**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

[redacted]

**26 NOVEMBER 2024** **FHD VAN OOSTEN**

**CASE NO: 28644/2024**

In the matter between

| | |
|---|---|
| **ASSOCIATION OF REGIONAL MAGISTRATES OF SOUTHERN AFRICA** | **APPLICANT** |
| and | |
| **INDEPENDENT COMMISSION FOR THE REMUNERATION OF PUBLIC OFFICE-BEARERS** | **FIRST RESPONDENT** |
| **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** | **SECOND RESPONDENT** |
| **SPEAKER OF THE NATIONAL ASSEMBLY** | **THIRD RESPONDENT** |
| **CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES** | **FOURTH RESPONDENT** |

---

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

---

**VAN OOSTEN J:**

**Introduction**

[1] In opposed matters, the question of costs, as a rule, and for a good reason, is generally determined at the tail-end of a case, after the judgment on the merits. But, where the court is required to decide costs, without a prior hearing and determination of the merits of the matter, challenges arise. One thereof, is the consideration of the merits of the matter, which have become moot, for the purpose of determining the success achieved by either party on the merits, which after all, is a decisive consideration in awarding costs. This is the steep hill I now turn to climb.

[2] This matter was enrolled for hearing on 8 August 2024, as a special motion of long duration. When the matter was assigned to me, the practice notes filed by counsel indicated that a hearing on all issues, which were briefly summarised by counsel, was envisaged, with an estimated duration of the hearing of 3 days. Some three weeks before the hearing, counsel for the applicant filed a further practice note informing the presiding judge 'of the recent developments and their possible impact on the matter and the hearing'. Counsel further indicated that the only matter now in dispute may be the question of cots.

[3] At the request of the parties a pre-hearing case management meeting was held before me, for the purpose of establishing and reaching agreement exactly which issues were to be adjudicated. Counsel for the applicant and the first respondent confirmed that the only issue in dispute was the question of costs. The applicant insisted on an order for the first respondent to pay the costs of the application, while counsel for the first respondent contended for each party to pay its own costs. The *lis* between the applicant and the second, third and fourth respondents, including costs, ceased to exist, and the applicant and the first respondent are the only remaining parties. Finally, counsel for the remaining parties agreed that no further hearing was required, and that counsel for each party would in due course file a short note on the issue of costs, primarily to avoid further costs being incurred.

[4] The notes were duly filed, and I wish to express my gratitude to counsel for succinctly setting out their arguments in the respective short notes.

**Substantial success**

[5] This brings me to a determination of the question whether the applicant has achieved substantial success regarding the relief sought in the notice of motion. The principal relief sought, in sum, is first (prayer 1), a declarator that the first respondent (the Commission) has since 2008, in making recommendations, failed to consider the role, status, duties, functions and responsibilities of Magistrates, as required by s 8(6)(d)(a)(i) of the Remuneration Act of 1997, and to publish its recommendations once a year from the 2013/2014 financial year, together with mandatory relief directing the Commission to comply with these statutory requirements in future recommendations. Second, (prayer 2) flowing consequentially upon the first, orders are sought, relevant for present purposes, directing the Commission to finalise and publish its annual recommendations concerning the salary, allowances, and benefits of Magistrates for the 2023/2024 financial year, as well as its major review of the roles, functions duties and responsibilities of Magistrates, which it has undertaken.

[6] I propose to deal with the relief sought in prayer 2, first. The appropriate point of departure, regarding substantial success, is to turn the calendar back to 15 March 2024, which is when the application was launched. The question requiring determination, is whether the applicant was entitled on that date to launch the application?

[7] The 2023/2024 annual recommendation had on that date neither been finalised nor published. The Commission had indicated in a letter dated 6 March 2024, that it intended to submit its recommendations for the 2023/2024 financial year (which ended on 31 March 2024), together with the recommendations for 2024/2025 to the President, by 30 March 2024. The inclusion of the recommendations for the 2024/2025 year, raised concerns, as the President's determination would then be valid for 2 years with the result that salaries would remain fixed for that period without the advantage of a further annual review, to which must be added that the President was only empowered to determine retrospectivity for one year. Nothing however turns on that. Past experiences concerning the inordinately long delays, and, in my view, to many, of the Commission's promises, undertakings and self-imposed deadlines not having been met, resulted in the applicant's scepticism as to the whether the undertakings that were made by the Commission would materialise, which in my view, was justified.

[8] Counsel for the Commission urged the court to consider the delays in the Commission's publication of the annual salary recommendations, in the light of factors, such as the various consultations that were required to be held with *inter alia* the Minister of Finance and the Chief Justice, who has delegated the Judges Remuneration Committee and the Lower Courts Remuneration Committee to be consulted, as well as numerous other persons and bodies, adding up to altogether 11 stakeholders. I am not satisfied that the explanation offered, is sufficient to raise any doubts that the applicant was entitled to launch the application. Although delays can certainly never be ruled out, the nature and frequency thereof in particular over extended periods, ought to be weighed up against the strategy adopted and measures implemented, if any, over a period to streamline the procedures and processes, to progressively improve effectiveness. Regarding whether any remedial measures were considered or implemented, in view of the continuous delays, the answering affidavit of the Commission is silent. The commission is a statutory body, in duty bound to make recommendations in respect of the salaries of Magistrates, in respect of which counsel for the applicant, in their heads of argument, have referred to *S v Van Rooyen* 2002 (5) SA 246 (CC) 138, where Chaskalson CJ remarked the following concerning the centrality of adequate remuneration for judicial independence:

'Adequate remuneration is an aspect of judicial independence. If judicial officers lack that security, their ability to act independently is put under strain. Moreover, if salaries are inadequate, it would be difficult to attract to the judiciary persons with the skills and integrity necessary for the discharge of the important functions exercised by the judiciary in a democracy. Thus, the requirement mentioned by Ackermann J in *De Lange v Smuts* [1998] (3) SA 785 (CC) para 70] that judicial officers must have 'a basic degree of financial security'.

