CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 91/12
[2013] ZACC 13

In the matter between:

ASSOCIATION OF REGIONAL MAGISTRATES
OF SOUTHERN AFRICA — Applicant

and

PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA — First Respondent

INDEPENDENT COMMISSION FOR THE
REMUNERATION OF PUBLIC OFFICE-BEARERS — Second Respondent

MINISTER FOR JUSTICE AND
CONSTITUTIONAL DEVELOPMENT — Third Respondent

MINISTER FOR FINANCE — Fourth Respondent

Heard on : 19 February 2013

Decided on : 23 May 2013

JUDGMENT

NKABINDE J (Mogoeng CJ, Moseneke DCJ, Froneman J, Jafta J, Khampepe J, Mhlantla AJ, Skweyiya J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] This case concerns the lawfulness of the decision of the first respondent, the President of the Republic (President), in relation to the remuneration of Regional Magistrates and Regional Court Presidents. It also implicates the constitutional principle of judicial independence.

[2] The applicant applies for confirmation of part of an order by the North Gauteng High Court, Pretoria[1] (High Court). The order set aside the President's decision to increase the annual remuneration of Regional Magistrates and Regional Court Presidents by 5% and directed that the increased remuneration was to continue to be of full force and effect until the President had taken the decision afresh.[2] The applicant also seeks conditional leave to appeal against part of the order of the High Court and asks that it be varied and replaced with an order remitting the matter to the President to enable him to invite and consider representations by members of the applicant before making the new determination. The second respondent applies for conditional leave to appeal against the decision of the High Court.

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[1] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* [2012] ZAGPPHC 186 (High Court judgment).

[2] The order of the High Court reads, in relevant part:

> "1. The first respondent's decision taken on or about the 16th November 2010 and published on 26th November 2010 wherein he increased the remuneration of Regional Magistrates and Regional Court Presidents by 5% with effect from 1 April 2010 is reviewed and set aside;
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> 2. The matter is remitted to the first respondent for reconsideration in the light of this judgment;
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> 3. The decision referred to in paragraph 1 shall continue to be of full force and effect until the first respondent has taken the decision afresh".

Parties

[3] The applicant is the Association of Regional Magistrates of Southern Africa (ARMSA or applicant), a non-profit professional association which represents over 90% of Regional Magistrates in South Africa.[3] The President did not oppose the application in this Court.[4] The second respondent is the Independent Commission for the Remuneration of Public Office-bearers (Commission), established under section 2 of the Independent Remuneration of Public Office-bearers Act[5] (Remuneration Act). The third and fourth respondents, the Minister for Justice and Constitutional Development (Minister for Justice) and the Minister for Finance (Finance Minister) respectively, are not represented before us.

Background

[4] The Commission resolved on 27 March 2010 to make recommendations for a 7% annual remuneration increase for public office-bearers[6] for the 2010/2011 financial year. In doing so, it considered the previous remuneration recommendations which included the first major review report made in 2007 and the second major review report made in 2008, which incorporated an 11% cost-of-living adjustment on the first major review.[7]

[3] See [63] below which elaborates on the expanded jurisdiction of, among others, Regional Courts.

[4] The President opposed the application and deposed to an answering affidavit in the High Court.

[5] 92 of 1997.

[6] See [19] below for the definition of "office-bearer".

[7] The review report of 2007 was not approved in that year. However, the Commission's recommendation of 2008 incorporated a further 11% cost-of-living adjustment on the 2007 review. These 2007 and 2008 reviews were approved by the President in 2008 and they provided significant changes to the pension and medical aid

[5] The Commission took into account the inflationary outlook of the Consumer Price Index (CPI) forecast by the South African Reserve Bank. Inflation was predicted to average between 5.3% in 2010 and 5.4% in 2011. In the recommendation the Commission made reference to the approach of the Department of Public Service, in terms of which an increase of CPI plus 1% was awarded. As the average CPI for 2010 was alleged to be 6% at the time, a recommended increase of an average cost-of-living adjustment, with effect from 1 April 2010, was considered sensible. A reduced percentage, the Commission reckoned, would mean that public office-bearers would fall behind the market for two consecutive years, meaning that a third major review would be required.

[6] As required under both the Judges' Remuneration and Conditions of Employment Act[8] and the Magistrates Act,[9] the Commission consulted with the Chief Justice by way of a letter dated 6 April 2010, about the recommendation it considered making to the President regarding the salaries, benefits and allowances of Judges and Magistrates.[10] It explained that the process of reviewing the remuneration of all public office-bearers for the 2010/2011 financial year was underway. It also proposed certain dates in April 2010 to meet with the Chief Justice. Proposed

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benefits of public office-bearers which were included in their total packages. The main reason for the review was due to the remuneration levels of public office-bearers not being on par with the rest of the market, nationally and internationally.

[8] Section 2 of Act 47 of 2001, as amended by the Judicial Officers (Amendment of Conditions of Service) Act 28 of 2003.

[9] Section 12 of Act 90 of 1993 (Magistrates Act).

[10] The recommendation was per the Commission's resolution at the meeting held on 27 March 2010.

2010/2011 recommendations and remuneration tables were also attached to the letter sent to the Chief Justice together with an explanatory memorandum. The letter was sent to the Magistrates Commission at the instance of the Chief Justice. Magistrates were asked to comment by 12 May 2010. The Magistrates Commission in turn forwarded the letter to ARMSA.

