####

**1. Report of the Select Committee on Security and Justice on the Withholding of Remuneration of Magistrate Ms V T Gqiba, a Chief Magistrate at East London, tabled in terms of section 13(4A)(b) of the Magistrates Act, 1993 (Act No 90 of 1993), dated 6 June 2018.**

1. **Introduction**

The Select Committee on Security and Justice, having considered the Magistrates Commission’s report dated 8 February 2018, as tabled by the Minister for Justice and Correctional Service, on their determination to withhold the remuneration of magistrate Ms V T Gqiba, a Chief Magistrate at East London, 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 Commission resolved to charge Ms Gqiba with the following counts of misconduct:

**Charge 1**

That she is guilty of misconduct in terms of Regulation 25(i) of the Regulations for Judicial Officers in the Lower Courts, No. R. 361 of 11 March 1994 (the Regulations) read with Regulation 26(17) of the Regulations and Section 16 of the Magistrates Act, No 90 of 1993 (hereinafter the Act) in that on or about 23 March 2015 and at or near East London she made a false or incorrect statement, knowing it to be false or incorrect, with a view to obtaining any privilege or advantage in relation to her official position or her duties or to the prejudice of the administration of justice.

**Alternative charge to charge 1**

That she is guilty of misconduct in terms of Regulation 25(b) of the said Regulations read with paragraphs 1 and/or 4 of the Code of Conduct for Magistrates as published in Schedule E to the said Regulations in that on or about 23 March 2015 and at or near East London she failed to act with integrity and/or failed to act at all times in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice.

**Charge 2**

That she is guilty of misconduct in terms of Regulation 25(i) of the said Regulations in that on or about 24 March 2015 and at or near East London she submitted/presented to the Department of Justice and Correctional Services a subsistence and transport claim for travel and subsistence expenses, purportedly relating to an official trip to Pretoria on 23 March 2015, well knowing that in truth and in fact the claim she submitted was false in that she travelled to Pretoria to further her personal interests.

**Alternative charge to charge 2**

That she is guilty of misconduct in terms of Regulation 25(b) of the said Regulations read with paragraphs 1 and/or 4 of the Code of Conduct for Magistrates as published in Schedule E to the said Regulations in that on or about 24 March 2015 and at or near East London she submitted/presented to the Department of Justice and Correctional Services a subsistence and transport claim, purportedly relating to an official trip to Pretoria on 23 March 2015, well knowing that in truth and in fact the claim she submitted was false in that she travelled to Pretoria to further her personal interests. She therefore failed to act with integrity and/or failed to act at all times in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice. The charge sheet dated, 29 September 2016, was served on her on 03 October 2016.

1. **Presiding officer findings**

Having considered the evidence presented at the hearing/inquiry and having been addressed by both parties on the merits of the evidence presented to the tribunal, the Presiding Officer on 26 April 2017 found Ms Gqiba guilty on both the main counts of misconduct against her. The Presiding Officer on 02 June 2017 recommended in terms of Regulation 26(17)(b) of the Regulations that Ms Gqiba be removed from office as contemplated in section 13(4) of the Act.

The Commission, on 25 August 2017, considered the documents as required by Regulation 26(22) read with Regulation 26(19) of 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 for Judicial Officers in the Lower Courts, 1994 (the Regulations) be accepted and that Ms Gqiba be removed from office on the grounds of misconduct in terms of Section 13(4)(a)(i) of the Act.

1. **Minister’s report to parliament**

On 13 September 2017 the Minister for Justice and Correctional Services (the Minister) acted on the recommendation of the Commission and suspended Ms Gqiba from office in terms of section 13(4)(a)(i) of the Act with immediate effect and tabled the required report in terms of Section 13(4)(b) of the Act in Parliament the following day. Ms Gqiba was, via her Cluster Head, accordingly advised on 14 September 2017.

On 13 November 2017, Ms Gqiba filed a Notice of Motion in the Gauteng Division of the High Court. The Minister, the Magistrates Commission, Regional Magistrate Patterson (the Presiding Officer) and the Portfolio Committee on Justice and Correctional Services (Parliament of the Republic of South Africa) as respectively the First, Second, Third and Fourth Respondents.

The Notice of Motion applied for the following orders:

Reviewing and setting aside the sanction which the Third Respondent (the Presiding Officer) imposed on 02 June 2017;

Directing that the sanction imposed by the Presiding Officer, namely a recommendation to the Magistrates Commission (the Second Respondent) that she be removed from office, was procedurally and substantively unfair, and

Staying the enforcement of the sanction imposed pending her review application.

Arrangements have been made for the office of the State Attorney to oppose the Application on behalf of the Magistrates Commission. The Minister and the Presiding Officer filed and served a notice to abide by the decision of the Court.

1. **Decision by the National Council of Provinces**

The National Council of Provinces (the NCOP) acting on legal advice, that since the NCOP was not mentioned in the Notice of Motion, that it could proceed with a resolution on the matter. Any decision by the High Court regarding the Notice of Motion would automatically rescind any resolution passed by the NCOP or confirm the decision of the NCOP. On 28 November 2017 the NCOP passed a resolution not to restore Ms Gqiba to the office of Magistrate. The National Assembly is yet to pass a resolution in this regard.

1. **Magistrates Commission’s Determination to withhold remuneration**

On 1 December 2017 Ms Gqiba was invited to show cause why the Commission should not determine to withhold her remuneration in terms of Section 13(4A)(a) of the Act, pending Parliament's resolution to either restore or not to restore her to office. It should be noted that only the National Assembly has to pass a resolution since the NCOP already decided on the matter. Her attorney filed her representations on her behalf with the Commission on 08 December 2017.

After reviewing Ms Gqiba’s representation the Commission is of the opinion that, in line with its previous resolutions to recommend to remove a magistrate from office and with reference to the Constitutional Court's judgment in Van Rooyen and Others v The State and Others, 2002(8) BCLR 810 (CC), where the Constitutional Court held that if good reasons exists for the suspension of a magistrate, the withholding of salary during the suspension is not necessarily disproportionate, it is the Magistrates Commission’s view that Ms Gqiba's suspension from office without remuneration is at this stage justified.Given the circumstances set out above, there seems to be no reason why Ms Gqiba, who is suspended from office pending the National Assembly’s decision to pass a resolution whether or not to restore her to the office of Magistrate, should still receive remuneration.

1. **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 seven days of such determination if Parliament is then in session, or, if Parliament is not then in session, within 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 Ms V T Gqiba, a Chief Magistrate at East London, 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.**