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**LEGAL OPINION**

[Confidential]

**TO : Mr T MH Mofokeng MP**

**Chairperson: Select Committee on Security and  
Constitutional Development**

**COPY : Secretary to Parliament**

**DATE : 13 September 2012**

**SUBJECT : IMPLICATIONS OF THE JUDGMENT ON THE  
DETERMINATION OF THE JUDGES AND  
MAGISTRATES' SALARIES FOR 2012/2013**

**LEGAL ADVISER : P Ngema**

**REFERENCE NUMBER : 234 / 2012**



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**MEMORANDUM**  
**[Confidential]**

**TO** : Mr TMH Mofokeng MP  
Chairperson: Select Committee on Security and  
Constitutional Development

**COPY TO** : Secretary to Parliament

**FROM** : Constitutional and Legal Services Office

**LEGAL ADVISER** : P Ngema

**DATE** : 13 September 2012

**REFERENCE** : 234 / 2012

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**SUBJECT** : LEGAL OPINION ON THE IMPACT OF THE COURT  
JUDGMENT IN THE MATTER OF ASSOCIATION OF  
REGIONAL MAGISTRATES OF SA AGAINST THE PRESIDENT

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**Introduction**

1. Our Office was requested to advise the Select Committee on Security and Constitutional Development (the Committee) on the implications of the judgment of Judge E Bertelsmann relating to the validity of the President's determination of public office bearers for 2010.
2. On 3 September 2012 the North Gauteng, Pretoria High Court handed down a judgment in the case *Association of Regional Magistrates of Southern Africa (Applicant) v President of the Republic of South Africa and Others (20210/11) [2012] ZAGPPHC 186* (the judgment). The judgment has not been appealed, however we have been advised that the Department of Justice and Constitutional Development reported to the Committee that the judgment would be appealed. Therefore, until there is an appeal against the judgment, the judgment remains valid and enforceable.
3. The Court made orders, amongst others, to set aside the decision of the President to determine the increase in the remuneration paid to Regional Magistrates and Regional Court Presidents by 5% with effect from 1 April 2010 and remitted the determination of the remuneration of Regional Magistrates and Regional Court Presidents for 2010.



4. There is no order made against the Speaker and the Chairperson, in their respective capacities.
5. The Committee received two submissions on the published recommendations of the Independent Commission for Remuneration of Public Office-Bearers (the Commission), in line with section 8(5) of the Independent Commission for the Remuneration of Public Office-Bearers Act, 1997 (Act No. 92 of 1997). The Announcements, Tablings and Committee Reports Paper (ATC) of 28 August 2012 through the Speaker and Chairperson also referred to the Portfolio Committee on Justice and Constitutional Development and the Committee the draft notice and determination by the President of the salaries, allowances and benefits for the Constitutional Court Judges, Judges and Magistrates for 2012/ 2013 for approval by Parliament.
6. There are two submissions before the Committee relating to the recommendations for 2012/2013 public office bearers' remuneration increases by the Commission. The first submission is from the Judicial Officers Association of South Africa (JOASA) and the other from an individual magistrate Mrs Annalene Larsen. JOASA is an association for magistrates. The submission of JOASA is broadly discussing previous recommendations that the Commission made to the Department of Justice and Constitutional Development which have not been given effect or implemented. The submission also notes that the determination of the salaries of magistrates for 2012 has been referred to the Committee. JOASA then provides general aspect in relation to the determination and factors to be considered in order to make an appropriate determination for magistrates' salary increases in 2012/2013.
7. The second submission is from Mrs Annalene Larsen who notes the referral of the draft notice and the schedule recommending the rate at which salaries, allowances and benefits payable to magistrates for recommendation to the President for the final determination of 2012/2013. Mrs Larsen's submission also records some historical events that have taken place in relation to magistrates and their schemes for remuneration. She requests the Committee to give serious considerations prior to approving the draft notice and the report on recommendations by the Commission.



8. The Committee seeks legal advice on whether its processes to approve or disapprove the annual determination for 2012/2013 on the remuneration of judges and magistrates, will be affected by the judgment.
9. We are required to outline the implications of the judgment, if any, on the proceedings of the Committee whilst dealing with the notice and determination by the President on the 2012/2013 remuneration for judges and magistrates.

### **Discussion of the law and judgment**

#### **(a) The judicial system (judges and magistrates)**

10. In terms of section 166 of the Constitution, the judicial system consists of the Constitutional Court, Supreme Court of Appeal, High Courts and Magistrates Courts. According to Chapter 8 of the Constitution, the judicial authority is vested in the courts. The judges of High Courts, Supreme Court of Appeal, Constitutional Courts and magistrates for Magistrates Courts are collectively referred to as the judicial officers or the judicial authority.
11. According to section 219(5) of the Constitution, national legislation must establish frameworks for determining salaries, allowances and benefits of judges. The Magistrates Act, 1993 (Act No. 90 of 1993) and Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001) is the national legislation envisaged in section 219(5) in relation to judges and magistrates read together with the Independent Commission for the Remuneration of Public Office-Bearers Act, 1997 (Act No.92 of 1997).

