IN THE HIGH COURT OF SOUTH AFRICA

NORTH GAUTENG DIVISION, PRETORIA

(DELETE WHICHEVER IS NOT APPLICABLE) 3/09/2012

(1) REPORTABLE: YES/NO **Case No: 20210/11**

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE SIGNATURE

In the matter between:

THE ASSOCIATION OF REGIONAL MAGISTRATES OF SOUTHERN AFRICA **Applicant**

and

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

THE INDEPENDENT COMMISSION FOR THE REMUNERATION OF PUBLIC OFFICE BEARERS **Second Respondent**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **Third Respondent**

THE MINISTER OF FINANCE **Fourth Respondent**

JUDGMENT

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1. The applicant is The Association of Regional Magistrates of Southern Africa, ('ARMSA'), a non-profit professional association of permanently appointed Regional Magistrates in the Republic, with associated membership being extended to judicial officers in SADEC countries. It is a juristic person not established for gain, with address at the office of its secretary *pro tem* and is empowered to conduct litigation in its own name and independently of its members.
2. The first respondent is the President of the Republic of South Africa of c/o the State Attorney, 8th Floor, Botongo Heights, 167 Thabo Sehume Street, Pretoria.
3. The second respondent is the Independent Commission for the Remuneration of Public Office-bearers, of c/o The Presidency, Union Buildings, Pretoria. It is an independent commission established by the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997, as envisaged by the provisions of section 219 (2) of the Constitution 108 of 1996, read with sub-section (5) thereof. The Commission's function is to "*...make recommendations concerning 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 Council of Traditional Leaders. The Commission is furthermore tasked with making recommendations in respect of Judges' and Magistrates' salaries, bearing in mind the relevant provisions of the Judges' Remuneration and Conditions of Employment Act 47 of 2001; as well as the provisions of the Magistrates Act 90 of 1993.

4. The third respondent is the Minister of Justice and Constitutional Development, cited in his official capacity, of c/o the State Attorney, Pretoria, 8th Floor, Bothongo Heights, 167 Thabo Sehume Street, Pretoria.
5. The fourth respondent is the Minister of Finance, cited as such in his official capacity, of c/o the State Attorney, 8th Floor, Botongo Heights, 167 Thabo Sehume Street, Pretoria.
6. The two Houses of Parliament were not joined by the applicant as parties to the proceedings, although applicant served copies of the application papers upon them. The court was, however, of the view that, given the relief sought by the applicant, both Houses had a substantial and direct interest in the outcome of the application and allowed the matter to stand down in order to allow the applicant's legal representatives to obtain a letter from Parliament's legal advisor, informing the court that neither House intended to join the proceedings and that both would abide the court's decision.
7. Applicant applies for a review in terms of Rule 53 of the Rules of Court of a salary determination in respect of the remuneration of Regional Magistrates and Regional Court Presidents by the first respondent. Such a determination must be approved by both Houses of Parliament. The two Houses' interest in the outcome of an application to set aside a determination approved by them is therefore such that their joinder, or a formal notification of their intention to abide the Court's decision, is essential.
8. The relevant determination was taken by the second respondent about the 16th November 2010 and was published on the 26th November 2010. It increased the remuneration of Regional Magistrates and Regional Court

Presidents (and other public office bearers) by 5% backdated to the 1st April 2010.The applicant challenges this determination on the grounds that:

a) The increase resulted in a *de facto* reduction in the remuneration of its members and was therefore *ultra vires* the enabling statute;

b) The applicant and its members were not afforded a fair opportunity to make representations to either the second or the first respondent;

c) The first respondent did not differentiate between the various classes of public office bearers, but applied a uniform increase across the board of all public office bearers whose remuneration had to be adjusted. In so doing, he adopted the second respondent's recommendation to determine all public office bearers' remuneration adjustment by the same percentage. This approach, the applicant argues, resulted in an unfair and unlawful determination of the applicant's members' remuneration because the particular circumstances of this class of public office bearers were overlooked. This is the case, the applicant submits, because the second respondent's recommendation failed to observe the need to consider the Regional Magistrates and Regional Courts Presidents' role, status, duties and functions as decreed by section 8 (6) of the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997;

d) By so doing, the first respondent unreasonably and irrationally failed to provide sufficient, or any, reasons for his determination.

