

The Magistrates Act of Namibia and the independence of magistrates

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Aim

This paper examines at length the concept of judicial independence with particular reference to the magistracy and the Magistrates Act, 2003 (No. 3 of 2003). It will attempt to examine the legislation and case law in this regard. As a point of departure this paper assumes that the magistracy is indeed independent and should be treated as such.

In the same vein, the paper attempts to highlight some of the threats to the independence of magistrates and proposes solutions to such threats. I am of the view that asserting the independence of magistrates requires reducing the control and powers of the Minister of Justice in the Magistrates Act and granting more powers to the Magistrates' Commission.

The legislation

The Namibian Constitution guarantees the independence of the judiciary. Article 78(1) thereof provides for judicial power to be vested in the courts, i.e. the Supreme Court, the High Court, and the magistrates' courts. Article 78(2) provides further that –

[T]he Courts shall be independent and subject only to this Constitution and the law.

Article 78(3) states that –

[n]o member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.

The Magistrates' Courts Act, 1944 (No. 32 of 1944) establishes the courts for magistrates. On the other hand, the Magistrates Act, 2003 (No. 3 of 2003) regulates, inter alia, the functioning of magistrates. Part of the latter Act's preamble says that it is to –

... provide for the establishment of a magistracy outside the Public Service.

The independence of the judiciary in general

Judicial independence first came to be determined by the High Court in the case of *S v Heita*¹ where the then Justice O'Linn expressly held that the independence of the judiciary contemplated by the Constitution had the following meaning:

The prohibition in art 78(3) not to interfere with Judges and judicial officers extends to each and every person, and is not restricted to members of the Legislature or Executive.
[Emphasis added]

In the head notes to the judgment, O'Linn correctly opines that –

Article 78(2) of the Constitution of Namibia Act 1 of 1990, which provides that the “Courts shall be independent and subject only to this Constitution and the law”, makes it abundantly clear that the independent Court is subject only to the Constitution and the law. This simply means that it is also not subject to the dictates of political parties, even if that party is the majority party. Similarly, the Court is not subject to any other pressure group. [Emphasis added]

This judgment is of pivotal importance in that it serves as a major point of reference when it comes to the interpretation of the independence of the judiciary.

Independence of the magistracy considered

In a recent High Court judgment,² the issue was whether the Magistrates' Commission was an independent body capable of managing and structuring its members and affairs relating to magistrates, such as relocating them, i.e. as magistrates themselves see fit. The High Court was, however, of the view of that the magistracy and the Commission were two distinct bodies, and when determining the independence of the former, it should not be confused with the latter. This opinion serves to present the dichotomy between the institutional independence of the Commission on the one hand, and the individual independence of magistrates as judicial officers on the other.

In *Jacob Alexander v The Minister of Justice and Others*,³ Justice Parker, without

¹ *S v Heita* 1992 NR 403 (HC), at 408 F.

² *Jacob Alexander v The Minister of Justice and Others*; unreported case of the High Court of Namibia, Case No. A210/2007 (Special Case), at 22; also available on the website of the Superior Courts of Namibia at [http://www.superiorcourts.org.na/high/docs/judgments/civil/jacob%20alexander%20versus%20the%20minister%20of%20justice%20and%204%20others.pdf#search=Jacob Alexander](http://www.superiorcourts.org.na/high/docs/judgments/civil/jacob%20alexander%20versus%20the%20minister%20of%20justice%20and%204%20others.pdf#search=Jacob%20Alexander); last accessed 2 November 2008.

³ (ibid.).

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considering the issue of independence of the magistracy at any length, correctly made the following remarks:

... it must be remembered that the concept of independence of the judiciary stands on two inseparable pillars, namely, individual independence and institutional independence.

On the same page the judge defined the two concepts thus:⁴

Individual independence means the complete liberty of individual judges and magistrates to hear and decide the cases that come before them. ...

Institutional independence of the judiciary, on the other hand, reflects a deeper commitment to the separation of powers between and among the legislative, executive and judicial organs of State.

The assertion regarding the individual independence of magistrates undoubtedly refers to the fact that, as individual judicial officers, they are independent in deciding the cases before them.

On 28 January 2003, the Supreme Court, per Chief Justice Strydom (with Acting Judges O'Linn and Chomba concurring), handed down a judgment in the matter of *Walter Mostert v The Minister of Justice*.⁵ In the High Court judgment of *Mostert v Minister of Justice*⁶ which is considered at length here, the first plaintiff challenged his transfer by the Permanent Secretary in the Ministry of Justice from Gobabis to Oshakati, seeking the following relief:

That the decision of the Permanent Secretary for Justice to transfer the applicant to Oshakati be reviewed and set aside.

