



**CONDITIONAL UPLIFTMENT OF REGIONAL MAGISTRATE MR PS HOLE'S PROVISIONAL SUSPENSION BY PARLIAMENT ON 19 JUNE 2013 TO COMPLETE HIS PART-HEARD MATTERS: REPORT BY THE MAGISTRATES COMMISSION TO PARLIAMENT ON PROGRESS WITH FINALISATION OF PART-HEARD MATTERS: 9<sup>TH</sup> REPORT TO THE NATIONAL ASSEMBLY DATED 08 JUNE 2017**

1. On 19 June 2013, Parliament resolved to lift the provisional suspension of Mr P S Hole, Regional Magistrate, Kimberley, with the following conditions:-
  - “(a) Mr Hole is assigned only these part-heard matters. Any decision regarding the allocation of new matters is to be informed by the outcome of the inquiry into his fitness to hold office currently underway;
  - (b) the Magistrates Commission consider starting those part-heard matters afresh where this is necessary and desirable having regard to possible prejudice to the children, women or any other person who has already testified;
  - (c) Mr Hole must not conduct himself in a manner that compromises the integrity of the judiciary and brings the administration of justice into disrepute; and
  - (d) the Magistrates Commission provide regular reports to the National Assembly on whether Mr Hole is abiding by the conditions of the upliftment and the progress of the cases before Mr Hole, as well as the status of the disciplinary hearing against him.”
  
2. In line with the conditions and directives issued by the Magistrates Commission on 8 July 2013 the Regional Court President arranged pre-trial conferences / consultative meetings with all the stakeholders and at these meetings all arrangements have been finalised to enable Mr Hole to as soon as possible complete his part-heard matters. The first part-heard matter commenced on 16 September 2013.

3. Mr Hole was charged with ten (10) charges of misconduct. The misconduct inquiry against Mr Hole was set down for the hearing of evidence on 29 July 2013. Mr Hole on this date brought an application for postponement which was opposed by the magistrate designated to lead the evidence on behalf of the Magistrates Commission. The Presiding Officer however ruled in favour of Mr Hole and the matter was postponed for hearing on 2 to 6 December 2013.
  
5. Mr Hole, who on 2 December 2013 was still unrepresented, applied for the recusal of the Presiding Officer. He based his application on alleged institutional bias by the Magistrates Commission and referred to case law in this regard. His application was dismissed by the Presiding Officer who ordered that the inquiry be proceeded with. Mr Hole then requested a postponement in order to approach counsel to advise him on whether or not he should take the ruling by the presiding officer on review. The Person Leading Evidence (PLE), Regional Magistrate J Lekhuleni, opposed the application for postponement. The Presiding Officer dismissed the application for postponement and ruled that the inquiry must proceed. The first witness was called and testified. The proceedings continued from 2 to 5 December 2013 when Mr Hole submitted a note from a medical practitioner whom he had consulted the previous afternoon which indicated that he is ill and unable to proceed with the inquiry. The inquiry was in the circumstances postponed to proceed from 12 to 16 May 2014 which would allow time for the magistrates who are witnesses to make the necessary arrangements as regards their individual court rolls.
  
6. On 12 May 2014 Mr Hole brought various applications which included the application on new grounds for the recusal of the Presiding Officer. He also requested to be provided with a copy of a preliminary investigation report which was compiled by Magistrate Thulare following complaints against Mr Nqadala. The Presiding Officer dismissed the application for recusal and ruled that the Thulare-report be made available. The report was made available to Mr Hole on 14 May 2014 whereafter Mr Hole further requested that copies of statements which were obtained from prospective witnesses who were interviewed by Mr Thulare as part of the preliminary investigation must also be made available to him. The Presiding Officer ruled that the person leading evidence must approach the Magistrates Commission to ascertain whether the statements are still available and if so, whether the Magistrates Commission is prepared to furnish Mr Hole with copies of the statements. The matter was on 14 May 2014 postponed to proceed on 8 to 12 September 2014 and on 13 to 17 October 2014 for further hearing. The Secretariat of the Magistrates Commission in the meantime traced the recordings which were

made during the interviews with the witnesses and a transcription thereof was provided to Mr Hole upon receipt thereof from the service provider.

