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Ref: 3/26/5/5 (n240101)
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The Honourable Ms B Mbete
Speaker of the National Assembly
Parliament of the RSA
CAPE TOWN
8000

Dear Ms Mbete

***REPORT ON THE WITHHOLDING OF REMUNERATION OF MS V T GQIBA, CHIEF
MAGISTRATE, EAST LONDON***

The purpose of this letter is to provide Parliament with the report to be tabled in Parliament in terms of section 13(4A)(b) of the Magistrates Act, No 90 of 1993. The report is attached.

With kind regards

**T M MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

DATE: 08/02/2018



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Ref: 3/26/5/5 (n240101)
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Email:Ministry@justice.gov.za

The Honourable Ms T R Modise
Chairperson of the National Council of Provinces
Parliament of the RSA
CAPE TOWN
8000



Dear Ms Modise

**REPORT ON THE WITHHOLDING OF REMUNERATION OF MS V T GQIBA, CHIEF
MAGISTRATE, EAST LONDON**

The purpose of this letter is to provide Parliament with the report to be tabled in Parliament in terms of section 13(4A)(b) of the Magistrates Act, No 90 of 1993. The report is attached.

Yours sincerely

**T M MASUTHA, MP (ADV)
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

DATE: 08/02/2018



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JUSTICE AND CORRECTIONAL SERVICES
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Ref: 2/1/3 (Jan 2018)
Enq: X1700
Email: Ministry@justice.gov.za

Mr L Claasen
Parliament of the RSA
P O Box 15
CapeTown
8000



Dear Mr Claasen

**REPORT ON THE WITHHOLDING OF REMUNERATION OF MS V T GQIBA, CHIEF
MAGISTRATE, EAST LONDON**

The purpose of this letter is to provide Parliament with the report to be tabled in Parliament in terms of section 13(4A)(b) of the Magistrates Act, No 90 of 1993. The report is attached.

Yours sincerely

Ms Judith Tshabalala
Parliamentary Liaison Officer

Date: 08/02/2018

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**REPORT IN TERMS OF SECTION 13(4A)(b) OF THE MAGISTRATES ACT, 90 OF 1993:
WITHHOLDING OF REMUNERATION: MS VT GQIBA, CHIEF MAGISTRATE, EAST LONDON**

1. PURPOSE

The purpose of this report is to inform Parliament of a determination by the Magistrates Commission (the Commission) in terms of section 13(4A)(a) of the Magistrates Act, 90 of 1993 (hereinafter the Act), to withhold the remuneration of Ms VT Gqiba, Chief Magistrate, East London and to provide Parliament with the reasons therefore.

2. BACKGROUND

The Commission resolved to charge Ms Gqiba with the following counts of misconduct:

CHARGE 1

That she is guilty of misconduct in terms of regulation 25(i) of the Regulations for Judicial Officers in the Lower Courts, No. R. 361 of 11 March 1994 (the Regulations) read with regulation 26(17) of the Regulations and section 16 of the Magistrates Act, No 90 of 1993 (hereinafter the Act) in that on or about 23 March 2015 and at or near East London she made a false or incorrect statement, knowing it to be false or incorrect, with a view to obtaining any privilege or advantage in relation to her official position or her duties or to the prejudice of the administration of justice.

ALTERNATIVE CHARGE TO CHARGE 1

That she is guilty of misconduct in terms of regulation 25(b) of the said Regulations read with paragraphs 1 and/or 4 of the Code of Conduct for Magistrates as published in Schedule E to the said Regulations in that on or about 23 March 2015 and at or near East London she failed to act with integrity and/or failed to act at all times in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice.

CHARGE 2

That she is guilty of misconduct in terms of regulation 25(i) of the said Regulations in that on or about 24 March 2015 and at or near East London she submitted/presented to the Department of Justice and Constitutional Development a subsistence and transport claim for travel and subsistence expenses, purportedly relating to an official trip to Pretoria on 23 March 2015, well knowing that in truth and in fact the claim she submitted was false in that she travelled to Pretoria to further her personal interests.

