



**PROGRESS REPORT DATED 08 JUNE 2017 TO PARLIAMENT: PROVISIONAL  
SUSPENSION FROM OFFICE, CHIEF MAGISTRATE JF VAN SCHALKWYK, KEMPTON  
PARK**

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**1. INTRODUCTION**

The Magistrates Commission must in terms of section 13(3)(f) of the Magistrates Act, No. 90 of 1993 (Act) cause a report on the progress made in respect of inquiries against magistrates who have been provisionally suspended from office to be submitted to Parliament every three months.

Section 13(3)(e) of the Act provides that the provisional suspension of a magistrate in terms of paragraph (a) lapses after 60 days from the date of suspension, unless the Commission, within that period, commences its inquiry into the allegation in question by causing a written notice containing the allegations concerned to be served on the magistrate.

**2. DISCUSSION**

2.1 The Magistrates Commission at its meeting held on 11 May 2013, having considered Ms Van Schalkwyk's representations relating the desirability to provisionally suspend from office, resolved to recommend to the Minister that she be provisionally suspended from office pending an investigation into her fitness to hold

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office as contemplated in in terms of section 13(3)(a) of the Magistrates Act, No 90 of 1993 (the Act). The Minister, on the advice of the Commission, provisionally suspended Ms Van Schalkwyk from office and tabled a report in Parliament in terms of section 13(3)(b) of the Act. Parliament on 12 November 2013 confirmed Ms Van Schalkwyk's provisionally suspension from office.

- 2.2 Having conducted a preliminary investigation into numerous complaints of alleged misconduct, 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.
- 2.2 The Commission on 18 September 2013 appointed a Presiding Officer and a Person to Lead the Evidence (PLE) at the hearing. Ms Van Schalkwyk was informed in writing accordingly.
- 2.3 On 7 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.
- 2.4 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.

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2.5 Ms Van Schalkwyk, through her attorney, thereafter requested numerous further particulars to be provided to enable her to furnish the Commission with a written explanation regarding the misconduct charges preferred against her. Her attorney's attention was drawn to the fact that the Regulations for Judicial Officers in the Lower Courts, 1994 do not make provision for the furnishing of further particulars. Mr Nair's office has been in constant interaction with the defence vis-à-vis the furnishing of further particulars and legal argument surrounding that together with issues pertinent to discovery. Mr Nair however deemed it appropriate to provide the defence with copies of all witness statements and documentation to be tendered during the misconduct inquiry/hearing. The defense raised numerous points *in limine* and applications which were argued before the Presiding Officer on 6 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. 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 PSA that they would authorize for senior counsel to be briefed. Advocate J Cilliers (SC) was briefed but not able to proceed with the

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hearing on 20 April 2015, even if he would be placed in a position to prepare. The application for a further postponement was opposed. 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 03 June 2015, on which date Adv Cilliers, SC with instructing attorney P Rudman, were placed on record. 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.

2.6 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.

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2.7 On 18 November 2015 the Directorate: Law Enforcement of the Department of Justice and Constitutional Development confirmed having complied with the Court order in that the applicants were served with the documents the Department had in its possession.

2.8 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 has been reserved. The Commission is awaiting the High Court's judgment in the matter.

## 3. CONCLUSION

3.1 The misconduct inquiry was on 30 October 2015 postponed to 05 February 2016 for the defense to file an application at the High Court challenging the validity of the Regulations for Judicial Officers and the Code of Conduct for Magistrates and for the State to oppose same. The Commission was advised that the State Attorney, acting on instructions of the Respondents, filed a Notice to Oppose on 18 January 2016. The Presiding Officer at the Inquiry against Ms Van Schalkwyk on 05 February 2016 was advised that the Applicants were awaiting the Respondents' answering affidavits and by mutual agreement between the parties therefore postponed the matter for the outcome of the Applicants' review application in the High Court. The Person appointed to lead the evidence (PLE) on behalf of the Commission, the Chief

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Magistrate Pretoria, initially withdrew from the proceedings since he has been appointed a member of the Commission. The Commission, at its meeting held on 27 May 2016, however considered the reasons for his withdrawal and resolved that he should proceed to lead the evidence in the matter. The misconduct inquiry against Ms Van Schalkwyk is kept in abeyance until the High Court has pronounced its judgement on the various legal issues she raised. Judgment is however expected to be delivered soon.