



**the doj & cd**

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Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

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Date: 19 November 2012

The Secretary  
The Magistrates Commission  
P O Box 9096  
PRETORIA  
0001

Attention: Mr A D Schoeman

**REQUEST FOR LEGAL OPINION: APPLICATION OF THE PROVISIONS OF  
REGULATION 29 OF THE REGULATIONS FOR JUDICIAL OFFICERS IN  
THE LOWER COURTS, 1993: REMOVAL FROM OFFICE ON ACCOUNT OF  
CONTINUED ILL-HEALTH: MS L MYLES, ADDITIONAL MAGISTRATE,  
UPINGTON: YOUR 6/5/1 DATED 5 OCTOBER 2012.**

**Background**

1. The Magistrates Commission, hereinafter referred to as "the Commission", has requested our legal opinion on the removal from office of Ms. Myles, additional magistrate, Upington, in terms of section 13(4)(ii) of the Magistrates Act, 1993 (Act No. 90 of 1993) (hereinafter referred to as the "Act") on account of continued ill-health.
2. After conducting the relevant investigation and taking into account several factors, the Ethics Committee, a sub-committee of the Commission established in terms of section 6 of the Act, recommended to the Commission that Ms. Myles be removed from office due to continued ill health.

3. The Commission has subsequently recommended to the Minister of Justice and Constitutional Development, hereinafter referred to as "the "Minister") that Ms. Myles be removed from office. Section 13(4) of the Act provides that, if the Commission recommends that a magistrate be removed from office, *inter alia*, on the account of ill-health, the Minister must suspend that magistrate from office, or confirm the suspension if such magistrate is at that stage provisionally suspended in terms of the Act. The Minister must also table a report on the removal before Parliament whereupon Parliament must, as soon as it is reasonably possible, pass a resolution as to whether or not the office of the magistrate must be restored, or confirm the suspension.

4. On 21 August 2012 the Minister tabled the report before the Portfolio Committee on Justice and Constitutional Development, whereafter the Portfolio Committee indicated that it has a problem with the interpretation of Regulation 29 of the Regulations for Judicial Officers in the Lower Courts, 1994, promulgated in Government Notice R .361 of 1994, hereinafter referred to as "the Regulations". In addition to the issue of interpretation of regulation 29, the Portfolio Committee indicated that there was no medical report "from an expert stating that Ms. Myles was not fit to work". The Portfolio Committee thereafter resolved that a legal opinion be obtained from our office before it proceeds any further with the matter.

#### **Legal questions**

5. In view of the above, the Commission requests our advice on the following legal questions:

5.1 Whether the Commission correctly applied the administrative procedure provided for in Regulation 29 of the Regulations.

5.2 Whether the opinion of the Commission that Ms. Myles does not have the capacity to carry out her duties of office in an efficient manner due to continued ill-health was justified.

5.3 . Whether it was proper for the Commission to recommend to the Minister that Ms. Myles be removed from office on account of continued ill-health, despite the medical opinions to the contrary, but in view of her continuous absenteeism and with due regard to the background and peculiar circumstances of the matter.

### **Deliberation**

#### ***Ad question 5.1***

6.1 The Commission made the recommendation that Ms. Myles be **removed from office** as magistrate, on the grounds of **continued ill-health**. It appears from the submission presented to us by the Commission that allegations of continued ill-health of Ms Myles and her ability to continue in her position as a magistrate surfaced due to her continued absence from work and the fact that she did indicate that she had been experiencing continued health issues. An investigation, conducted by the Ethics Committee of the Commission, thereafter followed.

6.2 Section 13(2) of the Act provides as follows in respect of the removal from office of a magistrate:

“(2) A magistrate shall not be suspended or removed from office except in accordance with the provisions of subsections (1), (3), (4) and (5).”

6.3 Section 13(4) of the Act reads as follows:

“(4) (a) 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,

the Minister must suspend that magistrate from office or, if the magistrate is at that stage provisionally suspended in terms of subsection (1)(a), confirm the suspension.

