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11 September 2012

The Secretary

Select Committee on Security and Constitutional Development

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Dear Sir,

SUBMISSIONS REGARDING THE SALARIES' INCREASE FOR MAGISTRATES

We wish to take this opportunity to thank you for inviting us to address members of the Select Committee on Security and Constitutional Development. We decided to consolidate our submissions in writing so we are able to cover a number of aspects in our address to you in a short time. In our submissions we cover the three issues raised in the invitation letter and few other important relevant aspects.

JOASA is a non-profit voluntary organisation with membership comprising of about 80 % of all the magistrates of all ranks – Magistrates, Senior Magistrates, Regional Magistrates, Chief Magistrates and Regional Court Presidents. Submissions we make are mandated by these magistrates.

We need to make it clear at this stage that we do not intend making submissions to this Committee on the salaries of magistrates regarding the percentage increase. As JOASA we have made our submissions to the IRC and we believe it was the right forum to do so. It is our understanding that the Parliament is not called upon to make a determination of salaries, but to approve only once satisfied that the process and determination that followed was done appropriately. The Parliament can disapprove the salary recommendation and direct the IRC to make fresh submission after attending to aspects that it (the Parliament) may direct the IRC to attend to first. It is with this background that we address the Parliament on a question whether the Parliament should approve the salary recommendations for magistrates or not.

It is necessary to give this Committee some background leading to where we are currently because at the end we will be asking the Parliament not to approve the salary recommendations in their current format.

1. Historical Background.

According to a Government Gazette no 30478 published on 16 November of 2007, a Magistrate being the lowest paid judicial officer earned 46.9 % (R388 568 p/a) of the income of the Chief Justice (R827 744 p/a), being the highest paid judicial officer prior to 2007. A Regional Magistrate / Chief Magistrate earned about 59 % of the income of the Chief Justice for the same period. The IRC undertook a review which culminated in a report that saw salaries of judicial officers adjusted.

On paragraph 306 of the First Review Report the IRC concluded in its report that "*The remuneration of the judicial office bearers needs to reflect an internal equity that is clearly defined, and fairly represents the judicial processes from the Constitutional Court to the District Magistrates Courts. On this basis, there needs to be a consistent philosophy and application of remuneration practice within the Judiciary. Magistrates have historically been regarded as separate from Judges. This*

means the Judiciary is not seen as being inclusive... Discussion has been held in the past over linking the salaries of Magistrate to those of Judges in the High Court. No link has been implemented thus far. A uniform remuneration structure including benefits and conditions of service should be developed and implemented for the entire Judiciary. Pay lines therefore are to be developed based on the anchoring of the remuneration of the Chief Justice with a sliding scale moving down the judicial hierarchy through to the District Magistrates. This appears to be the most logical approach if the Judiciary is to be viewed as inclusive of the Magistrates. The gap between the remuneration of the lowest level judge and the highest level magistrate is too wide." "On various other sections the IRC further remarked that magistrates were poorly paid indicating a need to rectify this."

So as to achieve equality between the three arms of the government; the executive, the legislature and the judiciary, the salary of the Chief Justice was adjusted from R827 744 to R1 708 600. This move is commendable since it achieves what it was meant to. No such equal adjustment was extended to the magistrates. As a result, magistrates' salaries were reduced from the 46.9 % of the Chief Justice to a mere 30 %. Regional Magistrates / Chief Magistrates' salary also came down from 59 % of the Chief Justice to 39.9 %. Further to this, we have done a comparison of the gaps between the highest paid judicial officer and the lowest, from the countries whose constitution is similar to ours (South African) such as Canada, Australia and USA and found the gaps between the judicial officers in South Africa were extra ordinarily the widest. There is no explanation for this especially in a country that professes to be working towards attainment of a Single Judiciary. According to section 166 of Act 108 of 1996 (the Constitution of RSA), magistrates form part of the judiciary.

