

**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT****NOTICE 912 OF 2022****INVITATION FOR PUBLIC COMMENTS****ON****THE MAGISTRATES BILL, 2022****1. INVITATION**

- 1.1 The Department of Justice and Constitutional Development (the Department) invites interested parties to submit written comments on the Magistrates Bill, 2022 (the Bill). The Bill and the Memorandum on the Objects of the Bill are available on the website of the Department at the following address:  
<https://www.justice.gov.za/legislation/invitations/invites.htm>
- 1.2 The comments on the Bill must be submitted not later than **Friday, 29 April 2022**, marked for the attention of **Mr M Mokulubete**, and –
- (a) if they are forwarded by post, be addressed to -  
**The Director-General: Justice and Constitutional Development**  
**Private Bag X81**  
**Pretoria**  
**0001**
  - (b) if they are delivered by hand, be delivered at –  
**SALU Building, Room 23.22**  
**316 Thabo Sehume Street**  
**Pretoria**
  - (c) if they are delivered by email, be emailed to [MMokulubete@justice.gov.za](mailto:MMokulubete@justice.gov.za)
  - (d) if they are faxed, be faxed to **086 519 8972**.
- 1.3 For further information, please do not hesitate to contact Mr Mokulubete on **084 842 5780 / 012 406 4755**.

## 2. BACKGROUND NOTE

2.1 The purpose of the Bill is to provide for the establishment, constitution, objects and functions of the Magistrates Commission, to regulate the appointment, conditions of service, remuneration, retirement, suspension and removal of, magistrates; and to provide for matters in connection with Magistrates.

2.2 The main aims of the Bill are threefold: **Firstly**, it aims to replace the current Magistrates Act, 1993 (Act No. 90 of 1993) in order to ensure the autonomy of the lower courts judiciary from the Executive. **Secondly**, it aims to incorporate all the provisions relating to the appointment of judicial officers of the lower courts in the Bill itself, since some provisions are presently contained in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944). **Thirdly**, it aims to bring the procedure for dealing with complaints about magistrates' conduct in line with the dispensation applicable to judges in the superior courts.

*DRAFT 9 March 2022*

REPUBLIC OF SOUTH AFRICA

MAGISTRATES BILL

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*(As introduced in the National Assembly)*  
*(The English text is the official text of the Bill)*  
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(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B XX - 2022]

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**GENERAL EXPLANATORY NOTE:**

References in the footnotes to—

"MA" denotes the Magistrates Act, 1993 (Act No. 90 of 1993);

"MCA" denotes the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);

"JSC Act" denotes the Judicial Service Commission Act, 1994 (Act No. 9 of 1994);

"SCA" denotes the Superior Courts Act, 2013 (Act No. 10 of 2013); and

"LCB" denotes the Lower Courts Bill, 2022.

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**BILL**

**To provide for the establishment, constitution, objects and functions of the Magistrates Commission; to regulate the appointment and remuneration of, and vacation of office by, magistrates; to provide for the remuneration and conditions of service of magistrates; and to provide for matters in connection therewith.**

**PREAMBLE<sup>1</sup>**

**SINCE** section 174(7) of the Constitution provides that judicial officers, other than judges, must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice;

**AND SINCE** section 180 of the Constitution provides that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including procedures for dealing with complaints about judicial officers,

**PARLIAMENT** of the Republic of South Africa, enacts as follows:—

**ARRANGEMENT OF SECTIONS**

*Sections*

**CHAPTER 1**

**DEFINITIONS**

1. Definitions

**CHAPTER 2**

**MAGISTRATES COMMISSION AND FOUNDING PROVISIONS**

2. Magistrates Commission

3. Constitution of Commission and period of office of members
4. Objects of Commission
5. Meetings of Commission
6. Committees of Commission
7. Powers and functions of Commission
8. Remuneration and expenses of members of Commission and committees
9. Secretary and staff of Commission

