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**Memorandum to facilitate a briefing to the Select
Committee on Security and Constitutional
Development on the Determination of Salaries and
Benefits and Allowances of Magistrates – 11
February 2014**

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Introduction

The Select Committee on Security and Constitutional Development graciously invited the Association of Regional Magistrates of South Africa (ARMSA) to brief them on and we quote:

“The Select Committee would appreciate a briefing by a representative of the Association of Regional Magistrates of Southern Africa (ARMSA) on the magistrates’ salary adjustments and progress made by the Department of Justice and Constitutional Development and the Independent Remuneration Commission for Public Office Bearers to resolve magistrates’ grievances.”

ARMSA wishes to express its gratitude to be afforded the opportunity to do so.

Judicial Officers, due to the Constitutional imperative of judicial independence, should not negotiate with either the Legislature or Executive sphere of government regarding salary increases. The Independent Commission for the Remuneration of Public Office Bearers is thus interposed between the Public office Bearers and the bearers of the public purse. We respect the independence of both the IRC and both Houses of Parliament.

It is our respectful submission that our appearance at this briefing should not be construed as a “negotiation”, and is merely aimed to brief the Committee on what we perceive to be a failure of the Independent Commission for the Remuneration of Public Office Bearers (ICRPOB) to comply with their statutory obligations and the lack of progress since our last submissions that were made on the 13 September 2012.

To give structure to this memorandum ARMSA wishes to deal with:

- ❖ the legislation applicable
- ❖ the formation of the Lower Court Remuneration Committee, the process followed in arriving at the 2013 determination
- ❖ the steps taken to address the magistrates concerns by the IRC and the Department of Justice.
- ❖ The process followed prior to this year’s recommendation.

The Legislation applicable

The Independent Commission for the Remuneration of Public Office Bearers is obliged in terms of section 8 (4) and (5) of the Independent Commission for the Remuneration of Public Office Bearers Act, 1997 read with Section 12 of the Magistrates Act 1993 (Act 90 of 1993) to make annual recommendations relating to the salaries benefits and allowances of inter alia magistrates.

The Independent Commission for the Remuneration of Public Office Bearers Act places a further burden upon the IRC that before they make their recommendation they have to consider :

- Role, Status, Duties, Functions and Responsibilities of magistrates.
- The affordability of different levels of remuneration of Public Office Bearers.
- Current principles and levels of remuneration.
- Current principles and levels of remuneration in Organs of State.
- Current principles and levels of remuneration of society in general.
- Inflationary increases
- The availability of resources of the state.
- Any other factor that the commission may find relevant.

These factors *must* be taken into consideration annually and it is our contention that they have not done so. It is further our view that they have not been doing so for the last few years.

The formation of the Lower Court Remuneration Committee (LCRC) and a brief historic overview that gave rise to this briefing.

The then Chief Justice requested during May 2011 that a single committee be formed to advise him regarding the salaries benefits and allowances of the magistracy. The Lower Court Remuneration Committee (LCRC) was formed.

The LCRC met with the IRC on 18 October 2011. At this meeting the chairperson of the independent commission for the remuneration of public office bearers precluded members of the LCRC from presenting a PowerPoint presentation of the concerns of magistrates. The LCRC raised (as one of the Section 8 (6) factors) the disparity in salaries between the Lower Court Judiciary and comparable members of the National Prosecuting Authority and Civil Service. It must be understood that this was only one of the factors to be raised at this meeting. We received support in our suggestions from members of the secretariat of the IRC. The IRC undertook to do a preliminary investigation into the matter and should our contentions be true they would have to do a thorough review of remuneration of Magistrates.

In a letter dated 7 April 2012 the IRC informs us that they are not able to undertake the comparative study, due to competing priorities and resource constraints. This is a concession that they not taken the required factors into consideration.

This gave rise to a number of magistrates expressing this dissatisfaction by way of a petition.