9. The first respondent joins issue with these allegations, denying that his actions were tainted by any irregularity or unlawfulness. In particular, the first respondent disputes that his decision is reviewable. Underlining the fact that he acts upon the recommendation of the second respondent and consults

with relevant ministers before determining a remuneration adjustment, which determination must be approved by both Houses of Parliament before it is published, first respondent argues that his decision does not amount to administrative action but constitutes executive action. His determination can therefore not be subjected to a review.

10. The first respondent's stance is supported by the second respondent. The Commission furthermore disputes that the uniform salary adjustment that it recommended amounted to an undifferentiated, unfair and unlawful recommendation.

11. Before dealing with the facts that are relevant to the dispute between the parties, it is necessary to pay attention to the constitutional principles that underlie the courts' judicial authority; and to legislative provisions that regulate the determination of the remuneration of the judiciary in general and the magistracy in particular.

12. Section 1 of the Constitution recognises the supremacy of the Constitution and the rule of law as a foundational value of the Republic.

13. Section 165 thereof establishes judicial authority:

> ***'165.*** *Judicial authority.-(}) 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.*
> *(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'*

14. 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 determined in terms of section 165.

15. The manner in which judicial officers are appointed is laid down in section 174 of the Constitution, which deals in sub-section (7) with the appointment of officers other than judges, and reads:

'(7) 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, those judicial officers take place without favour or prejudice.
(8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution'.

16. Section 219 of the Constitution decrees that the remuneration of public office bearers must be regulated by an Act of Parliament, which must in turn establish a framework for determining their salaries, allowances and benefits. National legislation must create an independent commission to investigate and make recommendations concerning these salaries, allowances and benefits. The second respondent is the Commission created in terms of this section by the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

17. The magistracy is included in this scheme of determining the salaries, allowances and benefits of its members through the provisions of section 12 of the Magistrates' Act, quoted here in full:

'12 Remuneration of Magistrates

(1)(a) Magistrates are entitled to such salaries, allowances and benefits –
(i) as determined by the State 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 (i) (a) or any provision thereof may commence from any date specified in such notice, which date may not be more than one year before 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.

(5) (a) If any magistrate is appointed in an acting or temporary capacity to any other judicial office –

(i) for a continuous period exceeding one day; and

(ii) the remuneration attached to that office exceeds the remuneration attached to the office ordinarily held by the magistrate,

he or she shall, for the duration of such appointment, be entitled to such additional remuneration as determined from time to time by the Minister.

(b) For the purpose of paragraph (a) additional remuneration must be calculated by the day, and any part of a day must be reckoned as a day.

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

(7) If an officer or employee in the public service is appointed as a magistrate, the period of his or her service as a magistrate shall be reckoned as a part of and continuous with his or her service in the public service for the purposes of leave, pension and any other condition of service.'

18. It is trite that the independence of the judiciary is ensured, *inter alia*, by a safeguard against unreasonable material and financial challenges. In *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC); 2002 (8) BCLR 210 (CC), Chaskalson CJ said, in discussing the need to ensure that judicial officers are adequately remunerated, and the manner in which such remuneration ought to be determined in practice,

'[138] The determination of salaries of judicial officers raises difficult questions to which there are no easy solutions. 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 that judicial officers must have "a basic degree of financial security". But who is to determine what that is? If it is the legislature or the executive this may give rise to the tensions between the judiciary and the other arms of government, and the judiciary itself could then be thrust into the position of having to deal with litigation in which the issue is whether the salaries are consistent with the constitutional requirement of judicial independence. That is obviously undesirable. Although judges could exercise that function in relation to the remuneration of magistrates, it would be invidious to have to be judges in their own cause if their own salaries were in issue.

