

**JUDICIAL CONDUCT AND DISCIPLINE: MAGISTRATES’ COURTS JUDICIARY**

**PURPOSE**

1. The purpose of this document is to brief the Select Committee on Security and Justice (SC) regarding the misconduct processes for Magistrates with specific reference to the following remark raised under focus areas point 5 by the SC in its document dated 18 April 2017 **(Z):**

*“5. Slow pace of the disciplinary processes of magistrates, at enormous costs to the State and negative impact on court services. Minister of Justice and the Magistrates Commission to discuss SC concerns matter and how this can be address (*sic)*, possibly through legislative amendments. At its meeting with the Magistrates Commission on 8 March 2017, the Select Committee requested the Commission and/or the Department of Justice and Constitutional Development to review the Magistrates’ Act of 1944 as well as other relevant legislation in order to streamline disciplinary processes and steps taken in respect of magistrates.”*

1. In order to limit the contents of this document, annexures will be used to refer to if deemed necessary.

**LEGAL FRAMEWORK AND PROCESSES**

1. The legal framework and processes are contained in **Annexure** **Y**.

**CONSTITUTION**

1. The advent of the Constitution, which entrenches fundamental rights, has a profound effect on all branches of the law, as it provides a mechanism for citizens, including judicial officers, to challenge legislation and actions by the State which infringe those rights. Chapter 2 of the Constitution contains several provisions of relevance to employment and labour law. Section 23 of the Constitution deals specifically with labour relations which ***inter alia*** determines that everyone, including judicial officers, has the right to fair labour practices.
2. The Labour Relations Act, 1995 (LRA) was promulgated as the ‘national legislation’ referred to in section 23(5) and (6) of the Constitution. Although the LRA is not applicable to magistrates (see ***Khanyile V CCMA and Others (2004) 25 ILJ 2348/LC)*** it, as the common law, guarantees fair labour practices. All courts are enjoined, when applying and developing common law, to have due regard to the spirit, purpose and objects of the Bill of Rights as contained in the Constitution. The Constitutional Court, in two landmark judgments ***[NUMSA and Others v Bader Bop PTY) Ltd v Another (2003) 24 JLJ305 (CC)*** and ***NEHAWU v University of Cape Town and Others (2003) 24 ILJ 95(CC)]***, made it clear that it will entertain appeals from the labour courts where interpretation of labour relations is at issue which affects the constitutional rights of fair labour practices. The entrenchment of labour rights in general terms raises the prospect of a constitutional jurisprudence being developed by the civil courts and the Constitutional Court that already have a far-reaching effect on the way the employment relationship is approached and led to a cross-fertilisation of the principles of labour law, the common law and public law which occurred over a long period, especially in so far as judicial officers had to rely on the application by the civil courts of the latter to protect their employment rights.
3. It is noteworthy that the Constitutional Court has in the case of ***Van Rooyen and Others v The State and Others 2002(5) SA 246 (CC)*** ordered that ***inter alia*** the provisions of section 13 of the Magistrates Act, 1993. (Discharge of magistrates) and regulations 25 and 26 and the Code of Conduct (Schedule E) of the Regulations for Judicial Officers in the Lower Courts, 1994 (the Regulations) (Misconduct of Magistrates), of which the provisions are contained in **Annexure** **Y** are, with a few minor exceptions, not inconsistent with judicial independence and the Constitution. The amendments as ordered by the Constitutional Court have already been done.

**LABOUR PROCEDURES**

1. The principles laid down in the Constitution and case law are that misconduct and disciplinary processes should be procedurally and substantively fair. Procedural fairness relates to the procedure followed in a disciplinary hearing. Substantive fairness relates to the existence of a fair reason for the disciplinary hearing. In relation to substantive fairness the question is whether or not, as the evidence before the court and not as the evidence produced during the consultation process, a fair reason to convict, exists. With regard to procedural fairness, the question is not whether a fair procedure was followed in court. The question is whether, prior to, and during the hearing,a fair procedure was followed.
2. In all misconduct cases against magistrates in which there was a review or an appeal to the Higher Courts, even the Supreme Court of Appeal, it was found that the Magistrates Commission (Commission) acted procedurally and substantively fair.