To declare that the judiciary, including magistrates, are independent in terms of Article 78 of the Namibian Constitution and that the Permanent Secretary has no jurisdiction to appoint, transfer and/or terminate the services of a magistrate, in particular that Section 23(2) of the Public Service Act does not apply to Magistrates.

In the High Court (per Acting Judge Levy), Mostert had only been partly successful, so he appealed to the Supreme Court. On appeal, the Supreme Court, as far as is relevant, ordered as follows:

*It is declared that the transfer of magistrates does not per se constitute a threat to their independence.*⁷

4 (ibid.:23).

5 2003 NR 11 (SC).

6 2002 NR 76 (HC), at 78.

7 *Mostert v The Minister of Justice* 2003 NR 11 (SC), at 40.

In the Supreme Court judgment, Chief Justice Strydom held that –⁸

[s]ection 23(2) [of the Public Service Act, 1995) empowers the Permanent Secretary to transfer “staff members” and it was in terms of this section that the Permanent Secretary of Justice exercised her powers to transfer the appellant, this notwithstanding the clear provisions of the Constitution that magistrates are part of the Judiciary of Namibia whose independence was guaranteed by the Constitution. This was clearly set out in Articles 12 (1)(a), 78(1) and (2) and 83 of the Constitution.

The learned Chief Justice continued as follows:⁹

For as long as magistrates remain subject to the provisions of the Public Service Act, which virtually designates them as employees of the Government and which requires of them prompt execution of Government policy and directives, their independence will be under threat and, what is just as important, is that magistrates would not be perceived by the public as independent and as a separate arm of government. I therefore agree with the order of the Court a quo that sec. 23(2) did not apply to magistrates. [Emphasis added]

In respect of section 23(2), the Chief Justice had the following to say:¹⁰

In regard to the independence of the Courts, and bearing in mind that we have shared for a long time the same legislative enactment concerning the magistrates’ courts (Act 32 of 1944) with South Africa, the general observations by Chaskalson CJ, in the Van Rooyen case, supra, as to what is necessary for protection of the independence of the various Courts at different levels is, in my opinion, also applicable to Namibia. It was pointed out by the learned Judge that the South African Constitution dealt differently with the appointment of Judges, on the one hand, and other judicial officers, on the other hand. This applies also to Namibia. In terms of Article 82 of our Constitution Judges of the High and Supreme Courts are appointed by the President on the recommendation of the Judicial Service Commission whereas Lower Courts, which shall be presided by magistrates ‘(shall be) appointed in accordance with procedures prescribed by Act of parliament’. Article 83(2).

For the present purposes, magistrates are appointed in terms of section 13 of the Magistrates Act. Section 13(3) provides for magistrates to be appointed by the Minister of Justice on the recommendation of the Magistrates’ Commission.

I am of the view that the appointment of judges by the President clearly takes judges out of the realm of the public service. I am mindful of the possible assertion that, if the President appoints judges and s/he is the head of the executive, this

8 (ibid.:33).

9 (ibid.:35).

10 (ibid.:31).

could be seen as a bigger threat to the independence of judges. There is, however, ample authority for the view that there are internal mechanisms aimed at guarding jealously the independence of judges.

It is, however, difficult to reconcile the legislative attempt to create a magistracy outside the public service and yet magistrates are to be appointed by the Minister of Justice. The powers of the Commission in this regard are merely to recommend an appointment to the Minister. The Minister may (from the wording of section 13(3)) disapprove of an employment contract recommended by the Commission. I opine that this provision constitutes an inroad into judicial independence and the section should be amended to provide for the Commission to make the actual appointments.

In the Supreme Court decision, Chief Justice Strydom went on to cite the following from the *Van Rooyen*¹¹ judgment:¹²

The constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required. Section 165(2) of the Constitution pointedly states that "the courts are independent". Implicit in this is recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent. This does not mean that particular provisions of legislation governing the structure and functioning of the courts are immune from constitutional scrutiny. Nor does it mean the lower courts have, or are entitled to have[,] their independence protected in the same way as the higher courts. [Emphasis added]

In paragraphs 24 and 25 of the *Van Rooyen* case, Chief Justice Chaskalson (as he then was) pointed out the following:¹³

[24] *But magistrates' courts are courts of first instance and their judgments are subject to appeal and review. Thus[,] higher courts have the ability not only to protect the lower courts against interference with their independence, but also to supervise the manner in which they discharge their functions. These are objective controls that are relevant to the institutional independence of the lower courts.*

[25] *Another relevant factor is that district and regional magistrates' courts do not have jurisdiction to deal with administrative reviews or constitutional matters*

11 *Van Rooyen and Others v The State and Others (General Council of the Bar Intervening)* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810.

