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**4. Report of the Select Committee on Security and Justice on the Withholding of Remuneration of Magistrate Mr M J Kgomo, an Additional Magistrate, Randburg, 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 21 November 2017, as tabled by the Minister for Justice and Correctional Service, on their determination to withhold the remuneration of magistrate Mr M J Kgomo, an Additional Magistrate at Randburg, 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**

The incumbent Minister at the time, on the advice of the Commission, provisionally suspended Mr Kgomo from office in terms of section 13(3)(a) of the Act with effect from 18 February 2014 which suspension was confirmed by Parliament on 13 March 2014.

1. **Criminal proceedings and reason for long delay in finalising the matter**
	1. Mr Kgomo was an additional Magistrate at Randburg and was appointed to the lower court bench in July 2000. He was arrested on 5 December 2013 and appeared in the Randburg Regional Court the following day on a charge of corruption.
	2. It is alleged that he demanded and received R150 000 in exchange for positively influencing the outcome of an appeal for extradition brought by the complainant in the particular matter. The complainant had to face charges of corruption in another country amounting to R20 million. The money was recovered in Mr Kgomo's briefcase in his office and in his presence. The Court on 9 December 2013 granted Mr Kgomo bail to the amount of R30 000.
	3. The criminal case was postponed on several occasions for various reasons.
		1. The matter was on 26 August 2014 remanded to 3 October 2014 for Mr Kgomo to instruct an attorney.
		2. Mr Kgomo's legal representative withdrew as attorney of record on 3 October 2014. The case was provisionally remanded to 30 October 2014 for Mr Kgomo to secure the services of a new legal representative. The Court also set the trial date for 16-20 February 2015. The new legal representative made his appearance in court on 30 October 2014.
	4. The criminal trial commenced on 16 February 2015 and proceeded for the entire week.
	5. After judgment was passed, the State called the complainant to the stand. The matter was postponed to 09 June 2015 for further trial and set down for three weeks for the evidence to be finalised.
	6. On 09 June 2015 Mr Kgomo once again experienced problems with legal representation.
		1. The record of the proceedings reflects that there was an issue between Mr Kgomo and his instructing attorney which issue could not be resolved, with the result that his attorney and counsel had to withdraw. The case was remanded to 11 June 2015 for Mr Kgomo to sort out his problem concerning legal representation.
		2. On 11 June 2015 Mr Kgomo placed on record that he had tried to negotiate with his previous legal team but that the trust relationship had irretrievably broken down. He was given until 17 June 2015 to instruct a new legal representative.
		3. On 17 June 2015 his new attorney placed on record that he was instructed to represent Mr Kgomo but that he would engage the services of counsel to assist him at the trial. Although previous counsel indicated that he was prepared to proceed with the matter when so briefed, he on 17 June 2015 indicated that he was already engaged and not willing to come back to represent Mr Kgomo in the matter. This left the newly appointed attorney with no option other than to ask the court for a postponement to brief another advocate. The Court postponed the case until 23 June 2015 on condition that Mr Kgomo's newly appointed attorney, as well as counsel be present to arrange new dates for the trial to proceed.
		4. On 18 June 2015 Mr Kgomo terminated the services of his new attorney and once again instructed another attorney to represent him. The now newly instructed attorney was on record on 23 June 2015. Mr Kgomo indicated that they would not be briefing counsel. Arrangements for a new trial date had to be set. The Presiding Officer, however, refused to set a trial date and gave Mr Kgomo until 01 July 2015 to pay his lawyer for the duration of the trial.
	7. The matter was back in court on 23 September 2015 and 26-28 October as well as 02-03 November 2015 for further hearing.
		1. The State made considerable progress in the matter. The matter was remanded to 03 and 04 May, 09 to 11 May, 16 to 18 May and 23 May 2016 for continuation of the hearing.
		2. The State again made significant progress in the matter during this entire period. The case was postponed until 03, 04, 06, 10, 11 and 17 to 19 October 2016 for further evidence.
		3. The Director of Public Prosecutions: Gauteng Local Division on 20 October 2016 reported that the State had closed its case and that the defence brought an application for Mr Kgomo's discharge in terms of Section 174 of the Criminal Procedure Act (CPA). The defence also brought an Application in terms of Section 186 of the CPA which was found to be premature. The court ordered the defence to proceed with its case and postponed the proceedings for this purpose until 18 -20 January 2017.
		4. Mr Kgomo's attorney was not available prior to these dates. The matter was further adjourned to 10 March 2017 to argue on the Section 186 Application. The Court on 31 March 2017 dismissed the application.
		5. The matter was postponed until 26 July 2017 for the parties to submit written Heads of Arguments and to address the court on the merits of the case.
	8. The cause of this long delay was once again due to the defence attorney not being available prior to this date and the fact that the parties requested a copy of the transcription of the record of proceedings. A magnitude of evidence has been led in the case which includes oral testimony as well as a large amount of documentary evidence.
	9. The Regional Court convicted Mr Kgomo on two (2) counts of corruption on 23 October 2017 and postponed the matter to 07 and 08 February 2018 for sentencing.
2. **Disciplinary proceedings**
	1. The Magistrates Commission charged Mr Kgomo with misconduct. A charge sheet dated 11 April 2014 was duly served on him.
	2. The National Prosecuting Authority (NPA) requested the Commission not to commence with its disciplinary hearing/inquiry against Mr Kgomo since it was of the view that it would prejudice the State's criminal case against him.
	3. The Magistrates Commission at its meeting held on 31 October 2014 considered this request and resolved to keep a decision on the matter in abeyance until its next meeting to be held on 27 February 2015 for the NPA to provide the Commission with a progress report regarding Mr Kgomo's criminal prosecution. The Commission at its meeting held on 27 February 2015 noted that the criminal case was complex and very sensitive. The Commission therefore resolved to keep the disciplinary hearing against Mr Kgomo in abeyance, pending the progress made in the criminal case.
	4. Mr Kgomo is on provisional suspension since 18 February 2014. The misconduct inquiry against him has been kept in abeyance pending the progress made in the criminal matter. Mr Kgomo has now been convicted on two counts of corruption. He has been provisionally suspended from office for almost four years and with full remuneration.
	5. The Commission holds the view that the mere fact that he has been convicted on two counts of corruption, on its own, justifies the withholding of his remuneration, pending the finalisation of the misconduct inquiry against him.
	6. 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, Mr Kgomo's provisional suspension from office without remuneration is justified.
	7. On 27 October 2017 Mr Kgomo was, in compliance with the rules of natural justice, therefore invited to show cause why the Commission (or its EXCO), at its next meeting, should not determine to withhold his remuneration forthwith. A letter in this regard was served on him on 03 November 2017, a copy of which is attached.
	8. Mr Kgomo, however, failed to respond within the time limits to this invitation to furnish the Commission with any representations in this regard. His representations dated 09 November 2017, which were filed out of time, were nevertheless considered by the Commission.
	9. Having regard to the fact that it is evident that Mr Kgomo is deliberately delaying the continuation of the disciplinary process against him and the serious nature of his criminal conviction, the Commission determined to withhold Mr Kgomo's remuneration in terms of Section 13(4A)(a) of the Act, pending the conclusion of the disciplinary inquiry against him 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 Mr M J Kgomo, an Additional Magistrate at Randburg, 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.**