[7] In its comments to the Chief Justice, dated 12 May 2010, ARMSA raised an assortment of concerns in relation to the proposed 7% increase. These included an alleged lack of consultation and transparency, the annual cost-of-living increase, the retirement gratuity of the head of the Judge Presidents which exceeded that of a Regional Magistrate by more than 300%, the gap between the lowest paid Judge and the highest paid Regional Magistrate which was alleged to have widened to 20%, and a far lower contribution to the Magistrates' medical fund as compared to the contribution made to Parmed, a medical aid scheme the membership of which includes Judges and their dependants, to which other public office-bearers belong.

[8] In its letter to the Chief Justice, ARMSA maintained that its comments had been made under severe time constraints and that the comments had not been placed before the Commission. It said that the fact that legislation mandated consultation with the Chief Justice did not preclude the Commission from engaging with its members because they had vested interests in the process regarding the determination of their conditions of service. ARMSA asked for more time to make what it called "comprehensive submissions".

[9] As to the annual cost-of-living increase, ARMSA complained that the 7% increase would have resulted in public office-bearers receiving an increase of 14% over the previous two years and that they would have fallen behind for two consecutive years in comparison to public servants. To avoid embarking on a third major review process, ARMSA proposed that the Commission "should consider recommending a general 'across-the-board' costs-of-living adjustment for all public office-bearers of at least 9.5%."

[10] ARMSA mentioned further that the across-the-board adjustment recommended by the Commission was improper and that in making its 7% proposed recommendation, the Commission failed to investigate the factors set out in section 8(6)(i)[11] of the Remuneration Act, but relied on conclusions published in the first and second major review reports. ARMSA said that the position of Regional Magistrates in relation to their remuneration had deteriorated to a basic salary component equal to 51.1% of a Judge's basic salary despite the increase in responsibility and workload.

[11] The Finance Minister received the Commission's proposal on 6 April 2010. He discussed the remuneration of public office-bearers with the Chairperson of the Commission on 7 May 2010. At that meeting, the Finance Minister raised certain issues including the need for remuneration to keep track with inflation while allowing for additional increases to recognise rising productivity. The Finance Minister warned

[11] The relevant parts of section 8 are set out in [21] below.

that inflation was falling. He projected the CPI to increase at an average of 5.2% for the 2010/2011 financial year.[12] He advised the Commission that its proposals would put immense pressure on the fiscus, and asked it to take these considerations into account when formulating the report.

[12] On 8 September 2010, the President met with the Chairperson of the Commission. The purpose of the meeting was to present the Commission's annual report to the President regarding the recommended remuneration adjustment for public office-bearers for 2010/2011. The report records, inter alia, that the Commission consulted with and considered the inputs received from the Finance Minister, the Minister for Justice and the Chief Justice, before compiling the annual recommendation for the President.

[13] After the Commission presented its recommendation to the President on 8 September 2010, the President consulted with the Finance Minister. The latter advised the President that submissions made to the Commission were based on an assessment of a CPI increase of 5.2% and that a determination in excess of 5% would have negative implications for the fiscus. The Finance Minister told the President that the inflationary outlook for 2010/2011 had decreased further to 4.2% of the CPI and that the recommended 7% remuneration adjustment for all public office-bearers was not affordable.

[12] The Finance Minister attached a technical note outlining the fiscal situation in South Africa and some of the pressures being faced by the fiscus, which he said were exacerbated by the European financial crisis and the uncertainty resulting from the crisis.

[14] The Commission published its recommendation as required under the Remuneration Act on 12 November 2010.[13] On the same date and at a press conference, the President announced his intention to set the salary increase of all public office-bearers at 5%. On or about 16 November 2010, the President's draft notice was sent to the Speaker of the National Assembly (NA) and the Chairperson of the National Council of Provinces (NCOP) for approval. The notice was approved by resolution in the NA and NCOP on 18 and 24 November 2010, respectively. On 26 November 2010 the President published his decision.[14]

[15] Before the High Court, the President stated that when making the determination, he took into account the advice of the Finance Minister which was that a 5% adjustment was in excess of the CPI at the time. He said that the Finance Minister pointed to the decrease in the CPI and highlighted important implications for the fiscus in the event that a determination in excess of 5% was made. He then rejected the recommendation of 7% and adopted a 5% adjustment which was considered to be a reasonable and affordable determination, having regard to the fact that Senior Management in the public service had received an increase of 5% and that public office-bearers would receive the CPI adjustment plus a further increase of 0.8%.

[13] *Government Gazette* 33768 GN 1061, 12 November 2010.

[14] *Government Gazette* 33800 GN 71, 26 November 2010.

[16] It is against this background that I consider the issues for determination. But before I do so, it is necessary to refer to the relevant constitutional and legislative framework and the litigation history.

Relevant constitutional and statutory provisions

[17] Section 165 of the Constitution provides, in relevant part:

> "(1) The judicial authority of the Republic is vested in the courts.
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
> (3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[18] Section 166 of the Constitution defines the judicial system and expressly includes the Magistrates' Courts in the list of judicial institutions that are vested with the authority conferred by, and entitled to the protection established under, section 165 of the Constitution. The manner in which judicial officers are appointed is dealt with under section 174 of the Constitution. Subsection (7) deals with the appointment of judicial officers other than Judges. It provides:

> "Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice."