### **CHAPTER 3**

#### **APPOINTMENT, CONDITIONS OF SERVICE, REMUNERATION, RETIREMENT, SUSPENSION OR REMOVAL OF MAGISTRATES**

10. Appointment of magistrates
11. Acting magistrates
12. Conditions of service of magistrates, except salary and retirement from office
13. Remuneration of magistrates
14. Retirement from office by magistrates
15. Suspension or removal from office of magistrate
16. Powers and duties of magistrates
17. Magistrates may not perform other paid work and disclosure of registrable interests
18. Equal benefits accruing to spouses and partners of magistrates

### **CHAPTER 4**

#### **REGULATIONS, REPEAL, TRANSITIONAL PROVISIONS AND SAVINGS, AND COMMENCEMENT**

19. Regulations
20. Repeal of Act 90 of 1993
21. Transitional provisions and savings
22. Short title and commencement

### **CHAPTER 1**

#### **Definitions**

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<sup>1</sup> New

## Definitions

1. In this Act, unless the context otherwise indicates—

"Chairperson" means the Chairperson of the Commission appointed in terms of section 3(1)(a)(i);

"Commission" means the Magistrates Commission established by section 2;

"committee" means a committee established by the Commission under section 6;

"District Court"<sup>2</sup> means any District Court referred to in section 3 of the Lower Courts Act;

"Head of the Court"<sup>3</sup> means a Head of the Court as defined in section 1 of the Lower Courts Act;

"lower court" means a court established under the Lower Courts Act;

"Lower Courts Act"<sup>4</sup> means the Lower Courts Act, 20... (Act No. XX of 20...);

"magistrate"<sup>5</sup> means—

(a) a District Court magistrate, a District Court senior magistrate and a District Court President; and

(b) a Regional Court magistrate and a Regional Court President,

appointed under section 10 of this Act, and also includes an acting magistrate;<sup>6</sup>

"Minister" means the Cabinet member responsible for the administration of justice;

"prescribed"<sup>7</sup> means prescribed by regulations under section 19;

"Regional Court"<sup>8</sup> means any Regional Court referred to in section 5 of the Lower Courts Act;

"registrable interests"<sup>9</sup> means a magistrate's registrable financial interests as contemplated in section 17;

"Registrar" means the Registrar of Magistrates' Registrable Interests;

"remuneration" means the remuneration that a magistrate is entitled to in terms of section 13;

"Secretary"<sup>10</sup> means the Secretary of the Commission referred to in section 9(1), and also serves as the Registrar; and

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<sup>2</sup> New

<sup>3</sup> New

<sup>4</sup> New

<sup>5</sup> New

<sup>6</sup> New

<sup>7</sup> New

<sup>8</sup> New

<sup>9</sup> New

<sup>10</sup> New

"this Act" includes the regulations under section 19.

## CHAPTER 2

### Magistrates Commission and founding provisions

#### Magistrates Commission<sup>11</sup>

2. Despite the repeal of the Magistrates Act, 1993 (Act No. 90 of 1993) by section 20, the Magistrate Commission established by section 2 of that Act, continues to exist under the name of Magistrates Commission, with the powers and duties conferred on or assigned to it by or under this Act or any other law.

#### Constitution of Commission and period of office of members<sup>12</sup>

3. (1) (a) The Commission consists of—
- (i) a Judge President or Deputy Judge President of a Superior Court, as Chairperson, designated by the President in consultation with the Chief Justice;
  - (ii) the Minister or the Deputy Minister or any other person designated by the Minister, as the Minister's alternate<sup>13</sup>;
  - (iii) a Regional Court President, designated by the Regional Court Presidents;
  - (iv) a Regional Court magistrate, designated by the Minister<sup>14</sup> after consultation with the Regional Court magistrates;
  - (v) two District Court Presidents, one to be designated by the District Court Presidents and the other by the Minister,<sup>15</sup> after consultation with the District Court Presidents;
  - (vi) two District Court magistrates who do not hold the office of District Court President, one to be designated by the District Court magistrates and the other by the Minister,<sup>16</sup> after consultation with the District Court magistrates;
  - (vii) two practising advocates, designated by the Minister, after consultation with the South African Legal Practice Council established under section 4 of the Legal Practice Act, 2014 (Act No. 28 of 2014);

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<sup>11</sup> Similar to s2 of MA.

