

**RACIAL CONSIDERATIONS ARE A
PREREQUISITE AND NOT AN
AFTERTHOUGHT: A DISCUSSION OF**

***Kroukamp v The Minister of Justice and
Constitutional Development* [2021] ZAGPPHC 526
and
Magistrates Commission v Lawrence 2022 1 All SA 321
(SCA)**

1 Introduction

This case note engages in a critical examination of two recent cases concerning the issue of race-based appointments, or rather the lack thereof, in the judiciary. The crux of this case note concerns the appointment of judicial officers as regulated by section 174 of the Constitution of the Republic of South Africa, 1996 (Constitution). In particular, the case note is driven by subsection 2 of section 174, which provides:

“The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”

In essence, this case note is an advocate for the argument that the South African judiciary must reflect the demographics of the country. That is to say, racial considerations are a prerequisite in judicial appointments, and not an afterthought. The case note starts with a discussion of the matter that was before the Gauteng High Court, sitting as the Equality Court, in *Kroukamp v The Minister of Justice and Constitutional Development* ([2021] ZAGPPHC 526). The case note then discusses the later decision of the Supreme Court of Appeal in *Magistrates Commission v Lawrence* (2022 1 All SA 321 (SCA)).

The *Kroukamp* case concerns a claim of unfair discrimination before the Equality Court (par 1). The first complainant in the matter was Martin Kroukamp, with the second complainant being the trade union Solidarity. The first respondent was the Minister of Justice and Constitutional Development (Minister), the second respondent was the Director-General of the Department of Justice and Constitutional Development (Director-General), the third respondent was the Magistrates Commission (Commission), and the fourth respondent was the Chairperson of the Magistrates Commission (Chairperson). The two complainants instituted proceedings in the Equality Court after a decision by the Minister not to fill 23 senior magistrate vacancies (par 1). The complainants sought relief in the form of a declaration that the decision by the Minister not to appoint Kroukamp in the position of senior magistrate was unfair discrimination on the basis of race (par 2). According to the complainants, this decision by the

Minister was prohibited by sections 6, 7 and 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) (par 2). With reference to the alleged unfair discrimination, the complainants also sought to prevent the Minister from making such appointments after considering race alone, and sought an order directing the Minister to appoint Kroukamp into the position of senior magistrate in line with the recommendation of the Commission (par 2).

The *Lawrence* matter consists of three judgments. The first judgment is the majority judgment by Potterill AJA, the second judgment is a minority judgment by Molemela JA, and the third judgment is a concurring judgment by Ponnann JA. The majority and its concurring judgment reject the prerequisite nature of section 174(2) of the Constitution, as according to the majority ruling, such an approach would lead to no White male candidates being appointed. The second, minority judgment of Molemela JA, on the other hand, advances the prerequisite nature of this section, whose intention is to give life to substantive equality and redress. The case note now proceeds to engage in an examination of the *Kroukamp* case.

2 Facts of the *Kroukamp* case

The Commission advertised 23 vacancies for the position of senior magistrate on November 2009 in various districts (par 3). Kroukamp applied for the post of senior magistrate in Alberton. The Commission then prepared a list of candidates. The candidates, who included Kroukamp, were then interviewed for the post in Alberton (par 4). After this process, a list of recommendations was submitted on 28 February 2011 by the Commission to the Minister. The Commission had only recommended one candidate per post for all 23 vacancies (par 5). According to the Commission, the recommended candidates reflected the racial and gender make-up of the Republic. Kroukamp was one of the candidates recommended for the various posts, in particular the vacant post of senior magistrate in the Alberton region. The Minister on 15 June 2011 proceeded to request the Commission to provide him with further information as the information before him was not sufficient to enable him to make judicial appointments (par 6). The Commission filed a response on 28 February 2012 in which it was of the view that there were not enough candidates from which it could make recommendations; as a result, it could only suggest one candidate per post (par 7). Furthermore, according to the Commission, the gender and racial balance in the Alberton region would not be disturbed by the appointment of this White male candidate (par 9). The list of recommendations had taken into account the race and gender make-up; as such, section 174(2) of the Constitution had been complied with (par 10).

However, during the course of 2011, the Minister questioned why only one candidate had been recommended for each of the 23 vacant positions and whether this was ideal for our constitutional aspirations especially after considering the recommendation of three White males for some of the posts (par 11). In February 2012, the Commission provided a detailed response stating that it was bound by its earlier decisions and in these circumstances, only three candidates were shortlisted per post and in most cases only one

candidate was found suitable for appointment, hence only one name being submitted to the Minister (par 12). The Commission went further, stating that the other suitable candidate, an Indian woman, had been appointed in the Johannesburg region (par 13).

