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**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:

1. **Background** 
   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. 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.
   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.
   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.
   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:
      1. 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;
      2. She has a long outstanding debt for private phone calls made from the land line of the office;
      3. Various complaints resulted in her allocation to the reception court;
      4. Partly heard matters prior to 2010 took years to finalize;
      5. There is a history of strained relationships between Ms Malahlela and the local attorneys, the prosecutors and administrative staff;
      6. 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.
   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.
   7. New complaints were lodged against Mrs Malahlela on 24 April 2013:
      1. 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;
      2. The warrant of arrest was not cancelled by the magistrate;
      3. She refuses to sign circulars and official communication;
      4. Failure to finalize her inquests despite reminders;
      5. Left the office without finalizing her court roll;
      6. The acting Judicial Head of Office does not see her way open to discuss anything with her;
      7. The relationship has become strained and she often does not know the whereabouts of Mrs Malahlela at the office.
      8. 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 2nd and 3rd 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.
   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.
   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.
   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.

1. **High Court Application**
   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.
   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. 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.
   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.
   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.
   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.
2. **Magistrates Commission’s Determination to withhold remuneration**
   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.
   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.
   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. 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.
   5. The Commission received no response from either Ms Malahlela or her attorney.
   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.
   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.
   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.
3. **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.

1. **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.**