[19] Section 219 of the Constitution provides for the remuneration of persons holding public office. It provides:

> "(1) An Act of Parliament must establish the framework for determining—
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> (a) the salaries, allowances and benefits of members of the National Assembly, permanent delegates to the National Council of Provinces, members of the Cabinet, Deputy Ministers, traditional leaders and members of any councils of traditional leaders; and
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> (b) the upper limit of salaries, allowances and benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories.
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> (2) National legislation must establish an independent commission to make recommendations concerning the salaries, allowances and benefits referred to in subsection (1).
>
> (3) Parliament may pass legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).
>
> (4) The national executive, a provincial executive, a municipality or any other relevant authority may implement the national legislation referred to in subsection (1) only after considering any recommendations of the commission established in terms of subsection (2).
>
> (5) National legislation must establish frameworks for determining salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192."

Magistrates are not specifically mentioned in section 219. However, "office-bearer" is defined in the Remuneration Act as including "any person holding the office of magistrate who is appointed in terms of section 9 of the Magistrates' Court Act (Act No. 32 of 1944), read with section 10 of the Magistrates Act".

[20] Section 12 of the Magistrates Act makes provision for a scheme determining the salaries, allowances and benefits of Magistrates. It provides, in relevant part:

> (1) (a) Magistrates are entitled to such salaries, allowances and benefits—

(i) as determined by the President from time to time by notice in the Gazette, after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office-bearers established under section 2 of the Independent Commission for the Remuneration of Public Office-bearers Act, 1997 (Act 92 of 1997); and

(ii) approved by Parliament in terms of subsection (3).

(b) Different categories of salaries and salary scales may be determined by the President in respect of different categories of magistrates.

(c) The Commission referred to in paragraph (a)(i) must, when investigating or considering the remuneration of magistrates, consult with—

(i) the Minister and the Cabinet member responsible for finance; and

(ii) the Chief Justice or a person designated by the Chief Justice.

(2) A notice in terms of subsection (1)(a) or any provision thereof may commence with effect from a date specified in the notice, which date may not be more than one year after the date of publication of the notice.

(3) (a) A notice issued under subsection (1)(a) must be submitted to Parliament for approval before publication thereof.

(b) Parliament must by resolution—

(i) approve the notice, whether in whole or in part; or

(ii) disapprove the notice.

(4) The amount of any remuneration payable in terms of subsection (1), shall be paid out of the National Revenue Fund as contemplated in section 213 of the Constitution.

. . .

(6) The remuneration of magistrates shall not be reduced except by an Act of Parliament."

[21] Section 8 of the Remuneration Act provides, in relevant part:

"(4) The Commission shall, after taking into consideration the factors referred to in subsection (6), publish in the *Gazette* recommendations concerning—

(a) the salary, allowances and benefits of any office-bearer as defined in paragraphs (a), (d) and (e) of the definition of 'office-bearer' in section 1;

(b) the upper limits of the salary, allowances or benefits of any office-bearer as defined in paragraphs (b) and (c) of the definition of 'office-bearer' in section 1; and

(c) the resources which are necessary to enable an office-bearer as defined in paragraphs (a), (b), (c) and (e) of the definition of 'office-bearer' in section 1 to perform the office-bearer's functions effectively.

(5) Recommendations referred to in subsection (4) must be published in the *Gazette* at least once a year in respect of each category of office-bearers and must be submitted to Parliament before publication.

(6) When making recommendations referred to in subsection (4) the Commission must take the following factors into account:

(i) The role, status, duties, functions and responsibilities of the office-bearers concerned;

(ii) the affordability of different levels of remuneration of public office-bearers;

(iii) current principles and levels of remuneration, particularly in respect of organs of state, and in society generally;

(iv) inflationary increases;

(v) the available resources of the state; and

(vi) any other factor which, in the opinion of the said Commission, is relevant."

High Court proceedings

[22] ARMSA applied to the High Court for the review and setting aside of the decision of the President on procedural and substantive grounds in terms of the Promotion of Administrative Justice Act[15] (PAJA) and the principle of legality, respectively. It relied, primarily, on the following grounds:[16]

(a) Once the effect of inflation was taken into account, the President's decision, in effect, constituted a reduction in remuneration to Regional Magistrates and Regional Court Presidents in violation of section 12(6) of the Magistrates Act.[17]

(b) The applicant and its members were not afforded a fair opportunity to make representations to the President or the Commission. This, it was argued, rendered the decision procedurally unfair.

(c) The President and the Commission, contrary to the requirements of section 8(6)(i) of the Remuneration Act,[18] adopted a uniform increase across-the-board for all public office-bearers. This approach, the applicant contended, resulted in an unfair and unlawful determination because the particular circumstances of the applicant's members were not considered.

(d) In doing so, the decision was unreasonable and irrational.

[15] 3 of 2000.

[16] High Court judgment above n 1 at para 8.

[17] Relevant provisions of section 12 are set out at [20] above.

[18] See [21] above.

[23] The President challenged these claims. He denied that his actions were tainted by any irregularity or unlawfulness and that his decision was reviewable. The Commission denied that its recommended remuneration adjustment amounted to an undifferentiated, unfair and unlawful recommendation.