The Minister then wrote to the Chairperson on 30 November 2011, stating that while he accepted the recommendation of one candidate per post, he still refused to make any appointments as he was not satisfied with the pool from which the recommendations were made (par 14). The Minister viewed these positions as being critical to the transformation of the judiciary, thus necessitating the consideration of Black women judicial officers (par 14). According to the Minister, this transformation agenda was more significant in vacancies such as the ones advertised, as it was in such senior positions (where there was an under-representation) that the appointment of Black women was needed (par 14). The Minister then proceeded to decline to make any appointments from the Commission's recommendations in May 2013; as such, the Secretary of the Commission suggested that the vacancies be re-advertised. The Equality Court expressed its opinion that there was no reason in law for the Minister not to make appointments simply because there was only one recommendation (par 15). The Equality Court stated further that the Minister in this instance over-relied on section 174(4) of the Constitution. The Constitution allows the appointment of magistrates to be based on an Act of Parliament – in this instance, the Magistrates Act 90 of 1993 (the Magistrates Act). The Magistrates Act does not suggest a specific number of recommendations per post for an appointment to be made. The court expressed the view that the Minister had sought to hide behind section 174(4), and that the only reason for the Minister refusing to appoint the complainant as a senior magistrate of Alberton was because he was not Black and a woman (par 15).

3 Decision of the Equality Court

As a result of the Minister's decision, Kroukamp felt aggrieved and proceeded to launch proceedings, claiming that there was unfair discrimination on the basis of race and/or gender in contravention of sections 6, 7 and 8 of the Equality Act (par 16). The court was of the view that the Minister had no regard to the Commission's balance-of-representation exercise and the merit requirement (par 20). Kroukamp argued that a decision based on considerations of race and gender does not stand in the face of the requirement that affirmative action must be applied in a situation-sensitive manner that takes into account the ability of the applicant.

Kroukamp conceded that it is not unfair discrimination to enforce requirements that were meant to redress the race-based injustices in an attempt to advance such persons who were disadvantaged (par 21). However, this concession according to him did not mean that such important vacancies be left open owing to the requirements of race or gender alone, which may go against other suitable candidates (par 21). Kroukamp was of the view that if the application of race and gender considerations alone went against the appointment of candidates, service delivery in such instances

would be unjustifiably and adversely affected by the Minister's pre-occupation with race and gender representation to the exclusion of other relevant considerations such as competency (par 21). To Kroukamp, the Minister taking into account that he was a White male was unacceptable (par 21). Kroukamp further conceded that the Minister refused to make such appointments owing to insufficient information as there had only been one recommendation per post, even in instances where Black women were recommended (par 22).

The argument of the respondents was that there were no appointments made, even in instances where Black males had been recommended; as such, there was no unfair discrimination (par 23). According to the respondents, there was a difference between not filling a vacant position and not making any appointments. The respondents argued further that the two complainants had failed to prove a *prima facie* case, on a balance of probabilities, that there was unfair discrimination. The respondents further argued that if the complainants made out a *prima facie* case of such alleged unfair discrimination, the respondents would have the onus to disprove it. The respondents' case, in simpler terms, was that there was no unfair discrimination owing to race or gender considerations, but rather, the Minister simply refused to fill the vacant posts owing to insufficient information because of the small pool of candidates recommended by the Commission (par 25).

In the Minister's letter dated 5 June 2011, he stated clearly that what had transpired was different from the usual practice where he was provided with a list of candidates who are according to the Commission fit and proper to be appointed as presiding officers, and from which he would then make such appointments (par 26). Moreover, the Commission's actions of simply submitting one recommended candidate per post deprived him of the opportunity to assess the various attributes that need to be analysed when making such appointments. Furthermore, the Commission's recommendations in the districts of Durban, Alberton and Worcester purported to meet the requirements of section 174(2) of the Constitution, when they did not (par 26). In essence, the respondents were of the view that the Commission's one recommendation per post deprived the Minister of his discretion. The respondents further suggested that since Kroukamp conceded that the Minister did not make any appointments, even where Black females were recommended, should have disposed of the matter (par 27).

The Chairperson had provided an explanation for the recommendation of Kroukamp, which was to bring stability to the office in Alberton owing to his leadership, which was needed (par 28). According to the Equality Court, the Minister failed to explain why he did not consider the additional information provided by the Commission in its response. The court expressed the view that this was owing to his fixation on the explanation he provided that one recommendation per post limited the pool from which he could choose, which violated his discretion, and which was why Kroukamp and others were not appointed (par 30). The Equality Court stated further:

“However, it is glaringly clear that the main reason for the nonappointment of the first complainant was that ‘I have found the pool of the candidates from which I am required to make appointments inadequate for purposes of making appointments that aim at the advancement of the constitutional imperative regarding the transformation of the judiciary. This is more significant especially at the level of Senior Magistrate where these vacancies occur, as it is at the management echelon of the judiciary where we still experience acute underrepresentation of Black and Woman Judicial officer.’” (par 31)

The Equality Court proceeded to state that the Equality Act forbids unfair bias. It is legislation that gives life to section 9 of the Constitution, which is the equality clause. Using the principle of subsidiarity, the court reasoned that it is the provisions of the Equality Act that must be applied and there must be no direct reliance on section 9 of the Constitution (par 33). The court gave effect to the principle laid down in *MEC for Education, KwaZulu Natal v Pillay* (2008 (1) SA 474 CC par 40) – namely, that a party cannot avoid statutes enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. In essence, the respondents cannot rely directly on section 174(2) of the Constitution, but rather, they were supposed to use section 9(2) of the Equality Act (par 34). The court was of the view that section 9 of the Equality Act provided procedural advantages that were not available in the constitutional provisions. The complainants, according to the Equality Court, provided evidence that forced the court to rule in their favour (par 35).