<sup>12</sup> Compare s3 of MA. The new clause is substantially the same, but the number of "fit and proper persons" appointed by the President has been reduced from five to four, and subclause (5) is new.

<sup>13</sup> Previously "the Minister or his or her nominee".

<sup>14</sup> Formerly "President".

<sup>15</sup> Formerly "President".

<sup>16</sup> Formerly "President".

- (viii) two practising attorneys, designated by the Minister, after consultation with the Legal Practice Council established under section 4 of the Legal Practice Act, 2014 (Act No. 28 of 2014);
- (ix) one teacher of law designated by the Minister after consultation with the teachers of law at South African universities;
- (x) a person designated by the Council of the South African Judicial Education Institute referred to in section 7 of the South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008);
- (xi) four persons designated by the National Assembly from among its members, at least two of whom must be members of opposition parties represented in the Assembly;
- (xii) four permanent delegates to the National Council of Provinces, designated by the Council with a supporting vote of at least six provinces;
- (xiii) four fit and proper persons appointed by the President<sup>17</sup>, at least two of whom are not involved in the administration of justice or the practice of law in the ordinary course of their business; and
- (xiv) when considering matters relating to a specific Regional Court or District Court, the Head of that Court.<sup>18</sup>

(b) The Chairperson must designate one of the persons referred to in paragraph (a) (iii) to (vi), inclusive, as the Vice-Chairperson of the Commission, and when the Chairperson is not available, the Vice-Chairperson must perform the functions assigned to the Chairperson by or under this Act.

(2) A member of the Commission is appointed or designated for a period not exceeding five years, and any such appointment or designation may be withdrawn by the appointing or designating authority, as the case may be, at any time after consultation with the Commission if there are sound reasons for doing so.

(3) Any person whose period of office as a member of the Commission has expired, may be reappointed or redesignated.

(4) A vacancy in the Commission does not affect the validity of the proceedings or decisions of the Commission.

(5) Whenever the Commission considers any matter relating to a complaint about the conduct of a magistrate, it must sit without the members referred to in

<sup>17</sup> Deleted: "in consultation with the Cabinet".

<sup>18</sup> Compare section 178(1)(k) of Constitution. This provision is favoured by the Heads of the lower courts.



subsection (1)(a)(xi) and (xii).<sup>19</sup>

## Objects of Commission

4. In recognition of the status of magistrates as judicial officers contemplated in Chapter 8 of the Constitution [and who are not employees]<sup>20</sup>, the objects of the Commission are—

- (a) to ensure that the appointment, promotion, transfer and discharge of, or disciplinary steps against, magistrates, take place without favour or prejudice<sup>21</sup>;
- (b) to ensure that no influencing or victimization of magistrates takes place;
- (c) to endeavour to promote the continuous training of magistrates and to make recommendations in regard thereto to the Minister and the South African Judicial Education Institute;<sup>22</sup>
- (d) to compile a code of conduct for magistrates;
- (e) to advise the Minister and to make recommendations to him or her regarding the administrative matters applicable to magistrates, including proposals regarding legislation purporting to regulate the conditions of service and relevant matters regarding magistrates, separately;
- (f) to carry out investigations and make recommendations to the Minister regarding the matters mentioned in section 15(2), (3) and (4);
- (g) to advise the Minister or to make recommendations to him or her regarding the requirements for appointment and the appointment of magistrates; and
- (h) to advise the Minister or to make recommendations to him or her or to report to the Minister for the information of Parliament regarding any matter which, in the opinion of the Commission, is of interest for—
  - (i) the independence of the dispensing of justice; and
  - (ii) the efficiency of the administration of justice, in the lower courts.

<sup>19</sup> New. Compare also section 178(5) of Constitution – functioning of JSC. See also section 180(c) of the Constitution – "complaints about judicial officers".

<sup>20</sup> This wording is intended to give effect to the important finding of the Constitutional Court that magistrates are not employees.

