upon to make a value judgment in the particular circumstances of a case on whether the procedures which were followed and the decision which was arrived at can be construed as having been reasonable, fair and just. Bearing that in mind, I turn to deal with the conduct of the proceedings before the Commission at the Osner Hotel on 23 June 1998.

One Brigadier Pienaar, who had investigated the complaint, appeared to present his findings and, in effect, to act as prosecutor. He had prepared a schedule, handed in as exhibit "D", in which he had recorded the names and other details of 295 former members of the Ciskeian Police (including all the present applicants) whose promotions he contended had been irregular. This schedule reflected each member's name, place of station, academic qualifications, rank

before the alleged irregular promotion, rank after the alleged irregular promotion as well as the date of the alleged irregular promotion and the earliest date when promotion to such rank could validly have taken place.

The matter then proceeded, with Brigadier Pienaar explaining to the Commission how promotions were dependent upon both educational qualifications and actual service as a member of the police but that, in certain instances, even if a member lacked the necessary educational qualification, the Ciskeian Commissioner of Police had been authorised to effect a promotion in a case of exceptional proficiency or special consideration. In explaining how he had investigated the matter, he went on to say:

> "The personal files of 784 members were perused. All these files were taken over by the South African Police Service when the police agencies amalgamated, they were stored with personal files of members of the former South African Police. Apart from personal files, computer printouts were also compared to ascertain, that the personal particulars and dates of promotion regarding the promotion of non-commissioned officers were correct. It was significant that almost no documentation on promotion procedures and evaluation reports was found on any of the files after 1992. At a certain stage after amalgamation all the files in which the routine documentation was filed, were transferred to provincial head office of the South African Police Service at Port Elizabeth. All the files connected to promotion were also scrutinised, and apart from the memoranda for the approval of promotions and a few evaluation reports, no documentation could be tracked down, to reveal which procedure had been followed when a member was considered for promotions."

After Pienaar's opening address, although counsel for the members whose names are reflected in exhibit "D" (junior counsel who appeared for the applicants in the proceedings before us) was not called upon to admit the correctness of any of the information set out in that schedule, he was asked if he

had anything to say. In response, he informed the Commission that he had not been able to discuss the matter with all of his clients but that he sought an adjournment to consult as it would “speed up matters” if he was able to admit certain of the information set out in exhibit “D”. The Commission then adjourned but, after consulting it seems with but a few of his clients, counsel stated that save for a few entries, he was unable to confirm that the information set out in exhibit “D” was correct. He went on to submit that unless there was evidence to the effect that his clients could not have been promoted due to exceptional proficiency or special consideration, there could not be a finding against them even if they lacked the necessary educational qualifications.

After these preliminaries, Pienaar again addressed the Commission. He did not seek to call any witnesses but, rather, went through exhibit “D” stating as fact the educational qualifications the various persons reflected thereon had achieved. He also informed the Commission that he had subsequently ascertained that certain of the information reflected in the exhibit was incorrect, and drew attention to the relevant entries in that regard. After this somewhat chaotic introduction, certain of the persons whose names were reflected in exhibit “D” were then called to testify. On doing so, they stated that the educational qualifications differed from those reflected in the exhibit. Their evidence in that regard was not challenged by Pienaar but was accepted without further ado. Having heard these witnesses, the Commission merely announced that it would consider all the evidence and hand down its finding in due course. Strangely enough, the parties were not called upon to address the Commission nor did they seek leave

to do so (an issue which was, however, not debated before this Court).

Be that as it may, it is clear from what I have set out above that the respective parties were clearly not *ad idem* on whether the information reflected in exhibit "D" was correct. It is also apparent that not all this information, gathered by Pienaar in the manner he described, was correct. Not only did Pienaar admit this at the outset by drawing the Commission's attention to a number of entries which he stated he had since ascertained were incorrect (for example where the persons concerned had subsequently handed in educational certificates reflecting a higher level of education than that that his enquiries had shown they had achieved) but it is also shown by those who testified to facts which Pienaar accepted but which are inconsistent with what had been set out in the schedule.