With regard to the issue of discrimination, the Equality Court noted that the relevant test in such instances is whether there is an element of unequal treatment of people owing to their characteristics, as suggested in *Harksen v Lane* (1998 (1) SA 300 (CC) par 48 (par 36)). According to the court, section 174(2) of the Constitution does not provide for absolute consideration of race or gender in judicial appointments (par 37). The court went further and stated that it agreed with the Equality Court’s decision delivered by Ledwaba J (as he was then) in *Singh v Minister of Justice and Constitutional Development* (2013 (3) SA 66 (EqC) par 27), when it stated that race and gender in section 174(2) of the Constitution must not be misconstrued as excluding the other crucial factors mentioned in section 9(3) of the Constitution. Rather, the Constitution must be construed as a whole. In this case, the Minister simply ignored the Commission when it said it had properly considered the application of section 174(2) when making its recommendation of Kroukamp (par 39). The Minister further ignored the Commission’s plea that the appointment of Kroukamp would have no effect on the composition of the demographic make-up of senior magistrates. The Minister only focused on the race and gender of Kroukamp, neglecting the other qualities for which he was recommended, and such behaviour by the Minister was simply unfair discrimination (par 39).

Another element the complainants raised was the neglect by the Minister of the Magistrates Act and of the Magistrates’ Courts Act 32 of 1944 (Magistrates’ Courts Act). These statutes provide for the appointment of fit and proper persons as suggested by section 10 of the Magistrates Act and section 9(1) of the Magistrates’ Courts Act (par 40 and 41). Relying on *Van Rooyen v State (General Counsel of the Bar of South Africa intervening)* (2002 (5) SA 246 (CC)), the court noted that these appointments are done in

consultation with the Commission, which consists of responsible members of society and there is no reason to believe that these members would fail to implement their duties with integrity (par 42). However, the recommendations of the Commission do not bind the Minister, as he is not obliged to make appointments based on such recommendations (par 42; see also *Van Rooyen v State supra* 109). The Equality Court in this case proceeded to note:

“Once it is recognised that the Magistrates Commission fulfils the role of a constitutional check upon the decision-making power of the Executive, then it must follow that the Minister must have reasons competent in law for declining to follow the recommendations.” (par 45)

In the present case, section 174(1) and (2) of the Constitution are relevant in the appointment of prospective judicial officers under section 10 of the Magistrates Act, as the judicial officer must not only be a fit and proper person, but the judiciary must also represent broadly the demographics of the Republic (par 46).

With regard to these appointments, the court referred to an article by Judge Davis, which supported an approach that first considers candidates who have merit for the appointment, and should appointment of such a candidate not ensure a proper representation of the demographics, only then would section 174(2) apply to consider another candidate that was not a first or second choice but who still had the necessary merit (par 47). Raulinga J in this case was of the view that the Minister held the idea that no matter what the Commission’s view or recommendation was regarding Kroukamp as a suitably qualified individual for the position of senior magistrate in the Alberton district, he was simply not ready to appoint a White male candidate to fill that vacancy (par 48). According to the Minister, White male candidates should not be recommended for that position given the constitutional aspirations towards transformation. However, the court found that section 174(2) makes no provision that prohibits the recommendation and appointment of White males in these judicial positions. The court, using the Minister’s “body language” as evidence, then concluded that his reasons were not sufficient to justify his decision, and that accordingly he had violated the Equality Act (par 50; see also *Minister of Environmental Affairs and Tourism v Pham Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) par 40). Raulinga J went further to state that the language used by the Minister, even though ambiguous, showed that his reason for the non-appointment of Kroukamp was that he was a White male, and this is unfair discrimination (par 50). The Minister failed to prove that such discrimination was fair.

The court then stated:

“We may not become a united society and heal the divisions of the past, if we apply the apartheid inequalities in reverse. Painful as the injustices of the past might have been, we must endure the pain and soldier on.” (par 52)

According to the Equality Court, there has been a lot of progress post 1994 in the demographic representation of magistrates (par 53). The Equality Court stated that members of the Black population have taken posts in the judiciary, which has increased their trust in the judiciary. In the same way,

the White population will have increased trust in the judiciary if they see some of their own occupying these positions.

4 Comments on the *Kroukamp* case

This case note respectfully does not agree with the approach and the conclusion reached by the Equality Court in this matter for reasons detailed below. The first point of departure is disagreement with the Equality Court's application of section 174(2) of the Constitution. This provision requires that the appointment of judicial officers must represent the demographic of the Republic of South Africa, in light of the injustices of the colonial and apartheid regimes' unjust racial policies (s 174(2) of the Constitution). While this provision has not yet been given a fixed interpretation by the courts and legal scholars, it is clear that it was intended to redress the injustices highlighted above (Siyo and Mubangizi "The Independence of South African Judges: A Constitutional and Legislative Perspective" 2015 18(4) *PELJ* 817 824). It is evident that the Constitution attempts to recognise the racial and gender oppression that the broader Black community faced from the White community, which extended to the appointment of judicial officers. The case note submits that the provision cannot be relegated into a secondary requirement as the Equality Court has attempted to do, but rather, the provision is a prerequisite on its own that can and should override other requirements (Malan "Reassessing Judicial Independence and Impartiality Against the Backdrop of Judicial Appointments in South Africa" 2014 17(5) *PELJ* 1965 1977).