<sup>21</sup> Deleted: ", and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly".

<sup>22</sup> "and the South African Judicial Education Institute" is new. Should SAJEI also not be involved in training?

## Meetings of Commission<sup>23</sup>

5. (1) Meetings of the Commission must be held at the times and places determined—

- (a) by the Chairperson or, if he or she is not available, by the Vice-Chairperson of the Commission; or
- (b) if both the Chairperson and the Vice-Chairperson of the Commission are not available, by the majority of the members of the Commission.

(2) The majority of the members of the Commission constitutes a quorum for a meeting of the Commission.

(3) If both the Chairperson and the Vice-Chairperson of the Commission are absent from a meeting of the Commission, the members present must elect one of their number to preside at that meeting.

(4) The person presiding at a meeting of the Commission may regulate the proceedings and procedure thereat, including the quorum for a decision of the Commission, and must cause minutes to be kept of the proceedings.

(5) The proceedings of the Commission take place *in camera* unless the person presiding at a meeting directs otherwise.

## Committees of Commission<sup>24</sup>

6. (1) The Commission, for the proper performance of its functions—
- (a) must establish—
    - (i) an executive committee consisting of the Chairperson<sup>25</sup> and two or more members of the Commission designated by the Commission; and
    - (ii) a standing committee consisting of the Chairperson and two or more members of the Commission designated by the Commission to deal with allegations of misconduct against magistrates;<sup>26</sup> and
  - (b) may establish such other committees as the Commission may deem necessary, consisting of one or more members of the Commission designated by the Commission and one or more other persons, if any, whom the Commission may appoint for that

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<sup>23</sup> Similar to s5 of MA.

<sup>24</sup> Similar to s6 of MA.

<sup>25</sup> Inclusion of the Chairperson on the Exec Committee is new.

purpose and for the period determined by the Commission.

(2) The Commission may extend the period of an appointment made by the Commission under subsection (1) or withdraw such appointment during the period referred to in that subsection.

(3) The Commission must designate a chairperson for every committee and, if the Commission deems it necessary, a vice-chairperson.

(4) (a) A committee must, in accordance with the policy laid down by the Commission and subject to the directions of the Commission, perform such functions of the Commission as the Commission may assign to such committee.

(b) Any function so performed by the executive committee referred to in subsection (1)(a)(i) is deemed to have been performed by the Commission.

(5) On completion of the functions assigned in terms of subsection (4) to a committee referred to in subsection (1)(b), such committee must submit a written report thereon to the Commission.

(6) The Commission may at any time dissolve any committee.

(7) The provisions of section 5 apply, with the changes required by the context, to a meeting of a committee.

### **Powers and functions of Commission<sup>27</sup>**

7. (1) The Commission may, in order to achieve the objects mentioned in section 4—

- (a) carry out or cause to be carried out any investigation that it deems necessary;
- (b) obtain access to official information or documents;
- (c) hear any person or summon any person to appear before the Commission for questioning, or require from any person a written explanation in respect of any matter falling within the ambit of its objects;
- (d) advise the Minister about any matter or provide him or her with a recommendation;
- (e) make known any finding, point of view or recommendation of the Commission in the manner which and to whom it deems fit; and
- (f) subject to subsection (2), report to the Minister for the information of Parliament on any matter the Commission deems fit.

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<sup>26</sup> RCPF proposal.

<sup>27</sup> Similar to s7 of MA. The words "Powers and" added in the heading.

(2)<sup>28</sup> The Commission must annually submit a report to the Minister for the information of Parliament regarding all matters considered by the Commission in the course of the application of section 15(2), (3) and (4).

(3) A report regarding a matter contemplated in subsection (1)(f) or (2), must be tabled in Parliament by the Minister within 14 days after it was presented to him or her, 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.

(4) A committee referred to in section 6 may, subject to the directions of the Commission, exercise any of the powers referred to in subsection (1)(a), (b) or (c).