(b) A report in which the suspension in terms of paragraph (a) of a magistrate and the reason therefor are made known, must be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

(c) Parliament must, as soon as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of a magistrate so suspended is recommended.

(d) After a resolution has been passed by Parliament as contemplated in paragraph (c), the Minister shall restore the magistrate concerned to his or her office or remove him or her from office, as the case may be."

6.4 In addition to the provisions of section 13(4) of the Act which deals with the removal of a magistrate on the grounds of continued ill-health, regulation 29 reads as follows:

"29. (1) The Commission may order that an **investigation** be held regarding the removal of a magistrate from office on account of continued ill-health.

(2) The Commission shall before the commencement of a health investigation inform the magistrate of that investigation.

(3) The magistrate in respect of whom a health investigation is conducted shall without delay after receipt of the notice of the investigation

submit a medical report from a medical practitioner of his or her own choice to the Commission.

(4) In addition to subregulation (3), the Commission may order that a magistrate subject himself or herself to a medical examination by a medical practitioner designated by the Commission, whereafter that medical practitioner shall submit a medical report to the Commission.

(5) The costs of the medical examinations contemplated in subregulations (3) and (4) shall be paid by the State.

(6) (a) If the Commission, after considering a medical report in terms of this regulation, together with any relevant information, is of the opinion that the magistrate concerned does not have the capacity to carry out his or her duties of office in an efficient manner due to continued ill-health, the Commission shall—

- (i) furnish the magistrate concerned with a written exposition, of its opinion and the reasons therefor; and
- (ii) forward without delay to the magistrate concerned, the medical reports and any other relevant documents or certified copies thereof which are not in the possession of the magistrate concerned.

(b) The magistrate concerned may, within 10 working days after the date on which the opinion of the Commission has come to his or her notice, submit to the chairperson of the Commission written comment regarding the opinion.

(7) (a) The Commission shall consider the medical reports, together with the comments of the magistrate contemplated in subregulation (6)(b), if any.

(b) The Commission shall, if it is of the opinion that the magistrate concerned should be removed from office due to continued ill-health,

recommend to Parliament that the magistrate concerned be removed from office as contemplated in section 13 of the Act.”

6.5 The facts applicable in the present matter with regard to the procedure indicated in regulation 29 of the Regulations are as follows:

6.5.1 The Commission ordered on 17 March 2010 that an investigation be conducted regarding the removal from office of Ms. Myles, on the grounds of continued ill-health.

6.5.2 Ms. Myles was informed of the investigation, by correspondence from the Commission. This correspondence was dated 17 March 2010. The correspondence requested her to comply with the requirements of regulation 29(3) of the Regulations and submit a medical report from a registered medical practitioner of her choice. We are informed that Ms. Myles complied in this regard and submitted medical reports to the Commission.

6.5.3 According to regulation 29(4), the Commission **may, in addition** to obtaining the medical report contemplated in subregulation (3), order a magistrate to subject himself or herself to a medical examination by a medical practitioner designated by the Commission, whereafter that medical practitioner shall submit a medical report to the Commission. The Commission then submitted her medical reports to Pro-Active Health Solutions (PHS), the service provider appointed by government to advise it on ill-health retirement and medical reports, for an expert opinion on whether Ms. Myles has the capacity to carry out her duties of office due to continued ill-health.

6.5.4 In terms of regulation 29(6)(a), the Commission, in particular the Ethics Committee, was tasked with considering the medical reports and all other relevant information to determine whether Ms. Myles had the capacity to carry out her duties of office in an efficient manner due to continued ill-health. After due consideration of all the reports the Commission made the following recommendations:

“That Ms. Myles be informed that the Commission is, after considering the medical reports and other relevant information, of the opinion that she does not have the capacity to carry out her duties of office in an efficient manner due to continued ill-health;

that Ms. Myles be furnished with a written exposition of the Commission’s opinion and reasons therefor;

that the medical reports and other documents in possession of the Commission be forwarded to Ms. Myles; and

that Ms. Myles be provided with an opportunity to forward, within ten working days after the date on which the opinion of the Commission has come to her notice, to the Chairperson of the Commission written comments regarding the Commission’s opinion in accordance with regulation 29(6) of the Regulations.”.