**DELAYS IN CARRYING OUT DISCIPLINARY ACTIONS**

1. The Commission has a **legitimate expectation** that Magistrates will adhere to rules and operating procedures in the workplace. Likewise, Magistrates have the same expectation that the Commission will adhere to timelines set out in internal procedures. A fair disciplinary process is inevitably founded on the availability of witnesses and accuracy of evidence, all of which will be promoted where the inquiry takes place timeously.
2. Despite this, it is preferable to state that disciplinary timelines represent **guidelines** only and that the Commission will not be obliged to comply therewith if it is not reasonable in the circumstances to do so.
3. The Commission is clearly entitled to investigate possible disciplinary infringements fully, including processes such as forensic and other audits. By their very nature, such investigations can be time-consuming but the Commission must pursue those investigations with due diligence.
4. Where the Commission feels obliged to postpone internal disciplinary proceedings pending the outcome of a related criminal matter, it clearly informs the Magistrate that it reserves the right to institute disciplinary action at any time and not only once the criminal proceedings are concluded. Where a Magistrate knows the reasons for delays or is responsible for delays he or she cannot use the delays to defeat the Commission’s effort to embark on disciplinary action. For guidance in this regard - see ***Naidoo/Department of Education, KwaZulu-Natal Province [2003] 6 BALR 667 (GPSSBC)*** for a useful illustration where the reason for the delay was found to be both persuasive and acceptable.
5. Whether a Magistrate’s claim for delays in carrying out disciplinary action is justified will depend on the overall circumstances, e.g. –
* the date of the disciplinary infringement;
* when the Commission became aware thereof;
* whether the Commission is required to adhere to strict timelines regarding disciplinary procedures;
* details of the delay, e.g. duration and reasons and whether or not they are persuasive and acceptable; and
* the impact on the Magistrate and whether he or she has been prejudiced thereby.
1. The Commission will be required and is able to give recorded reasons for delays in the disciplinary processes – see ***Reikert v CCMA & Others [2006] 4 BLLR 353 (LC)*** for guidelines in this regard. Also see ***Department of Public Works, Roads and Transport v Motshoso & Others [2005] 10 BLLR 957 (LC) and Labuschagne/SAA (Pty) Ltd [2008] 2 BALR 162 (CCMA)*** for further guidelines. The duration of a delay and the reasons therefor go hand-in-hand. The disciplinary process should not be abused, e.g. by continuous postponements under unreasonable periods of suspension and while the Commission is well aware of this.
2. The Magistrates Act, No. 90 of 1993 (the Act) and the Regulations set out the processes in misconduct matters against magistrates – see **Annexure** **Y**.
3. A schematic exposition of the misconduct processes is contained in the **Annexure Y**.
4. The objects of the Commission in terms of section 4 of the Act are ***inter alia*** to ensure that the discharge of, or disciplinary steps against a magistrate takes place without favour or prejudice and that the applicable laws and administrative directions in connection with such actions are applied uniformly and correctly. The Commission therefore has the responsibility to ensure that disciplinary processes against a magistrate are procedurally and substantively fair – see sections 23 and 33 of the Constitution and applicable case law.
5. The statutory processes of disciplinary steps against a magistrate are ***sui generis*** in nature. It however provides for procedurally and substantively fair procedures and processes. Magistrates do not enjoy the protection of labour laws, e.g. Labour Relations Act, No. 66 of 1995 – see ***Khanyile v CCMA and Others (2004) 25ILJ 2348 (LC) (Magistrates).***
6. The Commission is fully aware of its responsibility to have disciplinary matters against magistrates dealt with expeditiously. Many factors, over which the Commission and its supporting component have no control, have ***inter alia*** a major negative impact on the disciplinary finalisation rates, e.g. –
	1. The various role-players have a negative effect on finalisation of disciplinary matters, e.g. availability of witnesses, the accused magistrate, his or her legal representative, defence witnesses, interpreters, etc.
	2. Statutorily prescribed minimum time frames for various processes – see regulation 26 of the Regulations.
	3. Requests for further particulars by accused magistrates.
	4. Requests for access to information by accused magistrates and consideration thereof by the Commission in accordance with section 32 of the Constitution (Access to information) and national legislation.