Using the Magistrates Act, which provides for the appointment of any fit and proper person as a magistrate, the court sought to bypass the need for transformation and adopted once again the legal formalism that is a tool for colour blindness (par 40 and 41). In furtherance of the neoliberal approach of non-genuine meritocracy, the court stated that it preferred the approach where the first step is to find the candidates who are the very best in terms of criteria of merit. Then, and only then, if the ranking of candidates does not reflect the required representation, will race and gender apply to candidates who may not have been the first or second choice in the ranking but who nevertheless comply with the test of merit and hence are appropriately qualified.

This case note submits that the court suggests that race and gender are secondary issues, based on sympathy and not valid primary issues that are sought to be achieved from the start of the process (Madlingozi "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution" 2017 28(1) *Stellenbosch Law Review* 123 133). The court further provides a problematic approach when it states that our society may not become a united society and heal the divisions of the past if it continues to apply the apartheid inequalities in reverse. The court seems to suggest that Black people have the strategy, power and systems in place to effect racially-based discrimination. Needless to say, this is not the case. The court's perspective on this issue is, respectfully, misplaced. When it comes to an analysis of unfair discrimination, vulnerability is an important factor (Kruger "Equality

and Unfair Discrimination: Refining the Harksen Test” 2011 128(3) *SALJ* 479 491; for an example of the vulnerability of Black people, see *Moseneke v The Master of The High Court* 2001 (2) SA 18 (CC) par 20–22; *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 563 (CC) par 60–68). In the history of the Republic and the broader continent as a whole, White people have not historically had any form of vulnerability that is sufficient to suggest that redress statutes would be an application of reverse exclusion (Kruger 2011 *SALJ* 492). There are no past patterns of disadvantage and vulnerability that would justify this statement by the Equality Court (Kruger 2011 *SALJ* 493). In essence, if such an approach is allowed, it would undermine the actual victims of exclusion and injustice because the past political regimes ensured that their policies were to the sole advantage of White people and their infrastructure built on the backs of Black people (*Pretoria City Council v Walker* 1998 (2) SA 363 (CC) par 45 and 47).

The reason to have section 174(2) take precedence over other provisions is that such an approach would rid the courts of the narrative of meritocracy, which in reality is not neutral but rather breeds colour blindness and results in the perpetual disadvantage of the Black community (Ramalekana “A Critique of the Stigma Argument Against Affirmative Action in South Africa” 2022 4 *OHRH* 1 2; Brassey “The Employment Equity Act: Bad for Employment and Bad for Equity” 1998 *ILJ* 1366). The reality of South Africa is that merit is based on privilege. Allowing such an approach assumes that the starting point for the Black and White community is the same; needless to say, it is not (Ramalekana 2022 *OHRH* 21). Simply put, the case note makes the argument that the provision on demographic representation must not be interpreted as an afterthought or secondary requirement, but rather, demographic representation must be met at all costs without making the assumption (as the Equality Court does) that such an approach will be anti-merit. Nowhere in the Constitution does it state that merit supersedes the demographic-representation requirement.

Owing to the court’s refusal to allow reliance on section 9 of the Constitution, it is necessary to enquire whether this approach does not lead to a failure to understand substantive equality, which is the primary purpose of the equality clause. As can be seen from *Minister of Home Affairs v National Institute for Crime Prevention* (2005 (3) SA 280 (CC) par 21), substantive equality is a legally enforceable right (see also *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 par 62; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) par 41). The court’s approach is dangerous as it harbours conventionally gendered and racialised ideas of society (Albertyn “Substantive Equality and Transformation in South Africa” 2007 23(2) *SAJHR* 253 254). Albertyn suggests that equality jurisprudence must be consistent in order to properly address the systematic inequalities of our society and overcome the detrimental effect of legal formalism, which the court seemed to adopt in this case (Albertyn 2007 *SAJHR* 253 254).

This view is in line with the approach suggested by Molemela JA in par 38 of *Magistrates Commission v Lawrence* (*supra*), where she provides that section 174(2) must be understood in the context of substantive equality.

This approach would then invalidate the Equality Court's argument of reverse injustice to the White population. As Moseneke DCJ in par 26 of *Minister of Finance v Van Heerden* (2004 (6) SA 121 (CC)) states, the equality provision in the form of substantive equality must be understood in a historical context. In simple terms, when it comes to the issue of equality, one cannot reach a correct conclusion without an examination of the historical context of the Republic (Kruger 2011 SALJ 491; see also *Daniels v Campbell NO* 2004 (5) SA 331 (CC) par 48–54; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) par 40–43; *President of the Republic of South Africa v Hugo supra* par 74). This is because our history is filled with racism and sexism towards Black people. In order to address this, one must not simply interpret statutes as they are, but rather in a manner that seeks to redress and transform (Kruger 2011 SALJ 491). Nowhere in the history of the Republic of South Africa have Black people sought and had the necessary means to oppress White people, although the Equality Court also makes an assumption that enforcing this redress approach would result in such. It must be understood that restitution, transformation and redress are extremely important aspirations of the constitutional dispensation; they are given life to in the Bill of Rights and are not an abstraction as the Equality Court suggests (*Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC) par 1; see also *Singh v Minister of Justice and Constitutional Development supra*). Had the court followed the approach highlighted above, the case note submits that it would have reached an appropriate conclusion for South Africa's historical context. The case note now examines the *Lawrence* matter.