2. Role, Status, Duties and Functions of Magistrates.

According to section 8 (6) of Act 92 of 1997 (the Independent Commission for the Remuneration of Public Office Bearers Act); the IRC is compelled to look at the role, status, duties and functions of different categories of Public Office Bearers. Of importance and relevance of these provisions is the comparison of the magistrates' role, status, duties and functions currently compared to the time

prior to 2007. Unlike when the Magistrates' Court Act was first enacted in 1932, when magistrates were not required to have any qualification, all the magistrates countrywide have University qualifications currently, with the majority having a senior University degree. To qualify for appointment for the office of a Magistrate, a candidate must have an appropriate degree and at least 7 years post university experience. No other position of judicial officers has a similar prerequisite. Not even for the High Court appointment where the requirement is that a candidate must be "fit and proper".

Furthermore, the maximum penalty the magistrates could impose (jurisdiction) then used to be just a maximum of three months imprisonment. This has seen increase over the period to the extent that life imprisonment can now be imposed in the Lower Courts. The sentence of life imprisonment could in the past be imposed only by the High Courts. It is this House that changed the jurisdiction of the magistrates which finally resulted in the workload being shifted from the High Courts to the Regional Courts and from the Regional Courts to the District Courts.

According to the statistics provided by the Department of Justice over the past 5 years, more than 90 % of court cases are finalised in the Lower Courts with less than 10 % dealt with by the High Courts. This in essence means the man on the street knows justice as it is dispensed with in the Lower Courts. Recently and over the past few years, legislation passed in this House increased the workload of magistrates rather than reduce it. Over the recent years, legislation was passed extending civil jurisdiction to the Regional Courts; divorce matters are now dealt with in the Lower Courts as a result thereof. Other legislations such as the Child Justice Act, Children's Act, National Credit Act and others, require of the magistrates to do much more than what they were expected to do over the past 5 years or so. These have caused the court rolls in the Lower Courts to be overcrowded. These changes in the workload have unfortunately not been reflected in the salary recommendations by the IRC over the past 4 years.

3. Recommendations by the Magistrates' Commission (LCRC).

The IRC is obliged to consult with the Chief Justice in making the recommendations for the judicial officers. The Chief Justice mandated the Chairperson of the Magistrates' Commission Judge Legodi to convene a committee (the Lower Court Remuneration Committee) that would collate all the submissions regarding the salaries for the Lower Court judicial officers for purposes of consultation with the IRC. Recommendations by this committee were made during the year 2011 and also 2012. I hereby refer to Attachment A & B. The same were made available to the IRC through the Chief Justice and were signed by the Chairperson of the Magistrates' Commission in endorsing the contents thereof. On closer inspection of the documents, one realises that the document attempted to put the magistrates back to the position they were prior to 2007 in anchoring their salaries against that of the Chief Justice. The recommendations both for 2011 and 2012 were not implemented by the IRC.

4. Disparities between Public Prosecutors (Civil Servants) and Magistrates' Salaries.

One of the achievements of the Salary Review conducted by the IRC in 2007 was to restore the hierarchy in terms of seniority in the court room. Magistrates are mainly appointed from the ranks of public prosecutors in a rise within the career. Once appointed Magistrates, they are expected to do more than what Public Prosecutors do such as presiding in civil and family courts where Public Prosecutors play no role. Public Prosecutors deal exclusively with criminal work. Judicial officers have the final say in a court which is in line with the courts' judicial authority. The great salary increases that have been allocated to Civil Servants, over the past 4 years, coupled with the OSD implementation has resulted in public prosecutors earning more than magistrates, senior prosecutors earning more than Senior Magistrates and Chief Prosecutors earning more than Regional Magistrates / Chief Magistrates. This disparity can easily be illustrated through a table below:

Year	Magistrate	Senior Magistrate	Chief / Regional Magistrate	Deputy Director (PSA)	Director (PSA)	Public Prosecutor (NPA)	Senior Prosecutor (NPA)
2006	R361 459	R397 341	R454 813	R394 554		R372 915	R449 055
	100%	9.90%	25.80%	9.15%		3.16%	24.23%
2007	R388 568	R427 141	R488 923	R427 836	R540 429	R443 028	R486 423
	100%	9.90%	25.80%	10.10%	39.08%	14.01%	25.18%
2008	R568 986	R625 818	R758 574	R472 758	R666 123	R447 454	R537 498
	100%	9.98%	33.32%	-16.91%	17.07%	-21.35%	-5.53%
2009	R608 815	R669 625	R811 674	R528 333	R736 065	R492 483	R588 816
	100%	9.98%	33.32%	-13.21%	20.90%	-19.10%	-3.28%
2010	R639 256	R703 107	R852 258	R567 957	R780 228	R661 890	R852 546
	100%	9.98%	33.32%	-11.15%	22.05%	3.54%	33.36%
2011	R671 219	R738 262	R894 871			R706 899	R910 510
	100%	9.98%	33.32%			5.31%	35.65%

Sources¹

- ¹ Salary of prosecutor, Senior Prosecutor and Senior Advocate w.e.f 01/07/06 (GN R1124 dated 10/11/06)
- Inclusive remuneration package of Chief Prosecutor w.e.f 01/04/06 (GN R442 dated 12/05/06)
- Inclusive remuneration package of Deputy DPP w.e.f 01/01/06 (GN R442 dated 12/05/06)
- Salary of prosecutor, Senior Prosecutor and Senior Advocate w.e.f 01/07/07 (GN R886 dated 28/09/07 read with GN 1088 dated 07/10/08)
- Inclusive remuneration- package of Chief Prosecutor and Deputy DPP w.e.f 01/01/07 (GN R479 dated 08/06/07)
- Salary of prosecutor, Senior Prosecutor and Senior Advocate w.e.f 01/07/08 (GN R956 dated 05/09/08)
- Inclusive remuneration package of Chief Prosecutor and Deputy DPP w.e.f 01/01/08 (GN R173 dated 14/02/08)
- Salary of prosecutor, Senior Prosecutor and Senior Advocate w.e.f 01/07/09 (GN R666 dated 28/07/10)
- Inclusive remuneration package of Chief Prosecutor and Deputy DPP w.e.f 01/01/09 (GN R618 dated 16/07/10)
- Salary of prosecutor, Senior Prosecutor and Senior Advocate w.e.f 01/07/10 (GN R1151 dated 02/12/10)
- Inclusive remuneration package of Chief Prosecutor and Deputy DPP w.e.f 01/01/10 (GN R511 dated 08/06/10)
- Salary of prosecutor, Senior Prosecutor and Senior Advocate w.e. f 01/05/11 (GN R778 dated 20/09/11)
- Inclusive remuneration package of Chief Prosecutor and Deputy DPP w.e.f 01/01/11 (GN R346 dated 21/04/11)
- Salaries and motor vehicle allowance of the Judiciary w.e.f 01/04/06 (Proclamation 40/2006 dated 22/09/2006)
- Salaries and motor vehicle allowance of the Judiciary w.e.f 01/04/07 (Proclamation 42/2007 dated 27/11/2007)
- Total remuneration package of the Judiciary w.e.f 01/04/08 (Proclamation 48/2008 dated 27/10/2008)
- Total remuneration package of the Judiciary w.e.f 01/04/09 (Proclamation 75/2009 dated 19/11/2009)
- Total remuneration package of the Judiciary w.e.f 01/04/10 (Proclamation 71/2010)

A Deputy DPP and a Chief Magistrate / Regional Magistrate earned the same salary up to 1 December 1998. A Senior Prosecutor and a Senior Magistrate earned the same salary up to 2001. In the years that followed, the salary of a Deputy DPP / Chief Prosecutor went above that of a Chief / Regional Magistrate while that of a Senior Prosecutor went above that of a Senior Magistrate.