### **The three stage process leading to the final determination for the remuneration of judges and magistrates**

#### **(b) Stage1: Independent Commission for the Remuneration of Public Office-Bearers processes**

12. According to section 8 of the Independent Commission for the Remuneration of Public Office-Bearers, the Commission is obliged to consult with the public office bearers and



obtain information it deems fit from the Secretary to Parliament, secretary to any provincial legislature, secretary to the National House of Traditional Leaders and secretary to provincial house of traditional leaders, the chief executive officer of any municipality, the Chief Justice or any other functionary for the performance of its functions in terms of section 219 of the Constitution or any other law or conduct necessary investigations.

13. When making the recommendations concerning the salaries, allowances and benefits of any office-bearer the Commission is obliged to take the following factors into account:

- (i) The role, status, duties, functions and responsibilities of the office-bearers concerned;
- (ii) The affordability of different levels of remuneration, particularly in respect of organs of state, and in society generally;
- (iii) Inflationary increases;
- (iv) The available resources of the state; and
- (v) Any other factor which, in the opinion of the Commission, is relevant.

14. In terms of section 9 of the Independent Commission for the Remuneration of Public Office-Bearers Act, the President can request the Commission to investigate and consider matters relating to salaries, allowances and benefits relating to public office bearers.

15. In terms of section 8(4) and (5) of the Independent Commission for the Remuneration of Public Office-Bearers Act, the Commission is also empowered and required to publish in the Gazette its recommendations concerning the salary, allowances and benefits of any public office-bearer and such recommendations must be submitted to Parliament before publication.

16. Other than for Parliament to receive the notice on recommendations of the Commission prior to publication there is no specific role required from Parliament in terms of section 8 of the Independent Commission for the Remuneration of Public Office-Bearers Act.



17. Reading the relevant provisions of the Magistrates Act, the Judges' Remuneration and Conditions of Employment Act and that of the Independent Commission for the Remuneration of Public Office-Bearers Act together with the statement of the court at paragraphs 34 and 40 of the judgment. The Commission was created, amongst others, with the intention to promote and maintain the independence of the judiciary when it comes to engaging on remuneration matters of public office bearers as envisaged in section 219(5) of the Constitution. The Court confirmed this in the following words:

Para 34 of judgment:

...in particular judges and magistrates cannot enter into a bargaining process with the executive in respect of their salaries without compromising their independence. It is for this reason that the second respondent has been created, a commission that consults with all interested parties, considers all relevant information and independently assesses the factors and considerations that should be taken into account in determining the public office bearers' remuneration.

**(c) Stage 2: Process before the President prior to final determination**

18. Section 12 of the Magistrates Act, deals with remuneration for magistrates whilst section 2 of the Judges' Remuneration and Conditions of Employment Act deals with remuneration of Constitutional Court judges and judges. In terms of section 12(1)(a) of the Magistrates Act and section 2(1)(a) of the Judges' Remuneration and Conditions of Employment Act magistrates and judges respectively are entitled to such salaries, allowances or benefits determined by the President by notice in the Gazette, after taking into consideration the recommendations of the "Commission". Such determination must be approved by a resolution of Parliament.

19. The manner in which the law is crafted, President need not necessarily engage in remuneration discussions directly with the judicial officers. The President is obliged to consult and take recommendations from the Commission, who must have, in terms of section 12(1)(c) consulted with the Minister of Justice and Constitutional Development and the Cabinet member responsible for finance and the Chief Justice prior to making the recommendations.



20. There is no direct engagement required from the President with any of the public office-bearers. At para 40 of the judgment the Court found it appropriate to comment on this process and said:

The next submission is based upon the President's alleged failure to afford the applicant or its members an opportunity to make representations to him regarding the decision not to accept the applicant's proposed salary increase. This failure, it is submitted, resulted in materially adverse consequences for the applicant's members as they were denied due participation in the deliberative process. As has been set out above, the procedure decreed by section 12 of the Magistrates' Act read with relevant provisions of the Independent Commission for the Remuneration of Public Office Bearers Act 92 Of 1997, is specifically designed to ensure that the judiciary of the High Court and judicial officers in the Regional Courts do not have to engage in direct salary negotiations with the executive, which might affect their independence.

(Underlined phrases is our emphasis which is relevant to the current scenario before the Committee)

#### **(d) Stage 3: Processes before Parliament**

21. Section 12(3) of the Magistrates Act and section 2(4) of the Judges' Remuneration and Conditions of Employment Act which mirror one another requires that the notice by the President in this regard must be submitted to Parliament for approval. Sections 12(3) of the Magistrates Act and 2(4) of the Judges' Remuneration and Conditions of Employment Act grants Parliament a veto power since Parliament may reject or approve the determination of the President and it strengthens the oversight power over the executive.