[139] Judicial officers ought not to be put in a position of having to do this, or to engage in negotiations with the executive over their salaries. They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such matters, than others who can advance their interest through normal bargaining processes open to them.

[140] Parliament and the executive, the other two arms of government, are in a different position. They have control over the public purse and are entitled through legislation and executive action to determine their own remuneration and conditions of service. A mechanism has, however, been put in place to avoid the conflict inherent in such a situation. Sections 219(1) and (2) of the Constitution require an independent commission to be established to make recommendations concerning such remuneration. The Independent Commission for the Remuneration of Public Office Bearers performs that function.

(Footnotes omitted)

19. The second respondent, ('the Commission') is thus interposed between public office bearers and the bearers of the public purse. It is obliged to make recommendations concerning salaries, allowances and benefits to the executive and to Parliament that should, in the case of judicial officers and judges, ensure that their remuneration is determined at a level that will protect the latter's independence by ensuring an adequate level of financial security.

20. In so doing, the Commission must consider the following factors enumerated in section 8 (6) of the Commission for the Remuneration of Public Office Bearers Act 92 of 1997:

'(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 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.'

21. The importance of the second respondent's recommendations regarding the salaries and emoluments of judges and magistrates is emphasized by the fact that judicial officers cannot, and should not, find themselves in the role of employees and can neither negotiate directly with the executive nor resort to industrial action in the event of dissatisfaction with the return upon their labours.

22. The background to the first respondent's decision which it is sought to set aside has its origin in the second respondent's recommendation regarding the 2010 adjustment in the salaries of judges and magistrates (and other public office bearers) for the financial year 2010/2011. On the 6th April 2010 it addressed a letter to the then Chief Justice, attaching a copy of the proposed recommendations regarding the envisaged adjustment of the salaries, benefits and allowances of public office bearers. An early audience was sought with the Hon Chief Justice to discuss the proposals. Based upon the Commission's view that inflation would stabilise at 5.3% for the year and bearing in mind that the Public Service had received a salary increase of 10.5 % in 2008 and between 10% and 13% in 2009, while public office bearers had

received only 7%; the second respondent was of the view that a general increase of 7% for all public office bearers would be appropriate to avoid them falling behind the Public Service.

23. The second respondent motivated its recommendation as follows:

'... *The CPI for January 2010 was 6.2% and for February 2010 it was 5.7% The average so far for the year is 6.0%. If the traditional approach of CPI plus 1% is followed, then it does make sense to recommend an average percentage of cost-of living-adjustment with effect from ! April 2010 for Public Office Bearers.*

4.5 If a reduced percentage point is adopted, it would imply that Public Office Bearers will fall behind the market for two consecutive years. If this approach is followed next year, it will compel the Commission to recommend a third major review of Public Office Bearer remuneration levels. It should certainly not be the intention of the Commission to play catch-up every three to four years.'

(The reference to a major review of public office bearers' remuneration levels is to the Commission's reports of 2007 and 2008, which advised that substantial increases in the remuneration of public office bearers were required in those two years to bring public office bearers on par with average market remuneration levels nationally and internationally)

24. The Chief Justice sent the recommendation with the explanatory memorandum to the Magistrates' Commission on the 5th May 2010, with a request to comment thereupon by the 12th May 2010. The second respondent in turn forwarded the request to the applicant on the 7th May 2010. Although the applicant complains that it was given only five days to prepare its

comments, it is clear that a comprehensive presentation was prepared in time for the Chief Justice's consideration. The applicant has not suggested in its papers that it would have wished to, or could have added any further arguments to those contained in its memorandum.