12 *Mostert v The Minister of Justice* 2003 NR 11 (SC), at 32.

13 Quoted in (ibid.:32).

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where the legislation or conduct of the government is disputed. These are the most sensitive areas of tension between the legislature, the executive and the judiciary. Measures considered appropriate and necessary to protect the institutional independence of courts dealing with such matters, are not necessarily essential to protect the independence of courts that do not perform such functions.

In paragraph 28 the learned Judge expressed himself as follows:¹⁴

The jurisdiction of the magistrates' courts is less extensive than that of the higher courts. Unlike higher courts they have no inherent power[;] their jurisdiction is determined by legislation and they have less extensive constitutional jurisdiction. The Constitution also distinguishes between the way judges are to be appointed and the way magistrates are to be appointed. Judges are appointed on the advice of the Judicial Service Commission; their salaries, allowances and benefits may not be reduced; and the circumstances in which they may be removed from office are prescribed. In the case of magistrates, there are no comparable provisions in the Constitution itself, nor is there any requirement that an independent commission be appointed to mediate actions taken in regard to such matters. That said, magistrates are entitled to the protection necessary for judicial independence, even if not in the same form as higher courts. [Emphasis added]

Having thus quoted from the *Van Rooyen* judgment, Chief Justice Strydom concluded as follows:¹⁵

From the extracts out of the Van Rooyen case it seems clear that all courts are entitled, in terms of the particular Constitution, to the protection of their institutional independence but, depending on the nature of their jurisdiction and the hierarchical differences between the higher courts and the lower courts, this protection need not be in the same form. Coming to the situation in Namibia it seems to me that we have the same hierarchical differences between our higher and lower courts[,] which is [sic] dealt with in much the same [way] by our Constitution, as is the case in South Africa. It follows therefore that I am of the opinion that also in Namibia the protection of the institutional independence of the lower courts need not be in the same form as that necessary for the High and Supreme Courts and I say so for the reasons set out in the van Rooyen case [Emphasis added]

The Magistrates Act attempts to deal with the doubts and differences enunciated in both the *Van Rooyen* and *Walter Mostert* cases. The Act creates a Commission tasked independently with the issues of magistrates, and it clearly holds that the magistracy falls outside the public service. That, in my view, addresses the concerns in both cases, as the Act clearly constitutes a legislative attempt to comply with the order of the Supreme Court in the *Walter Mostert* case.

14 (ibid.)

15 (ibid.:33).

In the Canadian case, *The Queen in Right of Canada v Beauregard*,¹⁶ Justice Dickson, speaking of judicial independence, said the following:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of the individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another Judge [–] should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.

Subsequent to the enactment of the Magistrates Act, Walter Mostert returned to the High Court, arguing that the Act did not create an independent magistracy because the Magistrates' Commission was not independent but under the control of the Minister of Justice.¹⁷ In his judgment, Judge-President Damaseb remarked that –¹⁸

Decisions of the Supreme Court of Namibia are binding on this Court and all those below it by virtue of Article 81 of the Namibian Constitution. Sitting as the High Court we are bound by and must therefore apply the ratio in the Supreme Court judgment; and it is this: all courts are guaranteed institutional independence, but Lower Courts (magistrates' courts included) do not have to enjoy the same kind of rigorous protection given to the higher courts. What is also clear from the passages in the Van Rooyen judgment, cited with approval by Strydom CJ, is that in South Africa the institutional independence of the magistracy does not require an independent body to regulate its affairs. [Emphasis added]

To my mind, the *Van Rooyen* case can be distinguished from the Namibian scenario, where we have an independent Commission aimed at exactly that, i.e. the independence of the magistracy.

In his elucidation, with reference to the two standards required in respect of both the lower courts and the Superior Courts, the Judge-President went on to say the following:¹⁹

[A]lthough institutional judicial independence is guaranteed to all courts, the scheme adopted for effecting it may differ depending on which court we are looking at and that only in respect of the High and Supreme Courts is a more rigorous standard required.

16 (1986) 30 DLR (4th) 481 at 491 (SCC).

17 *Walter Mostert & Another v Magistrates' Commission & Another* [2005] NR 491 HC.

18 (ibid.:500).

19 (ibid.:502).

