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The Honourable Ms B Mbete
Speaker of the National Assembly
Parliament of the RSA
CAPE TOWN
8000

Dear Ms Mbete

**REPORTS BY THE MAGISTRATES COMMISSION ON THE PROGRESS IN
RESPECT OF MISCONDUCT INQUIRIES CONCERNING MAGISTRATES**

The purpose of this tabling is to provide Parliament with reports received from the Magistrates Commission on the progress in respect of the following magistrates who have provisionally been suspended from office:

- 1) JF van Schalkwyk, Chief Magistrate, Kempton Park;
- 2) Mr M D Hinxa, Chief Magistrate, Bloemfontein;
- 3) Mr E S Nzimande, Regional Court President, Kwazulu-Natal; and
- 4) Ms L B Freeman, Senior Magistrate, Mossel Bay

The reports are tabled in terms of section 13(3)(f) of the Magistrates Act, 1993 (Act No 90 of 1993). Copies of the reports are attached herewith.

With kind regards

T M MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

DATE: 13/03/2019



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The Honourable Ms T R Modise
Chairperson of the National Council of Provinces
Parliament of the RSA
CAPE TOWN
8000

Dear Ms Modise

**REPORTS BY THE MAGISTRATES COMMISSION ON THE PROGRESS IN
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T M MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

DATE: 13/03/2019



PROGRESS REPORT DATED 12 MARCH 2019 TO PARLIAMENT: PROVISIONAL SUSPENSION FROM OFFICE, SENIOR MAGISTRATE LB FREEMAN, MOSSEL BAY

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 Ms Freeman is a Senior Magistrate and the Judicial Head of Office at the Mossel Bay District Court. She is 42 years of age and has been appointed to the lower court bench on 24 October 2006. She was appointed a Senior Magistrate at Mossel Bay on 01 May 2017.

2.2 The Ethics Division of the Magistrates Commission (the Commission) conducted a preliminary investigation into a number of complaints against Ms Freeman. The Commission considered the preliminary investigation report submitted to it in this regard

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and resolved to charge Ms Freeman with misconduct. A charge sheet dated 17 November 2017, containing 24 counts of misconduct, was personally served on Ms Freeman on 23 November 2017.

2.3 The misconduct charges preferred against Ms Freeman relate to various acts of dishonesty during the period 2015 to 2017. In summary:

- a) In 21 of the misconduct charges it is alleged that Ms Freeman made a false or incorrect statement regarding transport claims where the kilometres claimed are more than the existing distances between the destinations;
- b) Ms Freeman indicated that she performed an inspection in loco at a location whilst no such inspection in loco took place. She claimed for the kilometres travelled;
- c) Ms Freeman indicated in one of her transport claims that she used an Audi A4 whilst in fact she used an Uno and that the kilometre tariff for the Audi is more than the tariff for the Uno;
- d) Ms Freeman, in her application for Appointment as Senior Magistrate on the question to list all directorships and other interests in business has held during the past ten years, she falsely and or unlawfully declared "N/A" on the application form, whilst she in fact is registered by the Commissioner of Companies and Intellectual Property as an active director and founding member in the company Southern Cape Fish Co-operative Limited, and
- e) Ms Freeman, in her application for Appointment as Senior Magistrate, on the question whether she has ever been convicted of any offence or crime, stated "No" whilst in fact she had been convicted of theft and sentenced in the Magistrates Court, Potchefstroom on 06 May 1993.

2.4 Having duly been served with a Notice of Hearing, the misconduct inquiry/disciplinary hearing against Ms Freeman commenced on 21 February 2018 at Mossel Bay. Ms Freeman was unrepresented at her first appearance at the inquiry. She requested the

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Presiding Officer (the PO) to postpone the inquiry to 22 March 2018 in order for her to obtain legal representation. She indicated that she was under the impression that the hearing would be held at the office of the Magistrate's Commission in Pretoria which caused her to consult with an attorney in Johannesburg. She later advised that she did not utilise the attorney in Johannesburg when she learned that the hearing was to be held in Mossel Bay.

2.5 On 22 March 2018 Ms Freeman was still unrepresented and indicated that the attorney she had approached was not available on that day. She was given an opportunity to approach another attorney, apparently from Oudtshoorn, to confirm his availability on a future date. On confirming a date on the availability of the attorney from Oudtshoorn, the hearing was postponed to 02 August 2018. On 02 August 2018, Ms Freeman advised the inquiry that the mandate of her attorney from Oudtshoorn was terminated but that she instructed another attorney, who was present at the inquiry. He confirmed having received instructions to act at the inquiry on Ms Freeman's behalf.