5 Facts of the *Lawrence* case

Mr Lawrence, an acting magistrate, applied for the position of permanent magistrate in the magisterial districts of Bloemfontein, Botshabelo and Petrusburg (par 1). He was not shortlisted for any of these posts. Feeling discriminated against and aggrieved, he instituted legal proceedings in the Free State Division of the High Court, Bloemfontein (par 1). Parties to the action against whom Mr Lawrence sought relief included the Magistrates Commission (the Commission), Mr Zola Mbalo who is the Chairperson of the Appointments Committee of the Magistrates Commission (the Chairperson), the Minister of Justice and Correctional Services (the Minister) and Cornelius Mokgobo who is the Acting Chief Magistrate Bloemfontein Cluster "A". These parties were cited as the first to fourth respondents respectively, with the Helen Suzman Foundation being admitted as a friend of the court (par 1).

6 Discussion of Potterill AJA's judgment

The court first had to deal with the contention by Mr Lawrence that, in terms of section 5(2) read with section 6(7) of the Magistrates Act, the Committee did not meet the quorum threshold when the prospective applicants were shortlisted for appointment to Bloemfontein (par 3). Another contention of the

appellants was that Mr Lawrence's failure to join the other shortlisted candidates prevented the court from granting relief until they had been joined as parties to the matter before the court.

The Bloemfontein High Court found that the Committee did not meet the required quorum threshold in respect of the Bloemfontein shortlisting process. The Committee had 10 members.

"In terms of s 5(2) of the Act the 'majority of the members of the Commission shall constitute a quorum for a meeting of the Commission'. During the shortlisting only five members were present." (par 4)

The Chairperson was fully aware of the shortfall. However, he relied on section 5(4) read with section 6(7), which allowed the progress of the meeting (par 4). In the absence of an appropriate quorum in terms of section 5(2), the meeting would not be valid and therefore section 5(4) could not be relied on (par 6). In essence, section 5(4) has to do with the determination of a quorum for a decision at a meeting that already meets the required minimum threshold (par 7). On this point, the SCA found that as the meeting was not quorate, the decisions made at that meeting, including the shortlisting of candidates for the Bloemfontein post, were not valid and accordingly had to be set aside (par 9). Regarding the joinder issue, the parties conceded that if the meeting did not meet the minimum threshold, then the issue of non-joinder would simply be academic (par 12).

The court then proceeded to highlight section 174(1) and (2) of the Constitution, which provides:

"(1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen. (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

In addition, section 174(7) provides:

"(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, these judicial officers take place without favour or prejudice." (par 13)

The court went further, pointing out that

"Section 10 of the Act provides:

'(10) The Minister shall, after consultation with the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates' Courts' [...] Act.'" (par 14)

The court then moved to the Regulations for Judicial Officers in Lower Courts (1994 GN R361 in GG 15524 of 1994-03-11). Regulation 3 deals with the appointment of magistrates (par 15). This regulation provides that those who can be appointed as magistrates must be citizens of the Republic, fit and proper and appropriately qualified. Regulation 5 provides that the qualifications, level of education, merits, efficiency and competency of the

people who qualify for the appointment must be considered (par 15). The appointment procedure was approved, taking note of section 174(2) of the Constitution, which provides for consideration of racial and gender demographics at a specific office in an attempt to redress the corruption and imbalances caused by the colonial and apartheid regimes (par 17).

Mr Lawrence commenced acting as a magistrate on 2 January 2015. At the time of the shortlisting process, he had been acting for four years; in addition, he had been acting as the head of the Petrusburg office for two years (par 19). According to the SCA, his competence was not in question. The SCA noted further that Mr Lawrence was known for managing his office well. He held meetings with stakeholders of the community on a regular basis to identify issues and took remedial action to improve the service delivery of the office (par 21). The SCA further noted that Mr Lawrence met the requirements of regulation 3 in that he was a South African citizen, fit and proper and had the necessary qualifications (par 22). According to Potterill AJA, the Committee disregarded the fact that Mr Lawrence had acted and managed the Petrusburg office and that he was knowledgeable in the beliefs and traditions of that predominantly Afrikaans and farming community (par 25). Potterill AJA stated further that the Committee did not consider the relevant experience, qualifications, needs of the office and appropriate managerial skills. Rather, it focused on race as an exclusionary measure to sideline candidates who were White (par 25; the court relied on *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC)).

To further justify its reasoning, the court relied on the decision of the Equality Court in *Singh v Minister of Justice and Constitutional Development* (*supra*) where the court had found that the mention of race and gender in section 174(2) of the Constitution should not be misunderstood to exclude the other important factors provided for by section 9(3) of the Constitution and which should also be factored in when shortlisting magistrates (*Magistrates Commission v Lawrence supra* par 27). The SCA also relied on the Equality Court decision in *Du Preez v Minister of Justice and Constitutional Development* (2006 (5) SA 592 (EqC)), which provided that such exclusionary measures create the absolute exclusion of non-designated groups (par 31). The SCA further relied on *Kroukamp v The Minister of Justice and Constitutional Development* (*supra* par 48), as the court stated that subsection 174(2) of the Constitution is not intended to prevent the appointment of White men (par 32). According to Potterill AJA, the advancement of section 174(2) as a disqualifying provision must be rejected (par 33).

