



JOASA

JUDICIAL OFFICER'S ASSOCIATION OF SOUTH AFRICA



REPORT BY THE LABOUR RELATIONS COMMITTEE TO THE ANNUAL GENERAL CONFERENCE OF THE JUDICIAL OFFICERS' ASSOCIATION OF SOUTH AFRICA: 31st OCTOBER 2009

Introduction

Section 237 of the Constitution of the Republic of South Africa provides: "All constitutional obligations *must be performed diligently and without delay*".

Insofar as magistrates' remuneration and conditions of service are concerned, these constitutional obligations rest upon public functionaries and institutions like the President, the Chief Justice, the Magistrates Commission and the Independent Commission for the Remuneration of Public Office Bearers by virtue of the statutory powers and functions vested in them. These statutes, no doubt, you are familiar with and they entail such processes as consultation, recommendation and determination of remuneration after parliamentary approval.

In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*, it was held that-

"[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law".

Section 2 of the Constitution - in which this Rule of Law is rooted - states that the obligations imposed by the supreme law "*must be fulfilled*".

Thus, a functionary will have the power necessary to fulfil a function that is assigned and, naturally, the corresponding obligation for its performance.

Much of the committee's activity since our last conference was generated by issues centered on questions relating to diligence and delay in carrying out these obligations (or, in some instances, no action or response at all). Members were regularly notified of developments and copies of relevant correspondence were circulated and therefore this report will not go into great detail.

Remuneration

As you read this we do not have any rules which oblige magistrates to use their private vehicles for official journeys or which require them to structure the flexible portion of their remuneration.

What we do have is a determination which has effectively reduced the proportionate percentage of pensionable salary from 65% to 60%. This, if not corrected, means a reduced pension benefit. It also means a reduction in your remuneration (pension) in violation of section 12 (6) of the Magistrates Act, 90 of 1993, which prohibits this except by an Act of Parliament. JOASA's representations, made in November 2008, for this matter to be corrected evoked no response to this day (Judges did make successful representations which resulted in an increase in their basic salary and a decrease in their 'flexible portion' in a ratio of 72.24%/27.76% – thus widening further the gap between them and magistrates whose package is currently in the ratio of 60%/40%).

The Independent Commission recommends that magistrates, justifiably, require a pension scheme separate from the GEPPF, but fails to investigate a viable alternative; leaving this aspect in limbo.

It finds specifically that the salary gap in relation to judges is too wide and then, inexplicably, recommends that the gap should be widened. When challenged, it responds by saying that it stands by its decision and will not change it because all we want is more money and that its recommendation is based on a thorough investigation. To this day it has not retracted this finding, nor has it been explained why it made this finding in the first place and why, if it was true, it did not recommend a narrowing of the gap. Subsequent to that finding being made there has been an interim percentage adjustment which widened the gap even further. It is difficult to imagine, in the light of the fact that the Remuneration Commission has itself repeatedly been instrumental in widening the gap despite its initial finding that it was too wide, that the cumulative result of this phenomenon should not now be accepted by any reasonable person as an irresistible justification for narrowing the gap.

When asked for reasons on 22 October 2008 for its decision not to change any of its recommendations in relation to each of the submissions made by JOASA to the President concerning its First and Second Review reports, its response was: "...the submissions made by the stakeholders did not persuade the Commission to change the decision it had already made...." No one knows why it was not persuaded. Does anyone seriously think that this response is a "reason"?

In its Third Review report of 15 October 2008 (culminating in the 60% reduction referred to earlier, as determined by the President) the Chief Justice is reported as having supporting the recommendations insofar as they relate to magistrates during consultations by the IRC with him. This, after JOASA had requested the Chief Justice, during June 2008, to clarify the magistracy's position insofar as the consultation between himself and the Commission regarding magistrates' remuneration is concerned. No response was received. At a recent meeting this year, when the letter of June 2008 was raised, the Chief Justice responded by stating, in effect, that he is not concerned with magistrates' remuneration. Another letter dated 18th September 2009 relating to the same issue was handed to the outgoing Chief Justice and copies endorsed for the attention of the newly appointed Chief Justice and Ministers of Finance and Justice and Constitutional Development in the hope of facilitating the recommendations for the magistracy's remuneration within a more likely, effective framework of consensus seeking rather than (or in addition to) the already proven, futile mere making of submissions to the Remuneration Commission.

Legislation

The Magistrates Commission has resolved to support the request by JOASA to abolish the requirement of the LLB degree for appointment as magistrate of a regional division and to once again submit a recommendation to the Department of Justice and Constitutional Development to amend section 9(b) of the Magistrates' Courts Act, No. 32 of 1944.

Following representations by the magistracy to the Magistrates Commission about conflicting opinions from the State Law Adviser (one in 2004 and the other in 2009) concerning the appropriate functionary for the determination of magistrates' allowances and benefits, it resolved to approve the recommendation by the Service Conditions Committee and to refer all the relevant documentation to the Independent Commission for the Remuneration of Public Office-bearers and to the Minister of Justice and Constitutional Development

for clarity whether the Minister is legally competent to make rules governing the structuring of the remuneration packages for magistrates or whether it is the function of the Independent Remuneration Commission to make recommendations in this regard to the President after consultation with the magistracy.

The draft amendments to the Magistrates Act Regulations, particularly in relation to leave, disciplinary matters and judicial appointments and, possibly the structuring of remuneration packages and the regulation of allowances and benefits (including 'tools of trade) are most likely to take some time before they can be implemented. To us, it seems inevitable that these matters can only be resolved properly if appropriate amendments to sections 11, 12 and 16 of the Magistrates Act, 1993 were to be effected in order to resolve the confusion that has resulted in the conflicting opinions.

We recommend, therefore, that this aspect should be referred to the Education and Research Committee to facilitate JDASA's intervention in the process envisaged in the preceding paragraph and to drive that legislative process to a satisfactory conclusion. This recommendation is based primarily on the basis that, in the absence of clear, appropriate statutory empowering provisions our committee's substantive recommendations have been, as past events have shown and will continue to be, a mere 'beating of the air'.

The next phase concerning the Remuneration Commission's 2009/10 programme

Owing to the 'lateness of the hour' in the judicial public office bearers' remuneration calendar, it is most likely that the Commission has opted for another (hopefully interim) percentage adjustment. If it does not confirm this expectation of its own volition in the ensuing months, we would recommend that it should again be urged to address the outstanding issues outlined above during the current phase on the basis that the continuous widening of the gap is in direct and material conflict with its professed foundational principles.

Concluding observations

Members will draw their own conclusions on whether or not the questions raised about constitutional obligations being fulfilled with diligence and without delay are justified when considered in the context of this report. But the context is actually much wider and it encompasses the historical and contemporary perspective of political, economic and judicial experience during the course of our constitutional dispensation. This report certainly does not make happy reading, but we trust that it will stimulate a resolve

to persevere in the pursuit of right and that deliberations will result in a clear and strong mandate from members.

Thank you to our President, Vice President, NEC, Management Committee, Secretariat, the members of my committee and the members in general for your encouragement and support during a time which has not been easy for any of us.

Best wishes to you all

A handwritten signature in black ink, appearing to read 'R E Laue', with a long horizontal flourish extending to the right.

R E Laue

Chair: Labour Relations Committee: JOASA

2 October 2009