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NOTES ON THE LEAVE REGULATIONS FOR JUDICIAL OFFICERS IN THE LOWER COURTS Tabled in Parliament in terms of Section 16(2)(A) of the Magistrates Act, 1993¹

CONTENTS

1. INTRODUCTION	1
2. MAGISTRATES AS PUBLIC SERVANTS UNDER THE PUBLIC SERVICE AND PENSIONS ACT	2
3. MAGISTRATES AS JUDICIAL OFFICERS UNDER THE MAGISTRATES ACT, 1993	2
4. LEAVE REGULATIONS IN TERMS OF MAGISTRATES ACT, 1993	3
4.1 2006 LEAVE REGULATIONS	3
4.2 2019 LEAVE REGULATIONS –REASONS FOR PROPOSED AMENDMENTS	4
4.3 OVERVIEW OF SELECTED PROVISIONS OF 2019 LEAVE REGULATIONS	4
5. CONCLUSION	7
6. SOURCES	7

1. INTRODUCTION

- This paper provides a brief overview of the **2019 Regulations governing leave arrangements for Magistrates**, tabled in Parliament in terms of section 16(2)(A) of the Magistrates Act 90 of 1993.
- The Magistrates Act, 1993 established the **Magistrates Commission to make recommendations to the Minister regarding issues affecting magistrates**, including disciplinary matters and complaints against magistrates.
- In terms of section 16(1) of the Magistrates Act, 1993 the **Minister of Justice makes Regulations in relation to judicial officers in the lower courts on the recommendation of the Magistrates Commission.**
- Regulations can cover a wide range of administrative issues, including (a) appointments, promotion, transfer, discharge and disciplinary steps; (b) duties, powers, conduct, discipline, hours of attendance, leave of absence, including leave gratuity, pension and (c) any other condition of service.
- **Regulations with financial implications for the state must be made “with the concurrence of the Minister of State Expenditure”** (i.e. the Minister of Finance).
- The Regulations came into operation on 1 January 2020.
- Section 16(2)(A) of the Magistrates Act, 1993 further provides that a “[R]egulation made under this section shall be in force unless and until Parliament...by resolution disapproves the regulation, in which event the regulation shall lapse with effect from a date to be specified in the resolution”.
- However, “the lapsing of a [R]egulation in terms of this subsection shall not affect the validity of anything done under the regulation prior to the date mentioned in the resolution”.

¹ GG 42916.20 December 2019. Magistrates Act, 1993 (Act No. 90 of 1993) Regulations for Judicial Officers in the Lower Courts, 1993: Amendment



- **The Minister can make a new Regulation regarding the matter dealt with by a lapsed regulation.**

2. MAGISTRATES AS PUBLIC SERVANTS UNDER THE PUBLIC SERVICE AND PENSIONS ACT

- Before the enactment of the Magistrates Act, 1993 magistrates were regarded as public servants as they were governed by the same legislation and pension provisions that governed the public service.²
- Magistrates were appointed from the ranks of prosecutors (public servants) in the Department of Justice, whereas judges were appointed from the ranks of advocates and lawyers.³
- As public servants, also, Magistrates were not regarded as being completely independent, compared to judges.

“Magistrates received directives from the Department of Justice and the Public Service Act contained provisions which included the regulation of conditions of service, periods of service, discipline, retirement, discharge and dismissal of magistrates. Since 1944 the then Minister of Justice made the appointment of magistrates. Later on this power was delegated by the Minister to an officer in the [Department of Justice]...[t]he independence of magistrates...was severely compromised, they could be transferred without their consent, they were dependent on merit assessments for promotion and could face an inquiry by the executive into charges of inefficiency or misconduct such as “disobeying a lawful order”. They performed both administrative and legal functions. Importantly, they were perceived as being politicised”.⁴

- Giving effect to the provision in section 165 of the Constitution, 1996 that the independence, impartiality, dignity, accessibility and effectiveness of the courts must be ensured, requires an independent judiciary.
- Thus, one of the ongoing projects in democratic South Africa has been the establishment of a single judiciary in order to bring Magistrates into the fold of other judicial officers⁵.

3. MAGISTRATES AS JUDICIAL OFFICERS UNDER THE MAGISTRATES ACT, 1993

- **The Magistrates Act 90 of 1993 defines a magistrate as “a judicial officer appointed under section 9 of the Magistrates’ Courts Act read with section 10 of this Act, excluding any person occupying that office in an acting or temporary capacity and any assistant magistrate”, making it clear that Magistrates are no longer part of the Public Service.**
- The enactment of the Magistrates Act 1993 started the still ongoing process to give full recognition to the status of Magistrates as members of the judiciary, as opposed to public servants.

² Jeffrey, J (2020)

³ Kgalema, L and Gready, P (2000)

⁴ Jeffrey, J (2020)

⁵ Lamola, R (2019)



- Magistrates are appointed by the Minister of Justice, after consultation with the Magistrates Commission which is also responsible for shortlisting and interviewing applicants.⁶
- The Judicial Officers (Amendment of Conditions of Service) Amendment Act 28 of 2003, amended the Independent Commission for the Remuneration of Public Office-bearers Act, 1997 to extend the definition of "office-bearer" to include judges and magistrates, and amend the Magistrates Act to further regulate the remuneration of magistrates.
- In terms of section 12 of the Magistrates Act, the Independent Commission for the Remuneration of Office Bearers has the statutory mandate to make recommendations to the President regarding salaries, remuneration allowances and benefits of judges and magistrates, which must be approved by Parliament.

4. LEAVE REGULATIONS IN TERMS OF MAGISTRATES ACT, 1993

- As said previously, the Minister makes Regulations on a number of issues affecting Magistrates on the recommendations of the Magistrates Commission.
- As the 2019 Regulations currently before Parliament for consideration deals with leave arrangements, the sections below compares the previous leave Regulations published in 2006 with the 2019 Regulations, and where available, the position in the public service.

4.1 2006 LEAVE REGULATIONS⁷

- **Despite no longer being public servants, the 2006 Regulations published in terms of the Magistrates Act, 1993 stated that the provisions contained in the Public Service Regulations and Public Service Staff Code was still applicable to magistrates.**
- Leave was subject to approval by the Minister or a person designated by him.
- References to "officer" or "employee" in the 2006 Regulations or code was interpreted as a reference to a "magistrate".
- Leave gratuity provisions applied "*mutatis mutandis*" (i.e. with the necessary changes) to magistrates.
- The Regulations provided that a magistrate could, after 20 years' uninterrupted service in the Public Service, or in the office of magistrate or both, discount a maximum of 10 days of his available vacation leave.
- After 30 uninterrupted years of service, the discount increased to 20 days or 10% of available vacation leave, whichever was the most.

Comment

It is not clear what effect a "discount" of leave had on how leave was calculated. The Department needs to explain this.

⁶ Jeffrey, J (2019)

⁷ Magistrates Act, 1993 (Act No 90 of 1993) Regulations. Clauses 38 and 39. Leave and Leave Gratuity. Available at <https://justice.gov.za/legislation/regulations/r2006/MAGISTRATES.pdf>. Accessed 22 May 2020.



4.2 2019 LEAVE REGULATIONS –REASONS FOR PROPOSED AMENDMENTS

The Magistrates Commission recommended that the Minister of Justice and Correctional Services amend the Regulations for Judicial Officers in the Lower Courts by introducing new provisions regarding the leave dispensation of magistrates.

The Department of Justice published a draft notice in 2018⁸ to elicit comments on the proposed amendments to the leave regulations in which it provided the following background information to the proposed amendments:

- The comprehensive regulations promulgated shortly after commencement of the Magistrates Act, 1993 were largely based on the public service regulations existing at the time.
- The 2006 Regulations that provided for the leave of magistrates were still subject to the Public Service Regulations and the Public Service Staff Code .
- **The Public Service Regulations have since been amended and in particular, the leave dispensation of public servants has been changed and has lessened the financial burden on the State relating to the payment of huge amounts for accumulated leave.**
- Savings was effected by (i) "capping" the accumulated leave of employees and (ii) introducing the principle that annual leave days not taken are forfeited, making it impossible to build up vast numbers of (newly) accumulated leave which must be paid out on termination of service.
- **Public servants benefitted from the conversion of leave from "calendar days" to "working days"** which meant that weekends and public holidays falling in a leave period would not be regarded as leave days.
- **In contrast, magistrates could accumulate leave and the number of leave days included calendar days.**
- **However, there was growing recognition that it was neither appropriate nor desirable that the leave dispensation (and other conditions of service) of the Magistracy should mirror those of the Public Service.**
- **The Magistracy forms part of the independent judiciary and should have a tailor-made dispensation reflecting and suited to their unique disposition as such.**
- The main intention with the new leave dispensation for magistrates "is to *move away from public service prescripts insofar as they still apply to magistrates, so as to further enhance the independence of the judiciary.*"⁹ (own emphasis)

4.3 OVERVIEW OF SELECTED PROVISIONS OF 2019 LEAVE REGULATIONS

(i) VACATION LEAVE ACCRUED

- The most important change regarding accrued / accumulated leave in **Regulation 38** is the **conversion of calendar days to working days**. *This is similar to the current Public Service Regulations.*

⁸ Department of Justice and Constitutional Development (2018)

⁹ Jeffrey, J (2019)



(ii) VACATION AND SICK LEAVE PROVISIONING

- In terms of Regulation 38A, **the 30 days' annual vacation leave of magistrates are "working days"**. *This is similar to the public service.*
- Leave not taken, can be carried over to the next year within a three-year cycle.
- Magistrates can take all leave, including leave accrued over the 3-year period in the third year of the cycle.
- **Any vacation leave not taken by the end of the third calendar year will lapse.** *This is similar to the public service.*
- Regional Court Presidents approve leave for regional court magistrates, while the Chief Magistrate approves leave for magistrates of a district court.
- Any refusal of an application for vacation leave or a withdrawal of vacation or any other or special leave already granted must be in writing, stating the reason and arrangements for the rescheduling thereof.

(iii) LEAVE GRATUITIES

- The cash value in respect of unused vacation leave accrued during the last year of service of a magistrate, as well as capped vacation leave to his or her credit, must be calculated in accordance with Regulation 38H and be paid to a magistrate on vacating his or her office.
- A magistrate may in writing request the Department to pay any leave gratuity owed to him or her upon his or her death to a beneficiary, including a trust, identified by him or her. If no beneficiary or trust was identified, it can be paid to the surviving spouse or registered partner; or to the estate of the magistrate if there is no surviving spouse or partner.
- The leave gratuity payable on termination of service may be used as a set-off against any departmental debt for which a magistrate may be liable.

(iv) SICK LEAVE

- **Paid sick leave is calculated as working days over a three-year cycle.** *This is similar to the public service.*
- A magistrate may on application in *writing* to the Minister, be granted any **vacation leave which he or she may have to his or her credit, in lieu of sick leave with half salary.** Provided that (a) such application is submitted not later than one calendar month after he or she has assumed duty; (b) the number of days' vacation leave so granted may not exceed 260 working days in the aggregate in any sick leave cycle; and (c) the Minister is satisfied that the magistrate concerned is not at that stage permanently unfit for the resumption of his or her normal duties.
- The Minister may grant **further sick leave with half salary, not exceeding 86 working days** in respect of separate periods of absence and any illness if (a) the Minister is satisfied that the magistrate at that particular time is not permanently unfit to resume his or her normal duties; and (b) the magistrate has no vacation leave including capped leave to his or her credit.

(v) SPECIAL SICK LEAVE

- A magistrate who is absent from duty owing to an injury sustained in an accident or owing to a disease contracted in the course of and as a result of his or her duties, must



be granted special sick leave with remuneration for the period, to a maximum of 130 consecutive working days, for the period that he or she is incapable to perform his or her normal duties.

- The Minister may grant **additional special sick leave with remuneration or half salary or without any remuneration for a further maximum period of six calendar months** if, after an investigation, a magistrate will be able to resume his or her duties within such further period.
- Special sick leave may be granted *even where the accident was caused by the negligent conduct of the magistrate*.

(vi) **SPECIAL LEAVE WITH REMUNERATION**

- **Special leave with remuneration including travel periods for the purpose for which the leave is granted**, may be granted (a) for pre-natal examinations and tests (8 days), pregnancy and confinement (4 months maternity leave); (b) for adoption; (c) family responsibility; (d) resettlement on transfer; and (e) in respect of disabled magistrate, for attending any training course related to his or her disability, or maintenance work for equipment used by him or her.

(vii) **SPECIAL LEAVE FOR ADOPTION**

- A magistrate who legally adopts a child that is not older than 24 months on the date of adoption, qualifies for adoption leave to a maximum of 45 working days commencing from the date that the adopted child takes up residence with the adoptive parent.

(viii) **SPECIAL LEAVE FOR FAMILY RESPONSIBILITY**

- A magistrate is entitled to a **maximum of five working days family responsibility leave** per year, which is *similar to public service*.

(ix) **SUBSTITUTION OF REGULATION 39 (DISCOUNTING OF LEAVE)**

The substitution is essentially the same as the 2006 Regulations.

- A magistrate may, after 20 years' uninterrupted service in the office of magistrate, discount a maximum of 10 days of his or her available vacation leave.
- A magistrate may, after 30 years' uninterrupted service in the office of magistrate, discount 20 days of his or her available vacation leave, or 10% of his or her available vacation leave, whichever is the most.
- Uninterrupted service in the office of magistrate' includes service in the Public Service immediately before appointment as a magistrate. *The Department should explain what is the effect of discounting leave in practice.*



5. CONCLUSION

- The Department had intended to implement the new leave Regulations with effect from 1 January 2019. However, as the leave Regulations had financial implications, the Minister of Finance required the Department to address a number of issues, after which the Regulations were Gazetted for implementation on 1 April 2019.
 - The draft Financial Instructions for Magistrates were also completed which, if approved by National Treasury, would further “de-link magistrates from public service prescripts”.¹⁰
 - The tabled Regulations became effective on 1 January 2020.
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¹⁰ Jeffrey, J (2019)