Title of Paper: Disciplinary processes for South African magistrates: Reflections on the Magistrates Act 90 of 1993 and the Labour Relations Act 66 of 1995

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1. Introduction

Magistrates in South Africa fulfil a very important role in the administration of justice and on a daily basis they fulfil both judicial and administrative duties to ensure the maintenance of law and order. These judicial officers have been referred to as the frontline of the judicial system, because the majority of South Africans, in their quest for justice, will first come into contact with the Magistrates' Courts.[1] Against the vital judicial role that magistrates fulfil, it is imperative that there should be certainty regarding the applicable disciplinary regime that applies to this category of persons. Added to this, they should be well-aware of the appropriate remedies that are applicable to them should their constitutional right to fair labour practices be given effect to.

As an example, magistrates ought to know what remedies are available to them should they, in the performance of their duties, be unfairly dismissed. This issue arose in the matter of *Reinecke v The President of South Africa*[2] where the High Court awarded a significant amount of contractual damages to a magistrate who claimed that the chief magistrate repudiated the contact of employment between the parties by making his (the magistrate's) continued employment intolerable. On appeal, the Supreme Court of Appeal (SCA)[3] left the question whether a magistrate is an employee open. Consequently, it remains uncertain whether magistrates are

[1] Van Dijkhorst 2000 *Advocate* 42; Hoexter and Olivier *The Judiciary in South Africa* 319.
[2] HC 4 September 2012 case no 25705/ 2004 unreported.
[3] *President of SA & others v Reinecke* 2014 (3) SA 205 (SCA); (2014) 35 *ILJ* 1485 (SCA). For a discussion of the case see Van Eck and Diedericks *ILJ* 2014 2700.

entitled to rely on remedies in terms of the Labour Relations Act[4] (LRA). The SCA concluded that the remedies for an aggrieved magistrate are to be found in administrative law. This conclusion was drawn despite the fact that it is trite that where administrative and labour law overlap, disputes should be resolved by making use of tailor-made labour law remedies.[5]

The aim of this paper is to compare the procedures for disciplining magistrates in terms of the Magistrates Act 90 of 1993 with the procedures established for other employees in terms of the LRA. This paper further evaluates whether the disciplinary regime applicable to magistrates is effective to ensure that they are appropriately and timeously disciplined when need be in order to ensure a well-functioning judiciary. The paper concludes by making recommendations regarding stream-lined processes that would provide role players in the judiciary with certainty about their applicable remedies and the appropriate dispute resolution institutions where their disputes should be resolved.

2. Disciplinary procedures applicable to employees in terms of the LRA

Section 23 of the Constitution[6] guarantees to every worker the right to fair labour practices. The LRA was enacted to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.[7] Section 185 of the LRA specifically provides protection to employees against unfair dismissal and unfair labour practices by their employers. However, these protections do not provide immunity to employees from being disciplined by their employers in the event that they misbehave. When the employer alleges that the employee committed misconduct, the employer is entitled to institute disciplinary action.[8] The first step in the disciplinary process would be for the employer to hold a disciplinary enquiry where the employee can have the opportunity to respond to the allegations and state his or

[4] Act 66 of 1995.
[5] *Gcaba v Minister for Safety & Security & Others* 2101 (1) SA 238 (CC); (2009) 30 ILJ 2623 (CC). See also *Chirwa v Transnet* 2008 (4) SA 367 (CC); 2008 29 *ILJ* 73 (CC).
[6] The Constitution of the Republic of South Africa, Act 108 of 1996.
[7] See section 1 of the LRA which sets out the purpose of the Act.
[8] Van Niekerk *et al Law@work* 89.

her case and.[9] Should the employee be found guilty of misconduct at the disciplinary enquiry, the employer must decide on the appropriate sanction. The appropriate sanction will depend on the circumstances of each case. Relevant factors to take into account include the severity of the misconduct, the employee's disciplinary record and length of service.

If the circumstances and facts of the case permit, the employer may impose dismissal as a sanction on the employee. In this regard section 188 protects the employee by requiring the employer to show that the reason for dismissal for misconduct was a fair reason and that a fair procedure was followed to effect the dismissal. Failure on the part of the employer to prove this will render the dismissal unfair- if the dismissal is not automatically unfair.[10]