25. In the submission that was eventually sent to the Chief Justice on the 12th May 2010, the applicant's representatives made the following salient points to illustrate the significant differences between the position of the High Court Judiciary and the Regional Magistrates in order to motivate the call for a significant adjustment on the latter's remuneration package:

a) The retirement gratuity of the head of the High Court Judiciary exceeded that of a Regional Court Magistrate by more than 300%;

b) The annuity on retirement between the two posts differed by nearly 600%;

c) The gap between the lowest paid judge and the highest paid regional magistrate was widening to 20%;

d) The Regional Magistrates had the lowest retirement benefits of all public office bearers;

e) Increases to these benefits had, over the past three years, been the lowest for magistrates when compared to judges and members of the National Assembly;

f) Magistrates received a far lower contribution to their medical fund than those made to Parmed to which other public office bearers belong;

g) Regional Magistrates had fallen behind members of the Public Service over the previous years because the Public Service received higher annual salary increases;

h) Although the applicant doubted the correctness and legality of a recommendation that advocated the same general increase across the board for all public office bearers. it suggested an increase of 9.5% if a 'one-size-fits-all' recommendation were to be persisted with.

26. The second respondent's proposals were presented to the first respondent on the 8th September 2010. The first respondent met with the Minister of Finance to discuss the recommendation and was informed by him that the inflationary outlook for the year had further decreased to 4.2 % of the Consumer Price Index. The proposed increase of 7% for all public office bearers was not affordable in the light of the above facts and a general increase of 5% of the remuneration of all public office bearers appeared to be appropriate.

27. On the 12th November 2010 the second respondent officially published its recommendation of a 7% across the board salary increase for public office bearers in the Government Gazette in compliance with section 8(4) of Act 92 of 1997. At a press conference on the same date the first respondent announced his intention to determine the salary increase at 5 % across the board.

28. The first respondent's draft notice was sent on the 16th November 2010 to the Speaker of the National Assembly and the Chairperson of the National Council of Provinces for approval by both houses. The notice was approved by resolution of the National Assembly on the 18th November 2010 and by resolution by the National Council of Provinces on the 24th November 2010.

29. The first respondent thereafter officially published the determination of the annual salary adjustment on the 26th November 2010. The present review application was launched on the 13th May 2011.

30. Although the affidavits filed by the applicant's president do not refer thereto in any detail, much was made in the applicant's heads of argument of the very considerable work load the regional Magistrates have to bear and of the additional burdens placed upon them by the comparatively recent expansions of their jurisdiction to impose life imprisonment in respect of offences referred to in Part 1 of Schedule 2 of Act 105 of 1997 as amended, together with the civil jurisdiction newly conferred upon the Regional Courts. Although these considerations were not presented under oath they were not contentious. It is common cause that the Regional Courts form the backbone of the criminal justice system in the Republic. The court can take judicial notice of the fact that they are continuously faced with overcrowded rolls and experience many administrative and other challenges.

31. The first issue that needs to be determined in respect of the review proceedings is the question whether the first respondent's determination of the remuneration adjustment amounts to administrative action or constitutes executive action incapable of being reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). '*Administrative action*' is defined in section 1 thereof as follows:

> '**1.** *In this Act, unless the context indicates otherwise—*
> *(i) "administrative action" means any decision taken, or any failure to take a decision, by—*
> *(a) an organ of state, when—*
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
> *(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 an 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 79(1) and*

(4), 84(2)(a), (b), (c), (d), m, (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and m, 126, 127(2), 132(2), 133(3)(b), 137,138, 139 and 145(1) of the Constitution;
(cc) the executive powers or functions of a municipal council;
(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
(ff) a decision to institute or continue a prosecution;
(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
(ii) any decision taken, or failure to take a decision, in terms of section 4(l)'

32. In arguing that the determination by the first respondent did constitute administrative action for the purposes of PAJA, the applicants relied upon the judgment by Chaskalson CJ in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd) and Others* 2006 (2) SA 311 (CC), in which the following was said:

'[121]The Minister and the Pricing Committee are both organs of state. The regulation of prices in the disputed regulations adversely affect the rights of pharmacists and other persons in the pharmaceutical industry. The regulations will therefore be "administrative action" within the meaning of PAJA, if the making of the regulations constituted a "decision", and if they are not excluded by subparagraph (aa) to (ii) of the definition of administrative action.