[24] The High Court rejected three of ARMSA's grounds of review.[19] It upheld the challenge to the decision involving a "one-size-fits-all" approach which, it held, was impermissible in terms of the relevant legislation.[20] The High Court found that if a blanket adjustment of all public officer-bearers' salaries were to be decided upon, the President was obliged to consider the circumstances of the individual categories of public office-bearers and their particular claims.[21] The Court further found that the President was obliged to consider whether the different categories of Magistrates should be remunerated according to different salary scales.[22]

[25] The High Court criticised the President for failing to provide reasons for his determination other than that he paid heed to the recommendation of the Commission and had taken advice from the Finance Minister.[23] It held that the decision was irrational and thus failed the legality test.[24] The Court set aside the President's decision, ordered remittal to the President for the matter to be considered by him in

[19] High Court judgment above n 1 at paras 39-41.

[20] Id at para 43.

[21] Id at para 44.

[22] Id.

[23] Id at para 45.

[24] Id at para 46.

the light of the judgment and ordered further that the decision of the President would remain in force and effect until a decision is made afresh by the President.[25]

[26] As to whether the President's decision amounted to administrative action, the High Court held that it did not and therefore that PAJA did not apply. It held that it would be inappropriate for the President to consult directly with ARMSA. In relation to the issue of procedural unfairness, the Court held:

> "[S]ection 12 of the Magistrates Act . . . is specifically designed to ensure that the judiciary of the High Court and judicial officers in the Regional Courts do not have to engage in direct salary negotiations with the executive, which might affect their independence. The perceived failure to consult the applicant or its members prior to the first respondent finalising his determination cannot therefore be regarded as inappropriate or unfair and this argument must be dismissed."[26]

In this Court

[27] These proceedings are a sequel to the litigation in the High Court. In seeking confirmation of paragraphs 1 and 3 of the High Court order,[27] in terms of section 172(2)(d) of the Constitution[28] read with Rule 16(4) of the Constitutional Court Rules,[29] ARMSA reiterated the argument advanced in the High Court. ARMSA asked

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[25] Above n 2.

[26] High Court judgment above n 1 at para 40.

[27] Above n 2.

[28] Section 172(2)(d) provides:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[29] Rule 16(4) provides:

> "A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making

that, to the extent that paragraphs 1 and 3 of the High Court order are not subject to confirmation, leave to appeal against the order in paragraph 2 be granted and that the order be varied and replaced with one remitting the matter to the President, subject to a direction that the President invites and considers representations by members of the applicant before deciding afresh. The Commission sought conditional leave to appeal against the decision of the High Court on certain bases, including that the Court's finding that the applicant's complaint of the "one-size-fits-all" approach was justified and that the Commission's explanation for the process lacked rationality. It argued that its application of the uniform increase was rational because the remuneration of all public office-bearers was already staggered in relation to the roles, duties, functions and responsibilities of each particular class.

Issues

[28] In the main, the President's decision is challenged on two grounds, namely that it constituted "administrative action" under PAJA and was procedurally unfair since the applicant and its members were not consulted, and that it was irrational. The preliminary issues that arise are—

(a) whether the proceedings are confirmatory proceedings under section 172(2) of the Constitution; and if not,

(b) whether leave to appeal should be granted.

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of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

[29] I now consider each of the preliminary issues before I turn to the main grounds of attack.

Are these confirmatory proceedings?

[30] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act *or any conduct of the President*, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court." (Emphasis added.)

[31] ARMSA argues that the decision constituted "conduct" under section 172(2)(a). The Commission submits that the High Court order is not subject to confirmation because the determination of the salaries of public office-bearers does not amount to "conduct" of the President as contemplated in section 172(2)(a). This is because the President can only take a decision after having received a recommendation from the Commission and because the decision has to be ratified by Parliament before it has any effect.

[32] In *Von Abo*,[30] this Court, per Moseneke DCJ, remarked that whether a specific power exercised by the President under the Constitution or other law amounts to a constitutional obligation which only this Court may decide remains a complex

[30] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC).

question.[31] After a discussion of certain constitutional obligations that are specifically entrusted to the President, the Court acknowledged that there may be appropriate instances where conduct of the President constitutes "conduct" that is susceptible to the jurisdiction of the High Court and the Supreme Court of Appeal under sections 172(2)(a) and 167(5) of the Constitution.[32]

[33] To determine the nature of these proceedings, it is necessary to have regard to the meaning of the language used in section 172(2)(a) of the Constitution. The section is couched in wide language. It contemplates that disputes concerning the constitutional validity of a statute or "any conduct" of the President may be considered, in the first place, by the Supreme Court of Appeal, a High Court or a court of similar status. These Courts are empowered to declare law or "any conduct" of the President that is inconsistent with the Constitution invalid, subject to confirmation by this Court.[33]

[34] In reviewing the phrase "any conduct", this Court, in *Pharmaceutical Manufacturers*,[34] said that the phrase must be accorded a generous and wide meaning. The Court, in discussing the content of section 172(2)(a) of the Constitution, remarked:

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[31] Id at para 37.

[32] Id at para 40.

[33] See [30] above.

[34] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*).

