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**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:

1. **Background**
	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. 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.
	3. The Commission on 18 September 2013 appointed a Presiding Officer and a Person to Lead the Evidence (PLE) at the hearing.
	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.
	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.
	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.
	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.
	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.
	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.
2. **High Court Application**
	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.
	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. 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.
3. **Magistrates Commission’s Determination to withhold remuneration**
	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.
	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.
	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. 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.
	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.
	6. Ms Van Schalkwyk filed her representations with the Commission on 09 November 2017.
	7. MsVan 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.
	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.
	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 Schlakwyk's remuneration in terms of Section 13(4A)(a) of the Act, pending the conclusion of the disciplinary inquiry against her with immediate effect.
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 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.

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 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.**