Bertelsmann J in his judgement in the matter of the **Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others** under case number 20210/2011 on **3 September 2012** agreed with this submission with regard to the 2010 determination. The Constitutional Court found (simplistically put) that ARMSA failed to factually prove our contentions. Both ARMSA and JOASA are at this stage asking the High Court to set aside the 2011 determination. Obviously ARMSA did not arrive at this decision lightly, and we readily

concede that the notion of magistrates litigating against their President should be avoided at all costs.

The Constitutional Court however made the following statements during the judgement :

It must also be borne in mind that the determination relates to the remuneration of members of the Judiciary, an issue that goes to the heart of judicial independence and is of fundamental importance to our constitutional state. Adequate remuneration is an aspect of judicial independence. If judicial officers lack that security, their ability to act independently will be put under strain. They should not be placed in a position of having to engage in negotiations with the Executive over their salaries.

And further in paragraph [63]:

It is nonetheless important to acknowledge that judicial officers, both in the District and Regional Courts are a vital part of the Judiciary and the administration of justice. The criminal and civil jurisdiction of both Courts has been increased substantially over the last few years. For instance, until recently, Regional Courts had no civil jurisdiction and were confined to hearing criminal cases. In 2010 Regional Court's civil jurisdiction in designated areas increased to range between R100 000 and R300 000 in terms of the Jurisdiction of Regional Courts Amendment Act. The effect of Regional Courts' expanded jurisdiction is that the workload, responsibilities and expertise of Regional Magistrates and Regional Court Presidents have increased significantly. In exercising civil jurisdiction the Regional Courts are absorbing a significant portion of the workload of both District Courts and High Courts.

It is accordingly important that their conditions of service including remuneration are adequate and consistent with the scheme envisaged by the Constitution and the relevant legislation under it.

The Judicial Officers Association of South Africa announced an industrial action. At that stage the Department of justice were very anxious to speak to the Lower Court Remuneration Committee and promises were made, that the LCRC would be involved in the investigation into the feasibility of the PARMED medical scheme, and an alternative pension fund for the lower court judiciary. The Lower Court Remuneration Committee would have assisted in drafting the terms of reference of these two investigations, to be funded by the Department of Justice. The Lower Court Remuneration Committee has not been approached by the Department of Justice as promised. The only positive that emanated from this meeting was a promise that the Department will supply the lower court judiciary with laptop computers and 3G cards. By the end of last year the majority of magistrates had received the laptops, but unfortunately major problems arose in the implementation stage. No 3G cards was generally distributed.

After our last submission to this committee, the Independent Commission for the Remuneration of Public Office Bearers approach the Lower Court Remuneration Committee, with the view of addressing some of the issues raised by us. This meeting took place on 12 December 2012. At this meeting two of the commissioners present stated that they have never seen our 2012 submissions. It was agreed that a line of communication would be established through the secretariat of the IRC.

It was agreed that three meetings was to be scheduled for the 2013 year, and that there would be meaningful interaction between the lower court remuneration committee and the IRC. The LCRC asked whether there were any of the principles that the IRC based their findings on that had changed since 2005/6. They stated that they doubt it, but chose to study our 2012 submissions in more detail prior to any firmer commitment. It was therefor agreed that at these engagements (as mentioned above) they would make it clear which portions, if any, of our submissions, is at issue. They further agreed that should there be a shift from the principled position in the first major review published in 2007 they would inform us prior to us finalising our 2013 submissions. We were confident at that stage that significant progress was made.

Unfortunately none of these meetings took place, no engagement took place and we are still left in the dark. The secretariat of the IRC choose not to meaningfully communicate with the Lower Court Remuneration Committee which led to the inevitable rumours regarding our salaries, and an escalation in the mistrust with which the IRC is viewed by the magistracy.

The process followed prior to this year's recommendation.

The Lower Court Remuneration Committee had finalised its recommendations in the early part of 2013. (Annexure A) We awaited the invitation by the IRC to engage with them in a meaningful manner. The Lower Court Remuneration Committee even went further and drafted a whole new set of job descriptions to be added to the recommendations.