The exclusions

[122] The exclusions from the definition of "administrative action" are

"(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4(1)".

[123] Subparagraph (aa) deals with the executive powers and functions of the National Executive. It refers to sections 79, 84, 85, 91, 92, 93, 97, 98, 99 and 100 of the Constitution. Sections 79 and 84 of the Constitution deal with powers vested in the President alone. They are not relevant to the present case. Nor are sections 92, 93, 97, 98, and 99. Section 85 is, however, relevant and of importance.

[124] 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 sections 85(2)(b), (c), (d), and (e), but excludes from the list section 85(2)(a). The provisions of section 85(2)(a) to (e) are as follows:

"(2) The President exercises the executive authority, together with the other members of the Cabinet, by—

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;
(c) co-ordinating the functions of state departments and administrations;
(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation."

[125] The omission of subparagraph (2)(a) from the specified list of exclusions is significant. Subparagraph (bb) of the definition of administrative action deals with the

powers of the provincial executive. Various provisions of section 125 of the Constitution are listed, but again significantly, sections 125(2)(a), (b) and (c), which refer to the implementation of legislation, are omitted from the list.

[126] In President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU) this Court said that

"one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of s 33."

If sections 85(2)(a) and 125(2)(a), (b) and (c) had not been omitted from the list of exclusions, the core of administrative action would have been excluded from PAJA, and the Act mandated by the Constitution to give effect to sections 33(1) and (2) would not have served its intended purpose. 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.

Does the making of regulations constitute a "decision"?

[127] PAJA defines "decision" as follows.

"'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—

(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;

(d) imposing a condition or restriction;
(e) making a declaration, demand or requirement;
(f) retaining, or refusing to deliver up, an article; or

(g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly".

[128] It is true that the making of regulations is not referred to in subparagraphs (a) to (f). But the reference in the main part of the definition to "any decision of an administrative nature" and in the general provision of subparagraph (g) to "doing or refusing to do any other act or thing of an administrative nature" brings the making of regulations within the scope of the definition. This seems to me to be the clear meaning of the definition. But if there is any doubt on this score, the definition of administrative action must be construed consistently with section 33 of the

Constitution. All the judges in the High Court considered that the making of regulations falls within the scope of "administrative action" in section 33 of the Constitution. I have already indicated why I agree with this conclusion.

[129] The majority in the High Court considered that the failure to refer specifically to legislative administrative action in the definition of "decision" in section 1 of PAJA was deliberate, and indicated an intention to exclude such action from being reviewed under PAJA. I have already dealt with why I take a different view. It is necessary, however, to deal briefly with reasons given by the majority of the High Court for their decision on this issue.

[130] They attached weight to the specific exclusion from the definition of administrative action in PAJA, of 'any decision taken, or failure to take a decision, in terms of section 4(1). Section 4 of PAJA provides:

"Administrative action affecting public.—(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—
(a) to hold a public inquiry in terms of subsection (2);
(b) to follow a notice and comment procedure in terms of subsection (3);
(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure, or
(e) to follow another appropriate procedure which gives effect to section 3.

(2) If an administrator decides to hold a public inquiry---

(a) the administrator must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and
(b) the administrator or the person or panel referred to in paragraph (a) must—

(i) determine the procedure for the public inquiry, which must—

(aa) include a public hearing; and

(bb) comply with the procedures to be followed in connection with public inquiries, as prescribed,
(ii) conduct the inquiry in accordance with that procedure;

(iii) compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and

(iv) as soon as possible thereafter—
(aa) publish in English and in at least one of the other official languages in the Gazette or relevant provincial Gazette a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and
(bb) convey by such other means of communication which the administrator considers effective, the information referred to in item (aa) to the public concerned

(3) If an administrator decides to follow a notice and comment procedure, the administrator must—

(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;

(b) consider any comments received;

(c) decide whether or not to take the administrative action, with or without changes; and
(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.