Judge-President Damaseb then concludes that –

[t]he requirement of institutional independence of the Judiciary is not subject to any limitation and, therefore, there can be no “justification”, in the constitutional sense, for interference or abridgement of the independence of the Judiciary. (See: Van Rooyen para 35 at 273 H.)

The Judge-President, quoting with approval paragraph 66 of the *Van Rooyen* case, which stated that an independent commission was not a requirement to ensure an independent magistracy, held as follows:²⁰

The Court held [in the First Certification Judgment] that as far as magistrates are concerned, the guarantee of independence accorded to all courts by s 165 of the Constitution and the provisions of s 174(7) dealing specifically with magistrates, was sufficient guarantee of independence.

Judge-President Damaseb (with Acting Judge Angula concurring) concludes as follows as regards the issue of the independence of the magistracy:²¹

The Supreme Court judgment does not, and could not[,] require the creation of a Magistrate’s Commission or a similar body; even less an independent one for that matter. The creation of such a Commission is thus a matter of political choice as long as it does not negate the independence of the magistracy. Applying, as I should, the properly contextualized objective test of institutional independence of the Judiciary, I come to the conclusion that the independence of the Namibian magistracy is sufficiently guaranteed by the following:

- i) Article 78(2) and (3) of the Constitution;*
- ii) Article 83 of the Constitution, since interpreted in the Supreme Court judgment to mean that the magistracy must be placed outside the public service;*
- iii) Constitutional scrutiny by the Superior Courts of any legislation and administrative action bearing on such matters as the appointment, remuneration, transfer and discipline of magistrates.*

In a paper delivered at a Magistrates’ Symposium, Chief Justice Peter Shivute stated the following:²²

The independence of the judiciary is guaranteed in two respects. The first is that the judicial power is specially vested in the courts and the last is that the members of the two arms of the state or any other person for that matter are, in no uncertain terms, prohibited from interfering with judicial officers in the exercise of their independence in the exercise of their judicial functions. Furthermore[,] all organs of the state, including the Judiciary, are in pre-emptory terms required to protect the independence, dignity and effectiveness of the judiciary.

20 (ibid.:509)

21 (ibid: 509).

22 Shivute, P. 2004. “Judicial independence and the responsibilities of a judicial officer”. Unpublished paper delivered at the Magistrates’ Symposium, Heja Game Lodge, Windhoek, 12 June 2004, p 4.

Factors undermining the independence of magistrates/the magistracy

Finance

In his address to the Magistrates' Symposium, the Chief Justice asserts that, in order to ensure its independence, the judiciary needs to –²³

... exercise control over its financial and administrative operations so as to exclude the possibility of the organ of the state that holds the purse [strings] from exerting financial and administrative pressure on the judiciary ...

The Chief Justice could not have been more correct on this score. It is undoubtedly true that the magistracy in Namibia relies on the Ministry of Justice for its financing. The latter Ministry, in turn, relies on the Ministry of Finance. The Ministry of Justice literally controls the number of positions available to the Commission within which to appoint magistrates. We need to strive for a magistracy with its own budget, for only then can the magistracy adequately address its needs as regards the appointment, placement and remuneration of magistrates.

Appointment of magistrates

The United Nations African Governance Report of 2005 dealt with hurdles that compromise that independence and assert themselves as follows:²⁴

The judiciary in many African countries does not have operational independence because the executive determines the appointment, promotion and remuneration of judicial officers. The prospects of career mobility for judges therefore depend largely on how well they can court and patronize the executive. In most cases the budget and funds of the judiciary are controlled by the Ministry of Justice (an executive arm of government), which creates bureaucratic procedures in financial matters and the possibility of discriminatory funding to be used against the “erring” courts.

I have already alluded to the provisions of section 13(3) of the Magistrates Act, to the effect that magistrates are appointed by the Minister on the recommendation of the Commission.

23 (ibid.:6).

24 United Nations Economic Commission for Africa. 2005. *African Governance Report 2005*. UNECA: Addis Ababa, p 204; available at www.uneca.org/agr2005/chap7.pdf; last accessed 26 September 2008.

It is clear that in the second *Walter Mostert* case, the plaintiffs challenged the wrong provision in attacking section 4(f) rather than section 13 in dealing with the appointment of magistrates.