At the end of the day, the Commission concluded that, although the promotion of 22 of the persons reflected in exhibit "D" had in fact been regular, the promotions of the others had been irregular and had to be set aside (although, in the main, in doing so it found that such promotions had been premature and, therefore, it altered the date of the promotions to the date when those concerned could validly have been so promoted having regard to the duration of service of the various members). Leaving aside the various members in respect of whom agreement had been reached on the material background facts or who were called to testify, the Commission's reasoning in respect of the present respondents (in respect of whom no agreement was reached and who had not

testified) is as follows:

> "Advocate S.V. Notshe, on the other hand, argued that the policy which should apply to the Respondents, was the policy contained in Force Order 2 of 1991. He submitted that in terms of paragraph 8.3 thereof, the Commissioner was in effect vested with a discretion to effect what may be termed special promotions.
>
> He contended that all of the Respondents had received such special promotions and therefore were regular. We cannot agree with that submission. In our view it is improbable that the Commissioner would have waived compliance with the policy in respect of all the Respondents on the basis that all of them were exceptionally proficient in the execution of their duties or they were otherwise worthy of special consideration. Mr. Pienaar informed us that he had scrutinised all files connected with the promotion. Had there been evidence of the Commissioner granting a special promotion to any of the Respondents on those files, Mr Pienaar would have been obliged to draw that to our attention. We can safely conclude from his presentation of the evidence that no special dispensation had been granted. It may be added that if any of the Respondents were serious in their contention that they had benefitted from a special promotion, then they should have placed evidence in support of their contention before us. It appeared to us that we were asked to infer that the Commissioner exercised the discretion vested in him in terms of paragraph 8.3 of Exhibit "J". Such inference was quite clearly not the only reasonable inference to be drawn in the circumstances. In the absence of any evidence being placed before us in support of their contention, the Respondents' submission in effect required us to engage in speculation and conjecture."

It is apparent from this that the Commission reached its decision in respect of the present respondents solely upon the information Brigadier Pienaar had stated he had ascertained. Not only was Pienaar's address hearsay, but he did not testify and what he said cannot be regarded as being evidence. Rather, it amounted to no more than unsubstantiated allegations made to the Commission. If one bears in mind that certain of the information set out in respect of a number of persons reflected in exhibit "D" was incorrect (as I have already mentioned) one does not know how reliable the information relating to the present applicants may have been. But, essentially, no evidence was led by Pienaar and the Commission relied upon his untested allegations. That being so, there was in truth no evidence on record which related to the applicants who, through their

counsel, had specifically challenged Pienaar to prove any irregularity in respect of their promotions.

It was the duty of the Commission to investigate the allegations which had been made. I do not see how it can be said to have discharged that duty if no evidence was led in regard to the allegations and it contented itself by relying upon what another person said he had ascertained through his own enquiries (enquiries which have been shown to have been defective in various respects).

Moreover, the conclusion that the Commissioner of Police did not grant a special promotion to any of the respondents is also unsupportable. Pienaar did not inform the Commission that he had found no reference to any such special promotion in the files that he had scrutinised. His written exposition he handed in as annexure "A" reveals that he alleged that his scruitiny of the files he'd been able to track down had failed to show what procedure had been followed when the various members had been promoted. It was because he had made no mention of special promotions that the Commission felt that it could "safely conclude" that he had found nothing in regard to any such promotions. Even if this somewhat tortuous process of reasoning can be accepted (upon which I prefer not to volunteer comment) the fact that Pienaar may not have discovered information in regard to special promotions does not mean that none of the applicants was specially promoted, and the Commission's conclusion to the contrary is fatally flawed.

The logical person to have been subpoenaed to testify before the Commission was the Commissioner of Police who effected the promotions. After all, having been the relevant functionary who took the decisions that were the subject of the enquiry, he could have explained his actions and whether any special promotions had been made. Despite the Commission having been informed by counsel for the applicants that the Commissioner was available, he did not appear before it and it would be impermissible to speculate as to what he may have said had he been called to testify.