(4)(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)(a) to (e), (2) and (3).
(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and
(v) the need to promote an efficient administration and good governance."

I refer more fully to its provisions later when I deal with arguments directed to the issue of procedural fairness.

[131] Section 4(1) imposes an obligation on an administrator concerned with decisions that affect the public to comply with the requirement of procedural fairness, but authorises him or her to decide how to give effect to this requirement. As long as the procedure followed meets the requirements of one of subparagraphs (a) to (d), the provisions of section 4(1) will have been complied with

[132] What is or is not administrative action for the purposes of PAJA is determined by the definition in section 1. It is only if the action taken falls within the definition that section 4 comes into play. The fact that the choice of a particular procedure to be followed in terms of section 4(1) is not itself subject to review, does not provide any help in deciding what is or is not "administrative action". All that it means is that an administrator's choice of procedure is final. Consistently with this the implementation of the choice in a manner consistent with sections 4(2), (3) or (4) remains subject to review."

33. A moment's reflection upon the process that has been decreed by section 219 of the Constitution read with section 12 of the Magistrates' Act to determine the salaries of public office bearers must lead to the conclusion that the first respondent's determination does not constitute administrative action if compared to the implementation of national legislation described in

the passage quoted in the previous paragraph.

34. Public office bearers, and in particular judges and magistrates cannot enter into a bargaining process with the executive in respect of their salaries without compromising their independence. It is for this reason that the second respondent has been created, a commission that consults with all interested parties, considers all relevant information and independently assesses the factors and considerations that should be taken into account in determining the public office bearers' remuneration. The first respondent cannot exercise any discretion in respect of such remuneration unless and until he has received a recommendation from the second respondent. He has no duty to request the second respondent's recommendation – the latter is compelled by the statute under which it has been created to prepare an annual submission and present the same to him.

35. The first respondent is not called upon to consider any of the actions envisaged in section 4 of PAJA. The only parties he may consult are the Minister of Finance or other members of the Cabinet, but he may certainly not initiate other consultative processes. The whole rationale for creating the second respondent and establishing the procedures by which the remuneration of public office bearers generally, and Judges and Magistrates in particular are determined, is aimed at eliminating the necessity of following a procedure as envisaged in section 4 of PAJA. Consultations with interested parties affected by the first respondent's decision are, for reasons of public policy and the need to protect the independence of judges and judicial officers, limited to the indirect discussions conducted by the second

respondent with representatives of the various categories of public office bearers.

36. The first respondent's determination is without force and effect until it has been approved by Parliament. Parliament's two Houses must approve the recommendation by resolution and have the power – and the duty - to approve a recommendation in part, to approve it in its entirety or to reject the recommendation as a whole.

37. The applicant described the approval by Parliament as a 'ratification' of the first respondent's determination. This submission is correct if it is intended to convey thereby that the first respondent's determination depends upon its validity and enforceability upon the decision by both Houses of Parliament: *Munimed v Premier van Gauteng en andere* [1999] 4 All SA 362 (T) and the authorities there quoted. *Non constat* that the first respondent's determination is therefore to be regarded as an administrative act that could be subjected to a PAJA review. Seen in its proper context, the process of preparing a notice in terms of section 12 of the Magistrates' Act falls into the category of an executive function intended in section 85 (2) (e) of the Constitution.

38. The question remains whether the first respondent's determination is reviewable on the principle of legality. Actions that are purely executive or legislative may still be challenged if they conflict with the principle of the rule of law either substantively or procedurally: *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* [2012] 2 All SA 345 (SCA) at paras [27] to [32] and the authorities there cited. In *Albutt and*

Others v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC) the following was said in paras [48] to [51]:

'[49] It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of section 84 (2) (j) (of the Constitution), *we held that although there is no right to be pardoned, an applicant seeking pardon has a right to have his application "considered and decided upon rationally, and in good faith, [and] in accordance with the principle of legality." It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it.*

[50] All this flows from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants. To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objects of the process. If it is not, it falls short of the standard that is demanded by the Constitution.