Lastly, the SCA held:

“The legislative scheme does not permit a targeted group approach, precisely because no one factor can at the outset override or take precedence over other factors. The starting point of the exercise was therefore fundamentally flawed. The record shows that the process was rigid, inflexible and quota-driven. The blanket exclusion of white persons, no matter how high they may have scored in respect of the other relevant factors is revealing. Any white candidate, no matter how good, was mechanistically excluded. The result was that Mr Lawrence’s application was not considered at all. The approach of the Committee was not consistent with the proper interpretation and application of

s 174 of the Constitution, regulation 5 or the AP. Rather than considering race as but one of factors, albeit an important one, the Committee set out to exclude candidates, including the respondent, on the basis of their race.” (par 34)

The SCA found that that this approach by the Committee leads to an instance where no White candidate is considered.

7 Discussion of Molemela JA’s judgment

Molemela JA, providing the minority judgment, agreed with her sister judge concerning the reasoning and conclusion of the non-joinder issue (par 36). The minority found that it cannot rightly be concluded that the Committee’s decision regarding the Botshabelo post was rigid, inflexible and quota-driven. However, concerning the Petrusburg post, the minority agreed that the Committee’s decision be set aside (par 36). Molemela JA agreed with Potterill AJA that the starting point to this issue is section 174(1) and (2) of the Constitution (par 37). Molemela JA saw these provisions as being two sides of the same coin.

According to the minority, context is everything. Section 174(2) must therefore be understood in the context of substantive equality (par 38). Molemela JA explained that equality is not only a core and foundational value provided for in the Preamble of the Constitution, but it is also an enforceable right enshrined in the Bill of Rights (par 38 of the judgment; the court also cited *Minister of Finance v Van Heerden supra* par 22). Molemela JA stated that the equality clause of section 9(2) required the State to take legislative measures to protect and advance persons who have been disadvantaged by unfair discrimination. This understanding of equality in a substantive manner unavoidably demands us to recognise the need to rectify the entrenched inequalities in our society (par 39). Molemela JA used the reasoning of Moseneke DCJ in *Minister of Finance v Van Heerden (supra* par 26) that, when dealing with the equity provision, one must consider the history of the Republic, the underlying values of the Constitution, and the non-racial, non-sexist society founded on human dignity to which it aspires (par 40). However, in *Van Heerden (supra* par 29), Moseneke DCJ proceeds to caution that if these principles are not viewed from the perspective of substantive equality, which seeks to redress the injustices caused by the past apartheid and colonial regimes, then these principles will simply ring hollow and not materialise (*Magistrates Commission v Lawrence supra* par 42).

Molemela JA proceeded to rely on *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association (supra* par 1), which holds that restitution is an important part of our transformative constitutional order. Something more than the abolition of discriminatory laws and the guarantee of equal rights was required in order to redress the injustices of past regimes – hence the Bill of Rights providing for remedial measures (*Lawrence* par 43).

Molemela JA concurred with these sentiments in *Van Heerden* and *SARIPA* in that section 174(2) aspires to a judiciary that mirrors the race and

gender make-up of the Republic, and this provision is focused on achieving substantive equality (par 44). Therefore, the measures taken in terms of section 174(2) are equally important to the transformation of our courts. Molemela JA cited Langa CJ in *Singh* (*supra* par 25), who stated that the justice system of the colonial and apartheid South Africa had an unwelcoming White face with Black people as its victims; injustice was administered by the courts, which were not only alien but also hostile to Black people (par 46). Molemela JA further noted that even after decades of the new constitutional dispensation, White males remained overrepresented in magisterial districts (par 48). The race of Mr Lawrence and the demographics of the magistrates' offices must not be considered an irrelevant and unspeakable topic, even though a non-racial society is the end goal of our country (par 52).

8 Discussion of Ponnan JA's judgment

Ponnan JA had immense difficulty in accepting Molemela JA's judgment, which according to him calls in aid certain statistics that formed no part of either party's case. Ponnan JA states that the second judgment goes beyond the appeal record, and doubted that the court could take judicial notice of statistics that date back over two decades (par 81). Ponnan JA argued further that the second judgment's approach and logic appear to misunderstand the nature of the case on appeal (par 82). According to Ponnan JA, Mr Lawrence did not seek to challenge the applicable provisions and regulations; rather, he sought to challenge how they were interpreted by the Committee. Therefore, the validity of these statutes and regulations is not in dispute (par 82). Ponnan JA was of the view that Mr Lawrence was not before the court to advance his case on gender; his case was based on race (par 83).

"The fixed resolve to exclude any and all white candidates on account of their race is clear ... Mr Lawrence's application was not considered at all. Instead, his candidacy was dismissed out of hand solely on the basis that he was a white male." (par 92)

Ponnan JA held that the process of the Committee was not only rigid and inflexible, but was also quota-driven (par 101).