> "The section is concerned with the law-making acts of the legislatures at the two highest levels, and the conduct of the President who, as head of the State and head of the Executive, is the highest functionary within the State. The use of the words 'any conduct' of the President shows that the section is to be given a wide meaning as far as the conduct of the President is concerned. The apparent purpose of the section is to ensure that this Court, as the highest Court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of State. That purpose would be defeated if an issue concerning the legality of conduct of the President, which raises a constitutional issue of considerable importance, could be characterised as not falling within s 172(2)(a) and thereby removed from the controlling power of this Court under that section."[35]

[35] It will be remembered that the legality of the decision by the President was in issue in the High Court. The President was said to have acted contrary to the requirements of section 8(6)(i) of the Remuneration Act,[36] by adopting a uniform increase across-the-board for all public office-bearers and not considering the particular circumstances of the members of ARMSA. This, the applicant argued, resulted in an unfair and unlawful decision by the President. The High Court held that the decision of the President failed the legality test.[37]

[36] Our democratic state is founded on certain values, including the supremacy of the Constitution and the rule of law.[38] In making a determination in terms of section 12 of the Magistrates Act, the President exercised a public power which is constrained by the principle of legality and which forms part of the rule of law under

[35] Id at para 56.

[36] See [21] above.

[37] High Court judgment above n 1 at para 46.

[38] Section 1(c) of the Constitution.

the Constitution.[39] The High Court made an order concerning the lawfulness of the decision of the President. In particular, it reviewed and set aside the President's decision on the basis that he failed to consider the particular circumstances of the members of ARMSA as required under section 8(6)(i). This amounts to "conduct" of the President under section 172(2)(a).

[37] Accordingly, I agree with ARMSA that the decision of the High Court is susceptible to confirmation by this Court under section 172(2)(a).

[38] Having concluded that these are confirmatory proceedings, both ARMSA and the Commission have an automatic right of appeal against the order sought to be confirmed.[40]

[39] I now turn to the main grounds of the challenge to the President's decision.

Does the decision constitute administrative action?

[40] ARMSA submits that the High Court erred in concluding that the decision of the President did not amount to "administrative action"[41] under PAJA and that there

[39] See *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 27 and *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 49.

[40] *Von Abo* above n 30 at para 13.

[41] Section 1 of PAJA, in relevant part, defines "administrative action" to mean:

> "[A]ny decision taken, or any failure to take a decision, by—
>
> (a) an organ of state, when—
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> . . .

was no duty on the President to offer Regional Magistrates and Regional Court Presidents an opportunity to make representations prior to a decision being made.[42] It contended that the President's power to implement national legislation, in this case through section 12(1)(a)(i) of the Magistrates Act, is not excluded from the definition of administrative action. Relying on *New Clicks*,[43] ARMSA argued that the exercise of the President's powers amounted to the implementation of national legislation not excluded under PAJA.

[41] The characterisation of a particular decision as being of an administrative nature is indeed "something of a puzzle".[44] Boundaries have to be drawn carefully in deciding which conduct should or should not be characterised as administrative action

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(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of the empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections . . . 85(2) (b), (c), (d) and (e) . . . of the Constitution".

[42] High Court judgment above n 1 at paras 33-7.

[43] *Minister of Health and Another NO v New Clicks South Africa* (*Pty*) *Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (*New Clicks*) at paras 124-6. This Court, per Chaskalson CJ, held:

> "Section 85 deals with the President and Cabinet. If it had stood alone there would have been greater force in the finding that the making of regulations by a minister is excluded from the definition of 'administrative action'. But it does not stand alone. Subparagraph (aa) of the definition goes on to refer to specific subparagraphs of section 85(2), including section 85(2)(b), (c), (d) and (e), but excludes from the list section 85(2)(a). . . . The omission of subparagraph (2)(a) from the specified list of exclusions is significant. . . . The omission of sections 85(2)(a) and 125(2)(a), (b) and (c) from the list of exclusions was clearly deliberate. To have excluded the implementation of legislation from PAJA would have been inconsistent with the Constitution. The implementation of legislation, which includes the making of regulations in terms of an empowering provision, is therefore not excluded from the definition of administrative action."

[44] See *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal*) *and Others* 2010 (5) SA 574 (KZP) (*Sokhela*) at para 61, quoting Hoexter *Administrative Law in South Africa* (Juta & Co, Ltd, Cape Town 2007) at 190-1.

and, as *SARFU*[45] provides, this can only be done on a case-by-case basis.[46] This cannot be done as "a mechanical exercise in which the court merely asks itself whether a public power is being exercised or a public function is being performed, and then considers whether it falls within one or other of the exceptions."[47] Courts should guard against a return to the classification of functions approach. In determining whether particular conduct constitutes administrative action, the focus must be on the nature of the power exercised rather than upon the functionary.[48]

[42] I am unable to agree with the applicant's argument that the President's power under section 12 of the Magistrates Act amounted to administrative action. It is noteworthy that section 33(1) of the Constitution[49] uses the adjective "administrative" as opposed to "executive" to qualify the word "action". As this Court stated in *SARFU*,[50] this suggests that the test for determining whether conduct constitutes

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[45] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*).

[46] Id at para 143. In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) (*Grey's Marine*) the Supreme Court of Appeal, relying on *SARFU*, remarked at paras 24 and 25 that:

> "Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.
>
> The law reports are replete with examples of conduct of that kind. But the exercise of public power generally occurs as a continuum with no bright line marking the transition from one form to another and it is in that transitional area in particular that '(d)ifficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33'." (Footnotes omitted.)