ALTERNATIVE CHARGE TO CHARGE 2

That she is guilty of misconduct in terms of regulation 25(b) of the said Regulations read with paragraphs 1 and/or 4 of the Code of Conduct for Magistrates as published in Schedule E to the said Regulations in that on or about 24 March 2015 and at or near East London she submitted/presented to the Department of Justice and Constitutional Development a subsistence and transport claim, purportedly relating to an official trip to Pretoria on 23 March 2015, well knowing that in truth and in fact the claim she submitted was false in that she travelled to Pretoria to further her personal interests. She therefore failed to act with integrity and/or failed to act at all times in a manner which upholds and promotes the good name, dignity and esteem of the office of magistrate and the administration of justice. The charge sheet dated, 29 September 2016, was served on her on 03 October 2016.

Having considered the evidence presented at the hearing/inquiry and having been addressed by both parties on the merits of the evidence presented to the tribunal, the Presiding Officer on 26 April 2017 found Ms Gqiba guilty on both the main counts of misconduct preferred against her.

Having heard both parties' submissions before sanction, the Presiding Officer on 02 June 2017 recommended in terms of regulation 26(17)(b) of the Regulations that Ms Gqiba be removed from office as contemplated in section 13(4) of the Act.

At its meeting held on 25 August 2017, the Commission considered the documents as required by regulation 26(22) read with regulation 26(19) of the Regulations and resolved to recommend to the Minister that the recommendation of the Presiding Officer in terms of regulation 26(17)(b) of the Regulations for Judicial Officers in the Lower Courts, 1994 (the Regulations) be accepted and that Ms Gqiba be removed from office on the grounds of misconduct in terms of section 13(4)(a)(i) of the Act.

3. DISCUSSION

On 13 September 2017, I, acting on a recommendation of the Commission, suspended Ms Gqiba from office in terms of section 13(4)(a)(i) of the Act with immediate effect and tabled the required report in terms of section 13(4)(b) of the Act in Parliament the following day. Ms Gqiba was, via her Cluster Head, accordingly advised on 14 September 2017.

On 13 November 2017 Ms Gqiba filed a Notice of Motion in the Gauteng Division of the High Court. The Minister of Justice and Correctional Services is the First Responded, with the Magistrates Commission, Regional Magistrate Patterson (the Presiding Officer) and the Portfolio Committee on Justice and Correctional Services (Parliament of the Republic of South Africa), respectively as the Second, Third and Fourth Respondents. Mrs Gqiba is applying for the following orders:

1. Reviewing and setting aside the sanction which the Third Respondent (the Presiding Officer) imposed on 02 June 2017;
2. Directing that the sanction imposed by the Presiding Officer, namely a recommendation to the Magistrates Commission (the Second Respondent) that she be removed from office, was procedurally and substantively unfair, and
3. Staying the enforcement of the sanction imposed pending her review application.

The State Attorney is opposing the Application on behalf of the Magistrates Commission. I have served a notice to abide by the decision of the Court and have been informed that the Presiding Officer is also abiding by the decision of the Court.

The National Council of Provinces (the NCOP) on 28 November 2017 passed a resolution not to restore Ms Gqiba to the office of Magistrate. The National Assembly is yet to pass a resolution in this regard.

On 01 December 2017 Ms Gqiba was, through her attorney, invited to show cause why the Commission should not determine to withhold her remuneration in terms of section 13(4A)(a) of the Act, pending Parliament's resolution to either restore or not to restore her to office. It should be noted that only the National Assembly has to pass a resolution whether or not to restore Ms Gqiba to her office since the NCOP already decided on the matter.

(01 December 2017)

Her attorney filed her representations on her behalf with the Commission on 08 December 2017. A copy is attached, the contents of which are self-explanatory.

(Representations)

With reference to her representations, it is correct that I filed a notice to abide by the Court's decision, for the simple reason that I am, in terms of section 13(4)(a)(i) of the Act, **compelled** to suspend Ms Gqiba from office. The Act is very clear, the Minister **must** suspend the magistrate if the Commission recommends that a magistrate be removed from office on the ground of misconduct. **I have no discretion in this regard.** The inference drawn by Ms Gqiba that this is a clear indication that *"the Minister and the Presiding Officer are of the view that there is a possibility that the High Court could reach a different conclusion than the Magistrates Commission's recommendation"* is therefore without substance.