"The blanket exclusion of white candidates, no matter their strengths, is disconcerting. No white candidate was considered for Bloemfontein either. Regrettably, not even excellence could open the door to the consideration of a white candidate." (par 101)

Ponnan JA held further that the approach of the Committee was inconsistent with the correct interpretation and application of section 174 of the Constitution and regulation 5. Rather than using race as one of the factors to be considered in the appointment, the Committee simply sidelined candidates on the grounds of their race (par 104). Such an approach and failure to have regard for any factor other than race was unlawful and unconstitutional.

9 Comment on the *Lawrence* case

Section 174(1) and (2) of the Constitution makes provision for the appointment of a judicial officer who is fit and proper, and who has the necessary qualifications for office; and such an appointment must reflect the demographic make-up of our Republic (Siyo and Mubangizi 2015 *PELJ* 817 824). As stated above in the discussion of *Kroukamp*, subsection 2 does not yet have a interpretation (Siyo and Mubangizi 2015 *PELJ* 824). Without this provision, it would not be possible for our judiciary to do justice and for justice to be seen to be done for the people of the Republic (Siyo and Mubangizi 2015 *PELJ* 824). This provision must not be interpreted in a manner that suggests it is merely a guide and not a prerequisite for the appointment of judicial officers. If one adopts it as a guide, as the first and second judgments have, it becomes too narrow to effectively enforce the reflection of South African demographics (Siyo and Mubangizi 2015 *PELJ* 825).

It stands to reason that this provision is there to ensure that the marginalisation of those who were prejudiced by the past regimes does not continue. Therefore, section 174(2) is not an island; it must be read alongside section 9(2) of the Constitution. In essence, section 174(2) is given life by the principle of substantive equality (Siyo and Mubangizi 2015 *PELJ* 825). Substantive equality necessitates a consideration of the social and economic conditions of groups to ensure that constitutional aspirations are observed and implemented effectively (Siyo and Mubangizi 2015 *PELJ* 825).

The first and third judgments had no regard to the history and current reality of South Africa. These two judgments accordingly did not appreciate the need to view the matter from the perspective of substantive equality. This principle is rooted in the understanding that inequality is a result of political, social and economic discrimination against certain groups of people in our society and that it is not some arbitrary and irrational circumstance (Albertyn 2007 *SAJHR* 253 254; see also De Vos "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness" 2001 17(2) *SAJHR* 258; De Vos "Substantive Equality after Grootboom: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence" 2001 52 *Acta Juridica* 52; Fredman "Providing Equality: Substantive Equality and the Positive Duty to Provide" 2005 21(2) *SAJHR* 163; Fredman "Substantive Equality Revisited" 2016 14(3) *International Journal of Constitutional Law* 712).

Substantive equality acknowledges that inequality is systemic in nature, being the implementation of corrupt social values by institutions and power relations. Langa CJ noted that substantive equality required a social and economic revolution so that everyone can enjoy equal access to the resources and amenities of life (Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 352 353). This social revolution necessitates the dismantling of systemic inequalities. The late revolutionary President of Cuba, Fidel Castro, in his trial in 1953 understood it best: "A revolution is not a bed of roses. A revolution is a struggle to the death

between the future and the past” (The Guardian “Castro in quotes” (2008-02-19) *The Guardian* <https://www.theguardian.com/world/2008/feb/19/cuba1> (accessed 2022-04-09)). In essence, substantive equality is a measure whose intention is redress. However, in the process of such transformation and in advancing the constitutional parameters of section 9(2) of the Constitution, another group of people has to be discriminated against even though this is not the primary objective (*Minister of Finance v Van Heerden supra* par 77).

This case note submits that substantive equality is not an easy task that will appease everyone; it is a struggle between South Africa’s race-based discriminatory past, present and its desired non-racial future. Pretending that White men do not have an upper hand in society (and by default, the labour sector) is simply turning a blind eye to the need for transformation and redress (Webster “On Conquest and Anthropology in South Africa” 2018 34(3) *SAJHR* 398 414; Gordon and Newfield “White Philosophy” 1994 20(4) *Critical Inquiry* 737–757). Therefore, the court in this case missed an opportunity to continue the reasoning laid down by Moseneke DCJ in *South African Police Service v Solidarity obo Barnard* (2014 (6) SA 123 (CC)), as upheld by Zondo J in *Solidarity v Department of Correctional Services (supra)*, of looking at the history of the country, the aspirations of section 9 of the Constitution, and the demographics of South Africa.

Substantive equality demands that there must be recognition of the skewed racial and gender advancement patterns in our society; and there must, as a result, be an active means of ensuring that such patterns do not persist (*Minister of Finance v Van Heerden supra* par 27). This case note concurs with the second judgment that section 174(2) is a redress and transformation measure (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) par 60). This redress measure must be considered when making judicial measures, not as a guide, but as a prerequisite (Siyo and Mubangizi 2015 *PELJ* 825). This section ensures that those who were prejudiced and discriminated against by past regimes are appointed, if they are suitably qualified (Siyo and Mubangizi 2015 *PELJ* 826).