[47] *Sokhela* above n 44.

[48] *SARFU* above n 45 at para 141. See also *Grey's Marine* above n 46 at paras 24-5.

[49] Section 33(1) reads:

> "Everyone has the right to *administrative action* that is lawful, reasonable and procedurally fair." (Emphasis added.)

[50] Above n 45.

administrative action is not whether the action concerned is performed by a member of the executive arm of government.[51] One needs to consider carefully whether the exercise of the power or taking of the decision by the President, in terms of section 12, constituted administrative action.[52] It is only after the question is answered that one may consider the constraints imposed upon the exercise of that power.

[43] Section 12 reveals that different functionaries are involved at different levels of the process of making a decision. The applicable statutory scheme for the determination of the remuneration of public office-bearers (through mandatory consultations, recommendations and approvals) represents a carefully balanced interplay between the various functionaries – executive, legislative, judicial and independent specialists – in formulating the ultimate determination. It must also be borne in mind that the determination relates to the remuneration of members of the Judiciary, an issue that goes to the heart of judicial independence and is of fundamental importance to our constitutional state. Adequate remuneration is an aspect of judicial independence. If judicial officers lack that security, their ability to act independently will be put under strain. They should not be placed in a position of having to engage in negotiations with the Executive over their salaries.[53] Having set up such a particular scheme to determine this sensitive issue, I am of the opinion that the impugned conduct of the President, located as it is at the heart of the scheme,

[51] Id at para 141.

[52] Id at paras 141-3.

[53] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) (*Van Rooyen*) at paras 138-9.

cannot be "conduct of the bureaucracy . . . in carrying out the daily functions of the State".[54]

[44] The President makes a determination only after receiving, and taking into account, the recommendation of the Commission.[55] That recommendation must have accounted for certain factors[56] and must be the product of consultation with various officials and organs of state with the relevant expertise and knowledge, including the Chief Justice and the Finance Minister.[57] The determination that the President makes must be approved by Parliament, and Parliament in turn may approve, partially approve or disapprove a determination proposed by the President.[58] Finally, section 12 specifically requires that the determination, duly approved by Parliament, be published in the *Government Gazette*.[59]

[45] In essence, when the President made the determination he was exercising a power which impacts on a matter that is of importance to the independence of the Judiciary, in terms of a particular constitutional and legislative scheme, subject to clear statutory checks, balances and standards of review. In the light of this Court's decision in *Masetlha*,[60] that renders his conduct "executive" rather than

[54] *Grey's Marine* above n 46 at para 24.

[55] Section 12(1)(a)(i) of the Magistrates Act at [20] above.

[56] Section 8(6) of the Remuneration Act.

[57] Section 12(1)(c) of the Magistrates Act.

[58] Id section 12(3).

[59] Id section 12(1)(a) read with section 12(3)(a).

[60] *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 77.

"administrative" in nature. Given the significance of the President's decision, the careful manner in which Parliament has prescribed that it should be taken and the complexity of the ultimate determination, I conclude that the President's decision did not constitute administrative action and that PAJA does not apply. The applicant's argument on this issue must thus fail. Next for determination is whether the decision is irrational.

Is the decision rational?

[46] The rationality challenge is directed at the uniform remuneration adjustment approach adopted by the Commission and the President in making the recommendation and the decision, respectively. The High Court held that the complaint in this regard against the Commission "appears to be well justified" because "its explanation of the process it followed lacks rationality."[61] Regarding the President's conduct, the Court went on to say:

> "From the record filed by the [President] in reaction [to] the notice in terms of Rule 53 it is clear that, in adopting the [Commission's] approach of a uniform increase for all classes of office bearers, but at a reduced level, no consideration was given to the different circumstances of the different categories of public office bearers affected by the determination. Their respective roles, status, duties, functions and responsibilities were neither mentioned nor considered or compared with one another. There is no evidence of any appreciation that the circumstances of the Regional Magistrates – who presented a detailed and well-motivated memorandum setting out their concerns that a failure to consider their particular circumstances might see them fall further behind other public office bearers if no particular provision was made for them – might require a salary adjustment that differed from that of other categories of office bearers affected by the determination. Even if a blanket adjustment of all public

[61] High Court judgment above n 1 at para 43.

> office bearers' salaries were to be decided upon eventually, the [President failed] to consider the circumstances of the individual categories of public office bearers and their particular claims to salary adjustments before coming to a final conclusion. . . . [H]e was furthermore obliged to consider whether the different categories of magistrates should be remunerated according to different salary scales. No such investigation was undertaken.
>
> The [President] defends his failure to provide any reasons for his determination on the basis that he paid heed to the [Commission's] recommendations and the advice by the Minister of Finance. This explanation confirms that he failed to take the particular circumstances of the various categories of public office bearers into account."[62]

[47] The Commission argued that the High Court erred in upholding the fourth ground, that a uniform, "one-size-fit-all" increase in the remuneration for all public office-bearers was irrational.

[48] The Remuneration Act and section 219 of the Constitution entrust certain powers and duties to the Commission.[63] The Commission is required under section 219(2) to "make recommendations concerning the salaries, allowances and benefits" of public office-bearers. In making the recommendation to the President, the Commission may conduct an inquiry into matters it is empowered to do in terms of the Constitution and the Remuneration Act. It has broad powers under section 8 of the Remuneration Act.[64] The Commission is enjoined to publish annually in the

[62] Id at paras 44-5.