	5. Requests by accused magistrates to reconsider the institution of misconduct proceedings and consideration thereof by the Commission.
	6. Applications to the High Court for review to set aside a decision of the Commission to institute misconduct proceedings.
	7. The availability of an attorney/counsel/representative to assist the accused magistrates in their defence. This aspect can cause a number of delays as on the date that the Commission wishes to lead evidence, the accused magistrates would either not have been able to obtain the services of an attorney of their choice timeously or the attorney of their choice would only be available on a date a few months later.
	8. The accused magistrates will frequently on the date set down for hearing send a messenger with a medical certificate to inform that they have been booked off sick.
	9. The misconduct hearing is often confronted with legal and other arguments (points raised ***in limine***) which the presiding officer needs to be addressed on. This often leads to further postponements of the proceedings. In some instances these matters are taken on review to the High Court which causes the proceedings to be postponed pending litigation in the High Court.
	10. Magistrates facing criminal charges arising from the conduct at issue in disciplinary proceedings usually request postponements of the misconduct hearing on the grounds that it would compromise their constitutional right to remain silent. Backlogs in criminal courts frustrate the speedy finalization of criminal trails.
	11. Accused magistrates should be afforded sufficient time to prepare for misconduct hearings and their defence in accordance with applicable labour, administrative and case law.
7. Misconduct hearings of magistrates are voluminous, time consuming and require specialised attention. Rulings made and processes applied must stand up in a court of law (High Court and Supreme Court of Appeal) as well as Parliament. Although the magistracy has its own disciplinary rules for its day-to-day operations, the delays in the finalisation of misconduct matters and the reasons therefore do not differ from other workplaces.
8. Magistrates who are suspended pending disciplinary action (provisional suspended magistrates are entitled to their full remuneration, but may not use the opportunity to supplement their income by working elsewhere) – see ***CEIWU obo Khumalo and SHM Engineering CC (2005) 26 ILJ 1803 (BCA) and Tsaperas and Another vs Clayville Cold Storage (Pty) Ltd. [2002] BALR 1225 (CCMA).*** In terms of the common law the employer may suspend an employee without pay only if the parties have contracted to that effect or if their statutory conditions of service expressly provide for suspension without pay. However, if exceptional circumstances exist, e.g. if magistrates wilfully delays disciplinary hearings, it may be fair to re-consider the position and withhold their remuneration. Such a process may, however, delay proceedings further.
9. The view is held that the mandate of the Commission and its supporting component regarding disciplinary matters are properly executed and that all relevant processes are finalised within the statutory time frames. There are no delays in formulating charges once the Commission has taken a statutory resolution in this regard. The Commission and its Chairperson should be complimented for the effective, objective and fair way in which they deal with disciplinary matters against magistrates. The statistics provided monthly to the Deputy Minister in this regard speak for itself. Matters against the Commission taken on review to the High Court have thus far not been successful. The performance of the Commission is in absolute contrast to the situation in the Judicial Services Commission and in Government Departments where it is even worse as indicated in Parliament by the Public Service Commission on 2 May 2012. It was indicated that vast amounts of money are spent on officials who were suspended precautionary while Departments do not comply with their disciplinary processes. In some instances it takes 10 months in Government Departments to formulate a charge after an official was placed on suspension. The Department of Justice and Constitutional Development has specifically been implicated by the Public Service Commission in this regard.
10. In the publication The Judiciary in South Africa by Hoexter and Oliver the learned authors ***inter alia*** stated an page 343 with reference to judicial accountability “….the Magistrates Commission seems to have been more successful in holding magistrates accountable than the Judicial Service Commission has been in relation to judges.” This is largely because statutory mechanisms for dealing with discipline against magistrates are effective, efficient and give rise to procedurally and substantively fair possesses.

**CJ BARNARD**

**HEAD: JUDICIAL QUALITY ASSURANCE OFFICE: PRETORIA**