

**PARLIAMENT**  
OF THE  
**REPUBLIC OF SOUTH AFRICA**

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**ANNOUNCEMENTS,  
TABLINGS AND  
COMMITTEE REPORTS**

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WEDNESDAY, 23 MAY 2018

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## ANNOUNCEMENTS

### National Assembly and National Council of Provinces

#### The Speaker and the Chairperson

#### 1. Classification of Bills by Joint Tagging Mechanism (JTM)

- (1) The JTM in terms of Joint Rule 160(6) and Assembly Rule 280 classified the following Bill as a section 75 Bill:
  - (a) **Public Audit Amendment Bill** [B 13 – 2018] (National Assembly).
- (2) The JTM in terms of Joint Rule 160(6) classified the **Customary Initiation Bill** [B 7 - 2018], introduced in the National Assembly, as a section 76 Bill and as a Bill falling within the ambit of section 18(1) of the Traditional Leadership and Governance Framework Act, 2003 (Act No 41 of 2003).

Bill to be referred to National House of Traditional Leaders.

## **National Assembly**

### **The Speaker**

#### **1. Introduction of Bills**

##### **(1) The Standing Committee on the Auditor General**

- (a) **Public Audit Amendment Bill** [B 13 – 2018] (National Assembly – sec 75) [Explanatory summary of Bill and prior notice of its introduction published in *Government Gazette* No 41386 of 19 January 2018.]

Bill initiated by the **Standing Committee on the Auditor-General** of the National Assembly (for Committee Report, see Announcements, Tablings and Committee Reports of 23 May 2018), and classified by the Joint Classification Mechanism as an section 75 Bill (see Announcements, Tablings and Committee Reports of 23 May 2018).

## **National Council of Provinces**

### **The Chairperson**

#### **1. Referral to Committees of papers tabled**

- (1) The following paper is referred to the **Select Committee on Land and Mineral Resources** for consideration:
- (a) Invitation to nominate candidates to serve on the Land Bank Board in terms of the Land and Agricultural Development Act, 2002 (Act No. 15 of 2002).
- (2) The following papers are referred to the **Select Committee on Security and Justice**:
- (a) Proclamation No R. 9, published in Government Gazette No 41561, dated 06 April 2018: Referral of matters to existing Special Investigating Unit and Special Tribunal: Mbhashe Local Municipality, in terms of the Special Investigating Units and Special Tribunals Act, 1996 (Act No 74 of 1996).
- (b) Proclamation No R. 10, published in Government Gazette No 41561, dated 06 April 2018: Referral of matters to existing Special Investigating Unit and Special Tribunal: Department of Correctional Services, in terms of the Special Investigating Units and Special Tribunals Act, 1996 (Act No 74 of 1996).

- (c) Proclamation No R. 11, published in Government Gazette No 41561, dated 06 April 2018: Referral of matters to existing Special Investigating Unit and Special Tribunal: Eskom Holdings SOC Limited and Transnet SOC Limited, in terms of the Special Investigating Units and Special Tribunals Act, 1996 (Act No 74 of 1996).
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## **TABLINGS**

### **National Assembly and National Council of Provinces**

#### **1. The Speaker and the Chairperson**

- (a) Fourth Quarterly Performance Report of Parliament for 2017-18, tabled in terms of section 54(1) of the Financial Management of Parliament and Provincial Legislatures Act, 2009 (Act No 10 of 2009).
- (b) Consolidated General Report of the Auditor-General on the Local Government Audit Outcomes for 2016-17 [RP 249-2018].

#### **2. The Minister of Finance**

- (a) Report to Parliament on the State of Local Government Finances and Financial Management as at 30 June 2017.
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## COMMITTEE REPORTS

### National Assembly

#### **1. Report of the Standing Committee on the Auditor-General, dated 22 May 2018**

The Standing Committee on the Auditor-General having amended the Public Audit Act, No 25 of 2004, reports as follows:

##### **1. Introduction**

1.1 The Public Audit Act, 2004 (the Act) gives effect to the provisions of the Constitution of the Republic of South Africa, 1996 (the Constitution) by establishing and assigning supreme auditing functions to the Auditor-General of South Africa (AGSA). The AGSA enjoys a large degree of independence, which allows it to select the most effective manner in which to execute its constitutional mandate. The Act, however, does not give it authority to implement its recommendations, to investigate undesirable audit outcomes or to recover losses to the State. The AGSA depends on the executive to implement its recommendations.

1.2 Since 2004 when the Act came into effect, the AGSA's efforts to assign consequences for poor financial and performance management through its audit reports has yielded mixed results. Each year the AGSA reported astronomical amounts of unauthorised, irregular and fruitless and wasteful expenditure. Actions by auditees to recover these losses have been unsatisfactory.

1.3 Section 10(3) of the Act requires that the National Assembly provides for a mechanism to maintain oversight of the AGSA in terms of section 55(2)(b)(ii) of the Constitution. Accordingly,

the Rules of the National Assembly provide for the establishment of the Standing Committee on the Auditor General (the Committee). The Committee is charged with assisting and protecting the AGSA in order for the latter to maintain its independence, impartiality, dignity and effectiveness.

- 1.4 On 22 May 2018 the Standing Committee on the Auditor-General (the Committee) adopted the Public Audit Amendment Bill, B13 of 2018 (the Bill) which proposes to give the AGSA powers to, amongst others, recover financial losses incurred through unauthorised, irregular and fruitless and wasteful expenditure.
- 1.5 This report comprises three parts:
  - Part A, outlining the process the Committee followed;
  - Part B, commenting on the financial implications of the amendments; and
  - Part C, containing the Committee's recommendations.

## **Part A**

### **2. Process**

- 2.1 On 16 November 2017 the Committee resolved to amend the Act in order to strengthen the AGSA. The Committee accordingly submitted a legislative proposal to the National Assembly in terms of National Assembly Rule 273 seeking permission to proceed with the preparation of a draft bill.
- 2.2 The National Assembly granted permission for the Committee to proceed with the proposed legislation, and the Draft Public Audit Amendment Bill was published in the Government Gazette 41386 on 19 January 2018 to allow members of the public opportunity to share their views with the Committee.

2.3 The Committee received 35 written submissions from the following commentators, all of whom were invited to present their comments at the public hearings which took place on 6, 7 and 9 March 2018:

Accounting Standards Board; Mr Jonathan Mukwevho; Accountability Now; Ms Laura Bezuidenhout; Mr Harold Marsberg; Public Protector of South Africa; Steve Tshwete Local Municipality; Bergrivier Municipality; Mr Benchef Madala; Mr Gregory Coetzee; Mr Ndivhuwo Rakhadani; Ms Linda le Roux; Mr Beukes Boshoff; Western Cape Government; Overstrand Municipality; Southern African Institute of Government Auditors; eThekweni Municipality; Mr Kwena Mokgokong; Dr Ramola Naidoo; Mr Eric Smith; Mr Thato Rabanka; Institute for Local Government Management; Mr JC Erasmus; Chartered Institute of Government Finance, Audit and Risk Officers; Drakenstein Municipality; South African Institute of Chartered Accountants; Council for the Advancement of the South African Constitution; Mr Andries Sekgetho; Rand Water; National Treasury; Association for the Advancement of Black Accountants of Southern Africa; Independent Regulatory Board for Auditors; Institute of Internal Auditors South Africa; Corruption Watch; and Mr Balekane Motlana.

2.4 The AGSA briefed the Committee on several occasions between June 2017 and the adoption of the Bill. The AGSA attended all public hearings, and responded to the concerns and proposals emanating from that process on 14 March 2018.

## **Part B**

### **3. Financial implications**

3.1 The Committee consulted the National Treasury extensively on the funding of the additional functions. It was agreed that the funding for the additional powers the legislation will provide to

the AGSA would be considered during the annual budget processes. The remaining amendments do not have cost implications for the state.