If an employee feels aggrieved by a dismissal the employee is entitled to challenge the fairness thereof at the relevant dispute resolution institution. In terms of section 191 the employee may refer a dispute to the bargaining council if the parties to the dispute fall within the scope of the relevant council. If no council has jurisdiction over the dispute, the employee may refer the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). The relevant dispute must be lodged within 30 days since the date of the dismissal or since the date the employer made a final decision to dismiss the employee. The burden of proof in dismissal disputes is set out in section 192 of the Act. The employee is required to prove the existence of the dismissal, in other words that he or she was indeed dismissed.[11] If a dismissal has been established, the employer must prove that the dismissal was for a fair reason and was effected in terms of a fair procedure. As stated above, if the employer cannot satisfy the burden of proof, the dismissal will be regarded as unfair and the employee will be entitled to certain remedies. Section 193 of the Act provides that the employee will be entitled to re-instatement, re-employment or compensation. Re-instatement and re-employment are the primary remedies available to an employee in the case of unfair dismissal. Compensation is an alternative remedy and must be awarded if the circumstances set out in section 193 (2) applies. Section 194 places

[9] See *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 *ILJ* 1644 (LC) for guidelines for a disciplinary enquiry to satisfy the requirement of fairness.
[10] Section 187 of the Act lists the automatically unfair reasons for dismissal.
[11] Conduct that constitutes dismissal is defined in section 186 of the Act.

limits on the amount of compensation that may be awarded to an employee. It stipulates that in the case of unfair dismissal, the employee will be entitled to compensation of up to 12 months' remuneration. If the dismissal was automatically unfair the compensation awarded may not be more than 24 months' remuneration.

An employer has the right to institute rules in order to establish the conduct required from its employees. If an employee fails to adhere to the required rules or standards, the employer has the right to institute disciplinary action in order to ensure that standards are maintained. However, an employee has the right to be treated fairly when subjected to discipline. The relevant procedures prescribed by the LRA provide employers, on the one hand, with peace of mind that their business standards and integrity can be maintained. Conversely, employees have certainty that their fundamental right to fair labour practices cannot be undermined by employers. In this regard, the LRA strikes a balance between the rights of employers and employees and ensures efficiency and certainty in the resolution of disputes arising in the course and scope of employment.

3. Disciplinary procedures for magistrates in terms of the Magistrates Act

Historically magistrates were employees and formed part of the public service. They were appointed by the Minister of Justice in terms of section 9 of the Magistrates Court Act 32 of 1944 and their conditions of service, retirement, remuneration, discipline, transfer, promotion and dismissals were regulated by the provisions of the Public Service Act 54 of 1957.

The Hoexter Commission of Enquiry into the Structure and Functioning of the Courts[12] recommended that magistrates be removed from the public service as their independence were being jeopardised. The magistracy were statutorily removed from the public service by the enactment of the Magistrates Act. The Act established an independent body, the Magistrates Commission,[13] with one of its objects to ensure that the appointment, promotion, discharge of or disciplinary steps taken against magistrates take place without favour or prejudice.[14]

[12] Part 1 of the 5th Report, (1983) para 4.4.1.
[13] S 2 of the Act.
[14] S 4.

The disciplinary procedures for magistrates in the case of misconduct are set out under part five of the regulations in terms of the Act. Regulation 25 contains the general provisions regarding misconduct and essentially describes the circumstances when a magistrate may be accused of misconduct.

In regulation 26 the procedures to conduct a preliminary investigation and an investigation are set out. It broadly prescribes that after an allegation of misconduct against a magistrate a preliminary investigation may be held by another magistrate or an investigation officer. Under sub-regulation 17, the sanctions are set out if the magistrate is found guilty of misconduct. It stipulates that:

> If the magistrate charged is found guilty or has admitted that he is guilty, and the Minister does not suspend or relieve him from office for misconduct, the Minister may impose one or more of the following sentences:
>
> (a) Caution or reprimand him;
>
> (b) withhold his translation to a higher salary scale or promotion to a higher post for a period not exceeding five years;
>
> (c) transfer him to other headquarters;
>
> (d) impose a fine not exceeding R 10 000 on him; and
>
> (e) postpone his decision under paragraphs (a) to (d), with or without conditions, for a period of 12 calender months.

If the magistrate is found guilty of misconduct and is not satisfied with the outcome, he/ she may file a grievance to the commission within 21 days after the conviction. The grievance procedures are dealt with in terms of regulations 31- 33. It stipulates the route that an aggrieved magistrate must take in order to have the dispute resolved. Generally, the magistrate must first approach the head of office, then the Commission, and finally the Minister. The Minister makes the final decision and will inform the magistrate thereof in writing.

Section 13 states that a magistrate may only be suspended or removed in accordance with the provisions of the Act. The Act prescribes that the Magistrates Commission may make recommendations to the Minister regarding the suspension of a magistrate. After taking consideration of the recommendations of the

Commission, the Minister may provisionally suspend a magistrate.[15] Parliament must then pass a resolution to confirm or lift the suspension.