22. From all documents received from the Committee it is apparent that the process before the Committee and which we are asked to provide legal advice on is the process that is envisaged in terms of section 8(5) of the Independent Commission for the Remuneration of Public Office-Bearers Act and sections 12(3) of the Magistrates Act and 2(4) of the Judges' Remuneration and Conditions of Employment Act. In our view, the processes of section 8(5) of the Independent Commission for the Remuneration of Public Office-Bearers Act cannot run concurrently with that of 12(3)



of the Magistrates Act and 2(4) of the Judges' Remuneration and Conditions of Employment Act.

23. Section 8(5) of the Independent Commission for the Remuneration of Public Office-Bearers Act is not articulated in a similar fashion as section 12(3) of the Magistrates Act or 2(4) of the Judges' Remuneration and Conditions of Employment Act. With regard to section 8(5) of the Independent Commission for the Remuneration of Public Office-Bearers Act, Parliament need just receive the recommendations prior publication, there is no veto power conferred to Parliament equivalent to that in section 12(3) of the Magistrates Act or 2(4) of the Judges' Remuneration and Conditions of Employment Act. Therefore, it is our view that a referral to the Committees of Parliament for a matter tabled in terms of section 8(5) is for information and engagement purposes in preparation for its own ideas and consideration once the matter is tabled for purposes of approving or disapproving the President's determination in terms of section 12(3) of the Magistrates Act or 2(4) of the Judges' Remuneration and Conditions of Employment Act.

**(e) The judgment**

24. In paragraph 43 of the judgment, the Court found issue with the complaint that the Commission failed to take proper account of the position of the applicant's members when preparing the 2010 recommendation on the basis of 'one size fits all'. The Court took a stern stand on the argument of the applicant that since the Commission failed to take cognisance of the different circumstances of the different categories of public office bearers in respect of their roles, status, duties, functions and responsibilities it followed as reasonable conclusion that the President also failed and so the applicant members' complaint was justified. The reasoning of the Court centered on the President's reliance on the flawed recommendation of the Commission since the Commission failed to consider the factors outlined in section 8(6) of the Independent Commission for the Remuneration of Public Office-Bearers Act and led the Court to conclude that the President's determination was unlawful and invalid.

25. The invalidity was due to President's failure to comply with the statutory requirement to consider the public office bearers' particular role, status, function, duties and responsibilities prior to determining an appropriate salary increase appropriate for





each category of public office bearers through the Commission or by the President requesting the Commission to investigate.

26. The Court thus concluded that for the President to take the recommendation of the Commission which was irrational rendered the President's determination to fail the test of legality. Breach of the principle of legality was achieved when President failed through the failure of the Commission to comply with the statutory requirements to consider the public office-bearers' particular role, status, duties and responsibilities prior to the appropriate determination of salary increases. The principle of legality requires every exercise of public power to be authorised by the Constitution or law and be reasonable within the circumstances of each case<sup>1</sup>. Based on the principle of legality, the determination by the President was found to be unlawful and irrational.

27. However the Court did not set aside the entire 2010/2011 determination for all public office bearers' remuneration. Only the portion relating to regional court magistrates and regional court presidents is set aside and remitted to the President.

**(f) Conclusion on whether the judgment impacts on the Committee proceedings**

28. In relation to the processes of Parliament in terms of section 12(3) of the Magistrates Act, 2(4) of the Judges' Remuneration and Conditions of Employment Act or 8(5) of the Independent Commission for the Remuneration of Public Office-Bearers Act, the judgment does impact on the functioning of Parliament and how it eventually handles this matter.

29. Firstly the Court confirms the separation of powers principle and the independence of each category of the public office-bearers. The Commission was created with the rational to ensure the independence of the executive, judiciary and legislatures when it comes to remuneration or related matters as envisaged in section 219 of the Constitution.

30. Parliament may not directly engage on the consultation processes required for purposes of the determination of salary increases and remuneration of public office-

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<sup>1</sup> Pharmaceutical Manufactures of SA: In Re Ex Parte President of the RSA 2000 (2) SA 674 at para 50.



bearers. However Parliament is constitutionally obliged to monitor and maintain oversight of the exercise of national executive authority<sup>2</sup>. In this regard, Parliament may call the President to account on whether he has complied with all the legal prescripts prior to making the final determination on the remuneration of public office bearers and the judgment alludes to that oversight process by inferring that Parliament rectifies the determination of the President when it approves it.

31. We are of the view that the judgment provides appropriate guidelines to Parliament and its Committees on how to deal with the recommendations and determination for the remuneration of all public office bearers.

A handwritten signature in black ink, appearing to be 'P Ngema', written over a horizontal line.

**Ms P Ngema**

**Parliamentary Legal Adviser**

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<sup>2</sup> See section 55(2) and 69 of the Constitution.