(5) Any person who intentionally obstructs the Commission or a committee in the exercising of its powers or carrying out its functions under this Act, is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding one year.<sup>29</sup>

### **Remuneration and expenses of members of Commission and committees<sup>30</sup>**

**8.** (1) The Chairperson of the Commission or a member of a committee who is a judge or a member of the Commission designated in terms of section 3(1)(a)(xi) and (xii), may be paid such allowances for travelling and subsistence expenses incurred by him or her in the performance of his or her functions in terms of this Act as the Minister may determine with the concurrence of the Cabinet member responsible for finance.

(2) A member of the Commission or a committee who is not a judge or a magistrate, or a member of the Commission designated in terms of section 3(1)(a)(xi) or (xii), or who is not subject to the laws governing the public service, may be paid such remuneration, including allowances for travelling and subsistence expenses incurred by him or her in the performance of his or her functions in terms of this Act, as the Minister may determine with the concurrence of the Cabinet member responsible for finance.

### **Secretary and staff of Commission<sup>31</sup>**

**9.** (1) The work incidental to the performance by the Commission of its

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<sup>28</sup> New. Similar to JSC reporting requirements.

<sup>29</sup> Previously "three months".

<sup>30</sup> Similar to s8 of MA.

functions must be performed by officials appointed in terms of the laws governing the public service<sup>32</sup>, of whom one must be appointed by the Minister, in consultation with the Commission, as the Secretary of the Commission.<sup>33</sup>

(2) The Secretary, under the control and direction of the Chairperson, must—

- (a) monitor compliance with any remedies referred to in section 19(1)(k), imposed on a magistrate, and report to the Commission on such compliance;
- (b) perform the functions of the Registrar;
- (c) perform such functions as may be prescribed; and
- (d) generally, perform such administrative tasks related to the work of the Commission as may, from time to time, be directed by the Chairperson.

### **CHAPTER 3**

#### **Appointment, conditions of service, remuneration, retirement, suspension or removal of magistrates**

##### **Appointment of magistrates<sup>34</sup>**

**10.** (1) Any appropriately qualified South African citizen who is a fit and proper person may be appointed as a magistrate.<sup>35</sup>

(2) The Minister must, after consultation<sup>36</sup> with the Commission, and in accordance with the provisions of the Lower Courts Act, appoint—

- (a) District Court magistrates, District Court senior magistrates and District Court Presidents, for the District Courts; and
- (b) Regional Court magistrates and Regional Court Presidents, for the Regional Courts.

(3)<sup>37</sup> Any person appointed as a magistrate (including an acting magistrate) must, before commencing with his or her functions as a judicial officer for the first time, swear or

<sup>31</sup> Based on s9 of MA. Provisions relating to Secretary's functions added.

<sup>32</sup> Previously DOJ.

<sup>33</sup> This provision aims to leave scope for the administrative capacity of the Commission to be provided by a new "Court Administration Service" or the like, to be established by statute.

<sup>34</sup> Compare sections 9 and 10 of MCA, as well as LCB.

<sup>35</sup> See MCA s 10.

<sup>36</sup> Appointment "after consultation" is in line with the existing provision.

<sup>37</sup> See MCA s9(2). Also see item 6 of Schedule 2 to the Constitution. (Subsections (3) and (4) were previously contained in the LCB.)

affirm as follows:

I, .....(full name) do hereby swear/solemnly affirm that in my capacity as a judicial officer I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.'

(4) An oath or affirmation in terms of subsection (3) must be taken or made in open court before the most senior available judicial officer of the lower court in question, or before a justice of the peace, who must at the foot thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

### **Acting magistrates**<sup>38</sup>

**11.** (1) The Minister may appoint any appropriately qualified and fit and proper person to act—

- (a) in the place of any magistrate who is not available;
- (b) in any vacant office of a magistrate; or
- (c) as a magistrate in addition to the judicial establishment of any lower court, where the case load justifies such appointment and with due regard to the financial and resource implications.<sup>39</sup>

(2) Before making an acting appointment referred to in subsection (1), the Minister must—

- (a) consult with the Head of the Court in question; or
- (b) if the acting appointment relates to a Head of a Court, consult with the Judge President of the Division of the High Court having jurisdiction.