2.6 At the request of Ms Freeman, the inquiry was once again postponed to 12 to 14 September 2018 as she, without giving prior notice to the PO at the inquiry, had approached the High Court for a ruling that certain statements be made available to the defence at that stage. This caused a further delay for the inquiry to commence hearing evidence. The High Court ruled that the statements must be made available. This ruling was complied with. Since the application by Ms Freeman was at that stage not yet finalised, it caused another postponement and further delay. The inquiry was then postponed to 21 to 23 November 2018.

2.7 The Presiding Officer at the time was to act in the High Court, where after he withdrew. At the time Ms Freeman had not tendered a plea to the charges preferred against her. The Commission therefore had to identify and appoint another magistrate to preside at the inquiry. This was done and the newly appointed PO presided at the inquiry on 21 November 2018. He instructed the Officer Leading Evidence (the PLE) and Ms Freeman's legal team to, prior to the continuation of the inquiry at its next date, sort out any outstanding issues in dispute in order to expedite the conclusion of this matter. The inquiry was therefore

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postponed to 28 to 31 January 2019 for that purpose. A "pre-trial" meeting took place which resulted in Ms Freeman making certain formal admissions.

2.8 Ms Freeman was on 28 January 2019 represented by her attorney and counsel. She pleaded not guilty to all the charges. The majority of the Commission's witnesses testified at the inquiry during this week. On 31 January 2019, the PO postponed the proceedings until 08 to 11 April 2019 for the presenting of further evidence on behalf of the Commission.

2.9 The Commission has reported the matter to the South African Police Service (SAPS) for investigation.

2.10 The NCOP and the NA confirmed the provisional suspension of Ms Freeman on 5 September 2018 and 25 October 2018, respectively.



PROGRESS REPORT DATED 12 MARCH 2019 TO PARLIAMENT: PROVISIONAL SUSPENSION FROM OFFICE, CHIEF MAGISTRATE MD HINXA, BLOEMFONTEIN

1. INTRODUCTION

1.1 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.

1.2 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 complainant in the matter is a 42 year old woman from Botshabelo. On 29 July 2016 she lodged a complaint with the Minister alleging that she was raped by Mr Hinxa in his flat in Bloemfontein after he made false pretences to her. Her complaint was submitted to the Department and on 02 November 2016 referred to the Commission for attention.

2.2 The complainant had reported the matter on several occasions to different police stations. They all refused to open a case. Hence her letter to the Minister as a last resort.

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2.3 On 14 January 2017, before the matter could serve before the Commission's Ethics Committee, Mr Hinxa showed the then Secretary of the Commission a report from the Director of Public Prosecutions, Free State (DPP) following a consultation the latter had with the complainant, indicating that he will not be prosecuted. Mr Hinxa furnished the then Secretary with a sworn statement, allegedly made by the complainant, indicating that she was paid R100 000-00 by Maroka Attorneys to implicate him. The complainant however persisted that she was raped by Mr Hinxa and denied having ever made such a statement.

2.4 The Commission therefore resolved to conduct a preliminary investigation into the allegations of rape against Mr Hinxa. Based on the evidence gathered during the preliminary investigation, the Commission charged Mr Hinxa with two(2) counts of misconduct in that he contravened regulation 25(c) of the Regulations for Judicial Officers in the Lower Courts, 1994 read with the Code of Conduct for Magistrates and the Bill of Rights as contained in the Constitution, in that he on two different occasions during 2010 and 2011, unlawfully and wrongfully compelled the complainant without her consent to commit an act of sexual intercourse with her which act wrongfully infringed her interest in her bodily integrity and constitutional right to have her inherent dignity respected. The charge sheet, dated 24 November 2017 was sent to Mr Hinxa's attorney electronically.

2.5 On 04 December 2017 Mr Hinxa, through his attorney, filed a Notice of Motion with the Gauteng Division of the High Court for an order *inter alia* to stay the Minister's decision to provisionally suspend him from office, pending review proceedings which he intended to institute, and for an order interdicting and restraining the Commission from proceeding with the disciplinary inquiry against him on the charges as set out in the charge sheet dated 24 November 2017. This urgent application was struck from the roll with costs.