## **Part C**

### **4. Recommendation**

4.1 The Committee recommends that Parliament approves the amendments which will:

- allow the AGSA to take remedial action, to ensure that losses suffered by the State are, where possible, recovered, and to refer certain suspected material irregularities for investigation;
- empower the AGSA to perform international audit work and to conduct performance audits; and
- align the AGSA's governance arrangements to current best practice.

4.2 The funding of the additional powers the legislation will provide to the AGSA should be considered during the annual budget processes.

4.3 The Committee should be consulted on the regulations which must be made within 90 days of the legislation coming into operation.

### **5. Acknowledgement**

The Committee wishes to express its profound gratitude to the individuals, organisations, and stakeholders who participated in our process, and contributed to the development of the Bill.

## **Report to be considered.**

## **National Council of Provinces**

### **1. Report of the Select Committee on Security and Justice on the Provisional Suspension from the Office of Magistrate of Mr M D Hinxa, Chief Magistrate Bloemfontein, tabled in terms of section 13(3)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), dated 23 May 2018.**

#### **1 Introduction**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 29 November 2017, as tabled by the Minister for Justice and Correctional Service, on the provisional suspension from office of Mr MD Hinxa, the Chief Magistrate at Bloemfontein, pending the outcome of a misconduct hearing into his fitness to hold the office of magistrate, as is required by section 13(3)(b) of the Magistrates Act, 90 of 1993, reports as follows:

#### **2 Background**

- 2.1** The complainant in the matter is a 42year old woman from Botshabelo. On 29 July 2016 she lodged a complaint with the Minister alleging that she was raped by Mr Hinxa in his flat in Bloemfontein after he made false pretences to her. Her complaint was submitted to the Department and on 02 November 2016 the complaint was referred to the Commission for attention.
- 2.2** The complainant had reported the matter on several occasions to different police stations. They all refused to open a case hence her letter to the Minister as a last resort.
- 2.3** On 14 January 2017, before the matter could serve before the Commission's Ethics Committee, Mr Hinxa apparently approached Mr Ramoroka, the then Secretary of the Commission, indicating to him that he became aware that a complaint was filed with the Commission against him by a member of the public for alleged rape. Mr Hinxa showed the Secretary a report from the Director of Public

Prosecutions, Free State (DPP) following a consultation the latter had with the complainant, indicating that he would not be prosecuted. Mr Hinxa furnished the Secretary with a sworn statement, allegedly made by the complainant, indicating that she was paid R100 000-00 by Maroka Attorneys to implicate him. The Secretary submitted the scanned documentation to the Commission's Ethics Division suggesting that the complainant be advised that her "*complaint will not be followed on and to close the file against Mr Hinxa*".

- 2.4** The complainant however persisted that she was raped by Mr Hinxa and denied having ever made such a statement. The names and signatures on her letter of complaint and the statement provided by Mr Hinxa differ substantially. Many other unclarified issues arise from the documents provided by Mr Hinxa to Mr Ramoroka, the former Secretary.
- 2.5** The Commission therefore resolved to conduct a preliminary investigation into the allegations of rape against Mr Hinxa.
- 2.6** Having approached the Regional Court Presidents for assistance, Mr I Cox and Ms N Dembula-Smile, Regional Magistrates at respectively Benoni and Paarl were appointed on 17 February 2017 to conduct a preliminary investigation in terms of Regulation 26(1) of the Regulations for Judicial Officers in the Lower Courts, 1994. Mr Hinxa was advised accordingly in writing.
- 2.7** Mr Hinxa, in an email dated 22 February 2017 directed representations to the Secretary of the Commission, requesting the Commission to "promptly review and set aside the decision of the Ethics Committee to investigate him". He based his request mainly on the statement dated 21 June 2015, purportedly made by the complainant, in which she withdrew the complaint against him. As indicated above, Mr Hinxa provided Mr Ramoroka with a copy of this statement on 14 January 2017. On 01 March 2017 Mr Ramoroka's successor, Mr Misser, advised Mr Hinxa that, due to short notice, his representations could not be placed on the agenda of the

Commission's meeting held on 24 February 2017 and that the matter will be referred to the Ethics Committee for their input/comments. The Secretary held the view that it would be prudent to first refer the matter to the Ethics Committee to afford the Committee an opportunity to respond to his representations before placing the matter on the agenda of the Commission or its Executive Committee's (EXCO) next meeting for consideration. This caused the conclusion of the investigation to be delayed.

- 2.8** The Ethics Committee at its meeting held on 03 April 2017 considered Mr Hinxa's representations and resolved "*...to stand by its decision to conduct a preliminary investigation in terms of Regulation 26(1) of the Regulations, due to the serious nature of the allegations and far reaching consequences thereof on both sides. The Committee further resolved that the matter be accordingly placed before the EXCO of the Magistrates Commission for its endorsement.*"
- 2.9** EXCO at its meeting held on 10 April 2017 resolved that the preliminary investigation against Mr Hinxa must proceed.

### **3 Discussion**

- 3.1** Having concluded their investigation, the Investigating Officers filed their combined report with the Commission on 12 October 2017. The Investigating Officers, based on the evidence they obtained, are of the view that the evidence justifies that Mr Hinxa be charged with misconduct.
- 3.2** It is common cause that Mr Hinxa had approached the office of the DPP Free State, concerning the criminal case filed against him by the complainant. It appears that the DPP's decision to decline to prosecute Mr Hinxa on a charge of rape is inter alia based on an incomplete investigation, including the withdrawal statement purportedly made by the complainant. On 18 October 2017, the National Director of Prosecutions (NDPP) has, in the interest of justice, been provided with

a copy of the docket, the preliminary investigation report and the supporting statements which were obtained during the preliminary investigation with a recommendation to reconsider the matter and take the steps he may deems fit.

- 3.3** In a letter dated 27 October 2017 Mr Hinxa was invited to show cause why the Commission should not recommend that he be provisionally suspended from office in terms of Section 13(3)(a) of the Act, pending the outcome of an investigation into his fitness to hold the office of magistrate.
- 3.4** Mr Hinxa, through his attorney, responded and furnished the Commission with his representations dated 09 November 2017.
- 3.5** Having due regard to the serious nature of the allegations, the totality of the information at hand and Mr Hinxa's representations, the Commission at its meeting held on 24 November 2017 resolved to charge Mr Hinxa with misconduct and to recommend that he be provisionally suspended from office in terms of Section 13(3)(a) of the Magistrates Act, 90 of 1993.
- 3.6** The Commission holds the view that:
- 3.6.1** Mr Hinxa's representations mainly rely on the Director of Public Prosecution's (DPP) decision not to criminally prosecute him. The evidence obtained during the preliminary investigation however indicates that there is sufficient evidence to charge Mr Hinxa with misconduct.
- 3.6.2** The existing evidence against Mr Hinxa is of such a serious nature as to make it inappropriate for him to perform the functions of a Magistrate while the allegations are being investigated.
- 3.6.3** Mr Hinxa's conduct tarnishes the good name, dignity and esteem of the Office of Magistrate and the administration of justice.

**3.6.4** Without anticipating the outcome of the investigation into his fitness to hold the Office of Magistrate, the available evidence against Mr Hinxa is of such a serious nature that it would justify his removal from office, should he be found guilty of the misconduct charges which are preferred against him.

#### **4 Legal position**

**4.1** In terms of Section 13(3)(a) of the Magistrates Act, 90 of 1993, the Minister, on the advice of the Magistrates Commission, may provisionally suspend a magistrate from office if-

- “(i) the Commission, after affording the magistrate a reasonable opportunity to be heard regarding the desirability of such provisional suspension, is satisfied that reliable evidence exists indicating that an allegation against that magistrate is of such a serious nature as to make it inappropriate for the magistrate to perform the functions of a magistrate while the allegation is being investigated; and
- (ii) an investigation has been instituted by the Commission into such magistrate’s fitness to hold office.”