[51]. The executive has a wide discretion in selecting the means of achieving its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the

decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution. This is the true exercise of the power ...."

39. The applicant suggests that there are several grounds upon which the first respondent's decision could be reviewed and set aside. The first is the argument that the increase of 5% amounted in effect to a reduction of the Regional Magistrates' salary in that it failed to keep up with inflation. While the determination must be made while keeping inflationary pressures upon the currency in mind, the prohibition against a reduction in salary is obviously aimed at a conscious, deliberate reduction in remuneration in real terms. Quite apart from a conflict of fact on the papers in this regard, a reduction in purchasing power as a result of inflation is not such a reduction in remuneration. Inflation is a fact of economic activity and monetary policies, of the working of market forces, subject to national and international economic and trade developments, which must be taken cognisance of during the annual reconsideration of the public office bearers' remuneration. The first respondent's determination did take due notice of the effect of inflation upon the salaries of the affected parties and cannot be attacked on this ground.

40. The next submission is based upon the first respondent's alleged failure

to afford the applicant or its members an opportunity to make representations to him regarding the decision not to accept the applicant's proposed salary increase. This failure, it is submitted, resulted in materially adverse consequences for the applicant's members as they were denied due participation in the deliberative process. As has been set out above, the procedure decreed by section 12 of the Magistrates' Act read with the relevant provisions of the Independent Commission for the Remuneration of Public Office Bearers Act 92 of 1997, 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.

41 Lastly, the applicant complains that the first respondent adopted the second respondent's recommendation of a uniform increase in remuneration for all public office bearers. By so doing, the argument goes, second respondent failed to comply with the statutory obligation imposed upon it by section 8 (6) (i) of the Public Office Bearers Act 92 of 1997 to take into account the role, status, duties, functions and responsibilities of the office-bearers concerned when making a recommendation in regard to an increase in their remuneration. The applicant argues that a blanket approach was evident in the recommendation of a uniform increase of 5% for all categories without any differentiation between the various categories of public office

bearers and without any proper motivation for this approach.

42. The second respondent considers the adjustment of judges and magistrates in the absence of its Chairperson, who is a member of the Judiciary and therefore recuses himself when this aspect of the Commission's recommendations is considered. The second respondent has explained the process it followed in the answering affidavit filed by its Deputy Chairperson as follows:

'7.12 .....The Commission considers, as it is required to do, the role, status, functions and responsibilities of the office bearers concerned. The various categories of office bearers are pegged differently. Members of Parliament, Cabinet Members, and Traditional authorities share a common character of being public office bearers and a uniform adjustment impacts on these categories differently. It is therefore inappropriate to describe it as a "one size fits all"....

25.1 Magistrates have been remunerated in terms of the same salary, allowances and benefits structure as public servants until 2003, when they were included under the definition of "office bearers". Despite their addition to the fold of public office bearers, their remuneration packages are however still composed similarly to those of ordinary public servants.

25.2 Based upon the available grading and market data per grade, it appeared as the majority of Magistrates at lower levels are being fairly paid relative to the National Market, but that the gap between the remuneration of the lowest level judge and the highest level magistrate is too wide; and the

level of compression between the remuneration of a Judge of the high Court (sic) and the Chief Justice is unduly small, and not in relation to job evaluation indicators, or international best practice.

25.3 The Commission considered levels of remuneration of public prosecutors and other legal practitioners in the public service, and the possible comparison thereof to the remuneration of Magistrates, based on historical remuneration practices. The Commission however considers it inappropriate to deviate from its principled and scientifically formulated remuneration practices in respect of Magistrates.

25.4 After due consideration, the Commission's view was that there should be no change to the current benefit structure of Magistrates for the time being....