The IRC Review Report published in 2007 rectified this situation which resulted in most magistrates appointed post 2007 being drawn from the ranks of Senior Prosecutors and Senior Advocates. A Chief / Regional Magistrate earned a salary above that of a Deputy DPP / Chief Prosecutor for the years 2008 and 2009. In 2008, a Chief / Regional Magistrate earned 5.23% above the salary of a Deputy DPP / Chief Prosecutor. In 2009 a Chief / Regional Magistrate earned 1.89% above the salary of a Deputy DPP / Chief Prosecutor. In 2008, a Senior Magistrate earned 41.13% above the salary of a Senior Prosecutor / Senior State Advocate. In 2009, a Senior Magistrate earned 13.72% above the salary of a Senior Prosecutor / Senior State Advocate. In 2008, a Magistrate earned 21.35% above the salary of a Prosecutor / State Advocate. In 2009, a Magistrate earned 19.10% above the salary of a Prosecutor / State Advocate. Over these years (2008 & 2009) a Magistrate also earned a salary above that of a Senior Prosecutor / Senior State Advocate by 5.53% and 3.28% respectively.

With the introduction of OSD to all Public Servants which includes Public Prosecutors the comparative salary structure was taken back to pre IRC Review Report of 2007: In 2011 a Chief / Regional Magistrate earned a salary below that of a Deputy DPP / Chief Prosecutor by 12.62%. In 2011 a Senior Magistrate earned a salary below that of a Senior Prosecutor by 23.33%. In 2011 a Magistrate earned a salary below that of a Prosecutor by 5.31%.

When these disparities were brought to the attention of the IRC, the IRC undertook to review the

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- dated 26/11/2010)
 - Total remuneration package of the Judiciary w.e.f 01/04/11 (Proclamation 40/2011 dated 22/09/2011)

salaries of the magistrates in case their preliminary investigations confirm what we brought to their attention. Please find enclosed a letter from the IRC in this regard marked as Attachment C where the IRC reiterated that they still intended to do the said review. When our allegations were confirmed to them, they changed their position and decided not to go ahead with their undertaking. To this effect, please find enclosed another letter from the IRC marked as Attachment D.

5. The Impact of the Court Judgment: ARMSA v The President of RSA and Others.

The judgment between ARMSA and the President of RSA confirms our submission in point 2 above that the IRC failed consider all aspects it is bound to in terms of the legislation.

6. Non Pensionable Allowance for Magistrates.

Magistrate's basic salary which constitutes the pensionable salary still stands at 60% even though the Civil Servants had theirs increased to 70% on the instruction of the Director General of the Department of Public Service and Administration. In the past it was at 65 % for Magistrates and it was reduced to bring them in par with Civil Servants at the time. The SMS (Senior Management Service) members who are members of the GEPF as at 31 March 2012 are also given a once off choice to change the pre-April 2012 60%/63% basic salary to 70% in the SMS package. The process of having similar provisions for magistrates now proves to be frustrating since magistrates do not have a Director General to order this. We are of the view that the IRC should have made a recommendation to the effect that the non-pensionable allowance of the magistrates' income be increased from 60% to 70% which would not just be in line with Civil Servants, but also in line with the judges.

7. Pension Fund and Benefits

Although the IRC recommended long ago that magistrates be removed from the Government Employees Pension Fund, this has not been implemented. We elaborate on the issue as follows :

Section 165(2) of the Constitution states that the Courts are independent and subject only to the Constitution. The constitution therefore recognizes the independence of the Courts as an institution.

Section 165(4) of the Constitution places an obligation on organs of state, through legislative and other measures to assist and protect the Courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. Section 166 of the Constitution defines the judicial system and expressly includes the Magistrates Courts in the list that are vested with the authority conferred by and entitled to the protection in terms of Section 165.

FINANCIAL INDEPENDENCE v GEPP

The salaries and benefits of public servants are fixed after a process of bargaining between trade unions and employer representatives. Neither the Magistrates nor the Magistrate's Commission and/or the IRC is party to the bargaining process.

The Board of Trustees of the GEPP

The Board of Trustees has 16 members. Eight of these members represent the Government as the employer and eight represent GEPP members and pensioners.

Of the eight Trustees representing members and pensioners, six are chosen by the labour representatives on the Public Service Coordinating Bargaining Council. The other two are a pensioner member and a uniformed service member, both of whom are elected. The Lower Court Judiciary (Magistrate's) has no representatives on the Board of Trustees

The Minister of Finance inaugurated the current Board on 22 September 2009.

Through their representatives on the Board, active members and pensioners have a direct say in its decisions on pension increases, investments and other important matters. Magistrates on the other hand are left in the cold with no say in respect of matters concerning themselves and/or their financial independence.