**4.2** A report in which the provisional suspension and the reasons therefore are made known, must be tabled in Parliament by the Minister within 7 (seven) days of such suspension, if Parliament is then in session, or if Parliament is not then in session, within 7 (seven) days after the commencement of its next ensuing session (section 13(3)(b) of the Act).

**4.3** Parliament must, as soon as is reasonably possible, pass a resolution as to whether or not the provisional suspension of the magistrate is confirmed (section 13(3)(c) of the Act).

**4.4** If Parliament passes a resolution as contemplated in paragraph (c) that the provisional suspension is not confirmed, the suspension lapses (section 13(3)(d) of the Act).

**5 Committee recommendation to the NCOP for approval**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 29 November 2017, as tabled by the Minister for Justice and Correctional Services, on the provisional suspension from office of Mr MD Hinxa, the Chief Magistrate, Bloemfontein, pending the outcome of a misconduct hearing into his fitness to hold the office of magistrate, as is required by section 13(3)(b) of the Magistrates Act, 90 of 1993, recommends the National Council of Provinces confirm Mr MD Hinxa's provisional suspension from the office of Magistrate.

**Report to be considered.**

**2. Report of the Select Committee on Security and Justice on the Withholding of Remuneration of Magistrate Ms F K Jasone-Twala, an Acting Additional Magistrate, George, in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), dated 23 May 2018.**

**1. Introduction**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 21 November 2017, as tabled by the Minister for Justice and Correctional Service, on their determination to withhold the remuneration of magistrate Ms F K Jasone-Twala, an Acting Additional Magistrate at George, tabled by the Minister for Justice and Correctional Services in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), reports as follows:

**2. Background**

The Magistrates Commission deliberated the matter and reported the following:

- 2.1. Prima facie evidence exists that she suffers from alcohol dependency which has a continuous detrimental effect on her daily work performance as a judicial officer;
- 2.2. She is on probation since 2012 and that her probation period has been extended twice by the Commission's Appointments Committee;
- 2.3. Despite her having been admitted for rehabilitation on three different occasions during the period of her probation and having been counselled by her colleagues her conduct has a detrimental effect on the smooth running of the courts, since she would on numerous occasions, and without advising her Judicial Head of Office timeously, or not at all, not report for duty;
- 2.4. When she reports for duty, the possibility exists that she would be intoxicated and not be able to dispense justice in the cases on her court roll;

2.5. There is furthermore no substantial proof that she is currently receiving any medical and/or psychiatric treatment which adequately addresses her alcohol dependency, and

2.6. There seems to be a progressive deterioration in her conduct.

The available evidence against Ms Jasone-Twala is of such a serious nature as to make it inappropriate for her to perform the functions of a magistrate while the allegations are being investigated. Her conduct tarnishes the good name, dignity and esteem of the Office of Magistrate and the administration of justice.

That, without anticipating the outcome of the investigation into her fitness to hold the Office of Magistrate, the available evidence against Ms Jasone-Twala is of such a serious nature that it would justify her removal from office, should she be found guilty of the misconduct charges which are preferred against her.

The Commission holds the view that it would be in the interest of the administration of justice that Ms Jasone-Twala's remuneration be withheld, whilst she is provisionally suspended from office pending the conclusion of the inquiry into her fitness to hold office.

### **3. Magistrates Commission's Determination to withhold remuneration**

On 12 October 2017 Ms Jasone-Twala was, in compliance with the rules of natural justice, invited to show cause why the Commission, should not determine to withhold her remuneration forthwith. Having considered Ms Jasone-Twala's response dated 24 October 2017, the Commission resolved to determine to withhold the remuneration of Ms Jasone-Twala in terms of section 13(4A)(a) of the Act, pending the investigation into her fitness to hold office and whilst she is provisionally suspended from office.

The Commission is of the opinion that, having further regard to the Constitutional Court's judgment in Van Rooyen and Others v The State and Others, CCT case no 21/2001, where the Constitutional Court held that if good reasons exist for the suspension of a magistrate, even if provisionally, the withholding of salary during such suspension is not necessarily disproportionate, Ms Jasone-Twala's provisional suspension from office without remuneration is justified.

#### **4. Legal position**

If the Commission determines that the remuneration of a magistrate shall be reduced or withheld, a report regarding that determination and the reason therefore must be tabled in Parliament by the Minister within 7 (seven) days of such determination if Parliament is then in session, or, if Parliament is not then in session, within 7 (seven) days after the commencement of its next ensuing session in terms of Section 13(4A)(b) of the Act. Parliament must, as soon as is reasonably possible, consider that report and pass a resolution as to whether or not the determination concerned is confirmed, either with or without amendment or set aside in terms of Section 13(4A)(c) of the Act.

#### **5. Committee recommendation to the NCOP for approval**

The Select Committee on Security and Justice, having considered the Minister's report on the Magistrates Commission's determination to withhold the remuneration of magistrate Ms F K Jasone-Twala, an Acting Additional Magistrate at George, tabled by the Minister for Justice and Correctional Services, in terms of Section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), recommends to the National Council of Provinces to confirm the determination.

#### **Report to be considered.**

### **3. Report of the Select Committee on Security and Justice on the Provisional Suspension of Magistrate Ms F K Jasone-Twala, an Acting Additional Magistrate, George, in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), dated 23 May 2018.**

#### **1. Introduction**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 21 November 2017, as tabled by the Minister for Justice and Correctional Service, on the provisional suspension from office of magistrate Ms F K Jasone-Twala, an Acting Additional Magistrate at George, pending the outcome of an investigation into her fitness to hold office as a magistrate, as required by section 13(3)(b) of the Magistrates Act, 90 of 1993, reports as follows:

#### **2. Background**

The Magistrates Commission deliberated the matter and reported the following:

- 2.1. Prima facie evidence exists that she suffers from alcohol dependency which has a continuous detrimental effect on her daily work performance as a judicial officer;
- 2.2. Ms Jasone-Twala is on probation since 2012 and that her probation period has been extended twice by the Commission's Appointments Committee;
- 2.3. Despite her having been admitted for rehabilitation on three different occasions during the period of her probation and having been counselled by her colleagues her conduct has a detrimental effect on the smooth running of the courts, since she would on numerous occasions, and without advising her Judicial Head of Office timeously, or not at all, not report for duty;
- 2.4. When she reports for duty, the possibility exists that she would be intoxicated and not be able to dispense justice in the cases on her court roll;
- 2.5. There is furthermore no substantial proof that she is currently receiving any medical and/or psychiatric treatment which adequately addresses her alcohol dependency, and
- 2.6. There seems to be a progressive deterioration in her conduct.

The available evidence against Ms Jasone-Twala is of such a serious nature as to make it inappropriate for her to perform the functions of a magistrate while the allegations are being investigated. Her conduct tarnishes the good name, dignity and esteem of the Office of Magistrate and the administration of justice.

That, without anticipating the outcome of the investigation into her fitness to hold the Office of Magistrate, the available evidence against Ms Jasone-Twala is of such a serious nature that it would justify her removal from office, should she be found guilty of the misconduct charges which are preferred against her.

The Commission holds the view that it would be in the interest of the administration of justice that Ms Jasone-Twala be provisionally suspended from office pending the conclusion of the inquiry into her fitness to hold office.

### **3. Magistrates Commission's Determination to withhold remuneration**

On 12 October 2017, Ms Jasone-Twala was, in compliance with the rules of natural justice, invited to furnish the Commission with representations why the Commission should not recommend that she be provisionally suspended from office and why the Commission should not determine to withhold her remuneration. A copy of the correspondence in this regard and her representations dated 24 October 2017 are attached.