6.5.5 In correspondence sent to Ms. Myles, dated 5 December 2011, the Commission stated the following:

“On 1 December 2011, the Ethics Committee of the Magistrates Commission considered the medical reports submitted in terms of regulation 29 of the Regulations for Judicial Officers in the lower Courts, 1994 together with other relevant information.

It was noted that, although you are suffering from genuine medical conditions, these medical conditions are not severe to render you totally and permanently disabled to discontinue working. However your

attendance record shows that you have been absent from duty for long periods. After considering the medical reports, together with other relevant information, the Ethics Committee is of the opinion that you do not have the capacity to carry out your duties of office in an efficient manner due to continued ill-health.”

6.5.6 On 9 January 2012, the commission received written comments from Ms Myles regarding the opinion of the Commission.

6.5.7 The comments of Ms. Myles were considered and on 16 February 2012, the Commission issued a report with the following recommendation:

“It is recommended to Parliament that Magistrate L Myles be removed from office as contemplated in section 13 of the Magistrates Act No. 90 of 1993”.

6.6 Based on the above set of facts submitted to us, it would appear that the Commission correctly applied the **administrative procedure** provided for in regulation 29 of the Regulations.

#### ***Ad question 5.2***

6.7 In terms of regulation 29(6)(a), of the Regulations, **the Commission** must formulate an opinion on whether Ms Myles has the capacity or not to carry out her duties of office due to continued ill-health, after having regard to the findings contained in the medical reports and “other relevant information”.

6.8 The two important issues here are the medical reports and the constant absenteeism.

6.9 We are informed that the Portfolio Committee took issue with the fact that no medical report by an expert was submitted which stated that Ms Myles was not fit to



work. It appears from the submission that the medical evidence submitted by Ms Myles in respect of her health was inconclusive, and for that reason she was referred to PHS. The latter found that her working environment has contributed significantly to her condition of depression but nevertheless recommended that she continues her work, "however with some accommodation where possible in terms of possibly reduced work load and less stressful cases". In our view, logic dictates that the recommendation that Ms Myles continues her work is therefore subject thereto that it is possible to reduce her work load and assign less stressful cases to her. If the latter is not possible it follows that she is unable to continue the work and is not fit to do her work as a magistrate.

6.10 We are informed that there was a general consensus among the members of the Executive Committee of the Commission that the expert opinion of the PHS does not support Ms Myles' removal from office. It was therefore resolved that the relevant Cluster Head must report to the Commission regarding the nature of the judicial work which she is required to perform when she is at the office, his opinion regarding the quality of her judicial work when she has been at the office, the impact that her long periods of sick leave has had on service delivery at the office and within the sub-cluster and any other information he could supply to the Commission to enable it to make an informed decision. He was also requested to indicate whether it was possible to, for a period, allocate judicial work to Ms Myles which would be less stressful, while she continues with regular psychotherapy from a clinical psychologist and regular consultations with a psychiatrist. The Cluster Head reported back that the judicial officers at Upington are struggling to cope with their normal work load and that in fact a further post of magistrate is required there. He further stated that the heavy work load at Upington court requires dedicated, versatile and hardworking magistrates who are able to assist across all divisions on a daily basis and that there is no less stressful court or environment available there.

6.11 Prior to 2010 Ms Myles' absence from office on sick leave was for brief periods but occurred frequently. However, during 2010 and 2011 she was absent on sick leave with full pay for 294 days and on half pay for 49 days.

6.12 It would appear that the Commission may have been justified to apply for the removal from office of Ms Myles on the grounds of ill-health. Her absenteeism is directly connected to her ill-health and serves as evidence thereof. If the nature of her health is such that she is only fit for work under less strenuous circumstances, which circumstances are not available, the indications are that the opinion formed by the Commission, namely that Ms. Myles does not have the capacity to carry out her duties of office in an efficient manner due to continued ill-health, was justified.