7. Mr Hole on 08 September 2014 appeared in person and applied for a postponement of the matter on ground that his legal representative, Adv Kalimashe, was sick. He submitted a medical certificate in support of his application. The PLE strongly objected to the application for a postponement as he was only at a very late stage made aware that the counsel would not be present. The matter was argued and the Presiding Officer eventually ruled that it is in the interest of justice that the matter be postponed. The inquiry was then postponed to 13 to 17 October 2014. The witnesses for the Commission were present and ready to testify.
  
8. The misconduct hearing proceeded on 13 October 2014. Mr Hole was represented by Adv Mxolisi Seti from the Johannesburg Bar (Group 3). Adv Seti indicated that he is junior to the counsel who has been appointed to lead the evidence, namely Adv Khalimashe of East London. Adv Khalimashe was not present. Adv Seti applied for the hearing to be postponed on the basis that they had not received all the documentation they requested and furthermore they were of the view that the Chairperson of the Magistrates Commission should have been present as they understood that the Presiding Officer had given such instruction on their request. They were however at a late stage informed that the provisions of section 25 of the High Court Act needs to be invoked to obtain a judge's presence as a witness, which route was unfortunately not followed by Mr Hole, as it is he who required the Judge's presence. The request for postponement was opposed by the person leading evidence who also argued that all requested documentation was handed to Mr Hole. The matter continued on 14 October 2014 and Mr Hole then appeared in person. His legal representative was absent due to other commitments. The Presiding Officer on 14 October 2014 dismissed the application for postponement and ruled that the failure on the part of Mr Hole to secure legal representation for the continuation of the hearing permits the person leading evidence to proceed. Mr Hole then indicated that all the documents that he needs for his case is with his advocate who had in the meantime returned to Johannesburg. Mr Hole volunteered to travel to Johannesburg to fetch the documents. He undertook to be at the hearing at 08h00 the next morning. The hearing stood down until 15 October 2014 when Mr Hole again appeared in person. He informed that he was only able to make contact with his counsel after he started his journey to Johannesburg. He was informed that the documents were with his counsel who in the meantime travelled to Lesotho to attend to another matter and that his counsel

took the documents with him to prepare. Mr Hole then also submitted a medical certificate indicating that he was sick and not fit to proceed. The hearing was then postponed to 23 to 27 February 2015.

9. On 23 February 2015 the matter was on the roll and Advocate Mnyatheli, Advocate Sethi and Mr Mthotwya (standing in for the instructing attorney) appeared on behalf of Mr Hole. Advocate Mnyatheli led Mr Hole's legal team and made another substantive application for the recusal of the presiding officer on the grounds that the Presiding Officer and Mr Hole are equals in the sense that they are all Regional Magistrates. He argued that the Presiding Officer and Mr Hole are competitors and the Presiding Officer did not have the competence to pronounce on the competence of Mr Hole. He further argued that the Magistrates Commission should appoint Senior Counsel to preside in these proceedings. The tribunal was referred to a number of cases as well as the Public Service Regulations that requires a senior to preside at the misconduct hearing of a junior employee. He argued that there is a perception of bias if the Presiding Officer, who is a Regional Magistrate, and the Officer Leading Evidence (PLE), also a Regional Magistrate, are on the same rank as Mr Hole.
10. This application was opposed. The PLE argued that the application by Mr Hole's legal team was based on an incorrect application and interpretation of the law. The Presiding Officer again dismissed the application for his recusal. Before further evidence could be led, Mr Hole's legal team indicated that there are certain documents that they need which the Commission had failed to provide. They indicated that they need the comprehensive minutes and not the extracts of the minutes of the Ethics Committee when it took the decisions to charge Mr Hole and to not charge Mr Nqadala.
11. On 26 February 2015 Mr Hole's legal team brought a substantive application wherein he applied that the Magistrates Commission must furnish him with a full record of the minutes of the Commission's Ethics Committee in which the decision to charge him was made as well as the minutes of the Ethics Committee where the decision not to charge Mr Nqadala was taken. The PLE in reply argued that all the documents that Mr Hole requested were furnished to him. He argued further that at the trial of the matter he will not use any document that was not furnished to Mr Hole. He also submitted that the application was a ploy to delay the hearing of the matter. The application of Mr Hole's legal team was dismissed. After their application was dismissed, Mr Mthotwya informed the Presiding Officer that he received instructions from his client to apply to the High Court for the review of the order of the

Chairperson in dismissing their application for further particulars. He indicated that they would serve the tribunal with the application the following day. The matter was postponed to 27 February 2015 for service of the relevant application.

