



**MINISTER
JUSTICE AND CORRECTIONAL SERVICES
REPUBLIC OF SOUTH AFRICA**

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**Ms Thandi Modise
The Honourable Speaker of the National Assembly
Parliament of the Republic of South Africa
P O Box 15
CAPE TOWN
8000**

E-mail: speaker@parliament.gov.za

Dear Honourable Speaker:

REQUEST FOR PARLIAMENT TO TABLE REPORT OF OUTCOME OF DISCIPLINARY PROCEEDINGS: MS JUDY VAN SCHALKWYK, CHIEF MAGISTRATE, SUB-CLUSTER HEAD, KEMPTON PARK, JOHANNESBURG

Ms Judy van Schalkwyk, Chief Magistrate and sub-cluster head of Kempton Park, Johannesburg, was charged with misconduct and she was provisionally suspended from office on the 4th of June 2013. During 2017 her remuneration was also provisionally withheld.


Her disciplinary proceedings were concluded and she was convicted on 13 of the 24 counts that she had been charged with. The presiding officer issued a dismissal sanction on the 2nd of October 2020. Ms Van Schalkwyk submitted her representation on the sanction within the timelines required and the matter was considered by the Magistrates' Commission, to the exclusion of all Commissioners who are Members of Parliament and the Executive.



The majority of the Commissioners have aligned themselves with the finding of the presiding officer that she be removed from office. The Chairperson of the Magistrates' Commission has submitted a detailed letter on the outcome of the proceedings for my consideration and requested me to implement the decision of the presiding officer which is supported by the Commission.

I have confirmed the suspension of Ms JF van Schalkwyk in terms of section 13(4)(a)(i) and further request the Honourable Speaker to table the attached report of the disciplinary proceedings of Ms JF van Schalkwyk before Parliament in terms of section 13(4) (b) of the Magistrates' Act, 1993 (Act No. 90 of 1993).

Yours sincerely-



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MR. R. O. LAMOLA, MP
MINISTER OF JUSTICE & CORRECTIONAL SERVICES
DATE: 27/07/2021



**REPORT IN TERMS OF SECTION 13(4) (b) OF THE MAGISTRATES' ACT, 1993
(ACT NO. 90 OF 1993): SUSPENSION/REMOVAL FROM OFFICE ON THE GROUND
OF MISCONDUCT: MS JF VAN SCHALKWYK, CHIEF MAGISTRATE, KEMPTON
PARK**

1. PURPOSE

The purpose of this report is to inform Parliament on the suspension from office of Ms J F van Schalkwyk, Chief Magistrate, Kempton Park, pending consideration by Parliament of a recommendation by the Magistrates' Commission for her removal from office as a Magistrate on the ground of misconduct in terms of section 13(4) (a) (i) of the Magistrates' Act, 1993 (Act No 90 of 1993), hereinafter referred to as the Act.

2. BACKGROUND

- 2.1 Having conducted a preliminary investigation into numerous complaints of alleged misconduct, the Magistrates' Commission charged Ms Van Schalkwyk with 24 counts of misconduct. Ms Van Schalkwyk's then attorney acknowledged receipt of the charge sheet on 1 August 2013 on her behalf.
- 2.2 The Commission on 18 September 2013 appointed a Presiding Officer ("the PO") and a Person to Lead the Evidence ("the PLE") on behalf of the Commission at the hearing. Ms Van Schalkwyk was informed in writing accordingly.
- 2.3 A request for further particulars was received on 2 October 2013 from her newly instructed attorney.
- 2.4 On 7 October 2013, Ms Van Schalkwyk filed a written objection with the Commission against the appointment of the PLE at the inquiry/misconduct hearing.

- 2.6 Ms Van Schalkwyk 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. The PLE duly responded where after a date for the misconduct hearing to commence was determined in consultation with Ms Van Schalkwyk's instructed legal representative and the PO.
- 2.7 The Minister, on the advice of the Commission, provisionally suspended Ms Van Schalkwyk from office. Parliament on 12 November 2013 confirmed Ms Van Schalkwyk's provisionally suspension from office.
- 2.8 The defense raised numerous points *in limine* and applications which were argued before the Presiding Officer on 06 October 2014. The PO 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 PO postponed the inquiry to 23- 25 February 2015 for hearing. The hearing did however not proceed on these days, since Ms Van Schalkwyk's mother had passed on. The inquiry was once again postponed to 20 and 21 April 2015.
- 2.9 On 15 April 2015, Ms Van Schalkwyk, prior to the hearing, advised the PLE that they were once again forced to apply for a postponement of the matter on 20 April 2015, since her 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. Counsel 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.
- 2.10 The PO requested both parties to file Heads of Argument in respect of the application for another postponement. The application was refused where after Ms Van Schalkwyk's attorney recused himself. Ms Van Schalkwyk asked for a postponement to obtain legal representation which was also opposed but granted by the PO. The PO 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 they intend 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 file an Application with 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.