***Ad question 5.3***

6.13 According to section 13(2) and (4) of the Act, a Magistrate may only be removed from office on either one of three grounds: misconduct; continued ill-health or incapacity to carry out the duties of his or her office efficiently.

6.14 The Commission has proceeded to remove Ms. Myles from office on the ground of continued ill-health. Although it appears (see paragraph 6.5.5 above) that the Commission arrived at its recommendation to remove Ms. Myles from office based on her continued absenteeism, the fact is that her absenteeism is, as indicated above, a direct result of her ill-health. Therefore, the issues concerning Ms. Myles continued absenteeism cannot be disregarded, neither can those issues be viewed in isolation from the issues that deal with her ill-health when determining whether she is fit to continue to work or be removed from office.

**Conclusion**

6.15 What is clear from the above is that the Commission appears to have followed the correct administrative procedure in terms of regulation 29 of the Regulations for the removal from office of Ms. Myles and in forming such opinion, the Commission was entitled to have regard to the issues of Ms. Myles continued absenteeism.

6.16 The Commission seems to have referred to cases on labour law to arrive at its

conclusion. These cases involve employer-employee relations, which are not necessarily directly applicable when dealing with the relationship between judicial officers and the Commission.

(See **Hanna v Government of the Republic of Namibia** 2000(4) SA 940 (NMLC) and **Van Rooyen and Others v The State and Others** 2002 (5) SA 246 (CC)).

6.17 However, the use of such case law appears not to have undermined the applied procedure and the subsequent recommendation by the Commission that Ms Myles be removed from office. It is advisable for future purposes that the Commission exercise caution in matters that involve judicial officers in citing labour law jurisprudence to arrive at its recommendations.

6.18 We therefore conclude that although the medical reports advise that Ms Myles continue her employment in the Department in a different capacity instead of terminating her services, it appears, for all purposes, that the advice cannot be accommodated. It therefore stands to reason that, in the absence of other alternatives, Ms Myles may be removed from office on the basis of her ill-health.



**T RAMCHARAN/ ADV PG PRINSLOO / S M MASAPU  
FOR CHIEF STATE LAW ADVISER**

# Magistrates Commission

## INTERNAL MEMORANDUM

TO:	THE CHIEF STATE LAW ADVISER VIA AC	FILE NO:	6/5/1
CC:		TEL NO:	012-325 3951
FROM:	MR A D SCHOEMAN: SECRETARY: MAGISTRATES COMMISSION	FAX NO:	012-325 3957
		DATE:	5 October 2012

SUBJECT:	APPLICATION OF THE PROVISIONS OF REGULATION 29 OF THE REGULATIONS FOR JUDICIAL OFFICERS IN THE LOWER COURTS, 1993: REMOVAL FROM OFFICE ON ACCOUNT OF CONTINUED ILL HEALTH: MS L MYLES, ADDITIONAL MAGISTRATE, UPINGTON
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### 1. INTRODUCTION

- 1.1 The Portfolio Committee on Justice and Constitutional Development (Portfolio Committee) on 21 August 2012 considered a recommendation from the Executive Committee of the Magistrates Commission that Ms Myles, additional magistrate, Upington be removed from office in terms of section 13(4)(a)(ii) of the Magistrates Act, No.90 of 1993 (the Act) on account of her continued ill-health. It was resolved by the Portfolio Committee that "the Department of Justice and Constitutional Development should get a legal opinion from the State Law Advisers as to whether the correct procedure was followed by the Magistrates Commission and whether it was proper for the Commission to recommend to the Minister that Ms Myles be removed from office on account of continued ill-health in view of the medical opinions".

### 2. BACKGROUND:

- 2.1 The history of the matter is that on 17 March 2010 the Ethics Committee, sub-

committee of the Magistrates Commission established in terms of section 6 of the Act, considered a report regarding the continued ill-health of Ms Myles as well as the legal position and labour law principles and ordered that an investigation in terms of regulation 29 of the Regulations for Judicial Officers in the Lower Courts, 1994 (the Regulations) be held regarding her removal from office on account of continued ill-health.