2.6 The Minister, on advice of the Magistrates Commission, provisionally suspended Mr Hinxa from office with effect from 29 November 2017, which decision was confirmed by Parliament. Mr Hinxa thereafter instituted review proceedings in the Gauteng Division of the High Court on 23 January 2018 applying for an order to review and set aside the Minister's decision to provisionally suspend him from office; reviewing and setting aside the Commission's decision to institute a disciplinary/misconduct inquiry against him; and

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declaring the disciplinary inquiry on the misconduct charges against him to be invalid and unlawful. This application is opposed and pending before the High Court.

2.6 In the absence of a court order barring the Commission to proceed with the disciplinary hearing/misconduct inquiry against Mr Hinxa , the Commission on 21 May 2018 duly appointed a Regional Magistrate to preside (PO) at the misconduct/disciplinary inquiry and two Regional Magistrates to lead the evidence (PLE) on behalf of the Commission.

2.7 Having duly notified Mr Hinxa, via his attorney, of the date, time and venue, the misconduct inquiry commenced on 30 October 2018 and was set down until 02 November 2018. Mr Hinxa raised various issues which had to be argued upon. No evidence was led. He on 01 November requested a postponement for him to attend to the review proceedings he instituted in the High Court, which is still pending, and to instruct an attorney to act at the misconduct inquiry on his behalf. The PO postponed the inquiry, for Mr Hinxa to instruct an attorney, to 14-18 January 2019. She ordered that the inquiry will continue either with or without his attorney and that the matter will proceed for hearing. Further dates were set, should the matter not be concluded within that period, to wit 18 -21 February 2019.

2.8 The inquiry proceeded on 14 January 2019. Mr Hinxa's instructing attorney and counsel were present. Four (4) witnesses testified on behalf of the Commission during this period. The inquiry was on 17 January 2019 postponed on the request of Mr Hinxa's legal team for further consultation with possible witnesses and to prepare to cross-examine the 4th witness. The inquiry continued on 18 February 2019. Three further witnesses testified where after the matter has been postponed to 30 May 2019 for further hearing.



PROGRESS REPORT DATED 12 MARCH 2019 TO PARLIAMENT: PROVISIONAL SUSPENSION FROM OFFICE: MR ES NZIMANDE, REGIONAL COURT PRESIDENT, KZN

1. INTRODUCTION

1.1 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.

1.2 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 Mr Nzimande is the Regional Court President of the Regional Division, Kwazulu-Natal. He is 59 years of age. Mr Nzimande served the Lower Courts Judiciary as a Regional Magistrate since 01 July 2000 and was appointed the Regional Court President, Kwazulu-Natal on 01 June 2011.

2.2 The Magistrates Commission (the Commission), during a preliminary investigation conducted in terms of regulation 26(1) of the Regulations for Judicial Officers in the Lower Courts, 1994, obtained reliable evidence indicating that the allegations against Mr

Nzimande are of such a serious nature as to make it inappropriate for him to perform his functions as a judicial officer and Regional Court President.

2.3 Having considered the existing evidence against him, the Commission at its meeting held on 31 August 2018 resolved to charge Mr Nzimande with misconduct. A charge sheet, dated 31 August 2018, containing 50 counts of misconduct, was personally served on Mr Nzimande on 04 September 2018.

2.4 In summary, the misconduct charges preferred against Mr Nzimande, inter alia, relate to acts of impropriety in that he:

- a) in his capacity as Head of the Office for the Kwazulu-Natal Regional Division during the period 2012 to 2016, was responsible for the recommendations of acting Regional Magistrates to the Minister for appointment in terms of section 9(3) of the Magistrates' Courts Act, No 32 of 1944 (the Minister has delegated the appointment of acting magistrates to the Deputy Minister);
- b) on various occasions during the period 2012 to 2016, approached the Minister, recommending the acting appointment of a number of attorneys for them to act in the Regional Courts within his Regional Division;
- c) in turn, received numerous payments from these attorneys, which were deposited into his bank accounts either prior to, or after their respective approved acting appointments;
- d) during the period 2012 to 2015 unlawfully and wrongfully victimized and/or sexually harassed a female acting Regional Magistrate for the Kwazulu-Natal Regional Division by making subtle sexual advances to her and/or calling her into his office, asking her to sit on his lap whilst talking to her and/or indicating that she was indebted to him for her job and that he was personally responsible for her receiving the position as acting Regional Magistrate and/or attempted to coerce her and pressure her into engaging in a sexual relationship with him and/or consistently discussed his personal circumstances such as who his sexual partners were and the activities which he engaged them in and/or consistently tell her of other magistrates who will engage in sexual favours in return for employment perks and/or sent a picture/photo of his genitalia *via* cellular phone to her, which conduct violated her rights to integrity of her body and personality.