Having considered Ms Jasone-Twala's response dated 24 October 2017, the Commission resolved to recommend that Ms Jasone-Twala be provisionally suspended from office in terms of Section 13(3)(a) of the Act, pending the investigation into her fitness to hold office.

The Commission holds the view that, without anticipating the outcome of the investigation into her fitness to hold the office of Magistrate, the existing evidence against Ms Jasone-Twala is of such a serious nature that it would justify her removal from office, should she be found guilty of the misconduct charges which are preferred against her.

#### **4. Legal position**

In terms of Section 13(3)(a) of the Magistrates Act, 90 of 1993, the Minister, on the advice of the Magistrates Commission, may provisionally suspend a magistrate from office if-

“(i) the Commission, after affording the magistrate a reasonable opportunity to be heard regarding the desirability of such provisional suspension, is satisfied that reliable evidence exists indicating that an allegation against that magistrate is of such a serious nature as to make it inappropriate for the magistrate to perform the functions of a magistrate while the allegation is being investigated; and

(ii) an investigation has been instituted by the Commission into such magistrate’s fitness to hold office.”

A report in which the provisional suspension and the reasons therefore are made known, must be tabled in Parliament by the Minister within 7 (seven) days of such suspension, if Parliament is then in session, or if Parliament is not then in session, within 7 (seven) days after the commencement of its next ensuing session (**Section 13(3)(b) of the Act**).

#### **5. Committee recommendation to the NCOP for approval**

The Select Committee on Security and Justice, having considered the Magistrates Commission’s report dated 21 November 2017, as tabled by the Minister for Justice and Correctional Services, on the provisional suspension from office of Ms F K Jasone-Twala, an Acting Additional Magistrate at George, pending the outcome of a misconduct hearing into her fitness to hold the office of magistrate, as is required by Section 13(3)(b) of the Magistrates Act, 90 of 1993, recommends the National Council of Provinces confirm Ms F K Jasone-Twala’s provisional suspension from the office of Magistrate.

#### **Report to be considered.**

#### **4. Report of the Select Committee on Security and Justice on the Withholding of Remuneration of Magistrate Mr M J Kgomo, an Additional Magistrate, Randburg, in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), dated 23 May 2018.**

##### **1. Introduction**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 21 November 2017, as tabled by the Minister for Justice and Correctional Service, on their determination to withhold the remuneration of magistrate Mr M J Kgomo, an Additional Magistrate at Randburg, tabled by the Minister for Justice and Correctional Services in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), reports as follows:

##### **2. Background**

The incumbent Minister at the time, on the advice of the Commission, provisionally suspended Mr Kgomo from office in terms of section 13(3)(a) of the Act with effect from 18 February 2014 which suspension was confirmed by Parliament on 13 March 2014.

##### **3. Criminal proceedings and reason for long delay in finalising the matter**

3.1. Mr Kgomo was an additional Magistrate at Randburg and was appointed to the lower court bench in July 2000. He was arrested on 5 December 2013 and appeared in the Randburg Regional Court the following day on a charge of corruption.

3.2. It is alleged that he demanded and received R150 000 in exchange for positively influencing the outcome of an appeal for extradition brought by the complainant in the particular matter. The complainant had to face charges of corruption in another country amounting to R20 million. The money was recovered in Mr Kgomo's briefcase in his office and in his presence. The Court on 9 December 2013 granted Mr Kgomo bail to the amount of R30 000.

- 3.3. The criminal case was postponed on several occasions for various reasons.
  - a. The matter was on 26 August 2014 remanded to 3 October 2014 for Mr Kgomo to instruct an attorney.
  - b. Mr Kgomo's legal representative withdrew as attorney of record on 3 October 2014. The case was provisionally remanded to 30 October 2014 for Mr Kgomo to secure the services of a new legal representative. The Court also set the trial date for 16-20 February 2015. The new legal representative made his appearance in court on 30 October 2014.
- 3.4. The criminal trial commenced on 16 February 2015 and proceeded for the entire week.
- 3.5. After judgment was passed, the State called the complainant to the stand. The matter was postponed to 09 June 2015 for further trial and set down for three weeks for the evidence to be finalised.
- 3.6. On 09 June 2015 Mr Kgomo once again experienced problems with legal representation.
  - a. The record of the proceedings reflects that there was an issue between Mr Kgomo and his instructing attorney which issue could not be resolved, with the result that his attorney and counsel had to withdraw. The case was remanded to 11 June 2015 for Mr Kgomo to sort out his problem concerning legal representation.
  - b. On 11 June 2015 Mr Kgomo placed on record that he had tried to negotiate with his previous legal team but that the trust relationship had irretrievably broken down. He was given until 17 June 2015 to instruct a new legal representative.
  - c. On 17 June 2015 his new attorney placed on record that he was instructed to represent Mr Kgomo but that he would engage the services of counsel to assist him at the trial. Although previous counsel indicated that he was prepared to proceed with the matter when so briefed, he on 17 June 2015 indicated that he was already engaged and not willing to come back to represent

Mr Kgomo in the matter. This left the newly appointed attorney with no option other than to ask the court for a postponement to brief another advocate. The Court postponed the case until 23 June 2015 on condition that Mr Kgomo's newly appointed attorney, as well as counsel be present to arrange new dates for the trial to proceed.

- d. On 18 June 2015 Mr Kgomo terminated the services of his new attorney and once again instructed another attorney to represent him. The now newly instructed attorney was on record on 23 June 2015. Mr Kgomo indicated that they would not be briefing counsel. Arrangements for a new trial date had to be set. The Presiding Officer, however, refused to set a trial date and gave Mr Kgomo until 01 July 2015 to pay his lawyer for the duration of the trial.
- 3.7. The matter was back in court on 23 September 2015 and 26-28 October as well as 02-03 November 2015 for further hearing.
- a. The State made considerable progress in the matter. The matter was remanded to 03 and 04 May, 09 to 11 May, 16 to 18 May and 23 May 2016 for continuation of the hearing.
  - b. The State again made significant progress in the matter during this entire period. The case was postponed until 03, 04, 06, 10, 11 and 17 to 19 October 2016 for further evidence.
  - c. The Director of Public Prosecutions: Gauteng Local Division on 20 October 2016 reported that the State had closed its case and that the defence brought an application for Mr Kgomo's discharge in terms of Section 174 of the Criminal Procedure Act (CPA). The defence also brought an Application in terms of Section 186 of the CPA which was found to be premature. The court ordered the defence to proceed with its case and postponed the proceedings for this purpose until 18 -20 January 2017.
  - d. Mr Kgomo's attorney was not available prior to these dates. The matter was further adjourned to 10 March 2017 to argue on the Section 186 Application. The Court on 31 March 2017 dismissed the application.

- e. The matter was postponed until 26 July 2017 for the parties to submit written Heads of Arguments and to address the court on the merits of the case.
- 3.8. The cause of this long delay was once again due to the defence attorney not being available prior to this date and the fact that the parties requested a copy of the transcription of the record of proceedings. A magnitude of evidence has been led in the case which includes oral testimony as well as a large amount of documentary evidence.
- 3.9. The Regional Court convicted Mr Kgomo on two (2) counts of corruption on 23 October 2017 and postponed the matter to 07 and 08 February 2018 for sentencing.

#### **4. Disciplinary proceedings**

- 4.1. The Magistrates Commission charged Mr Kgomo with misconduct. A charge sheet dated 11 April 2014 was duly served on him.
- 4.2. The National Prosecuting Authority (NPA) requested the Commission not to commence with its disciplinary hearing/inquiry against Mr Kgomo since it was of the view that it would prejudice the State's criminal case against him.
- 4.3. The Magistrates Commission at its meeting held on 31 October 2014 considered this request and resolved to keep a decision on the matter in abeyance until its next meeting to be held on 27 February 2015 for the NPA to provide the Commission with a progress report regarding Mr Kgomo's criminal prosecution. The Commission at its meeting held on 27 February 2015 noted that the criminal case was complex and very sensitive. The Commission therefore resolved to keep the disciplinary hearing against Mr Kgomo in abeyance, pending the progress made in the criminal case.