12. On 27 February 2015 the legal team of Mr Hole served the Presiding Officer and also gave the PLE Evidence a copy of the affidavit signed by Mr Hole in which he indicated that he will be approaching the Gauteng High Court Local Division for the review of the Presiding Officer's decision. He indicated that he could not file or include the Notice of Motion as he will be approaching the High Court in Gauteng which was a distance away for filing the relevant Notice of Motion. The Chairperson postponed the matter to 23 March 2015 for progress of the application to review his order.
13. On 23 March 2015 Mr Hole handed in proof that his application was filed at the North Gauteng High Court and that the matter was set down on an urgent basis for the next day, 24 March 2015. The Presiding Officer granted his request for a postponement of the inquiry *sine die*, pending the outcome of Mr Hole's application in the High Court.
14. The Notice of Motion was served at the offices of the Magistrates Commission on 20 March 2015. The Department of Justice and Constitutional Development was requested to oppose the matter on behalf of all three (3) Respondents. Mr Hole approached the North Gauteng local Division of the High Court to interdict, restrain and prohibit the Presiding Officer (cited as the Third Respondent) from conducting, commencing, resuming and/or proceeding with the disciplinary hearing ordered by the Magistrates Commission (cited as the Second Respondent). He further sought relief from the High Court declaring that the Chairperson of the Magistrates Commission (the First Respondent) and/or the Commission's appointment of the Presiding Officer as Chairperson in the disciplinary hearing instituted against him, is wrongful, unlawful, irrational, unreasonable and unconstitutional. Mr Hole also applied for an order, directing that the Chairperson of the Magistrates Commission appoints a new, independent and impartial Chairperson to substitute the Presiding Officer who presided at the misconduct hearing at the time.
15. The Commission, in light of Mr Hole's actions/conduct in delaying the finalisation of the misconduct hearing against him, placed the following issue on the agenda of its meeting on 27 November 2015:

- Due to the absence of a court order not to proceed with the misconduct hearing against Mr Hole, to resolve that the misconduct hearing against Mr Hole be proceeded with and that the Officer Leading Evidence be directed to set a date for the hearing to continue accordingly.
16. The Commission subsequently resolved that the misconduct hearing should proceed as there was no court order directing the Commission otherwise. On 12 February 2016 the PLE in the matter was advised accordingly in writing and was requested to arrange that the misconduct hearing/inquiry against Mr Hole be proceeded with. Mr Hole's attorney was accordingly informed on 22 February 2016. The latter indicated that he would contact counsel to confirm his availability for the continuation of the inquiry on 03 to 06 May 2016. The Presiding Officer was also advised of the Commission's resolution and confirmed his availability to continue with the misconduct proceedings. The PLE was requested to serve a Notice for the inquiry to proceed on 03 May 2016 on Mr Hole and his legal team, which he duly did. Despite having been duly notified, Mr Hole and his legal team were absent. Having satisfied himself that proper notice was given, the Presiding Officer ordered the proceedings to continue in their absence. Evidence was lead and the inquiry was postponed to 06-08 June 2016 for argument, judgment and, depending on the outcome, for the imposition of a sanction.
  17. On 06 June 2016 the PLE presented arguments on the Merits and on 07 June 2016 the PO gave a written judgment, finding Mr Hole guilty on all the 10 (ten) charges, some on the alternative, levelled against him. A local attorney appearing on behalf of Mr Hole, on 07 June 2016 again requested the tribunal to postpone the inquiry pending the outcome of Mr Hole's application in the High Court. The PO dismissed this application. The attorney remained in attendance and observed the proceedings until same were concluded.
  18. In imposing an appropriate sanction, the PO considered all the mitigating and aggravating factors and recommended that Mr Hole be removed from office as contemplated in section 13 of the Magistrates Act, 90 of 1993. Mr Hole's rights to make representations to the Magistrates Commission in terms of the applicable regulations were explained to the attorney, who undertook to advise Mr Hole's instructing attorney accordingly.
  19. Mr Hole's legal team provided the Commission with his representation after having requested to be provided with a copy of a transcription of the