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2.5 On 25 October 2018, Mr Nzimande responded to the allegations of misconduct against him, as fully set out in the charge sheet, tendering a plea of not guilty on all 50 charges preferred against him.

2.6 The Commission, having obtained approval from the respective Heads of Courts to release them for this purpose, at its meeting held on 22 February 2019 approved the appointment of three (3) Regional Magistrates (PO's) to preside, and two (2) Persons to Lead the Evidence (PLE's) at Mr Nzimande's misconduct hearing/inquiry.

2.7 A date for the hearing to commence will be set after consultation with all the parties concerned.

2.8 The Minister, on a recommendation of the Commission, provisionally suspended Mr Nzimande from office on 05 October 2018. The National Assembly confirmed the Minister's decision on 05 October 2018. Although the Select Committee on Security and Justice on 27 February 2019 recommended to the NCOP the confirmation of the provisional suspension of Mr Nzimande, the NCOP has not as yet passed a resolution whether or not to confirm it.



PROGRESS REPORT DATED 12 MARCH 2019 TO PARLIAMENT: PROVISIONAL SUSPENSION FROM OFFICE, CHIEF MAGISTRATE JF VAN SCHALKWYK, KEMPTON PARK

1. INTRODUCTION

- 1.1 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.
- 1.2 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 suspension from office, resolved to recommend to the Minister that she be provisionally suspended from office pending an investigation into her fitness to hold 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

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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 the PLE to lead the evidence at the misconduct hearing.
- 2.4 In its response the Commission advised Mr Coetzee that the PLE was 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.
- 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. The PLE's office was in constant interaction with the defense vis-à-vis the furnishing of further particulars and legal argument surrounding that, together with issues pertinent to discovery. The PLE however deemed it appropriate to provide the defense with copies of all witness statements and documentation to be tendered during the misconduct inquiry/hearing. The defense raised numerous points *in*

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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 defense since Ms Van Schalkwyk's mother had passed on. The inquiry was postponed to 20 and 21 April 2015. The defense on 15 April 2015 advised the PLE 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. 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 defense 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, Ms Van Schalkwyk and three others, 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

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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.

- 2.7 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 was reserved.
- 2.9 The High Court on 01 August 2017 delivered judgment dismissing the Applicants' application with costs.
- 2.10 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.
- 2.11 The Applicants thereafter petitioned to the Supreme Court of Appeal (SCA). They lodged their application on 13 December 2017. The SCA on 12 March 2018 dismissed the application with costs.
- 2.12 The Commission immediately thereafter, on 15 March 2018, instructed the person leading the evidence (PLE) to set the misconduct inquiry down for hearing. The inquiry was to continue on Saturday, 14 April 2018, but was on the request of Ms

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Van Schalkwyk's attorney postponed to 03-06 July and 09-11 July 2018 for hearing. On 05 June 2018 Ms Van Schalkwyk's attorney, who acted on her behalf in her High Court applications, advised the PLE that his mandate was terminated. The PLE requested Ms Van Schalkwyk to provide her with the particulars of her newly appointed attorney. The parties during 03-06 July exchanged the relevant evidential documentation and compiled the bundles of evidence to be used at the inquiry. The inquiry did not proceed on 09 July and was postponed to 27 September 2018. Ms Van Schalkwyk's newly appointed attorney was not available on that day and the matter was by mutual agreement between the parties postponed to 01-03 October 2018 for hearing. The defense again raised certain points *in limine* upon which the PO made a ruling. Evidence was eventually presented on 02 and 03 October. The matter was postponed to 10-12 December 2018 for further hearing. The Commission's first witness continued to testify during this period. The inquiry was again postponed to 21-25 January 2019 for further hearing.

- 2.13 On Saturday, 19 January 2019, the PLE advised the Ethics Division that Ms Van Schalkwyk's attorney had a fatal motorcycle accident wherein he and his wife were killed. The inquiry did however proceed on Monday, 21 January 2019. Ms van Schalkwyk elected to proceed in person. The Commission's first witness concluded her evidence on 22 January 2019 where after Ms Van Schalkwyk requested the matter to be postponed to instruct an attorney and brief counsel to represent her in future. The inquiry has been postponed to 01-05 April 2019 for cross-examination of the first witness and further hearing of evidence.