If the Commission recommends that a magistrate be removed from office, the Minister must suspend the magistrate or confirm the suspension, if the magistrate had been provisionally suspended. Parliament is then required to pass a resolution as to whether or not the restoration of the magistrate into office is so recommended.[16]

Despite the above procedures and the provision in the Act stipulating that Parliament must pass the relevant resolution, as soon as reasonably possible, this has not been the case in practice. The Magistrates Commission raised concern that the cases for misconduct against magistrates are not timeously resolved. One of the cases before the Commission was one of a magistrate who had been found guilty of murder and provisionally suspended in 2011 already, but whose suspension had not yet been confirmed by Parliament. Another matter concerned the provisional suspension of a magistrate where the matter remained unresolved for 10 years.[17]

In light of the above, it is submitted that the disciplinary procedures applicable to magistrates are not as effective as the disciplinary procedures applicable to other employees in terms of the LRA.

4. Evaluation of the different disciplinary regimes

4.1. Introduction

If it is established that the disciplinary regime that applies to magistrates are not effective, it raises the question on whether or not the procedures in terms of the LRA should be made applicable to magistrates in order to ensure a well- functioning judiciary. The answer lies in the fact that the provisions of the LRA are only applicable to employees. As mentioned above, the SCA in the *Reinecke* case left the question open as to whether or not the LRA is applicable to magistrates.

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[15] S 13(3).
[16] S 13(4)(c).
[17] Hartley 2014 http://www.bdlive.co.za/national/law/2014/10/29/delays-in-cases-against-magistrates-bothers-committee

In the matter of *Khanyile v CCMA*[18] the Labour Court advanced the constitutional guarantee of an independent judiciary as rationale for excluding magistrates from the ambit of the LRA. In that case a magistrate had been denied a promotion to the status of senior magistrate and as a result filed an unfair labour practice dispute, in terms of section 186 (2) of the Labour Relations Act,[19] against the minister of justice, whom the magistrate regarded as his employer. The court held that at face value it would seem that a magistrate could be categorised as an employee, taking into consideration the definition of an "employee" in terms of section 213 of the LRA[20] and the fact that magistrates are not explicitly excluded from the ambit of the LRA.[21] However, the court noted that the definition of an employee in section 213 should be construed within a broader constitutional framework.[22] The court took the enquiry of the employment status of a magistrate beyond the traditional tests for the existence of employment or an employment relationship. It was held that a judicial officer cannot be an employee, in *lieu* of the fact that the Constitution stipulates that the courts are independent and subject only to the Constitution and the law.[23] The Constitution requires the judiciary to apply the law and Constitution without interference from any person or organ of State.[24] Accordingly the court refused to bring magistrates within the protective measures of the LRA and found that the constitutional guarantee of an independent judiciary would be compromised, should judicial officers be categorised as employees. The court concluded that it would be difficult to reconcile an employment relationship, between a magistrate and the State, with judicial independence.[25]

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[18] *Khanyile v CCMA* unreported case number D 532/2002 of 26 November 2004 (hereafter *"Khanyile"*).
[19] S 186 (2) of the *LRA* prohibits unfair conduct by the employer relating to, *inter alia*, promotion.
[20] S 213 of the LRA defines an employee as a) "any person, excluding an independent contractor, who works for another person or the State and who receives or is entitled to receive any remuneration; and b) any person who in any manner assists in carrying on or conducting the business of an employer."
[21] *Khanyile* para 10; s 2 of the *LRA* expressly excludes certain categories of persons from its scope and application.
[22] *Khanyile* para 10.
[23] Above footnote para 30.
[24] S 165 of the *Constitution*.
[25] *Khanyile* para 31.

A similar approach was followed by the CCMA in *LDM du Plessis obo L Pretorius v Department of Justice*[26] where it was held that a magistrate is not an employee and cannot rely on the dispute resolution mechanisms established by the LRA.

In light of the above, the question to be considered is whether the independence of the judiciary unequivocally justifies the exclusion of magistrates from the scope and ambit of the LRA. In order to address this question, it is important to consider some of the core aspects of judicial independence.

4.2. Independence of the judiciary as rationale for excluding magistrates from the ambit of the LRA

Judicial independence has many facets and there is no universally agreed definition of the principle.[27] However, there is consensus regarding some of the core aspects of judicial independence. In its narrow sense judicial independence essentially entails that judicial officers should be independent from any influence from the executive and from any other form of interference when they have to decide on matters over which they preside. This principle stems from the doctrine of separation of powers among the branches of government- which is the executive, legislature and the judiciary. Therefore, as in *Khanyile*, it is argued that should a judicial officer be categorised as an employee, the State as the employer may have the authority to influence the outcome of a decision and this in turn will compromise the constitutional guarantee of an independent judiciary. At first glance, this seems to be a valid argument, but the concept of judicial independence requires further analyses.