proceedings. Mr Hole representations/arguments are in essence that the continuation of the disciplinary hearing prior to the conclusion of his application proceedings in the North Gauteng High court is unlawful and that the finding arrived upon by the PO is therefore, on this ground alone, also unlawful.

20. The Senior assistant State Attorney dealing with the High Court application on behalf of the Respondents on 02 June 2016 confirmed that Mr Hole did not further his application and that he had not complied with his duty to have the matter prepared for hearing and set down. The State Attorney accordingly took steps to place the matter on the roll. Mr Hole's legal representative on 19 September 2016 inter alia "*proposed that the application be withdrawn with each party paying its own costs*". It was therefore clear that Mr Hole intended not to proceed with his Notice of Motion which he filed in the High Court, despite his submissions in his representations to the Commission that the finalization of the disciplinary hearing against him, prior to the conclusion of his High Court application, is unlawful. The Commission was advised that that Mr Hole's application was set down on the opposed motion roll to be heard on 24 October 2016 in the North Gauteng High Court.
21. At its meeting held on 25 November 2016 the Magistrates Commission considered the documents as required by regulation 26(22) read with regulation 26(19) of the Regulations for Judicial Officers in the Lower Courts, 1994 (the Regulations) and resolved to recommend to the Minister that the recommendation of the Presiding Officer in terms of regulation 26(17)(b) of the Regulations be accepted and that Mr Hole be removed from office on the grounds of misconduct in terms of section 13(4)(a)(i) of the Act. The Commission is of the view that Mr Hole's conduct as set out in the charges of which he was found guilty is so serious that it justifies his removal from office.
22. The Minister, on the recommendation of the Magistrates Commission and in terms of section 13(4)(a) of the Magistrates Act, suspended Mr Hole from office with effect from 30 November 2016 and tabled the required report in Parliament in terms of section 13(4)(b) of the Act.
23. Both the Portfolio Committee on Justice and Constitutional Development and the Select Committee on Security and Justice were briefed on the report and held the view not to make a recommendation to the respective Houses of Parliament but to await the outcome of Mr Hole's High Court application.

24. On 26 October 2016, the State Attorney, Pretoria advised the Commission that Mr Hole's High Court application did not proceed in the opposed motion court on 24 October 2016 since Mr Hole indicated that he was not in a position to proceed as his counsel was unexpectedly taken ill and that he was not able to attend court. A copy of a medical certificate was tendered to the Court to this effect. Mr Hole only sought interim relief to have the determination to withhold his remuneration set aside. The presiding judge had under the circumstances little choice but to postpone the application with costs reserved. The matter was again enrolled for 20 December 2016 and stood down until 21 December 2016. On this day the court removed the application from the roll to enable Mr Hole to supplement his affidavit. The application was again set down to be heard on 14 February 2017. The matter proceeded in court on that day where after the presiding judge reserved judgment. The High Court delivered judgment on 30 May 2017. The Court found that Mr Hole failed to make out a proper case against the withholding of his salary and therefore dismissed his application with costs.
25. Parliament is now poised to consider the reports dated 30 November 2016 tabled by the Minister in Parliament and pass:
- 25.1 a resolution in terms of section 13(4)(c) of the Magistrates Act, No 90 of 1993, as to whether or not to recommend Mr Hole's restoration to his office, and
- 25.2 a resolution in terms of section 14(4A)(c) of the Magistrates Act, No 90 of 1993 as to whether or not to confirm the Magistrates Commission's determination on 25 November 2016 to withhold Mr Hole's remuneration.



**M F LEGODI**

**CHAIRPERSON: MAGISTRATES COMMISSION**

**08 JUNE 2017**