For Magistrates to be individually and objectively independent their salaries and benefits which include pension benefits must not only be secured by law, but should not be subjected to undue interference or interferences outside the law or by unilateral decision making processes. Yet this seems to be happening by linking Magistrates pension benefits to those of public servants and/or locking Magistrate's pensions in the GEPP. This is also contrary to the provisions of the Constitution which provide that Magistrates must be independent.

The above decision to lock all Magistrates in the GEPP and/or by forcing Magistrates to remain members of the GEPP is unconstitutional and in direct conflict with the provisions of section 165 (2) and 165(4) of the Constitution.

8. Tools of Trade.

In its Second Review Report for 2008, published on the 17th April 2008 (Government Gazette No. 30982), the IRC recommended at paragraph 292 that the non-provision of laptop computers, printers and access to electronic reference material for the magistrates need to be addressed by the department of Justice and Constitutional Development urgently and immediately. This was after the IRC had branded these as the “most basic and core tools of trade required to perform [the] duties effectively.” This was after the IRC had expressed concerns that “lack of the same has a potential of breaking down the efficiency of and undermining justice at the coalface.” Four years have gone by without the provision of the same to magistrates. Magistrates are forced to either buy laptops at own expense or work without these, making it almost impractical to work especially in preparing judgments after hours which often require these “basic tools of trade.”

9. Medical Aid and other Benefits.

Unlike other members of the judiciary (judges) and MPs, magistrates are not members of Parmed and do not even have equal subsidy on medical aid. Sadly, they also cannot be members of GEMS for reasons that they are not Civil Servants. Magistrates are therefore left at the mercy of expensive medical aids that usually cannot last for a year with funds still available. If magistrates were to be included in Parmed as judicial officers, with equal benefits, this could help ensure the judicial independence of the magistrates which hangs a lot on financial and health security.

Magistrates are not judges of the High Court, and we do not claim that they are. However, looking at their role, function and status, their work is to judge and they judge over 90% of the South African cases. Magistrates cannot be equated with their seniors in the High Court in terms of earnings. Seniority demands that there should be different levels of earnings. It is however our view that judicial officers should be entitled to similar benefits which would not be identical since the ranks vary. There is no justification in other words for other judicial officers to have pension for life while others do not have. Extending pension for life does not mean and should not be interpreted to mean that magistrates would be earning the same pension as judges. For the salaries are not even the same and we do not want salaries to be the same either.

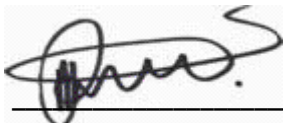
But as judicial officers whose appointment is equally provided for in the Constitution of the Republic of South Africa, their independence was seen necessary when they were moved out of Civil Service to become Public Office Bearers. This signified a need for the judiciary as a whole to be independent and that independence is necessary even in the financial security in the judiciary as a whole. As of now, Magistrates are excluded from many benefits that are enjoyed by High Court Judges. Also noteworthy is that the IRC recommendations for Magistrates are an all-inclusive package incorporating all benefits, yet the recommendations for Judges is not inclusive of the substantial benefits.

Failure to implement some of the recommendations referred to here, or to make such recommendations is usually attributed to financial constraints. We wish to bring it to your attention that each time we hear of allocation of tools of trade by the Department of Education and Training to educators, it is because the 300 000 legion of our teachers have been recognised as doing something of great value to our children. What about attaching the same value to magistrates who dispense justice to the public? The total number of magistrates of all ranks in the country is less than 2000. Lack of such recommendations or implementation of the same (e.g. tools of trade) hinders the speedy and effective dispensing of justice.

It is for these reasons that we submit that the IRC did not take into consideration all the aspects it is obliged by law to. We therefore request the Parliament not to approve the recommendations made by the IRC, but to refer them back to the IRC with instructions on how to deal with submission from the Magistrates

Commission's LCRC and other submissions from other stakeholders before re-submitting them back before the Parliament.

Kind regards



VINGENT RATSHIBVUMO

PRESIDENT - JOASA