- 4.4. Mr Kgomo is on provisional suspension since 18 February 2014. The misconduct inquiry against him has been kept in abeyance pending the progress made in the criminal matter. Mr Kgomo has now been convicted on two counts of corruption. He has been provisionally suspended from office for almost four years and with full remuneration.
- 4.5. The Commission holds the view that the mere fact that he has been convicted on two counts of corruption, on its own, justifies the withholding of his remuneration, pending the finalisation of the misconduct inquiry against him.
- 4.6. The Commission is of the opinion that, having further regard to the Constitutional Court's judgment in *Van Rooyen and Others v The State and Others*, CCT case no 21/2001, where the Constitutional Court held that if good reasons exist for the suspension of a magistrate, even if provisionally, the withholding of salary during such suspension is not necessarily disproportionate, Mr Kgomo's provisional suspension from office without remuneration is justified.
- 4.7. On 27 October 2017 Mr Kgomo was, in compliance with the rules of natural justice, therefore invited to show cause why the Commission (or its EXCO), at its next meeting, should not determine to withhold his remuneration forthwith. A letter in this regard was served on him on 03 November 2017, a copy of which is attached.
- 4.8. Mr Kgomo, however, failed to respond within the time limits to this invitation to furnish the Commission with any representations in this regard. His representations dated 09 November 2017, which were filed out of time, were nevertheless considered by the Commission.
- 4.9. Having regard to the fact that it is evident that Mr Kgomo is deliberately delaying the continuation of the disciplinary process against him and the serious nature of his criminal conviction, the Commission determined to withhold Mr Kgomo's remuneration in terms of Section 13(4A)(a) of the Act, pending the conclusion of the disciplinary inquiry against him with immediate effect.

## **5. Legal position**

If the Commission determines that the remuneration of a magistrate shall be reduced or withheld, a report regarding that determination and the reason therefore must be tabled in Parliament by the Minister within 7 (seven) days of such determination if Parliament is then in session, or, if Parliament is not then in session, within 7 (seven) days after the commencement of its next ensuing session in terms of Section 13(4A)(b) of the Act. Parliament must, as soon as is reasonably possible, consider that report and pass a resolution as to whether or not the determination concerned is confirmed, either with or without amendment or set aside in terms of Section 13(4A)(c) of the Act.

## **6. Committee recommendation to the NCOP for approval**

The Select Committee on Security and Justice, having considered the Minister's report on the Magistrates Commission's determination to withhold the remuneration of magistrate Mr M J Kgomo, an Additional Magistrate at Randburg, tabled by the Minister for Justice and Correctional Services, in terms of Section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), recommends to the National Council of Provinces to confirm the determination.

**Report to be considered.**

**5. Report of the Select Committee on Security and Justice on the Withholding of Remuneration of Magistrate Ms R M Malahlela, an additional Magistrate at Delmas, tabled in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), dated 23 May 2018.**

**1 Introduction**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 29 November 2017, as tabled by the Minister for Justice and Correctional Service, on their determination to withhold the remuneration of magistrate Ms RM Malahlela, an aspirant additional Magistrate at Delmas, tabled by the Minister for Justice and Correctional Services, in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), reports as follows:

**2 Background**

- 2.1 Ms Malahlela is an aspirant additional magistrate at the Delmas District Court. She is 54 years of age and has been appointed to the lower court bench on 1 November 2004. She is still on probation. The Minister, on the advice of the Commission, provisionally suspended Ms Malahlela from office with effect from 17 July 2014 which provisional suspension was confirmed by both Houses of Parliament on 6 and 18 November 2014 respectively.
- 2.2 Her permanent appointment could not be finalized due to poor performance, irregularities in her work, absenteeism from office, refusal to execute lawful orders, major delays in handing down judgments, failure to finalize matters and poor utilization of court time. Her evaluation reports indicated that she is not a fit and proper person for appointment as a magistrate.

- 2.3 Ms Malahlela was for considerable periods absent from work and in default to explain her absence, she could not satisfy the Commission that she is a fit and proper person to be appointed as a magistrate. Medical reports indicated that she suffered from Major Depressive Disorder and Panic Disorder. The condition does however not render her unfit to work, but she has to continue with monthly psychotherapy and medication.
- 2.4 A report dated 18 October 2011 recommended that she does not have the capacity to carry out her duties of office in an efficient manner due to continued ill-health and that she should furnish reasons in terms of Regulation 29(6) of the Regulations.
- 2.5 The Ethics Committee subsequently requested a Judicial Quality Assurance Report on the judicial work performed by Ms Malahlela be submitted to the Commission for consideration. The report covered the period 2010 to August 2012 and raised the following concerns:
- a. Ms Malahlela made mistakes in the Criminal Court that were not in line with her experience on the bench and had a negative impact on the right to a fair trial; similarly, the mistakes made in the Family Court is not reflecting her years of experience;
  - b. She has a long outstanding debt for private phone calls made from the land line of the office;
  - c. Various complaints resulted in her allocation to the reception court;
  - d. Partly heard matters prior to 2010 took years to finalize;
  - e. There is a history of strained relationships between Ms Malahlela and the local attorneys, the prosecutors and administrative staff;
  - f. Her absenteeism from office has reduced since she works in the reception court – she has a tendency to be absent on Mondays which extends to Wednesdays.

2.6 The Ethics Committee on 6 September 2012 resolved that she be exposed to an additional six months of probation under the guidance of an on board mentor, namely the then acting Judicial Head of Office. A report in this regard was submitted to Ms Malahlela on 18 April 2013 for her comments. Although the gist of the report was positive in nature, the acting Judicial Head of Office at the time was not prepared to make a recommendation as Ms Malahlela was during the period of extended probation absent for 39 days, namely 31 days for vacation leave and 8 days for sick leave. The report, however found that the statistics she provided raised many questions as to her productivity because she often arrived late at work; does not attend in time to circulars/official correspondence which she must sign and her dedication to her work was questionable.

2.7 New complaints were lodged against Mrs Malahlela on 24 April 2013:

- a. The Control Prosecutor averred that she in case A793/2012 held an enquiry into the accused`s failure to attend court and found him not guilty despite the fact that his bail was finally forfeited to the state on a previous occasion;
- b. The warrant of arrest was not cancelled by the magistrate;
- c. She refuses to sign circulars and official communication;
- d. Failure to finalize her inquests despite reminders;
- e. Left the office without finalizing her court roll;
- f. The acting Judicial Head of Office does not see her way open to discuss anything with her;
- g. The relationship has become strained and she often does not know the whereabouts of Mrs Malahlela at the office.
- h. Further complaints on 7 May 2013 indicated the following: the inquests mentioned above were not submitted. She did not return on 2 May 2013 from leave and eventually handed in a sick note for the 2<sup>nd</sup> and 3<sup>rd</sup> of May 2013; she did not submit her monthly statistics on 26 April 2013; she only did so on 6 May 2013 after various reminders; she did not respond to a reminder from the Magistrates Commission.

- 2.8 A letter from the then acting Judicial Head of Office and the sub-cluster Head dated 20 May 2013 requested the Commission to take into consideration all previous reports and recommendations to consider whether Mrs Malahlela is indeed a fit and proper person to be appointed as a magistrate considering the many complaints and personal matters that reflected negatively on the conduct and good standing of a magistrate.
- 2.9 The Commission's Ethics Committee accordingly resolved to conduct a preliminary investigation in terms of Regulation 26(1) of the Regulations to obtain evidence in order to determine whether there are any grounds for a charge of misconduct against Mrs Malahlela and to investigate the feasibility of re-opening the previous four charges of misconduct against her.
- 2.10 The investigation report recommended that the Magistrates Commission charge Mrs Malahlela with misconduct. A charge sheet comprising of 29 counts of alleged misconduct was served on her on 05 March 2014.