(A)

- 2.2 Ms Myles was informed accordingly and was requested to submit a medical report from a medical practitioner of her choice to the Commission.

(B)

- 2.3 The medical reports submitted by Ms Myles together with the reports compiled by herself were submitted via the Department of Justice and Constitutional Development to Pro-Active Health Solutions (PHS), the service provider appointed by Government to evaluate and advise on ill-health retirement and medical reports, for an expert opinion.

(C)

- 2.4 PHS provided the Department with a feedback report. The medical reports indicate that her mental state has been severely compromised as a result of a major depressive episode since April 2009. Her working environment has contributed significantly to her condition (depression), as well as other social stressors. However, she is fit enough to continue with her work, but because of her previous medical history, PHS recommended that she should, where possible, be accommodated in terms of possible reduced workload and less stressful cases and that the employer be empathetic and supportive towards Ms Myles. It has furthermore been recommended that she should continue with regular psychotherapy from a Clinical Psychologist and regular consultations with a Psychiatrist.

(D)

- 2.5 On 1 December 2011 the Ethics Committee considered the medical reports submitted together with other relevant information. Her attendance record shows

that she has been absent from duty for long periods. Since 1 November 2004 she was absent from office on sick leave with full pay for 460 days and 141 days on sick leave with half pay. After considering the medical reports, together with other relevant information, the Ethics Committee formed the opinion that she does not have the capacity to carry out her duties of office in an efficient manner due to continued ill-health.

(E)

- 2.6 In accordance with regulation 29(6)(a)(ii) of the Regulations Ms Myles was informed accordingly and the medical reports and other relevant documents considered by the Ethics Committee were forwarded to her. She was informed that regulation 29(6)(b) provides that she may, within 10 working days after the date on which the opinion of the Commission has come to her notice, submit to the Chairperson of the Commission written comments regarding the opinion.

(F)

- 2.7 On 9 January 2012 the Secretary of the Commission received written comments dated 26 December 2011 from Ms Myles regarding the opinion. Ms Myles contends that her sick leave is not unreasonable as it was covered by medical certificates for every period. She submits that she never requested to be accommodated with a reduced workload and that her history of work performance shows that she is capable of producing longer court hours and that she can dispose of more matters than her colleagues. In her view she has the capacity to deal with a normal workload. She feels that other magistrates who are charged with crimes received better treatment than she did and submits that the enquiry into her capacity to carry out her duties of office in an efficient manner due to continued ill-health is not substantively and procedurally fair.

(G)

- 2.8 The Ethics Committee at its meeting held on 16 February 2012 considered her comments and was of the view that there was a fair review of Ms Myles' capacity to carry out her duties of office in an efficient manner. She was given the opportunity to submit to the Chairperson of the Commission written comments regarding the opinion. She is still on sick leave and it is not clear when she will return to work.

The Ethics Committee resolved to recommend to the Commission that Ms Myles be removed from office due to continued ill-health, and that the Commission recommends to Parliament accordingly as contemplated in section 13 of the Magistrates Act, No. 90 of 1993.

(H)

2.9 There was a general consensus among the members of the Executive Committee that the expert opinion presented to the Commission by PHS is not supporting Ms Myles' removal from office. The experts are suggesting that she should continue with her occupation, however with some accommodation where possible such as reducing her workload and exposing her to less stressful cases whilst she continues with regular consultations with a Psychiatrist. The question to be answered is whether it would be possible to accommodate her in this manner in view of her sick leave history and extend to which she has already been accommodated by means of sick and vacation leave.