Judge-President Damaseb opines that the Minister does not have absolute power in the appointment of magistrates. With all due respect, the learned Judge-President has failed to address the fact that the Minister can refuse an appointment despite a recommendation by the Commission. How, then, is that power not absolute? It would have been different – and even preferable – if the provision were couched in such terms as to oblige the Minister to make an appointment once the Commission had duly made its recommendation. In the alternative, the provision should be amended to the effect that the Commission is the appointing authority. That way, the Minister will have no say in who should preside in our lower courts. Nonetheless, I am comforted by the Judge-President’s own assertion:²⁵

I need to mention at the outset that the requirement of institutional independence of the Judiciary is not subject to any limitation and, therefore, there can be no “justification”, in the constitutional sense, for interference or abridgement of the independence of the Judiciary.

This opinion indicates that, in the event of conflict, our courts will assert the independence of magistrates. The question is, however, why we should wait for a threat to the independence of magistrates before we rake in the said protection.

Remuneration of magistrates

Section 18(2) provides that the Minister of Justice, in consultation with the Commission and with the concurrence of the Minister of Finance, may increase the remuneration of a magistrate. It is hard to fathom that two ministers from an arm of government from which magistrates are independent can and do determine increases in magistrates’ remuneration. The solution, in my view, lies in having a separate budget for the magistracy.

Retirement of magistrates

Magistrates may generally retire when they attain the age of 65. If, however, a magistrate had served as such prior to the commencement of the Act, s/he could retire upon attaining the age of 60 or 55. In that case, s/he would apply to the Commission for retirement, and the Commission would then make its recommendation to the Minister of Justice. In terms of section 20(3)(d) of the

²⁵ *Walter Mostert & Another v Magistrates’ Commission & Another* [2005] NAHC at 20.

Act, the Minister is not permitted to grant such approval unless s/he is satisfied that –

- sufficient reasons exist for the retirement, and
- the retirement will not be detrimental to the magistracy.

Once more, if the magistracy is meant to be outside the realm of the public service, why should the Minister be the one to decide the magistracy's interests? If the Commission is the one that regulates the functions of the magistracy, is it not, then, the proper organ to decide the matter? I believe that the section constitutes another inroad into the institutional independence of the magistracy.

Appointment of members of the Commission

In the latter *Walter Mostert* case, the first and second plaintiffs took issue with sections 4(f) and 5 of the Act, by virtue of which the Minister of Justice is empowered to appoint at least four persons to the Commission, and in terms of which the Commission makes recommendations to the Minister in the appointment and retirement of magistrates. Hence, by extension, the plaintiffs argued that the Commission was not independent. I have dealt with the latter two aspects already herein, and now turn to the first: the Minister's power to appoint at least four persons to the Commission. In this regard, Judge-President Damaseb was of the view that such appointment did not necessarily negate the independence of the Commission.²⁶

Section 5 of the Act primarily aims at ensuring all stakeholders are involved in the Commission, and that the Commission is as inclusive as possible. A cursory look at it indicates that the Minister has the power to appoint at least four of the seven members of the Commission. The fear in the *Mostert* case was that such a provision tilts the balance of power in favour of the Minister.

That fear is, in my view, justified. Firstly, section 5 should be amended to curtail the Minister's power of appointment: the Minister is already permitted to have a representative on the Commission. Secondly, magistrates themselves should be granted more representation on the Commission besides the one – appointed by the Minister – from the Judges' and Magistrates' Association. Thirdly, provision should be made for legal practitioners to be represented on the Commission. Such representation is notably lacking, and yet legal practitioners do business in the lower courts on a daily basis.

26 *Walter Mostert & Another v Magistrates' Commission & Another* 2005 NAHC.

Societal influence

It has been argued that the law is a social science and, as such, needs to reflect the views of society. One of the pillars of our criminal justice system is that, in meting out a sentence, a court has to consider the interests of society as well.²⁷ Societal influence is pervasive – and this becomes very evident in regard to applications for bail. Bail is at times refused on the basis that there is a societal outcry against granting it. Being pressurised by society taints the public view about the independence of our courts.

Conclusion

I have argued that the institutional and individual independence of the magistracy are clearly entrenched in our law. There is ample authority for the view that, when faced with guarding the independence of magistrates, our courts will undoubtedly do so.

However, I believe there are threats to such independence. These threats lie within the very Magistrates Act that should remove magistrates from the realm of the public service. The provisions considered herein have given the Minister of Justice a hold over both the Commission and magistrates. In my opinion, the Act should be amended in various ways to curb such potential ministerial interference, so that the Commission and the magistracy can stand on their own two feet and be truly independent.

27 In *S v Rabie* 1975 (4) SA 855 (A) at 862 G, the court held that –
punishment should fit the criminal as well the crime, be fair to society and be blended with a measure of mercy according to the circumstances.