### **3 High Court Application**

- 3.1 On 18 June 2014 Mrs Malahlela filed a Notice of Motion at the North Gauteng High Court for a Court order, *inter alia* to declare the Commission's decision to charge her with misconduct to be wrongful and unlawful. The application was opposed.
- 3.2 At its meeting held on 31 October 2014 the Commission considered Mrs Malahlela's attorney's request not to proceed with the disciplinary hearing, pending the outcome of the High Court review application since the relief sought, *inter alia*, is to set aside the decision by the Magistrates Commission to charge Mrs Malahlela with misconduct. The Commission resolved to stand by its earlier decision that the misconduct hearing must proceed.
- 3.3 In consultation with her attorney, the date for the misconduct hearing was set to commence on 11 May 2015. On 11 May 2015, the defence requested a postponement of the disciplinary inquiry

which application was argued before the Presiding Officer. The Presiding Officer however ruled to keep the disciplinary inquiry in abeyance pending the outcome of Ms Malahlela's High Court application.

- 3.4 Having delayed her High Court application for more than three years, the matter was set down for hearing on 2 and 3 May 2017 by the Gauteng Local Division of the High Court. Ms Malahlela persisted with an application to have the matter heard by 2 Judges or more. This request was turned down. She then brought an application for the Presiding Judge to recuse herself on the basis of incidents which occurred in court. Her attorney was given the opportunity to bring an application from the bar which he refused.
- 3.5 He insisted that he wanted to bring it by way of a Notice of Motion, supported by an affidavit. The Court refused this request given the fact that the matter would then have to be postponed to allow the Applicant time to consult and bring such an application. The attorney then decided to withdraw as attorney of record. The Court allowed the Applicant/Ms Malahlela a postponement to afford her an opportunity to get another legal representative. She was ordered to pay the wasted costs.
- 3.6 The Office of the State Attorney, Pretoria holds the view that the order of the Gauteng Division of the High Court of 03 May 2017 is not appealable and that the matter should be set down for hearing.

#### **4 Magistrates Commission's Determination to withhold remuneration**

- 4.1 Ms Malahlela was charged with misconduct on 05 May 2014. The disciplinary inquiry against her commenced on 11 May 2015 and was postponed pending the outcome of her High Court application.
- 4.2 The disciplinary proceedings were, on her request, postponed pending the outcome of her High Court application. On 03 May 2017 the High Court postponed her application to afford her an opportunity to instruct another legal representative.

- 4.3 The Commission has been advised that Ms Malahlela has requested the Court to furnish reasons for its decision but that she has to date not taken any steps to further her application, causing the conclusion of the misconduct inquiry to be deliberately delayed. She has been provisionally suspended from office by the Minister on 17 July 2014. Ms Malahlela is to date still receiving remuneration and is still on probation. The Deputy Minister is approached on a three-monthly basis to appoint an acting magistrate in her place, resulting in the Department having to pay the extra costs. The Commission considered the matter and is of the view that a determination to withhold Ms Malahlela's remuneration is at this stage justified.
- 4.4 On 09 November 2017, Ms Malahlela was, in compliance with the rules of natural justice, invited to furnish the Commission with representations why the Commission should not determine to withhold her remuneration in terms of section 13(4A)(a) of the Act. The letter was forwarded to her erstwhile attorney who confirmed that Ms Malahlela "*has returned to us for assistance*" and that they are preparing the court file to be set down shortly. A copy of the correspondence in this regard is attached.
- 4.5 The Commission received no response from either Ms Malahlela or her attorney.
- 4.6 The Commission holds the view that Ms Malahlela is deliberately delaying the disciplinary process against her and that a determination by the Commission to withhold her remuneration is justified. In terms of Section 13(3)(f) of the Act, a misconduct inquiry against a magistrate must be concluded as soon as possible. It could never have been the intention of the Legislature to allow disciplinary inquiries against magistrates to be held in abeyance indefinitely.
- 4.7 The Commission is of the opinion that, having further regard to the Constitutional Court's judgment in Van Rooyen and Others v The State and Others, CCT case no 21/2001, where the Constitutional Court held that if good reasons exist for the suspension of a

magistrate, even if provisionally, the withholding of salary during such suspension is not necessarily disproportionate, Ms Malahlela's provisional suspension from office without remuneration is justified.

4.8 Having regard to the fact that it is evident that Ms Malahlela is deliberately delaying the continuation of the disciplinary process against her and the serious nature of the misconduct charges preferred against her, the Commission, at its meeting held on 24 November 2017, determined to withhold Ms Malahlela's remuneration in terms of Section 13(4A)(a) of the Act, pending the conclusion of the disciplinary inquiry against her with immediate effect.

## **5 Legal position**

If the Commission determines that the remuneration of a magistrate shall be reduced or withheld, a report regarding that determination and the reason therefore must be tabled in Parliament by the Minister within 7 (seven) days of such determination if Parliament is then in session, or, if Parliament is not then in session, within 7 (seven) days after the commencement of its next ensuing session in terms of Section 13(4A)(b) of the Act. Parliament must, as soon as is reasonably possible, consider that report and pass a resolution as to whether or not the determination concerned is confirmed, either with or without amendment or set aside in terms of Section 13(4A)(c) of the Act.

## **6 Committee recommendation to the NCOP for approval**

The Select Committee on Security and Justice, having considered the Minister's report on the Magistrates Commission's determination to withhold the remuneration of magistrate Mrs R M Malahlela, an aspirant additional Magistrate at Delmas, tabled by the Minister for Justice and Correctional Services, in terms of Section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), recommends to the National Council of Provinces to confirm the determination.

### **Report to be considered.**

**6. Report of the Select Committee on Security and Justice on the Suspension from the Office of Magistrate of Mr IWOM Morake, Magistrate at Lichtenburg, tabled in terms of section 13(4)(a)(i) of the Magistrates Act, 1993 (Act No 90 of 1993), dated 23 May 2018.**

**1 Introduction**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 8 February 2018, as tabled by the Minister for Justice and Correctional Service, on the suspension and removal from office of Mr IWOM Morake, Magistrate at Lichtenburg, on the ground of misconduct in terms of section 13(4)(a)(i) of the Magistrates Act, 1993 (Act 90 of 1993, hereinafter the Act) reports as follows:

**2 Background**

The previous incumbent Minister, on the advice of the Commission, provisionally suspended Mr Morake from office with effect from 04 November 2010 which suspension was confirmed by both Houses of Parliament on 18 and 24 November 2010 respectively. The Commission on 24 November 2011 determined to withhold his remuneration with immediate effect, which determination was confirmed by Parliament on 24 November 2011. Mr Morake is currently not receiving any remuneration.

**3 Criminal proceedings**

**3.2** Mr Morake is the Magistrate and Judicial Head at Lichtenburg. The Commission charged Mr Morake with six counts of misconduct which are contained in a charge sheet which was served on Mr Morake on 29 December 2010.