2.10 It was resolved that the Secretariat should approach the relevant Cluster Head [Chief Magistrate] for him to report to the Commission regarding the nature of judicial work which Ms Myles is required to perform when she is at the office, his opinion regarding the quality of her judicial work when she has been at the office, the impact which her long periods of sick leave has had on service delivery at the office and within the sub-cluster and any other information which he can give to enable the Commission to take an informed decision. The Cluster Head must also indicate whether it would be possible to, for a period, allocate judicial work to Ms Myles which would be less stressful whilst she continues with regular psychotherapy from a Clinical Psychologist and regular consultations with a Psychiatrist. The matter must upon receipt of the report from the Cluster Head again be placed before the Commission for consideration.

(I)

2.11 Both the Cluster Head, Kimberley as well as the acting head of office Upington responded to the Commission's enquiry. The Cluster Head, *inter alia*, indicated that the judicial officers at Upington are struggling to cope with the normal workload. During the last judicial staff establishment investigation it was recommended that

one further post of Magistrate is required at Upington due to the increased workload. The post has not been created yet and the Magistrate at Kenhardt is assisting at Upington for three days per week. The heavy workload at Upington court requires dedicated, versatile and hardworking Magistrates who are able to assist across all divisions on a daily basis. There is no "less stressful" court and/or environment at Upington court. Ms Myles has still not returned to work and since 31 December 2011 has failed to submit medical certificates despite various requests to file same. It was thus not possible to accommodate Ms Myles as was suggested by PHS.

(J)

- 2.12 The Commission in the circumstances resolved to support the recommendation of the Ethics Committee that Ms Myles, additional Magistrate, Upington be removed from office in terms of section 13(4)(a)(ii) of the Act on account of her continued ill-health, and to advise the Minister accordingly.

(K)

- 2.13 In terms of section 13(4) of the Act, if the Magistrates Commission recommends that a Magistrate be removed from office, *inter alia* on account of continued ill-health, the Minister of Justice and Constitutional Development must suspend that Magistrate from office, or if the Magistrate is at that stage provisionally suspended in terms of the Act, confirm the suspension.

- 2.14 A report in which such suspension and the reason therefore are made known, must be tabled in Parliament by the Minister within 14 days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session. Parliament must then, as soon as it is reasonably possible, pass a resolution as to whether or not the restoration of his/her office of the Magistrate so suspended is recommended. After a resolution has been passed by Parliament the Minister shall restore the Magistrate concerned to his/her office or remove him/her from office, as the case may be.

- 2.15 The Minister's report served before the Portfolio Committee on 21 August 2012.

(L)



- 2.16 The Portfolio Committee had a problem with the interpretation of regulation 29 since the covering report from PHS and the two supporting medical reports from the Occupational Therapist and Psychiatrist supported her continued employment on certain conditions. There was no medical report "from an expert stating that Ms Myles was not fit to work". The Portfolio Committee in the circumstances resolved that a legal opinion from the State Law Advisers should be obtained.

### **3. REQUEST:**

- 3.1 You are in the circumstance kindly requested for a legal opinion regarding the following:

- [a] Whether the Magistrates Commission correctly applied the administrative procedure as provided for in regulation 29 of the Regulations for Judicial Officers in the Lower Courts, 1993,
- [b] Whether the opinion of the Commission that Ms Myles does not have the capacity to carry out her duties of office in an efficient manner due to continued ill-health was justified, and
- [c] Whether it was proper for the Commission to recommend to the Minister that Ms Myles be removed from office on account of continued ill-health, despite the medical opinions to the contrary but in view of her continuous absenteeism and with due regard to the background and peculiar circumstances of the matter.

- 3.2 Copies of the following documents are attached for your ease of reference:

Regulation 29 of the Regulations for Judicial Officers in the Lower Courts, 1993.

**(M)**

Section 13 of the Magistrates Act, No. 90 of 1993.

**(N)**

- 3.3 It is trusted that the above information will be of assistance and we will await your final opinion to enable the Commission to report to the Portfolio Committee. Should you have any further enquiries please contact Mr A D Schoeman on 012-325 3951 or 083 305 9830.

**A D SCHOEMAN**  
**SECRETARY: MAGISTRATES COMMISSION**  
[ads2792]