Ms Gqiba further refers the Commission *"to the fact that in terms of the legal relief sought...it is specifically requested that the enforcement of the sanction imposed by your office (the Commission) be stayed, pending the adjudication of the review application"*. She further submits that *"proceeding with an attempt to have the resolution dealt with by Parliament in those circumstances is deemed irregular and premature"*. I suspended Ms Gqiba on 13 September 2017 and tabled the required report in Parliament on 14 September 2017. The matter is currently with Parliament and both Houses **must**, in terms of section 13(4)(c) of the Act, **as soon as is reasonably possible, pass a resolution to either restore or not to restore her to her office of magistrate.** As stated above, the NCOP has, in compliance with the Act, considered the matter and passed a resolution on 28 November 2017 not to restore Ms Gqiba to office. The National Assembly must still pass a resolution in this regard. The Commission, in terms of section 13(4)(a)(i) of the Act, made a recommendation to the Minister for Ms Gqiba's removal from office. I, in compliance with section 13(4)(b) of the Act tabled a report in Parliament. Parliament must, in terms of section 13(4)(c) of the Act now pass a resolution as to whether or not the restoration to her office of a magistrate is recommended. The Magistrates Commission is of the view that Ms Gqiba's argument that any attempts to have such a resolution, which is

to be passed by Parliament, is deemed to be irregular and premature, is without substance and not in accordance with the provisions of the Act.

With regard to the withholding of her remuneration, Ms Gqiba argues that I suspended her with full financial benefits and that the Commission is not entitled to interfere with my decision. She further argues that if the Commission was of the view that good reasons existed for the withholding of her remuneration, the Commission should have submitted such "*recommendations*" to the Minister "*simultaneously with the recommendation to suspend her from office*". Ms Gqiba argues that seeing this was not done, the Commission confirms the view that the withholding of her salary during her suspension is not reasonable. She submits that the only reason the Commission seems to have "*changed its mind in this regard*" is as a result of the fact that she instituted review proceedings as to the sanction imposed on her and finds "*this belated behaviour regrettable, ill-founded and in contradiction of the recommendation previously provided to the Minister*".

The Commission submits that her arguments are based on a total misunderstanding or a misinterpretation of section 13(4A)(a) of the Act. In terms of this section of the Act the Commission may **determine, not recommend**, that a magistrate's remuneration be withheld. If the Commission so determines, I must table a report in Parliament. I do not act on a **recommendation** from the Commission in this regard. I am by law compelled to table a report in Parliament. The Commission is of the view that it is fully entitled by law to determine to withhold remuneration, even if a magistrate is provisionally suspended from office. In *casu*, Ms Gqiba has been suspended, pending Parliament's confirmation, or not, that she be removed from office. The Commission is further of the view that although it could have determined to withhold her remuneration once I had suspended her from office on 13 September 2017, the view was held that Parliament would have passed a resolution shortly thereafter and that I would have given effect to the resolution. Since the NCOP on 28 November 2017 already passed a resolution not to restore her to office, the Commission on 01 December 2017 requested Ms Gqiba to show cause why her remuneration should not be withheld forthwith. Her submission that the Commission's contemplation to withhold her remuneration forthwith is nothing but a "*belated change of mind*" therefore holds no water.

The Commission is further of the opinion that in line with its previous resolutions to recommend to remove a magistrate from office and with reference to the Constitutional

Court's judgment in Van Rooyen and Others v The State and Others, 2002(8) BCLR 810 (CC), where the Constitutional Court held that if good reasons exist for the suspension of a magistrate, the withholding of salary during the suspension is not necessarily disproportionate, Ms Gqiba's suspension from office **without remuneration** is at this stage **justified**. Since Parliament is currently not in session, it may still take some time for the NA to pass a resolution in this regard. Given the circumstances set out above the Commission is of the view that there seems to be no reason why Ms Gqiba, who is suspended from office pending the NA's decision to pass a resolution whether or not to restore her to the office of Magistrate, should still receive remuneration.

4. LEGAL POSITION

Section 13 (4A)(b) of the Act provides that should the Commission determines that the remuneration of a magistrate be reduced or withheld, a report regarding that determination and the reason therefore must be tabled in Parliament by the Minister within 7 (seven) days of such determination if Parliament is then in session, or, if Parliament is not then in session, within 7 (seven) days after the commencement of its next ensuing session. In terms of section 13(4A)(c) of the Act, Parliament must as soon as reasonable consider the report and pass a resolution as to whether or not the determination concerned is confirmed, either with or without amendment, or set aside.

5. CONCLUSION

This report is submitted for consideration by Parliament in terms of section 13(4A)(b) of the Magistrates Act, 1993.

Given under my hand at Cape Town on this... 8th day of February 2018.


TM MASUTHA, MP (ADV)

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT