



20 August 2012

BRIEFING DOC: MAGISTRATES COMMISSION: PROGRESS REPORTS, REMOVAL FROM OFFICE AND WITHHOLDING OF REMUNERATION

1. INTRODUCTION

The following reports have been submitted for the Committees consideration:

- Progress reports:

Mr I W O M Morake
Mr T M Masinga
Mr T Rambau
Mr C Dumani

- Removal from office:

Mr M Tyulu
Ms N Ndamase
Ms L Myles

- With holding of remuneration:

Mr M Tyulu

The history of these matters and the reports have been briefly summarised for consideration as follows:

2. PROGRESS REPORTS

In terms of section 13 (3)(e) of the Magistrates Act No 90 of 1993:

'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 allegations in question by causing a written notice containing the allegation concerned to be served on the magistrate.'

In terms of the Act this inquiry must be concluded as soon as possible and *the Commission must in accordance with section 13(3)(f) of Act 90 of 1993 submit a report on the progress made in respect of that inquiry to Parliament every three months.*



2.1 MAGISTRATE I W O M MORAKE, LICHTENBURG, NORTH WEST

- Magistrate and Judicial Head at Lichtenburg

The complaints against Mr Morake emanated from the following.

- Attorneys Ranamane Phungo Inc: who alleged Mr Morake called their client into his office and instructed her to vacate premises she was occupying despite the fact there were no eviction applications or orders in connection with her occupation of the property.
- Provincial Head of SAPS Detective Service, North West: A SAPS officer had complained that following his arrest of a suspect in a stock theft matter who was charged and appeared before the Lichtenburg Magistrate Court matter he was instructed to appear before Mr Morake at his office or risk arrest. Present at the meeting was the accused and Mr Morake asked the SAPS officer if he would assist the accused the officer refused finding Mr Morake's conduct unusual and threatening.
- Legal Tax and Service Pty Ltd: who alleged they had paid Mr Morake R950 to assist their client to obtain a loan which Mr Morake had failed to do. They wanted a refund.
- Mr Shohag: who alleged he was ordered to Mr Morake's office and threatened with arrest if he failed to do so. The businessman ignored this instruction but was visited by three police officers and told to see Mr Morake. Mr Shohag went with his two partners and found one of his employees with Mr Morake who forced him to sign a business agreement with the employee failing which he would be deported back to Bangladesh. Mr Shohag obtained an interdict against him and reported him to SAPS Organised Crime Unit.
- A dispute over the payment of electricity arrears: Mr Morake ordered the two parties to his office and insisted the one party pay the amount of R1173 to him rather than the municipality threatening the party with jail if the payment was not made. The money was then paid to Mr Morake and the party some weeks later was then summonsed to the Small Claims Court because the other party had not received the R1173. Mr Morake stated that the money had been taken from his office.

CRIMINAL PROCEEDINGS

13 July 2007: Mr Morake appeared in Lichtenburg District Court on three charges of theft. The matter was postponed for judgement.

18 October 2010: he was convicted of two of the three charges of theft and the matter was postponed for sentence.

1 February 2011: the matter was for set down for sentencing; however, Mr Morake terminated the mandate of his attorney. The matter was postponed to 1 April 2011 for sentencing. The criminal case was then postponed.

13 May 2011: Mr Morake's attorney fell ill and Mr Morake indicated that he wanted to call witness(es) to testify in mitigation.

21 June 2011: Mr Morake was sentenced to 4 years imprisonment on each count in terms of Section 276(i) of the Criminal Procedure Act. The sentences are to run concurrently.



Mr Morake indicated that he intended to appeal. However, the appeal was not filed, since both parties experienced difficulty in having the record of proceedings reconstructed. Tapes and CD's, containing the criminal trial proceedings had gone missing.

2.1.1 DISCIPLINARY PROCEEDINGS

PROVISIONAL SUSPENSION

4 November 2010: the Minister provisionally suspended Mr Morake.

18 November 2010: the suspension was confirmed by the National Assembly.

24 November 2010: the suspension was confirmed by the NCOP.

29 December 2010: the Magistrates Commission decided to charge Mr Morake with several counts of misconduct and the charge sheet was served on him.

11 April 2011: the misconduct inquiry commenced and Mr Morake's legal representative requested a postponement pending his appeal against his criminal conviction. The postponement was granted providing Mr Morake could show evidence that he had filed such an appeal.

24 June 2011: the misconduct inquiry was to continue, however, a further postponement was granted to give Mr Morake the opportunity to file his appeal against the conviction and provide requisite proof to the Presiding Officer of the appeal against the criminal conviction.

11 July 2011: the appeal had apparently still not been filed, since both parties experienced difficulty in having the record of proceedings reconstructed. Tapes and CD's, containing the criminal trial proceedings had gone missing. The Presiding Officer in the misconduct inquiry, therefore ordered the disciplinary hearing to proceed on the actus reus concerning the allegations of theft. This implied that the charge of misconduct had to be amended or replaced.

REMUNERATION WITHHELD

22 November 2012: determination of Magistrates Commission to withhold remuneration ¹ approved by the NCOP.

24 November 2012: determination of Magistrates Commission to withhold remuneration approved by National Assembly.

23 April 2012: the Commission reports that the misconduct inquiry was to set proceed in respect of all the charges.

¹ Withholding of remuneration: Section 13 (4A) (b) If the Commission determines that the remuneration of a magistrate shall be reduced or withheld a report regarding that determination and the reasons therefore must be tabled in Parliament by the Minister within seven days of such determination, if Parliament is in session, or, if Parliament is not in session, within seven days after the commencement of its next ensuing session.



Comment

- Did the misconduct inquiry proceed as indicated? Were further postponements required?
- Is information available on the Status of Mr Morake's appeal – was any explanation forthcoming in respect of the fact that the tapes and CD's, containing the criminal trial proceedings had gone missing. Have the record of proceedings been reconstructed?

2.2 MAGISTRATE MT MASINGA, UMLAZI, KWA-ZULU NATAL

- Additional Magistrate at Umlazi District Court.

CRIMINAL PROCEEDINGS

19 March 2009: Mr Masinga appeared before the Durban Magistrates Court on charges of contravening section 17(a) read with section 7 of the Domestic Violence Act 116 of 1998. It was alleged that Mr Masinga assaulted his wife with a blunt axe; he kicked her; hit her with open hands; threatened to kill her; and that he also assaulted his daughters.

14 July 2009: the criminal proceedings were remanded to this date and Mr Masinga was granted bail of R 1 000. The matter was transferred to the Durban Regional Court where he appeared on additional charges of attempted murder and two counts of assault.

23 May 2011: Mr Masinga was convicted by the Regional Court in Durban on the charge of attempted murder. The case was remanded to **12 August 2011** for a pre-sentence report.

16 January 2012: the accused was sentenced to 10 years imprisonment. He appealed against his sentence and conviction. The appeal is still pending.

2.2.1 DISCIPLINARY PROCEEDINGS

8 February 2010: the Commission charged Mr Masinga with three counts of misconduct and a notice was served on him.²

2 March 2010: the Commission received a letter from NEHAWU to inform them it was acting on behalf of Mr Masinga.

PROVISIONAL SUSPENSION

30 March 2010: Mr Masinga was provisionally suspended by the Minister.

1 June 2010: the suspension was confirmed by the National Assembly.

4 June 2010: the suspension was confirmed by the National Council of Provinces.

² 13(3)(e) of the Magistrates Act



26 August 2010: the misconduct hearing was set down for this date but NEHAWU requested a postponement to appoint a legal representative for Mr Masinga. They also contended the disciplinary proceedings should be postponed pending the finalisation of the criminal trial.

21 October 2010: the misconduct inquiry was to commence but the representative from NEHAWU was absent and the matter had to be postponed again.

4 February 2011: the misconduct inquiry was to commence but neither Mr Masinga nor the NEHAWU representative appeared.

24 February 2011: Mr Masinga was served with a new notice of hearing.

28 March 2011: the misconduct hearing was to commence. Mr Masinga requested another remand to enable NEHAWU to instruct an attorney.

24 May 2011 the misconduct hearing commenced and Mr Masinga was represented by an attorney but various points were raised *in limine* which the Presiding Officer wanted addressed.

22 August 2011 the Presiding Officer made a ruling on the points *in limine* and postponed the matter for plea and the leading of evidence.

31 October 2011 Mr Masinga indicated he was considering resigning and the proceedings were postponed.

1 November 2011: Mr Masinga decided not to resign. His attorney of record withdrew. He requested a postponement to approach Cosatu/NEHAWU for representation.

REMUNERATION WITHHELD

22 November 2011: determination of Magistrates Commission to withhold remuneration³ approved by the NCOP.

24 November 2011: determination of Magistrates Commission to withhold remuneration approved by National Assembly.

5 December 2011: Mr Masinga reported he had no success in his approach to COSATU. A further postponement was requested and granted by the Presiding Officer provided that the inquiry would proceed for trial either with or without any representation.

18 January 2012: Mr Masinga indicated he would conduct his own defence and requested a further postponement on the basis that he had no access to the documents in the possession of his attorney. Copies of relevant documents were given to him.

9 February 2012: the witnesses were present but the matter did not proceed as Mr Masinga had lost his spectacles - a further postponement was granted.

³ Withholding of remuneration: Section 13 (4A) (b) If the Commission determines that the remuneration of a magistrate shall be reduced or withheld a report regarding that determination and the reasons therefore must be tabled in Parliament by the Minister within seven days of such determination, if Parliament is in session, or, if Parliament is not in session, within seven days after the commencement of its next ensuing session.



5 March 2012: the witnesses were present but Mr Masinga was absent and a family member provided a medical certificate that indicated that he was ill – a further postponement was granted. Mr Masinga was notified by SMS of the postponement.

23 March 2012: the witnesses were present but Mr Masinga was absent and his fiancé provided a medical certificate covering the period 22-24 March 2012. At the request of the Commission's representatives proceedings continued (in terms of regulation 26(14) of the Regulations for Judicial Officers in Lower Courts, 1994: A presiding officer may order that a misconduct hearing be proceeded with even if the magistrate charged is absent from the proceedings or any part thereof, subject thereto that the presiding officer must be satisfied that proper notice of the hearing has been handed to the magistrate charged as contemplated in sub-regulation (7)⁴). The evidence of three witnesses was led.

20 April 2012: it was reported that the matter was set down to continue on this date with further evidence to be led.

Comment

- It was reported that on 1 November 2011 Mr Masinga requested a postponement to approach Cosatu/NEHAWU. Following concerns raised by the PC in this regard it is not clear why Presiding Officers continue to permit magistrates to approach Public Service Unions for representation.
- After close to a year of postponements the Presiding Officer finally ordered proceedings continue (in terms of regulation 26(14) of the Regulations for Judicial Officers in Lower Courts, 1994: A presiding officer may order that a misconduct hearing be proceeded with even if the magistrate charged is absent from the proceedings or any part thereof, subject thereto that the presiding officer must be satisfied that proper notice of the hearing has been handed to the magistrate charged as contemplated in sub-regulation (7).⁵ Given the persistent delays in Mr Masinga's case could this have not been done sooner?

2.3 MAGISTRATE TR RAMBAU, POLOKWANE, LIMPOPO

- Regional Magistrate, Polokwane.

⁴ Regulation 7 provides as follows: (7)(a) The magistrate or person appointed in terms of subregulation (6)(b) must in writing notify the magistrate charged of the date, time and venue of his or her hearing.

(b) The magistrate or person appointed in terms of subregulation (6)(b) or a person designated by him or her, must personally hand the notice contemplated in paragraph (a) to the magistrate charged.

(c) The magistrate charged must immediately acknowledge receipt of the notice contemplated in paragraph (a).

⁵ Regulation 7 provides as follows: (7)(a) The magistrate or person appointed in terms of subregulation (6)(b) must in writing notify the magistrate charged of the date, time and venue of his or her hearing.

(b) The magistrate or person appointed in terms of subregulation (6)(b) or a person designated by him or her, must personally hand the notice contemplated in paragraph (a) to the magistrate charged.

(c) The magistrate charged must immediately acknowledge receipt of the notice contemplated in paragraph (a).



Corruption charges – on 5 February 2010 Mr Rambau along with a prosecutor and attorney were arrested for corruption.⁶ It was alleged that the three had colluded to arrange the outcome of trials for financial benefit.

CRIMINAL PROCEEDINGS

8 February 2010: Mr. Rambau and his co-accused appeared in the Musina District Court on charges of corruption. They were released on R10000 bail. Mr Rambau was prohibited from entering any Magistrates court in the Thohoyandou cluster. The matter was set down for **11 to 13 October 2010**.

The criminal case was then postponed for further hearing to **7 – 11 March 2011, 11-15 April 2011, 30 May - 3 June 2011, 29 August 2011 - 2 September 2011 and 10 - 14 October 2011**. The Commission reports that the matter is still part-heard and stands postponed to **21-25 May 2012**.

2.3.1 DISCIPLINARY PROCEEDINGS

17 November 2010: a written notice containing the charges of misconduct was served on Mr Rambau.

PROVISIONAL SUSPENSION

18 November 2010: the suspension was confirmed by the National Assembly.

24 November 2010: the suspension was confirmed by the National Council of Provinces.

9 February 2011: the misconduct inquiry was held and Mr Rambau requested a postponement of the disciplinary proceedings pending the finalisation of the criminal trial. The inquiry was postponed and the Presiding Officer requested representation from both parties on whether the inquiry should be postponed pending the finalisation of the criminal case. Mr Rambau instructed an attorney to represent him.

8 April 2011: proceedings at the misconduct inquiry resumed. Mr Rambau appeared without his attorney and requested a further postponement. He also requested further particulars in respect of the misconduct charge against him. The request for postponement was granted providing Mr Rambau's attorney appeared and formally requested further particulars in respect of the misconduct charge in writing.

20 June 2011: Mr Rambau's attorney appeared at the misconduct inquiry, no request was made for further particulars. A request was made again for postponement of the inquiry pending finalisation of the criminal matter against Mr Rambau. They indicated that the criminal case would likely be concluded in October 2011. The inquiry was then postponed.

Counsel for Mr Rambau thereafter requested disclosure and/or discovery of all documents, statements, and a list of witnesses etc. from the Commission which was duly submitted.

12 September 2011: Neither Mr Rambau nor his counsel were present at the last occasion (however, no date was provided in the Commission report as to when this was).⁷ Mr Rambau submitted a medical certificate indicating that he was unfit for work, due to "diabetes mellitus".

⁶Prosecutor Estene Willemsse and attorney T E Lubisi.



According to the Magistrate Commission Report a new date for the continuation of the inquiry had not yet been determined.

Comment

- Was a date for the continuation of the inquiry finally determined?
- Local community newspapers report that Mr Rambau's corruption case was postponed until 27 August 2012.
- Mr Rambau was arrested in January 2011 on a charge of conspiracy to commit murder. However, this case was withdrawn in August 2011. In April 2012 Mr Rambau apparently instituted an action to claim damages for his 'unlawful arrest and prosecution' as well as defamation from various newspapers, the SAPS, the NPA and the Department of Justice.⁸

2.4 MAGISTRATE CM DUMANI, GRAFF REINET, EASTERN CAPE

- Acting Chief Magistrate, Graaf Reinet.

The complaint against Mr Dumani involved sexual harassment of female staff at Graff Reinet magistrate court.

2.4.1 DISCIPLINARY PROCEEDINGS

On 5 March 2009 the Executive Committee of the Magistrates Commission resolved to charge Mr Dumani with four counts of misconduct. Following the inquiry he was found guilty of three of the four charges of sexual harassment. Mr Dumani was charged with four (4) counts of misconduct. He denied all the allegations against him. At the conclusion of the misconduct inquiry he was found guilty of three (3) of the four (4) charges of sexual harassment against female clerks at the Graaff-Reinet Magistrate's Office.

PROVISIONAL SUSPENSION

16 September 2009: the Minister provisionally suspended Mr Dumani.

12 November 2009: the suspension was confirmed by the National Assembly.

17 November 2009: the suspension was confirmed by the NCOP.

24 May 2010: the presiding officer of the misconduct enquiry recommended that Mr Dumani be removed from office and he was given the opportunity to make representations.

⁷ Although it was reported in a local community newspaper as being 25 January 2012

⁸ www.limpopomirror.co.za



26 –27 August 2010: the Commission having considered his representations supported the recommendation that he be removed on grounds of misconduct.

2 September 2010: the Commission informed the Minister of its recommendation. Mr Dumani was also informed in writing of the Commission's recommendation that he be removed from office.

HIGH COURT APPLICATION

13 September 2010: Mr Dumani filed a motion in Eastern Cape High Court requesting the court interdict and restrain the Minister from taking action pending the determination of another application before the court to review the Commission's decision in the disciplinary hearing. The Minister did not oppose this application.

21 October 2010: the High Court granted the order in favour of Mr Dumani interdicting the Minister from taking action.

29 July 2011: the review application was heard.

12 August 2011: the review application was dismissed by the High Court with costs. Mr Dumani indicated he would appeal.⁹

19 and 26 October 2011: The Commission appeared before the Portfolio Committee and the Select Committee respectively, requesting both Committees to hold Mr Dumani's matter in abeyance, pending the finalisation of the appeal.

REMUNERATION WITHHELD

22 November 2012: determination of Magistrates Commission to withhold remuneration¹⁰ approved by the NCOP.

24 November 2012: determination of Magistrates Commission to withhold remuneration approved by National Assembly.

21 February 2012: following a petition to the President of the Supreme Court of Appeal (SCA) leave to appeal to the SCA was granted.

Comment

- What is the status of Mr Dumani's appeal?

⁹ CM Dumani v D Nair and the Magistrates Commission, Eastern Cape High Court Grahamstown (Case No: 2458/2010), Chetty J, 'The conclusion reached by the first respondent cannot be construed as being unreasonable. It was a conclusion based on credible evidence, with regard to the probabilities and clearly not one that a reasonable decision maker, in casu, the first respondent, could not reach.'

¹⁰ Withholding of remuneration: Section 13 (4A) (b) If the Commission determines that the remuneration of a magistrate shall be reduced or withheld a report regarding that determination and the reasons therefore must be tabled in Parliament by the Minister within seven days of such determination, if Parliament is in session, or, if Parliament is not in session, within seven days after the commencement of its next ensuing session.



3. PORTFOLIO COMMITTEE REPORT (7 September 2011)

Just to note that following the PC's consideration of the Magistrates Commission's Progress Reports in respect of Magistrates Dumani, Jacobs, Maruwa, Masinga, Morake, Rambau and Skrenya,¹¹ during a meeting with the Commission on 11 August 2011, the Portfolio Committee Report (dated 7 September) noted:

- The length of time taken to finalise disciplinary matters.
- An acknowledgment of the policy decision taken by the Commission in March 2011 to proceed with disciplinary inquiries without waiting for the criminal matter to be finalised. Although concern was expressed by the Committee as to why the Commission ever coupled a disciplinary matter to the conclusion of a related criminal case.
- The need to expedite criminal cases involving Magistrates and a request for feedback following an approach by the Commission to the NDPP.
- The continued postponement of disciplinary proceedings while the outcome of a criminal matter is taken on appeal. The reasons for doing so are unclear and it does not appear to be justified.
- The anomaly of allowing representation for magistrates from Public Service Trade Unions.
- Sympathy for the capacity constraints of the Quality Assurance Unit.
- The possibility that the Magistrates Act and regulations need to be revised to allow for a more streamlined procedure.
- The need to ensure that Acting appointments are properly screened and the possibility of adopting a similar mechanism as is contained in the Municipal Systems dispensation.

4. REMOVAL FROM OFFICE OF MAGISTRATES M TYULU, N NDAMASE AND L MYLES

Section 13(4) (a) of the Magistrates Act 90 of 1993 provides that if the Commission recommends that a magistrate be removed from office-

- (i) on the ground of misconduct;
- (ii) on account of continued ill-health; or
- (iii) on account of incapacity to carry out the duties of his or her office efficiently

then the Minister must suspend that Magistrate, or if the Magistrate is suspended, confirm that suspension.

A report must be tabled in Parliament by the Minister within 14 days of such suspension and Parliament must as soon as is reasonably possible pass a resolution as to whether or not the restoration to office of a Magistrate so suspended is recommended.¹²

4.1 MAGISTRATE MR M TYULU, CAPE TOWN

- Additional Magistrate, Cape Town.¹³

REMOVAL FROM OFFICE ON THE BASIS OF MISCONDUCT

¹¹ Dated 29 June 2011

¹² 13 (3)(d) If Parliament passes a resolution that the provisional suspension is not confirmed, the suspension lapses.

¹³ Appointed as a Magistrate in 1994.



This is the second disciplinary matter involving Mr Tyulu. He was originally appointed a Magistrate at Seymour in 1994 and shortly after that transferred to Malmesbury. At some point a disciplinary inquiry was held about his fitness to hold office and he was found guilty of four counts of misconduct (one count involved an approach made to an applicant in a domestic violence matter from whom he tried to borrow money and the other counts involved civil debt). He was 'severely reprimanded' by the Presiding officer and in 2000 he was transferred to Cape Town to perform his duties 'under direct supervision.'

In the current matter he has been charged with two charges of misconduct. He was found guilty on one of the charges – the sexual harassment of a female accused appearing in a criminal matter before him.

4.1.1 DISCIPLINARY PROCEEDINGS

17 October 2011: the Presiding Officer, taking into account Mr Tyulu's previous disciplinary record, recommended that he should be removed from office. Mr Tyulu was given the opportunity to make written representations in respect of this recommendation.

10 November 2011: Written representations were received from Mr Tyulu's legal representative contending that alternative sanctions to removal should have been considered.

25 February 2012: the Executive Committee of the Commission supported the recommendation of the Presiding Officer that Mr Tyulu should be removed as his conduct rendered him unfit to hold the office of magistrate.

13 April 2012: on the basis of this recommendation the Minister reported on the suspension of Mr Tyulu from office with effect from 29 March 2012.

4.2 MS N NDAMASE, PRETORIA MAGISTRATES COURT, GAUTENG

- Additional Magistrate, Pretoria.¹⁴

REMOVAL FROM OFFICE ON THE BASIS OF MISCONDUCT

Ms Ndamase was charged with 42 counts of misconduct which ranged from contraventions of the Code of Conduct, negligence in carrying out duties, absenteeism and refusal to execute lawful orders. She was found guilty of 11 of the 42 charges:

- 8 of the guilty counts – concerned her refusal to execute lawful orders.¹⁵
- 3 of the guilty counts – concerned her failure to execute her official duties objectively, competently and with dignity, courtesy and self-control.¹⁶

4.2.1 DISCIPLINARY PROCEEDINGS

¹⁴ Permanently appointed as a Magistrate in 2000.

¹⁵ In terms of Regulation 25(j).

¹⁶ In terms of Regulation 25(c)



4 December 2008: A complaint was made to the Commission by the Chief Magistrate, Pretoria Mr D Nair who provided an oral briefing to the Ethics Committee. He alleged Ms Ndamase was insubordinate and neglected her duties.

27 February 2009: Ms Ndamase was requested in writing to show why the Commission should not advise the Minister of Justice to provisionally suspend her from office.

2 March 2009: Ms Ndamase responded indicating that the accusations against her were false.

29-30 July 2009: The Commission considered the documentation and decided reliable evidence existed for Ms Ndamase to be provisionally suspended.

16 September 2009: the Minister indicated that a decision had been taken to provisionally suspend Ms Ndamase and a report was submitted to Parliament. However, it was not confirmed by Parliament and had to be uplifted.

2009 - REPORT ON PROVISIONAL SUSPENSION OF MS NDAMASE ¹⁷

The Portfolio Committee was briefed by the Commission on 10 November 2009 on a Report tabled by the Minister which recommended that Ms Ndamase be provisionally suspended.

In the PC's Report (dated 11 November 2009) on the provisional suspension from office of Ms Ndamase the Committee noted the following:

'The Committee is of the view that the issues raised by this matter are complex, pointing to problems of transformation within the judicial system. It is not helpful to look solely at an individual's conduct while ignoring the broader context. Of particular concern to the Committee is the 'gatekeeping role' that language proficiency plays within the justice system, and the frustration that this engenders. This Committee is aware that there are no 'quickfix solutions' but believes much more needs to be done, and urgently, to address the problem.'

'The Committee also intended to engage more closely with the Magistrates Commission to better understand its role, as well as the systemic challenges facing our judicial system and possible solutions to these. It would be particularly interested in the Commission's views on whether it has a mediatory or conciliatory role in matters such as these. It urges the Commission to explore this possibility in this particular matter.'

Consequently, the PC recommended that 'the National Assembly **does not confirm** the provisional suspension of Magistrate NE Ndamase.'

19 November 2009: Ms Ndamase was charged with 42 counts of misconduct.

No information is provided on the disciplinary process as it unfolded between November 2009 and the judgement of the Presiding officer which was handed down on 17 April 2012.

¹⁷ In terms of section 13(3)(a) of the Act pending the outcome of an investigation into Ms Ndamase's fitness to hold office.



17 April 2012: In his 209 page judgment the Presiding Officer commented on - the battle for over a year to start with the actual hearing. 'I allowed postponements up to appoint where a final postponement was unavoidable.' He goes on to comment in respect of the hearing itself that 'it is a really sad day for the administration of justice and for the magistracy in particular, that two magistrates (in this case Ms Ndamase and Mr Nair), who are supposed to execute their duties according to the Code of conduct for Magistrates, objectively, competently and with dignity, courtesy and self-control, during the misconduct hearing lost their cool to such an extent that the staff working in the offices adjacent to the conference room in which the hearing took place, was disturbed by the high volume of conflict that took place in the conference centre.'

During the hearing Ms Ndamase expressed some concern at the composition of the Tribunal and the legal representative of the Commission who was leading evidence, the Presiding officer dismissed claims of any bias.

The Presiding Officer found Ms Ndamase guilty on the following 11 counts: She refused to attend a scheduled meeting at the office of the Chief Magistrate Mr Nair (count 3); raised her voice and threw a letter at an administration officer (count 4); refused to accept written correspondence from the Chief Magistrate (count 5); refused to report to the Magistrate in charge of the Criminal Section (count 6); wrote a letter to the Chief Magistrate that was insulting, contemptuous, sarcastic and disrespectful (count 7); failed to submit her Admission of Guilt statistics on the civil statistics form (count 10); refused to assume duty at the Criminal Section (count 11); submitted leave directly to the Chief Magistrate rather than to the relevant Senior Magistrate (count 17); refused to submit her sick leave forms to the Acting Senior magistrate (count 19); refused to sign acknowledgements of receipt for two letters from the Office of the Chief Magistrate; (count 23); made comments in court, yawned shamelessly and looked uninterested in proceedings (count 28).

2 May 2012: in respect of his sentence the Presiding Officer (PO) considered various aggravating factors. He found that she showed total disrespect to her head of office and for her supervisors. This had a negative impact on the management of the Magistrates office. In mitigation the PO accepted that 2008 had been a stressful year for Ms Ndamase – following the death of her daughter and various health problems. She had a long career as a magistrate and was a single parent. However, the PO was of the view that the aggravating factors outweighed the mitigating factors. The insubordination and disrespect shown by Ms Ndamase undermined the powers of the Judicial Head of the Office resulting in a complete breakdown in their working relationship. Ms Ndamase did not display any remorse and any other sanction such as – a caution or reprimand; an apology or counselling or attendance of a training programme, would serve no basis. Consequently, the PO recommended that she should be removed from office.

14 May 2012: Ms Ndamase lodged written representations with the Commission in respect of the findings against her, although no information is provided in the report about these representations.

17 May 2012: the Presiding Officer provided the Commission with additional reasons for his recommendations.

20-21 July 2012: the Commission recommended Ms Ndamase should be removed from office on the basis that her conduct rendered her unfit to hold the office of Magistrate.

30 July 2012: on the basis of this recommendation the Minister suspended Ms Ndamase from office.



4.3.1 DISCIPLINARY PROCEEDINGS

17 March 2010: the Ethics Committee considered a report concerning the continued ill-health of Ms Myles. An investigation was ordered and Ms Myles was requested to submit a medical report.

Medical reports were submitted to Pro-Active Health Solutions (a service provider that evaluates and advises of ill-health retirement and medical reports) who then provided the Department of Justice with a feedback report.

1 December 2011: the Ethics Committee considered the medical reports and noted that:

- Ms Myles mental state has been severely compromised due to a major depressive episode since April 2009.
- Her working environment and other social stressors have contributed to her depression.
- She is fit enough to continue work but Pro-Active Health Solutions recommended she should where possible be accommodated in respect of reduced workload, less stressful cases and employer support.
- It was recommended that she should continue with regular psychotherapy and consultations with a Psychiatrist.

However, the Commission also noted that Ms Myles had been absent from duty for long periods – from 1 November 2004 it was reported that she had been absent on sick leave with full-pay for 460 days and for 141 days on sick leave with half pay.¹⁹

Consequently, the Ethics Committee concluded that Ms Myles lacked the capacity to carry out her duties in an efficient manner due to continued ill-health.

Ms Myles was informed of this decision and given 10 working days to submit written comments

9 January 2012: the Commission received the written comments from Ms Myles which contended that her sick leave was not unreasonable as it was covered by medical certificates and that she did not request to be accommodated through a reduced workload as she has the capacity to deal with a normal workload. Moreover, the enquiry into her capacity to carry out her duties was not substantially and procedurally fair.

16 February 2012: the Ethics Commission maintained there had been a fair review of Ms Myles case, nonetheless, she was given the opportunity to submit written comments to the Chairperson of the Commission. The matter was referred to the Commission's Executive Committee.

The Executive Committee referred to the expert opinion provided by Pro-Active Health Solutions which did not support Ms Myles removal from office – recommending instead a reasonable accommodation. The Executive Committee wanted to determine whether such a reasonable accommodation would be possible given Ms Myles sick leave history.

¹⁹ During 2009 it was reported that Ms Myles was absent for 323 days on sick leave. It appears she was off work from March 2009 – February 2010. She returned to work in March 2010 for four days and then was booked off until June 2010. She returned to work at the beginning of July 2010. In September 2010 she contracted H1N1 and was booked off again. Her attendance at work during the 2011-2012 period is not clear.



Subsequently, Ms Myles Cluster Head was requested to provide an opinion on the quality of Ms Myles work, the impact of her sick leave on service delivery and the possibility of allocating 'less stressful work' to Ms Myles for a period while she was receiving psychotherapy as well as any other relevant information.

The Cluster Head consulted with the Acting Senior Magistrate, Upington.

The Cluster Head indicated:

- The heavy workload at Upington requires dedicated and hardworking Magistrates who can assist across all divisions.
- There is no less stressful court or environment which can accommodate Ms Myles.
- Ms Myles continued absence is compromising service delivery.
- He supports a recommendation that Ms Myles be removed from office due to continued ill-health.

The Acting Senior Magistrate, Upington also indicated:

- Ms Myles would be allocated to the 'channelisation court'.
- The number of outstanding cases on court rolls in Upington is high and because of this and Ms Myles history of absence the risk of cases not being finalised due to her absence cannot be afforded.
- Ms Myles history in criminal and civil matters shows she could not cope with the workload.
- It could not be argued that her work was of poor quality.
- Ms Myles continued absence has impacted on the morale of her colleagues because of the need to share her workload.
- As on 18 July 2012 Ms Myles had not returned to work and since 31 December 2011 had not submitted medical certificates.

20-21 July 2012: the Commission was of the view that Ms Myles should be removed from office on the grounds of ill health. Her continued absence and failure to submit medical certificates was noted and the Commission contended that the detrimental impact this has on service delivery and the administration of justice can no longer be justified.

30 July 2012: on the basis of the Commission's recommendation the Minister reported that Ms Myles had been suspended from office.

Comment

- The Commission Report noted that since 1 November 2004 Ms Myles was absent from office on sick leave with full pay for 460 days and 141 on sick leave with half pay. If reference is going to be made to problems with Ms Myles sick leave prior to the 2008-2010 period, which appears to be the period under investigation, should action not have been taken against her sooner?
- Were any reasonable accommodations made in line with the recommendations from Pro-Active Health Solutions?
- What has been Ms Myles attendance at work during the 2011-12 period?

5. WITHHOLDING OF REMUNERATION

5.1 MAGISTRATE MR M TYULU, CAPE TOWN



- Additional Magistrate, Cape Town.

WITHHOLDING OF REMUNERATION

In terms of Section 13 (4A) (b) and (c) of the Magistrates Act 90 of 1993 if the Commission determines that the remuneration of a magistrate shall be reduced or withheld a report regarding that determination and the reasons therefore must be tabled in Parliament by the Minister within seven days of such determination, if Parliament is in session, or, if Parliament is not in session, within seven days after the commencement of its next ensuing session. Parliament must as soon as 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.

25 February 2012: the Commission resolved to recommend the suspension of Mr Tyulu.

29 March 2012: Mr Tyulu was suspended from office.

Mr Tyulu was then invited to provide reasons why his remuneration should not be withheld. Mr Tyulu's legal representatives submitted the following reasons:

- Mr Tyulu has occupied the office of Magistrate for a number of years and is a family man with a number of expenses that have to be paid. His employment should continue pending the finalisation of his matter.
- An addendum is attached that sets out his current expenses – should his remuneration be withdrawn he will not be in a position to meet his obligations.
- It would be unfair and also unjustifiable against him and his family if his salary was stopped abruptly before the finalisation of his removal from office.
- Mr Tyulu plans to approach the High Court for relief if he is not accommodated.

Having considered his submission the Commission decided to withhold Mr Tyulu's remuneration on the basis that:

'there seems to be no reason why a magistrate, on suspension or provisional suspension for that matter, who is not fit to hold office, and is being removed from office for that reason, should be paid for the period during which he or she is suspended prior to his or her removal.'

General Comment

This comment does not relate to the reports to be presented by the Commission but rather to the matter of Magistrate PS Hole who was provisionally suspended in December 2011.²⁰

Perhaps it is not appropriate to draw Members attention to this article because Mr Hole's matter is not being considered at the meeting and in addition it is unclear whether a decision has been reached by the Northern Cape High Court in respect of Mr Hole's part-heard matters – however, it serves simply to alert Members to the following article in the City Press (dated 15 July 2012) which reported as follows:

²⁰ A report of the Portfolio Committee on the provisional suspension of Mr Hole (dated 22 November 2011)



Court feud bodes ill for sex victims²¹

Charl du Plessis

Suspended magistrate's cases may have to be reheard

Victims of brutal sexual offences – including a 69-year-old grandmother and an eight-year-old girl – could be forced to face their tormentors in court for a second time and relive their personal hells.

This is despite a National Prosecuting Authority (NPA) Christmas function held for some of the victims where they were given bravery certificates and assured they could move on with their lives.

The Northern Cape High Court will next month decide if 26 pending cases before suspended magistrate Pumelele Hole – including rape, attempted rape and sexual assault cases involving 17 children between the ages of three and 17 – should be set aside and tried again, from scratch.

If the order is granted, at least nine of these victims will have to relive details of their rapes in court testimony and face cross-examination by lawyers.

This state of affairs was caused by a bitter personal feud that goes back to September 2009 between Hole and the Kimberley regional court president Khandilizwe Nqadala.

Both laid complaints against one another at the Magistrates' Commission.

According to NPA records City Press has seen, the cases pending before Hole – who presided over sexual offence cases before being suspended in December 2011 – include:

An "extremely traumatised" 69-year-old woman who sustained serious and lasting head injuries when she was thrown into an opencast mining pit and raped;

The rape of a 64-year-old woman in "very poor health". The police officer first on the scene testified that she "could not walk after the attack and crawled to her house";

A man accused of raping two seven-year-olds, and sexually assaulting three others between the ages of six and nine;

The rape and assault of a 17-year-old boy who was "trying to be strong, but is shattered, ashamed and disgusted"; and

The rape of an eight-year-old who was groomed by the accused.

The pending court case to set aside the partly heard trials has caused officials from Legal Aid SA and the NPA to beg Northern Cape Judge President Frans Kgomo and the Magistrates' Commission for a special review of the matter.

In a memorandum dated June 1, officials asked that Hole's "suspension be uplifted and (he) only be

²¹<http://www.citypress.co.za/SouthAfrica/News/Court-feud-bodes-ill-for-sex-victims-20120714>



allowed to return to finalise his partly heard matters”.

The letter states that the lawyers believe the magistrate remains a “fit and proper person” until his disciplinary matter is finalised.

“It appears the suspension of Mr Hole was not based on judicial incompetence but rather on other issues,” the letter said.

Central to the dispute between Nqadala and Hole is the fact that their relationship deteriorated to such an extent that Hole subpoenaed Nqadala to explain himself in a criminal court trial.

Hole claimed Nqadala had written a note to Hole about a criminal trial before Hole in which he said an accused, “despite being the youngest of them all, is the gang leader”.

According to Hole’s charge sheet, which City Press has obtained, he displayed an abuse of power by, among others, asking Mr Nqadala if he agreed that he was a “disgrace to the profession”.

While Hole was suspended last December, his complaint against Nqadala remains unfinalised by the Magistrates Commission.

Nqadala asked the high court for Hole’s cases to be set aside, and refused a request to allow Hole to finish them.

Danie Schoeman, secretary of the Magistrates’ Commission, declined to comment on a matter before court, but said the commission was close to finalising the investigation into the complaint against Nqadala.

The department of justice did not respond to questions.

Sources:

Magistrate Act 90 of 1993

Magistrates Code of Conduct

Regulations for Judicial officers of Lower Courts