As is apparent from the Commission's findings, it was of the view that if the present applicants had been serious in their contention that they had benefited from special promotions they should have placed evidence in support thereof before it. The Commission appears to have placed an onus upon the applicants to show that they had been specially promoted. In my view, in doing so it misdirected itself. Not only had no evidence been led for the applicants to meet but, in order for the Commission to make the finding that it did, it was obliged to make a factual finding that the applicants' promotions had been irregular. As there was no evidence that such promotions had in fact been irregular, there was no onus, evidential or otherwise, resting upon the applicants. It was not for them to show that they had not been properly promoted. Rather it was for Pienaar to persuade the Commission that the applicants had been improperly promoted – as their counsel challenged him to do.

Then there is the Commission's finding that it was improbable that the

Commissioner of Police would have waived compliance with the policy of promotion in respect of all the applicants on the basis that they were exceptionally proficient in the execution of their duties or were otherwise worthy of special consideration. Not only was no evidence led of any irregularity in the promotions but, even if Pienaar's hearsay allegations are sufficient to engender a suspicion that not all of the applicants had been properly promoted, it is an unjustified quantum leap to then find that each and every one of their number had been irregularly promoted. A finding that there must have been improper promotions amongst a large group does not justify a finding that the entire group was irregularly promoted. While I appreciate the logistical difficulties the Commission may have been facing, it seems to me that it lost sight of its true task, namely, to investigate the irregularity or otherwise of the promotion of each and every person reflected in exhibit "D" – an important consideration if one bears in mind the substantial adverse consequences for the various individuals flowing from its decision. Accordingly, even if it is improbable that the Commissioner of Police would have waived compliance with the policy provisions in respect of all the applicants, and even if some of their number may in fact not have been properly promoted, that did not justify the Commission tarring them all with the same brush and stripping them all of their promotions. To do so is illogical, unreasonable and unfair.

Having regard to what is set out above, it seems to me that the hearing before the Commission was procedurally unfair and that its decision was unreasonable, the product of faulty reasoning and fundamentally unjust. The applicants' right

to administrative action that is lawful, reasonable and procedurally fair as enshrined in s. 33 (1) of the Constitution was therefore breached and, that being so, the Commission's decision must be reviewed and set aside. The applicants are accordingly entitled to an order as set out in paragraph 4 of the notice of motion. By the same token, the interdict sought in paragraph 5 of the amended notice of motion is relief which must follow consequent upon the granting of an order setting aside the decision taken against the applicants who are therefore entitled to the interdictory relief they seek as well. On the other hand, the setting aside of the first respondent's decision renders it unnecessary to consider the orders for declaratory relief set out in paragraphs 1, 2 and 3 of the notice of motion.

That then brings me to the question of costs. There is no reason for costs not to follow the event. Without wishing to belabour the point, it is, however, necessary to briefly say something about the position of the first respondent. Generally one would have had expected him to have merely set out the Commission's findings and left the merits of the matter in the hands of the Court. Unfortunately, the first respondent entered the lists and vigorously joined issue with the applicants. Indeed, so vigorous was his opposition that the other respondents did not file answering affidavits. In the result, although the first respondent is a public officer who has acted in a quasi-judicial capacity, there is no reason for him not to be ordered to pay the costs – *MacLean v Haasbroek NO and Others* 1957 (1) SA 464 at A at 468 – 9.

As all the respondents unsuccessfully have opposed the relief which is to be granted, the appropriate order would be to direct them to pay the costs of the application jointly and severally, the one paying the other to be absolved. In the light of the complexity and importance of the matter, this is clearly a matter in which costs of two counsel should be allowed and counsel for the respondents did not seek to contend otherwise.

The following order shall therefore issue:

(a) The decision of the first respondent in hearing 114, finding the promotions of the applicants to be irregular and setting aside such promotions, is hereby reviewed and set aside.

(b) The second and fourth respondents are interdicted and restrained from implementing the aforesaid decision of the first respondent.

(c) The respondents, jointly and severally, the one paying, the others to be absolved, are ordered to pay the applicants' costs of this application, such costs to include the costs of two counsel.

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**L.E. LEACH**

**JUDGE OF THE HIGH COURT**

**NEPGEN, J:**

I agree.

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**J.J. NEPGEN**
**JUDGE OF THE HIGH COURT**