[63] Section 8(1) of the Remuneration Act, see [21] above.

[64] These include the powers contemplated in the Commissions Act 8 of 1947 in respect of persons who give evidence before it or who have been summoned to attend any meeting of the Commission as a witness or to produce any book, document or object. The Commission may conduct or cause to be conducted such research or obtain such information from the Secretary to Parliament, the secretary to any provincial legislature, the secretary to the Council of Traditional Leaders, the secretary to any provincial house of traditional leaders, the chief executive officer of any municipality or any office-bearers as may be necessary for the performance of the functions of the Commission under the Remuneration Act and section 219 or any other law.

Government Gazette recommendations regarding the salary, allowances and benefits of public office-bearers. It must publish its recommendation in the *Government Gazette* and must take the factors set out in subsection (6) into account when making a recommendation.

[49] The exercise of any public power must conform to the requirements of the Constitution. Similarly the principle of the rule of law which is a foundational principle of the Constitution, and the exercise of public power under consideration in the present matter must also conform to the requirements of the Magistrates Act and the Remuneration Act. The rule of law requires that a decision, viewed objectively, must be rationally related to the purpose for which the power was given.[65] I hasten to stress that rationality is an incident of the rule of law.[66]

[50] More recently, this Court in *Democratic Alliance*,[67] per Yacoob ADCJ, reaffirmed the test for rationality review. It held:

> "[R]ationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the

[65] *Democratic Alliance* above n 39 at para 27. See also *Albutt* above n 39 at para 49.

[66] See *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 12; *Poverty Alleviation Network v President of the Republic of South Africa* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) at para 65; and *Albutt* above n 39 at para 49.

[67] *Democratic Alliance* above n 39 at para 27.

> power was conferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional."[68]

[51] This Court, in *Democratic Alliance* cited *Albutt*[69] as authority for the proposition that "both the process by which the decision is made and the decision itself must be rational."[70]

[52] In casu, the power to make a determination is entrusted to the President. He is enjoined, in terms of section 12, to make the determination after taking into consideration the recommendation of the Commission. Self-evidently, the President is not obliged to follow the recommendation. He may, after considering the recommendation and other factors that may be brought to his attention by the Finance Minister (as is the case here) and the Minister for Justice, accept or reject parts of the recommendation.

[53] Against the above setting, I now consider whether the process followed by the Commission was irrational, as the applicant contends.

[54] Put simply, the applicant's complaint amounts to the fact that the Commission and the President failed to treat its members as a category of public office-bearers who were previously left out when all other categories of public office-bearers' remuneration packages were reviewed and appropriately determined. The applicant

[68] Id at para 32.

[69] *Albutt* above n 39 at paras 49-50.

[70] *Democratic Alliance* above n 39 at para 34.

points out that the remuneration of Regional Magistrates was left to lag behind that of High Court Judges, despite the increase in their workload as a result of the expanded Regional Court jurisdiction. The 5% salary increase across-the-board, the applicant contends, did not take into account the role, status, duties, functions and responsibilities of the Magistrates concerned. In its recommendation presented to the President on 8 September 2010, the Commission stated that it consulted with and considered the input received from the Finance Minister, Minister for Justice and the Chief Justice before submitting the annual recommendation to the President. There is no evidence to gainsay this.

[55] In its opposing papers, the Commission said that in making a recommendation it considered, as it is required to do, "the role, status, duties, functions and responsibilities of the office-bearers concerned." It explained that the various categories of office-bearers are pegged differently. The Commission further said that members of Parliament, cabinet members, and traditional authorities share a common character as public office-bearers and a uniform adjustment impacts on these categories differently. For these reasons, it said that it was inappropriate to describe it as a "one-size-fits-all" adjustment. Again, save for the applicant's insistence that the Commission adopted a "one-size-fits-all" approach, the contentions of the Commission in this regard were not refuted. It means that the process before the Commission cannot be faulted.

[56] In any event, the finding by the High Court that there was no differentiation between classes of public office-bearers[71] is also not borne out by evidence.[72] Different categories of Magistrates were remunerated according to different salary scales. This is underscored by the contents of the Schedule dealing with the salaries of Magistrates. Evidently, that Schedule tables a different grade for the Chief Magistrate and Regional Court Presidents; for the Regional Magistrates and Chief Magistrates; and for Senior Magistrates and Magistrates. Based on this and the Commission's response in its opposing papers, it can be inferred that the Commission did take into account the different roles, status, duties, functions and responsibilities of the public office-bearers concerned. It follows that the High Court also erred in this regard.

[57] ARMSA contends further that the President irrationally reduced the recommended percentage. The decision cannot be set aside on the ground of irrationality. The determination was based on expert advice about inflation and affordability. The President is only required under section 12(1)(a) to consider the recommendation of the Commission.[73] The President was not bound to adopt the recommended 7% salary adjustment.

[71] High Court judgment above n 1 at paras 41-3.

[72] Schedule 1 of the Commission's memorandum accompanying the recommendation dealt with the salary of the National Executive and the Deputy Ministers; Schedule 2 dealt with the salary of the National Parliament; Schedule 3 with the Provincial Executives and Legislatures; Schedule 4 with Local Government; Schedule 5 with Judges; Schedule 6 with Magistrates; and Schedule 7 with Traditional Leaders.