- 3.3** One of the counts related to the fact that the Regional Court, Lichtenburg on 18 October 2010 convicted him on two counts of theft. On 13 July 2007, Mr Morake appeared in the Lichtenburg Regional Court on three charges of theft. On 21 July 2011 the Court sentenced him to four years' imprisonment on each count in terms of Section 276(i) of the Criminal Procedure Act. The sentences were to run concurrently. He filed an application for leave to appeal, which application was finally struck from the roll on 27 January 2016. He was represented by Senior Counsel and argued all along that the record of the criminal proceedings against him were incomplete and had to be reconstructed. The Court refused another postponement for this purpose and revoked his bail. He started to serve his sentence on 27 January 2016 and was released at the end of 2016.
- 3.4** The Commission commenced with the disciplinary inquiry against Mr Morake on 11 April 2011. He requested the disciplinary inquiry to be kept in abeyance until the outcome of the criminal case against him. The Commission therefore served an amended charge sheet on him in March 2012 and proceeded to set down the matter for hearing. A copy of the amended charge sheet dated 20 March 2012 is attached.
- 3.5** The inquiry was set down to continue on 23 April 2012. Since then Mr Morake on numerous occasions requested for a postponement to either instruct an attorney or to raise funds to pay his attorney and Senior Counsel, etc. The evidence was finally led on 28 September 2015 and postponed for Heads of Argument to be filed.
- 3.6** Mr Morake's incarceration caused a further delay to have the misconduct inquiry against him concluded.
- 3.7** The inquiry was however postponed to a provisional date in April 2016 for both parties to submit Heads of Arguments on the merits to the Presiding Officer. On 25 May 2016 Counsel for Mr Morake advised the Presiding Officer that he was not placed in funds for drafting Heads of Arguments and indicated that judgment may be delivered in his absence. Counsel, as well as his instructing attorney's mandate was terminated.

- 3.8** Arrangements were made for Mr Morake to appear at the Lichtenburg Court House for both parties to address the Presiding Officer the merits on 26 September 2016. He reported ill and did not appear. His legal representative advised the Presiding Officer on 26 September 2016 that he has again been instructed to proceed in the misconduct proceedings and to brief counsel. Although Mr Morake was afforded an opportunity to file Heads of Argument, he failed to do so.
- 3.9** A notice of motion was set down for the inquiry to continue on 18 April 2017 was served on Mr Morake. He appeared in person and indicated that his former attorney of record and counsel will again represent him. The inquiry was postponed to 23 June 2017 for both parties to address the Presiding Officer (PO) on the merits. Neither Mr Morake nor counsel was present. The Presiding Officer ruled to proceed with the inquiry in Mr Morake's absence. The Presiding Officer delivered judgment on 23 June 2017 and found Mr Morake guilty of five counts of misconduct. A copy of the judgment and the reasons therefore is available.
- 3.10** The Presiding Officer imposed a sanction on 16 November 2017 and in terms of Regulation 26(17)(b) of the Regulations for Judicial Officers in the Lower Courts, 1994 (the Regulations) recommended to the Commission that Mr Morake be removed from office as contemplated in Section 13 of the Act.
- 3.11** A decision by the Magistrates Commission to determine to withhold Mr Morake's remuneration in terms of Section 13(4A)(a) of the Magistrates Act No 90 of 1993 was confirmed by Parliament on 24 November 2011. Mr Morake is currently not receiving any remuneration. His whereabouts since his last appearance at the misconduct inquiry and the withdrawal of his legal team are unknown. He could not be traced and failed to submit any representations.
- 3.12** Having duly considered all the required documentation presented to it, the Commission's Executive Committee on 30 January 2018 resolved to recommend that Mr Morake be removed from office in terms of Section 13(4)(a) of the Act.

#### **4 Legal position**

- 4.1** In terms of Section 13(4)(a) of the Magistrates Act, 90 of 1993, the Minister, on the advice of the Magistrates Commission, must suspend that magistrate from office or, if the magistrate is at that stage provisionally suspended in terms of subsection (1)(a), confirm the suspension.
- 4.2** A report in which the suspension in terms of paragraph (a) of a magistrate and the reason therefore are made known, must be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session in terms of Section 13(4)(b) of the Act.
- 4.3** Parliament must then as soon as is reasonably possible, pass a resolution as to whether or not the restoration of his/her office of a Magistrate so suspended is recommended in terms of Section 13(4)(c) of the Act.
- 4.4** After a resolution has been passed by Parliament as contemplated in paragraph 4.3, the Minister shall restore the Magistrate concerned to his/her office or remove him/her from office, as the case may be.

#### **5 Committee recommendation to the NCOP for approval**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 8 February 2018, as tabled by the Minister for Justice and Correctional Services, on the suspension from office of Mr IWOM Morake, Magistrate at Lichtenburg, on the ground of misconduct in terms of Section 13(4)(a)(i) of the Magistrates Act, 1993, recommends that the National Council of Provinces does not restore Mr Morake to the office of Magistrate.

#### **Report to be considered.**

**7. Report of the Select Committee on Security and Justice on the Withholding of Remuneration of Magistrate Ms JF Van Schalkwyk, Chief Magistrate at Kempton Park, tabled in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), dated 23 May 2018.**

**1 Introduction**

The Select Committee on Security and Justice, having considered the Magistrates Commission's report dated 29 November 2017, as tabled by the Minister for Justice and Correctional Service, on their determination to withhold the remuneration of magistrate Ms JF Van Schalkwyk, Chief Magistrate at Kempton Park, tabled by the Minister for Justice and Correctional Services, in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), reports as follows:

**2 Background**

- 2.1 The Magistrates Commission at its meeting held on 11 May 2013, agreed to provisionally suspend Ms Van Schalkwyk pending an investigation into her fitness to hold office as contemplated in terms of Section 13(3)(a) of the Magistrates Act, No 90 of 1993 (the Act). Parliament on 12 November 2013 confirmed Ms Van Schalkwyk's provisional suspension from office.
- 2.2 After a preliminary investigation, the Magistrates Commission charged Ms Van Schalkwyk with 18 counts of misconduct. Ms Van Schalkwyk's then attorney acknowledged receipt of the charge sheet on 01 August 2013 on her behalf.
- 2.3 The Commission on 18 September 2013 appointed a Presiding Officer and a Person to Lead the Evidence (PLE) at the hearing.
- 2.4 On 07 October 2013, Messrs C Coetzee attorneys, acting on Ms Van Schalkwyk's behalf, filed a written objection with the Commission against the appointment of Mr D Nair, the Chief Magistrate, Pretoria to lead the evidence at the misconduct hearing.

- 2.5 In its response the Commission advised Mr Coetzee that Mr Nair has been duly appointed in terms of the applicable legislation and that his duties and functions are different to those of the Presiding Officer in the matter. He was further advised to raise any objections in this regard to the correct forum, which would be at the inquiry before the Presiding Officer.
- 2.6 The defense raised numerous points *in limine* and applications which were argued before the Presiding Officer on 06 October 2014. Ms Van Schalkwyk's application was successful in respect of one count. The Presiding Officer postponed the inquiry to 16 January 2015 for hearing on which date the defense again requested a postponement. Although this was vigorously opposed by the PLE on behalf of the Commission, the matter was postponed to 23-25 February 2015 for hearing. The hearing did however not proceed on these days.
- 2.7 A further postponement was requested by the defence since Ms Van Schalkwyk's mother had passed on. The inquiry was postponed to 20 and 21 April 2015. The defence on 15 April 2015 advised the person leading evidence on behalf of the Commission that they were once again forced to apply for a postponement of the matter on 20 April 2015. Ms Van Schalkwyk's legal representative indicated that he on 13 April 2015 received confirmation from the Public Service Association (PSA) that they would authorize for senior counsel to be briefed. Advocate J Cilliers (SC) was briefed but not able to proceed with the hearing on 20 April 2015, even if he would be placed in a position to prepare. The application for a further postponement was opposed.
- 2.8 The Presiding Officer requested both parties to file Heads of Argument in respect of the application for another postponement. The application was refused. Ms Van Schalkwyk's attorney thereafter recused himself which the person leading the evidence opposed. Ms Van Schalkwyk asked for a postponement to obtain legal representation which was also opposed. The Presiding Officer however granted the postponement and remanded the inquiry to 3 June 2015, on which date Adv Cilliers, SC with instructing attorney P Rudman, were placed on record.