2.11 The Applicants, Ms Van Schalkwyk and three (3) others on 14 August 2015 obtained a High Court order compelling the Minister and the Secretary of the Magistrates Commission 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.

2.12 The matter was heard on 15 March 2017 and judgment was reserved. The High Court on 01 August 2017 delivered judgment dismissing the Applicants' application with costs. On 29 August 2017 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). Having heard both parties on 08 November 2017 the High Court on 10 November 2017 dismissed the Applicants' application with costs. The Applicants there after petitioned to the SCA. The SCA on 18 March 2018 dismissed the Applicants' application for leave to appeal with costs.

3. DISCUSSION

3.1 The Commission immediately thereafter instructed the 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 Van Schalkwyk's attorney postponed to 03-06 July and 09-11 July 2018 for hearing.

- 3.2 The Commission, at its meeting held on 24 November 2017, determined to withhold Ms Van Schalkwyk's remuneration in terms of section 13(4A)(a) of the Act, pending the conclusion of the disciplinary inquiry against her. The Commission was of the view that it is evident that Ms Van Schalkwyk was deliberately delaying the continuation of the disciplinary process against her. Parliament confirmed the Commission's decision.
- 3.3 Despite numerous challenges encountered during the misconduct proceedings, all the evidence was eventually lead and both parties were given the opportunity to submit their respective written Heads of Arguments on the merits and orally amplify them before the PO on 17 and 18 September 2020. Ms Van Schalkwyk elected not to testify at the inquiry. The PO postponed the inquiry to 01 and 02 October 2020 for judgment and the imposition of a sanction.
- 3.4 The PO on 01 October 2020 delivered his Judgment and found Ms Van Schalkwyk guilty on 13 of the 22 remaining counts of misconduct preferred against her.
- (Judgment)**
- 3.5 After having given both parties an opportunity to present any aggravating or mitigating factors to him on the imposition of an appropriate sanction, the PO on 02 October 2020, in terms of regulation 26(17)(b) of the Regulations, recommended that Ms Van Schalkwyk be removed from office as contemplated in section 13 of the Magistrate Act.
- (Sanction)**
- 3.6 The PO in terms of regulation 26(20) of the Regulations explained to Ms Van Schalkwyk her right to, within 21 days, lodge written representations and the grounds therefore to him and the Commission. Ms Van Schalkwyk filed her 93 pages representations on 23 October 2020, which the Commission only received on 16 November 2020.
- 3.7 The bulk of Ms Van Schalkwyk's representations, which have been dealt with by the Commission, deal with the merits of the case, part of which she had already

presented at the inquiry and part of which she should have raised at the inquiry for consideration by the PO before he delivered his judgment.

- 3.8 Ms Van Schalkwyk only in paragraphs [35] to [48] of her representations deals with the sanction which the PO imposed, namely his recommendation that she be removed from office. She is of the view that the PO contradicted himself when he mentioned that the charges of which the verdict of guilty was rendered did not involve dishonesty or criminality to be impeachable. She is further of the view that the charges may be described as ethically or morally incorrect, "not warranting dismissal".

(Representations)

- 3.9 The PO, however is of the view that, taking the seriousness of the charges on which she was found guilty holistically and in its totality, Ms Van Schalkwyk is not fit to hold the office of Magistrate any longer, therefore recommending her removal from office. The undisputed fact that she borrowed monies from a local attorney, who frequently appeared at the Kempton Park Magistrates Court, to pay for her overseas trip, on its own, justifies her removal from office.

- 3.10 The following documentation in terms of regulation 26(22) of the Regulations, was considered by the Commission:

- (a) the Presiding Officer's findings in relation to the charges and the reasons therefor;
- (b) the Presiding Officer's findings in relation to the aggravating and mitigating factors presented at the hearing;
- (c) the sanction imposed and the reasons therefor, and
- (d) a copy of the record of the proceedings.

- 3.11 A complete transcription of the record of the proceedings is, due to the enormous volume thereof, as indicated, not attached but will be made available if so required. Ms Van Schalkwyk has been provided with a transcription on a continuous basis.

- 3.12 Having considered all the relevant documentation, as is required in terms of

regulation 26(19) of the Regulations, including Ms Van Schalkwyk's representations, the Commission resolved to recommend that Ms Van Schalkwyk be removed from office on the ground of misconduct as contemplated in section 13(4)(a)(i) of the Act. The Commission finds Ms Van Schalkwyk's conduct as set out in the charge sheet of which she was found guilty so serious that it justifies her removal from office. Her conduct renders her unfit to hold the office of Magistrate any longer.