[73] Section 12(1)(a)(i) of the Magistrates Act.

[58] There is no basis for the finding that the President was "obliged to consider whether the different categories of Magistrates should be remunerated according to different salary scales."[74] While one appreciates that section 12 needs to be interpreted consistently with the Constitution to exclude a construction that would be inconsistent with judicial independence under section 165 of the Constitution,[75] the President is entitled to rely on the recommendation of the Commission. He is not obliged to perform the specialist research of the Commission or hear submissions from individual categories of public office-bearers again should he decide to adjust the recommended salary increase. The processes before the Commission and the President, particularly after the latter had considered the recommendation and consulted with the Finance Minister, were rational.

[59] A further issue relates to ARMSA's contention that neither it nor its members were consulted either by the Commission or the President. The applicant argues that the decision was procedurally unfair. The challenge is without merit. With regard to the decision of the President, a procedural fairness challenge is not competent because the decision he took did not amount to administrative action. As it was pronounced in *Masetlha*,[76] executive action may be reviewed on narrow grounds which fall within the ambit of the principle of legality. These grounds include lawfulness and rationality.[77] Procedural fairness is not a requirement for the exercise of executive

[74] High Court judgment above n 1 at para 44.

[75] *Van Rooyen* above n 53 at para 88.

[76] *Masetlha* above n 60 at paras 23, 78 and 81.

[77] Id at para 81.

powers[78] and therefore executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing is specifically required by the enabling statute. Section 12 of the Magistrates Act does not require the President to hear Magistrates before determining their salaries.

[60] The scheme of both the Remuneration Act and Magistrates Act ensures that judicial officers do not have to engage in direct negotiations with the Executive over conditions of employment, including salaries. The purpose of this scheme is to safeguard the independence of judicial officers. In this regard, I agree with the High Court that:

> "[T]he procedure decreed by section 12 of the Magistrates' Act read with the relevant provisions of the [Remuneration Act], is specifically designed to ensure that the judiciary . . . and judicial officers . . . do not have to engage in direct salary negotiations with the executive, which might affect their independence. The perceived failure to consult [ARMSA] or its members prior to the [President] finalising his determination cannot therefore be regarded as inappropriate or unfair and this argument must be dismissed."[79]

[61] The procedural fairness attack directed at the Commission's recommendation must also fail for these reasons. First, the Remuneration Act does not require the Commission to consult public office-bearers individually before making a recommendation. Instead, the Magistrates Act lists persons whom the Commission

[78] Id at para 78.

[79] High Court judgment above n 1 at para 40. These sentiments endorse the remarks of this Court, per Chaskalson CJ, in *Van Rooyen* above n 53. In that case the Court endorsed the approach taken in *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC), which identified three fundamental pillars of institutional independence: security of tenure; financial security; and institutional independence concerning matters that relate directly to the exercise of judicial function.

must consult. They include the Chief Justice, who represents the entire Judiciary in such consultations. Second, in this case the Chief Justice consulted ARMSA before submitting representations to the Commission. As stated earlier, representations made to him by ARMSA were forwarded to the Commission. ARMSA failed to show that those representations were not taken into account by the Commission when it was compiling the recommendation for the President.

[62] For these reasons, I do not agree with the argument by ARMSA that the determination was irrational. Therefore, the argument must also fail and the order of the High Court on this ground must be overturned.

[63] It is nonetheless important to acknowledge that judicial officers, both in the District and Regional Courts are a vital part of the Judiciary and the administration of justice. The criminal and civil jurisdiction of both Courts has been increased substantially over the last few years. For instance, until recently, Regional Courts had no civil jurisdiction and were confined to hearing criminal cases. In 2010 Regional Court's civil jurisdiction in designated areas increased to range between R100 000 and R300 000 in terms of the Jurisdiction of Regional Courts Amendment Act.[80] The effect of Regional Courts' expanded jurisdiction is that the workload, responsibilities and expertise of Regional Magistrates and Regional Court Presidents have increased significantly. In exercising civil jurisdiction the Regional Courts are absorbing a significant portion of the workload of both District Courts and High Courts. It is

[80] 31 of 2008 read with *Government Gazette* 33418 GN 670, 29 July 2010.

accordingly important that their conditions of service including remuneration are adequate and consistent with the scheme envisaged by the Constitution and the relevant legislation under it.

Costs

[64] The applicant has asked for costs, including the costs of two counsel to be paid by the President. These are confirmatory proceedings in which the President's decision has not been shown to have been irrational. Although the applicant has not been successful, I do not think there should be a costs order against it. This litigation is essentially constitutional in nature and the applicant, albeit unsuccessful, was entitled to approach the Court to challenge the decision which provoked this litigation. For these reasons, there should be no order as to costs.

Order

[65] In the event, the following order is made:

1. The order of the North Gauteng High Court, Pretoria is not confirmed and is set aside.
2. In its place the following order is made:

   "The application is dismissed."
3. There is no order as to costs.

For the Applicant:	Advocate M Chaskalson SC and Advocate S Budlender instructed by Rudman Attorneys.
For the Second Respondent:	Advocate I Semenya SC and Advocate N Mayet instructed by the State Attorney.