[9] In the exercise and fulfilment of its functions and duties, the commission is expected, notwithstanding the substantial workload, and often scarce resources, as referred to in the answering affidavit and by counsel for the Commission, to foster a quest for excellence in the pursuit of effectiveness. Having carefully read and considered the Commission's answering affidavit, the majority of the delays in my view, exceeded the parameters of reasonableness, and I am not satisfied that the factors relied on were solely to blame for all the delays that have occurred.

[10] Counsel for the Commission submit that it was not reasonable for the applicant to bring the application. For the reasons given, I am unable to agree. Likewise, I disagree with counsel that in the event of costs order being made, the applicant's entitlement to costs should be limited to costs on the scale of an unopposed application. The application until the very end, proceeded on an opposed basis. The applicant, as I have alluded to, was justified in launching the application and has succeeded in showing substantial success. A full set of affidavits was filed, and the procedural steps taken in this application, are set out in the letter of the applicant's attorneys of record addressed to the Commission, a copy of which is attached to counsel for the applicant's note on costs. Limiting the costs awarded to the applicant to unopposed costs, in my view would be unfair and therefore inappropriate.

[11] I interpose to put certain procedural steps and other events in proper perspective: the recommendation sought was published in the Gazette on 16 May 2024, one day after the judicial case management before Wepener J was held, at which directions were issued concerning the filing of answering papers and heads of argument. The President made a determination for the two financial years, which was published on 28 May 2024, which also constitutes the date of it becoming effective.

[12] Next, the major review. The major review concept was introduced by the Commission under the chairpersonship of Moseneke J, and is intended, as stated in the Commission's report 'to review the current system for office-bearer remuneration, and to establish baselines and policy for office-bearer remuneration to serve as guidelines to the Commission when making recommendations'. The first major review was published and it was thereafter decided by the Commission that a follow-up major review was required to cover aspects which had not been dealt with in the first major review. The follow-up major review, took significantly longer than was expected by members of the applicant, on the one hand, or planned for by the Commission, on the other. Its importance to both the applicant and the Commission cannot be over-emphasised. In explaining the delay, the Commission once again places reliance on the necessity of prior consultation with numerous stakeholders, and the related arrangements in regard thereto, which the Commission concedes resulted in 'quite extensive delays'. Counsel for the applicant, in the note on costs, have set out the

chronology of events regarding the finalisation of the major review since 2015, which discloses a long and arduous road the Commission was travelling regarding the delays in finalising the major review. The major review, has now been published, and although it was not subject to a time limit, it took more than 5 years to finalise. The irresistible inference, as counsel for the applicant correctly pointed out, is that this application, and the consequent threat of a court order against it, eventually led to the Commission publishing the major review on 16 October 2024, seven months after the application was launched, and just over a month before the hearing date of this application.

[13] In conclusion, for all the above reasons, I am satisfied that the applicant has achieved substantial success regarding the relief sought in prayer 2. For that reason, the applicant is entitled to its costs, subject to the rider I am about to add.

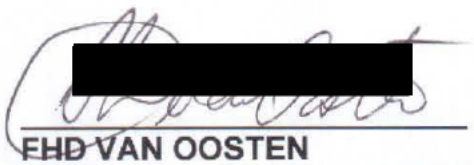
[14] Counsel for the Commission submitted the relief sought in prayer 2 became moot on 16 May 2024 and 16 October 2024, when the Commission's recommendations and the major review respectively were published. I agree, save that in my view, the relief pertaining to the Commission's recommendations, became moot on 28 May 2024, which is when the President's determination was published. In the exercise of my discretion and in fairness to the parties, I have joined the directives sought in prayer 2, for a determination of the date of mootness, which I propose to order as the cut-off date for the purpose of limiting the applicant's entitlement to costs. I have accordingly decided to award the applicant its costs regarding prayer 2, up to and including 16 October 2024. Thereafter, it follows, each party is to bear its own costs.

[15] It remains to deal with the relief sought by the applicant in prayer 1 of the notice of motion. Quite understandably so, a substantial portion of the case record as well as the heads of argument was devoted to this relief. Counsel for the applicant confirmed that the relief will not be pursued with. It is accordingly moot and a consideration of the merits of the relief, is not called for, as it has effectively been withdrawn. In regard thereto, I consider it appropriate to order each party to pay its own costs.

**Order**

[16] In the result, I make the following order:

1. The first respondent is to pay the applicant's costs relating to prayer 2 of the application, up to and including 16 October 2024, such costs to include the costs of two counsel where so employed, on scale C.
2. Regarding the remainder of the costs of the application, each party is to pay its own costs.



**FHD VAN OOSTEN**
**JUDGE OF THE HIGH COURT**

| | |
|---|---|
| ***COUNSEL FOR APPLICANT*** | ***ADV G BUDLENDER SC***<br>***ADV M DE BEER*** |
| ***APPLICANT'S ATTORNEYS*** | ***MOETI KANYANE ATTORNEYS*** |
| ***COUNSEL FOR 1ST RESPONDENT*** | ***ADV V SONI SC***<br>***ADV (MS) H RAJAH*** |
| ***1ST RESPONDENT'S ATTORNEYS*** | ***STATE ATTORNEY, CAPE TOWN*** |
| ***DATE OF JUDGMENT*** | ***26 NOVEMBER 2024*** |