As previously stated no invitation was forwarded by the IRC and as such they completed draft recommendations without any input from the lower court judiciary Annexure B and from this document it is evident that the role, function, status and duties received no attention.

For the first time ever the Chief Justice took it upon himself to discuss these recommendations with the Lower Court Remuneration Committee and he thereafter accompanied Judges and Magistrates in making a presentation to the IRC. His leadership and understanding of our plight is much appreciated by ARMSA. There was no engagement from the IRC's side.

When the final recommendations were published late in December the IRC decided not to amend the initial recommendations. Although we made it clear that in certain instances the determinations made since 2008 has caused certain groupings of the judiciary to lose a month's salary in real terms due to the effect of inflation, this made no impact upon the IRC. Not even the Chief Justice's inputs imploring the IRC to reconsider the position of the judiciary held any sway.

The final recommendation is attached as an Annexure C. In this recommendation the IRC makes the curious statement, that in essence that they do not have the funds to complete the statutory duties. It is not the first time that we have heard this argument, it was mentioned in the 2012 letter to the lower court remuneration committee and repeated at the 2013 meeting with the Chief Justice.

This places the magistracy and I suspect all other office bearers in the untenable position, in that their arguments and recommendations cannot be properly considered, due to a lack of capacity or funds.

ARMSA decided to distal our grievances into five major areas.

1. The lack of proper engagement with the Lower Court Remuneration Committee prior to the publishing of a draft recommendation by the IRC. Consultation in the form that it is currently being implemented by the IRC is nothing short than mere window dressing. The IRC only consults to be able to state that they have complied with their statutory obligations and it is our contention that at that stage the IRC's mind has really been unduly fixed. Annexures b & c clearly points this out.
2. Mention is made that the IRC to into consideration is the role duties status and functions of the magistracy in the last major review. ARMSA wishes to remind this committee that the last consultation in this regard took place in 2004 with the magistracy. In in early 2006, Justice Moseneke presented this to the magistracy at the constitutional court. Since then this issue has not been investigated by the IRC and thus it is our submission that the IRC is not complying with the with the statutory obligations. In the last decade the judicial landscape has changed considerably.
3. A full review of the remuneration of the lower court is urgently needed. The principles set out in the 2007 first report must be implemented as a matter of extreme urgency.
4. The timing of the request for inputs the recommendation and determination has caused great distress amongst the members of ARMSA. We or the LCRC were supplied with no reasons, why for the second year the rear remuneration process could not be finalised before December. As will be shown hereunder this causes extreme prejudice in that magistrates cannot structure their salaries and this has significant tax implications. Our salaries should be determined by 1 April of each year.
5. Lastly we wish to indicate the total lack of support that we received from the Department of Justice. The lack of progress regarding the Lower Courts bill, the re- drafting of regulations, the lack of training support, where monies promised to SAJEL, were withheld without good cause by DOJ, the non-provisioning of cellular phone allowances, the lack of urgency relating to the medical aid and pension issue to name but a few.

The 2013 notice before this Committee.

ARMSA is in a very difficult position in that we assert that the statutory requirements have not been complied with by the IRC, but that our members are in such financial difficulties that two further delay the implementation of these recommendations, defective and as unjust as they may be, will cause greater embarrassment for our members. The upward adjustment in the pensionable portion

of our remuneration package has the net effect of reducing the non-pensionable allowance and although calculations differ, it would seem that it would have the effect that regional magistrates would only receive the gross 1.4% increase this year.

Conclusion

The inescapable conclusion must be that the IRC failed to apply the law. They made recommendations to the President who in turn is placing this notice before the two houses of Parliament. I wish to leave you with the words that I have adapted from the famous Benjamin Franklin quote:

If you think that it is expensive to fund an effective and well trained Lower Court judiciary, imagine what it would cost not having one.