The substantive equality approach is critical as it shines a light on an argument that is proposed by critical race theorists – that meritocracy is used to stigmatise the legitimate need to redress past injustices (Ramalekana 2022 *OHRH* 1). The first and third judgments, in essence, portray the need to aspire to an equally represented South Africa as an afterthought, with “competency” as the driving force. This critique must not be misunderstood as an argument against merit; rather, it is an argument in favour of merit that, like Molemela JA’s judgment, puts the need to represent the demographics of the country first, which does not mean a decline in merit. If the argument of Ponnann JA regarding merit is accepted, then, by default, one accepts that the demographics of South Africa do not represent people with merit, and continues to stigmatise transformation. Furthermore, the South African reality is that merit is not neutral; it is based on privilege, domination and subordination (Ramalekana 2022 *OHRH* 21). This means that merit only works if all people are on an equal footing. This case note

submits that a person's race, gender, class and disability, or lack thereof, determines the employment opportunities they get and or do not get. The blind adoption and application of merit could lead to perpetual disadvantage for the poor/working class, black people, women and people living with a disability.

The argument of meritocracy raised by Ponnann JA at face value and to an unsuspecting eye is legitimate. This is because it advocates for skill and qualifications to be the reason that people are hired and promoted, this being what equality is about (Fallon "To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination" 1990 *Boston University Law Review* 815 822).

However, if analysed closely, it is flawed and does not align with substantive equality. The meritocracy argument, as highlighted above, assumes that people are on an equal footing, irrespective of race, gender, class and the disability they live with (Ramalekana 2022 *OHRH* 21). It assumes that there are no privileged people in our society and people are where they are because of hard work. Needless to say, this is false and a shield against the reality of state-sanctioned racism, where preference for certain jobs and salaries was, and to a certain extent still is, based not on hard work, but solely on race, ability/disability and or gender.

Disregarding statistics of the demographic make-up of magistrates, as Ponnann JA suggests, would be to forget history – that the South African labour market was, as the social life, organised and segregated along racial lines (Mariotti "Labour Markets During Apartheid in South Africa" 2012 65(3) *The Economic History Review* 1100 1102). Such an approach would forget that the need for demographic representation in the judiciary is our history and past, which must be considered when dealing with substantive equality, and which these two judgments conveniently sideline.

The case note submits that Ponnann JA's reduction of section 174(2) to an afterthought is incorrect. The importance of this provision was highlighted by Chief Justice Mogoeng: section 174(1) and (2) are equally important; however, the need for racial representation in the ranks of judicial officers may, in certain circumstances, override other applicable provisions (Malan 2014 *PELJ* 1965 1977). The need to take into account the racial and gender make-up of the country in making judicial appointments in terms of section 174(2) has legal standing and merit if one appropriately applies substantive equality by considering South Africa's history of racial and gender dispossessions, and the deliberate advancement of unequal opportunities (Tapanya *The Constitutionality of the Concept of Demographic Representivity, Provided for in terms of the Employment Equity Amendment Act 47 of 2013* (LLM thesis University of KwaZulu-Natal) 2015 25).

10 Conclusion

This case note has attempted to examine the court's approach in the application of section 174(2) of the Constitution in *Kroukamp*. Through examining the argument that supports substantive equality as an enforceable constitutional right (which the Equality Court in this instance

sought to ignore) and an analysis of the need for transformation and redress of the injustices of the apartheid and colonial regimes, the case note concludes that it does not concur with the Equality Court's decision. The court's approach in this instance simply reduces race-based redress initiatives to an afterthought rather than a prerequisite, which in turn downplays the injustices that the Black community faced and continues to face. The case note also attempts to show that it was incorrect for the court to suggest that if its meritocracy approach was not adopted, it would lead to reverse injustice against White people. The essence of the case note's argument is that Black people were oppressed in unimaginable ways; they are capable of being appointed to the judiciary; as such, it is incorrect to assume that understanding race as a prerequisite means a downgrade in merit.

This case note has discussed the *Lawrence* case, engaging first with the first judgment, which found that the Committee applied an approach that ensured that White candidates were not considered for vacancies. That judgment found that the Committee's approach did not reflect a proper interpretation of section 174 of the Constitution. However, this case note concurs rather with the reasoning of Molemela JA in the second judgment, in that section 174(2) was meant to be a transformation provision to fix the horrors of the apartheid and colonial regimes. It is submitted that this provision is not an island, but must be understood together with the concept of substantive equality, which requires one to engage with the history, social and economic reality of South Africa in order to understand section 174(2) fully. The case note also examined the judgment of Ponnann JA, who did not agree with Molemela JA's approach. Ponnann JA's judgment rather saw section 174(2) as being a guide, race being a secondary if not the last issue to be considered in appointing judicial officers.

The case note engaged finally in a critical discussion of the above-mentioned judgments, finding (unlike Ponnann JA) that section 174 is a prerequisite provision and not a guideline that treats race as an afterthought consideration. The case note has further suggested that these two judgments should have engaged in a discussion of substantive fairness, as failure to do so advances the assumption that those who will be appointed, if section 174(2) is applied as a prerequisite, would lead to the appointment of incompetent people. The case note lastly engaged in a discussion of how the focus on merit assumes that people of this country are on an equal footing, and that none are disadvantaged, and that none are more privileged than others. The case note did not dispute the interpretation of section 174(1), the Regulations or the Act, nor that Mr Lawrence was a fit and proper person who is appropriately qualified. Rather, the case note has simply argued that the second and third judgments' interpretation and understanding of section 174(2) of the Constitution were narrow and incorrect.

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