4. AUTHORITY TO SUSPEND

- 4.1 In terms of section 13(4)(a) of the Act, the Minister of Justice and Correctional Services, if the Magistrates Commission would recommend that a magistrate be removed from office on *inter alia* the basis of misconduct, must suspend that magistrate from office or if the magistrate is provisionally suspended from office, confirm the suspension.
- 4.2 A report in which such suspension and the reasons therefore are made known, must be tabled in Parliament by the Minister within fourteen (14) days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within fourteen (14) days after the commencement of its next ensuing session.
- 4.3 Parliament must then as soon as is reasonably possible, pass a resolution as to whether or not the restoration of his/her office of the Magistrate so suspended is recommended.
- 4.4 After a resolution has been passed by Parliament as contemplated in paragraph 4.3, the Minister shall restore the Magistrate concerned to his/her office or remove him/her from office, as the case may be.
- 4.5 Ms Van Schalkwyk has instituted review proceedings. She does not seek any relief against me in my capacity as the Minister. Her grounds of review are based

on decision of the 2nd (the Magistrates Commission) and 3rd Respondents (the Presiding Officer) in the misconduct proceedings. However, in paragraphs 58 to 60 of her affidavit she states that the presiding officer failed to consider appropriate alternative sanctions such as demotion and suspension and accordingly failed to apply his mind to the issue of sanction. If she is wrong in her interpretation and the section is indeed exhaustive of the type of sanction that may be imposed then she submits that regulation 26(17)(a) of the Regulations must be set aside in terms of PAJA and or is unconstitutional and must be set aside as it deprives of her constitutional right to equality, human dignity, and the freedom to carry out a trade, occupation or trade and or must set aside on the basis of the legality principle.

- 4.6 A total number of 13 (70%) out of 18 Commissioners had supported the sanction of dismissal. The majority of the Commissioners have aligned themselves with the finding of the presiding officer that she be removed from office.

5. CONCLUSION

- 5.1 In view of the above, I herewith in terms of section 13(4)(i) of the Magistrate Act, 1993, confirm the suspension of Ms Schalkwyk; and
- 5.2 This report, as required by section 13(4)(b) of the Magistrates Act, 1993 is submitted for Parliament's consideration.

Given under my hand at PRETORIA on this 27 day of JULY 2021



MR R LAMOLA, MP

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES



**MAGISTRATES COMMISSION
OF THE
REPUBLIC OF SOUTH AFRICA**

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The Honourable Mr R Lamola, MP
Minister of Justice and Correctional Services
Private Bag X276
PRETORIA
0001

Our Ref: 6/5/5
Enquiries: Mr Dawood
Date: 17 March 2021

Dear Honourable Minister

**OUTCOME OF DISCIPLINARY PROCEEDINGS: MS JUDY VAN
SCHALKWYK, CHIEF MAGISTRATE, SUB CLUSTER HEAD, KEMPTON
PARK, JOHANNESBURG.**

1. Ms Judy van Schalkwyk, Chief Magistrate and Judicial Head of the Kempton Park sub cluster was charged for misconduct and she was provisionally suspended from office on the 4 June 2013 and during 2017 her remuneration was provisionally withheld.
2. Her disciplinary proceedings commenced on 2 October 2018 and two years to the date the matter was finalised to which she was convicted on 13 of the 24 counts that she had been charged on.
3. The presiding officer in the matter, Regional Magistrate, Mr A Maharaj issued a sanction of dismissal on 2 October 2020.
4. Ms van Schalkwyk submitted her representation on the sanction within the timelines required and the matter was considered by the Magistrates Commission, to the exclusion of all Commissioners who are Members of Parliament and the Executive.

5. After having considered the judgement and the Ms van Schalkwyk's representation a total number of 13 (70%) out of 18 Commissioners had supported the sanction of dismissal. Many of the Commissioners were not too keen to support the findings on the charges that were related to the activities of the professional body for magistrates, Judicial Officers Association of South Africa (JOASA), however in the main they had indeed supported the overall sanction of dismissal.
6. The Commissioners who did not support the sanction were of the view that the presiding officer did not have the full set of information related to the work of JOASA in relation to the arrangements with the Department that went back a number of years and that he had been overly harsh with his finding. One Commissioner recommended that Ms van Schalkwyk be demoted in rank to the exclusion of dismissal.
7. The majority of the Commissioners have aligned themselves with the finding of the presiding officer that she be removed from office. The Commission therefore request the Honourable Minister to take the relevant steps to implement the decision of the presiding officer which is supported by the Commission.
8. The Honourable Minister may contact the Commission for further information or clarification on the matter.

Yours sincerely

A handwritten signature in black ink, appearing to be 'A P Ledwaba', written over a large, loopy flourish.

JUDGE A P LEDWABA
CHAIRPERSON: MAGISTRATES COMMISSION