2.9 Counsel indicated that the defence intends to challenge the validity of the Regulations for Judicial Officers in the Lower Courts, No R361 of 11 March 1994 but that he had to take final instructions thereon. The inquiry was postponed to 30 October 2015 for the defense to institute a Motion Application to the High Court, inter alia, to seek a Declaratory Order challenging the validity of the promulgated Regulations and the Code of Conduct for Magistrates. The State Attorney was instructed to oppose the application.

### **3 High Court Application**

3.1 The Applicants on 14 August 2015 obtained a High Court order compelling the Minister and the Secretary of the Magistrates Commission, respectively the first and third Respondents in the matter, to provide the Applicants with any information relating to, including copies of any recommendations by the Commission to the Minister in terms of section 16 of the Magistrates Act, 90 of 1993 relating to the promulgation of the Regulations for Judicial Officers in the Lower Courts and the Code of Conduct for Magistrates.

3.2 The office of the State Attorney, Pretoria on 26 September 2016 advised the Commission that Heads of Arguments were filed on 11 July 2016. The matter was set down on the Opposed Motion roll at the Gauteng Division of the High Court for hearing on 30 January 2017. During argument a new issue arose necessitating brief supplementary submissions to the Court. The matter was therefore postponed until 15 March 2017. The matter was heard on 15 March 2017 and judgment was reserved.

3.3 The High Court on 01 August 2017 delivered judgment dismissing the Applicants' application with costs. The Applicants filed a Notice of Application for leave to appeal to either a full bench of the High Court or the Supreme Court of Appeal (SCA) on 29 August 2017. Having heard both parties on 08 November 2017 the High Court on 10 November 2017 dismissed the Applicants' application with costs.

#### **4 Magistrates Commission's Determination to withhold remuneration**

- 4.1 Ms Van Schalkwyk was charged with misconduct, which charge sheet was served on her on 01 August 2013. She has been provisionally suspended from office by the Minister on 04 June 2013.
- 4.2 She is to date still receiving the remuneration of a Chief Magistrate, whilst the disciplinary proceedings are pending against her. More than 4 years have lapsed and not a single piece of evidence has been placed before the disciplinary inquiry. The PLE has been requested to, in consultation with the Presiding Officer at the misconduct inquiry, to set the inquiry down to continue without any further delay.
- 4.3 Having regard to the Constitutional Court's judgment in the Van Rooyen case CCT 21/2001 the Constitutional Court thoroughly dealt with the validity of the Magistrates Act, 90 of 1993, the Regulations for Judicial Officer in the lower Courts and the Code of Conduct for Magistrates and found them, with the exception to a few amendments to be made, to be consistent with the Constitution. The Act and the Regulations were accordingly amended in 2003. Her High Court Application has been dismissed with costs.
- 4.4 The Commission holds the view that Ms Van Schalkwyk is deliberately delaying the disciplinary process against her and that a determination by the Commission to withhold her remuneration is justified. In terms of Section 13(3)(f) of the Act, a misconduct inquiry against a magistrate must be concluded as soon as possible. It could never have been the intention of the Legislature to allow disciplinary inquiries against magistrates to be held in abeyance indefinitely.
- 4.5 On 27 October 2017 Ms Van Schalkwyk was, in compliance with the rules of natural justice, invited to show cause why the Commission should not determine to withhold her remuneration forthwith. A letter in this regard was served on her on 01 November 2017. A copy is attached.

- 4.6 Ms Van Schalkwyk filed her representations with the Commission on 09 November 2017.
- 4.7 Ms Van Schalkwyk in her representations admits "*that the misconduct hearing is dependent on the outcome of the High Court cases*" and that "*the High Court cases have due process to be followed*". Due process has been followed and the High Court dismissed her applications. The judgments in this regard are clear. Her representations not to withhold her remuneration therefore have no substance.
- 4.8 The Commission is of the opinion that, having further regard to the Constitutional Court's judgment in Van Rooyen and Others v The State and Others, CCT case no 21/2001, where the Constitutional Court held that if good reasons exist for the suspension of a magistrate, even if provisionally, the withholding of salary during such suspension is not necessarily disproportionate, Ms Van Schalkwyk's provisional suspension from office without remuneration is justified.
- 4.9 Having regard to the fact that it is evident that Van Schalkwyk deliberately delayed the continuation of the disciplinary process against her and the serious nature of this misconduct charges preferred against her, the Commission, at its meeting held on 24 November 2017, determined to withhold Ms Van Schalkwyk's remuneration in terms of Section 13(4A)(a) of the Act, pending the conclusion of the disciplinary inquiry against her with immediate effect.

## **5 Legal position**

If the Commission determines that the remuneration of a magistrate shall be reduced or withheld, a report regarding that determination and the reason therefore must be tabled in Parliament by the Minister within 7 days of such determination if Parliament is then in session, or, if Parliament is not then in session, within 7 days after the commencement of its next ensuing session in terms of Section 13(4A)(b) of the Act. Parliament must, as soon as is reasonably possible, consider that report and pass a resolution as to whether or not the determination concerned is confirmed, either with or without amendment or set aside in terms of Section 13(4A)(c) of the Act.

**6 Committee recommendation to the NCOP for approval**

The Select Committee on Security and Justice, having considered the Minister's report on the Magistrates Commission's determination to withhold the remuneration of magistrate Ms JF Van Schalkwyk, chief Magistrate at Kempton Park, tabled by the Minister for Justice and Correctional Services, in terms of Section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), recommends to the National Council of Provinces to confirm the determination.

**Report to be considered.**

**8. Report of the Select Committee on Economic and Business Development on Budget Vote 18: Labour on Strategic Plan, Annual Performance Plan and Budget for 2018/19 of the Department of Labour, dated 21/05/2018.**

The Select Committee on Economic and Business Development, having considered Budget Vote 18: Labour Strategic Plan, Annual Performance Plan and budget for 2018/19 of the Department of Labour, reports that it has concluded its deliberations thereon.

Report to be considered

**9. Report of the Select Committee on Economic and Business Development on Budget Vote 11: Public Works Strategic Plan, Annual Performance Plan and Budget 2018/2019 of the Department of Public Works, dated 23 May 2018.**

The Select Committee on Economic and Business Development, having considered Budget Vote 11: Public Works and Strategic Plan, Annual Performance Plan and Budget for 2018/2019 of the Department of Public Works, reports that it has concluded its deliberations thereon.

Report to be considered

**10. Report of the Select Committee on Education and Recreation on the Revised Addis Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and Other Academic Qualifications in Higher Education in African States, tabled in terms of section 231(2) of the Constitution, 1996, dated 23 May 2018.**

The Select Committee on Education and Recreation, having considered the request for approval by Parliament of the Revised Addis Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and Other Academic Qualifications in Higher Education in African States, tabled in terms of section 231(2) of the Constitution, 1996, recommends that the House approves the said Convention.

**Report to be considered**

**11. Report of the Select Committee on Education and Recreation on the Budget Vote and Annual Performance Plan 2018/2019 of the Department of Arts and Culture – Budget Vote No 37, dated 23 May 2018**

The Select Committee on Education and Recreation having considered Budget Vote: 37 and Annual Performance Plan 2018/2019 of the Department of Arts and Culture, reports that the Committee has concluded its deliberations thereon.

**Report to be considered**

**12. Report of the Select Committee on Land and Mineral Resources on the Budget Vote and Annual Performance Plan 2018/19 of the Department of Agriculture, Forestry and Fisheries – Budget Vote No 24, dated 22 May 2018.**

The Select Committee on Land and Mineral Resources having considered Budget Vote: 24 and Annual Performance Plan 2018/2019 of the Department of Agriculture, Forestry and Fisheries, reports that the Committee has concluded its deliberations thereon.

**Report to be considered**