44.2 I maintain that the remuneration of public office bearers are (sic) already staggered in relation to the role, duties, functions and responsibilities of each particular class.

44.3 A uniform percentage increase impacts on these classes of public office bearers differently and yet there is a rational explanation for a uniform adjustment where inflation and other considerations apply with equal force to each class of public office bearers.'

43. With respect to the second respondent it is difficult to extract from these comments on what basis the Regional Magistrates' and Regional Court Presidents' role, status, functions and responsibilities were evaluated when it appears to be common cause on the one hand that they are insufficiently recompensed when considering their position in the judicial hierarchy, but it is

maintained at the same time that scientifically justifiable considerations warrant not only the continuation of an insufficient remuneration package; but also a uniform increase for all public office bearers that must, in real terms, exacerbate the existing unfairness of the Regional Magistrates' and Regional Court Presidents' remuneration. The complaint that the second respondent failed to take proper account of the position of the applicant's members when preparing the 2010 recommendation on the basis of "one-size-fits-all" appears to be well justified. Its explanation of the process it followed lacks rationality.

44. From the record filed by the first respondent in reaction the notice in terms of Rule 53 it is clear that, in adopting the second respondent'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 office bearers' salaries were to be decided upon eventually, the first respondent

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. In respect of the applicant's members he was furthermore obliged to consider whether the different categories of magistrates should be remunerated according to different salary scales. No such investigation was undertaken.

45. The first respondent defends his failure to provide any reasons for his determination on the basis that he paid heed to the second respondent'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.

46. It follows that the first respondent's determination of the 2010 salary adjustments relating to the Regional Magistrates and Regional Court Presidents fails the test of legality because of the failure to comply with the statutory requirement to consider the public office bearers' particular role, status, function, duties and responsibilities prior to determining an appropriate salary increase, rendering the determination unlawful and irrational. It must therefore be set aside and remitted to him for reconsideration.

47. From the above reasoning it is clear that even if the conclusion that the first respondent's determination constitutes executive action is wrong, and applicant's submission that it is in fact an administrative act is correct, the first respondent's decision would – *a fortiori* – be subject to review and liable to be set aside on the grounds of a failure to take relevant factors into account and

on the resultant irrationality of the determination.

48. It might be argued that it is inappropriate to set aside only the decision relating to the applicant's members, and not the first respondent's determination in its entirety. Bearing in mind that the first respondent is obliged to pay attention to the individual circumstances of each group of public office bearers, his determination, although singular in its composition, is in fact a conglomerate of individual determinations for each class of public office bearers affected thereby. It is consequently possible to set aside only one of these determinations relating to one category of public office bearers Quite apart from this consideration the applicant has correctly pointed out that it has only *locus standi* to deal with the recommendation affecting its members

49. For reasons set out in this judgment, the applicant's demand that the first respondent consult with its members prior to reconsidering the recommendation cannot be entertained.

50. While the matter is remitted to the first respondent for reconsideration, the determination will remain of full force and effect to avoid the consequence that the applicant's members receive the – lower – salary that was payable according to the scales that applied prior to the impugned decision coming into effect.

The following order is made:

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;
2. The matter is remitted to the first respondent for reconsideration in the light of this judgment;
3. The decision referred to in paragraph1 shall continue to be of full force and effect until the first respondent has taken the decision afresh;
4. First respondent is ordered to pay the applicant's costs.

Signed at Pretoria on this 14 day of September 2012.

E BERTELSMANN

Judge of the High Court

Case no: 20210/11

Date of the hearing	:	15 June 2012
Judgment delivered on	:	03 September 2012
Counsel for the Applicant	:	Adv M Chaskalson SC with Adv S Budlender
Instructed by	:	Rudmanl Attorneys, Pretoria
Counsel for the 1st & 2nd Respondents	:	Adv I A M Semenya SC with Adv A Rawjee
Instructed by	:	State Attorney, Pretoria