Judicial independence cannot be viewed in this narrow sense only. It has many dimensions and entails more than the idea that the judiciary should not be subjected to undue influence in their decision-making. Judicial independence is one of the fundamental values of justice. Some of these values are procedural fairness,

[26] Unreported award number GA 26670 considered by Commissioner PJ van der Merwe, 17 December 2002; See also van Eck and Diedericks 2014 *ILJ* for a discussion of the issue of the case.
[27] Malleson 1997 *Modern Law Review* 657.

efficiency, accessibility and public confidence in the courts.[28] Judicial independence is important in ensuring justice by creating an efficient and reliable judiciary.[29]

The delays in effectively resolving disputes regarding the suspension and removal of magistrates from office, gives rise to delays in court proceedings, as magistrates on suspension cannot perform their judicial duties. Delays in the judicial process undermines judicial independence because delays destroy the public confidence in the judiciary.[30] Furthermore, the public will lose confidence in the judiciary if they see that justice is not being done to magistrates who are makes themselves guilty of misconduct.

The rationale for excluding magstrates from the ambit of the LRA is to protect judicial independence. However, the current disciplinary regime applicable to magistrates in terms of the Magistrates Act also has the effect of jeopordising judicial independence by eroding public confidence. The author therefore submits that independence as rationale for excluding magistrates from protection in terms of labour law is unsubstantiated.

5. Recommendations and conclusion

Because the majority of South Africans come into contact with the judicial system through the Magistrates courts, it has been stated that:

> Magistrates tend to shape the impressions and perceptions of litigants, witnesses and onlookers of the administration of justice. It is in the Magistrates courts that admiration is earned and respect is lost.[31]

In light of important role magistrates fulfil and the image they represent to the public, it is imperative that the public confidence in the judicial system are fostered and

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[28] Shetreet and Forsyth *The Culture of Judicial Independence Conceptual Foundations and Practical Challenges* 18)

[29] Above footnote 1.

[30] *Pharmaceutical Society of South Africa (Pty) Ltd v Tshabalala-Msimang NO; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 (SCA) at 260G to 261H; *National Director of Public Prosecutions v Naidoo* (419/09) [2010] ZASCA 143; 2011 (1) SACR 336 (SCA) ; [2011] 2 All SA 410 (SCA) (25 November 2010)

[31] Hoexter and Olivier *The Judiciary in South Africa* 319).

promoted. The author therefore recommends that magistrates be categorised as employees and be subjected to the dispute resolution procedures and remedies in terms of the LRA. This will result in the efficient and timeous resolution of disputes, which will ensure the proper administration of justice. The inclusion of magistrates under the LRA will not necessarily result in the undermining of judicial independence. Instances exist where the executive is involved in the administrtaion of justice.[32] The judiciary cannot operate as an island. It has certain connections with the executive, relating to issues such as funding for example. The challenge is to have in place proper protections against influences that may interfere with the judiciary's independence in performing their duties.[33]

The author acknowledges the potential issues relating to the inclusion of magistrates under labour law protection. It may, for example, not be ideal or practical for magistrates to embark on strike action should an issue arise between them and the State. This would impede the administration of justice. To resolve these potential problems, it is suggested that magistrates still be classified as employees, but should be included under the definition of essential services in terms of the LRA.[34]

Bringing magistrates within the ambit of the LRA will provide clarity to magistrates regarding their appropriate remedies as well as to presiding officers regarding the appropriate relief they are authorised to grant to an aggrieved magistrate. In the case of *Reinecke*, it seemed that the substantial amount of damages claimed by the aggrieved magistrate and awarded by the High Court and the difficulties for computing damages until retirement, played a contributory role in the SCA's decision to reject the claim.[35] As discussed above, the LRA provides for specific remedies in case of unfair dismissal or unfair labour practice in terms of section 193 of the Act and a presiding offer may not make an award beyond those remedies.

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[32]Shetreet and Forsyth *The Culture of Judicial Independence Conceptual Foundations and Practical Challenges* 25.

[33] Russell and O'Brien *Judicial Independence in the Age of democracy Critical Perspectives from around the World* 21.

[34] Employees engaged in essential services are prohibited from embarking on strikes.

[35] Van Eck and Diedericks 2014 *ILJ* 2700.

Making the tailor- made procedures established by the LRA available to magistrates will not only provide clarity to magistrates regarding their remedies, but it will also ensure that they are appropriately and timeously disciplined when need be in order to ensure a well- functioning judiciary.