(3) (a) (i) Whenever a magistrate is for any reason unavailable to carry out the functions of his or her office, the Head of the Court concerned may temporarily appoint any competent person in the place of the magistrate concerned.<sup>40</sup>

(ii) If the duration of an appointment under this paragraph is required to exceed one day, the appointment must be made in consultation with the

<sup>38</sup> New but based largely on the provisions of s9 of MCA.

<sup>39</sup> Compare MCA s9(3). Compare also s175(2) of Constitution.

<sup>40</sup> Compare MCA s9(4).

Minister or an officer in the public service designated by the Minister.<sup>41</sup>

(b) An appointment in terms of paragraph (a)(ii) remains valid for the duration of the unavailability of the magistrate in question, or for a period not exceeding five consecutive court days, whichever period is the shortest.

(c) Any person appointed in terms of paragraph (a) may—

- (i) upon the expiry of the appointment; and
- (ii) if the magistrate in whose place the appointment has been made, is still unavailable, be reappointed once only in terms of paragraph (a) in the place of that magistrate.

(4) (a) Subject to paragraph (b)<sup>42</sup>, any person appointed in terms of subsection (1)—

- (i) holds that office for a period determined by the Minister at the time of the appointment, but the period so determined may not exceed 12 months; and
- (ii) may be reappointed to that office in terms of subsection (1).

(b)<sup>43</sup> A person appointed in terms of subsection (1) may be suspended from the acting office in question by the Minister on the recommendation—

- (i) of the Head of the Court concerned; or
- (ii) if he or she is acting as the Head of a Court, of the Judge President of the Division of the High Court having jurisdiction,

before the expiry of the period referred to in paragraph (a)(i), if the Head of the Court or the Judge President, as the case may be, having afforded the person a reasonable opportunity to be heard regarding the desirability of such suspension, is satisfied that reliable evidence exists indicating that an allegation against that person is of such a serious nature as to make it inappropriate for the person to perform the functions of judicial office while the allegation is being investigated.

(c) The Minister must inform the Commission of any suspension in terms of paragraph (b), and provisions of section 15(4) are applicable, with the changes required by the context, in respect of a person so suspended.

(5) Any person appointed in terms of subsection (1) or (3) is also deemed to have been so appointed in respect of any period during which he or she is necessarily engaged in connection with the disposal of any proceedings—

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<sup>41</sup> The Regional Courts Heads have requested that provision be made for an appointment without consultation where the purpose of the appointment is for a postponement, bail application or any single-day matter, where such appointment would not result in financial expenditure.

<sup>42</sup> "Subject to paragraph (b)" inserted.

<sup>43</sup> Paragraphs (b) and (c) inserted in order to make provision for the suspension of acting judicial officers who

- (a) in which he or she has participated as such a magistrate, including an application for leave to appeal in respect of such proceedings; and
- (b) which have not yet been disposed of at the expiry of the period for which he or she was appointed.<sup>44</sup>

(6) (a) A magistrate appointed in terms of subsection (1) who presided in criminal proceedings in which a plea was recorded in accordance with section 106 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), must, notwithstanding his or her subsequent vacation of office at any stage, dispose of those proceedings and, for such purpose, continues to hold such office in respect of any period during which he or she is necessarily engaged in connection with the disposal of those proceedings—

- (i) in which he or she participated, including an application for leave to appeal in respect of such proceedings; and
- (ii) which were not disposed of when he or she vacated the office in question.<sup>45</sup>

(b) The proceedings contemplated in paragraph (a) must be disposed of at the court where the proceedings were commenced, unless all parties to the proceedings agree unconditionally in writing to the proceedings being resumed in another court mentioned in the agreement.

(c) If the magistrate contemplated in paragraph (a) has subsequently been appointed as a judge of a Superior Court as defined in section 1 of the Superior Courts Act, 2013 (Act No. 10 of 2013)—

- (i) he or she is only entitled to the benefits to which such a judge is entitled as contemplated in the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), in respect of any period taken to dispose of the proceedings as contemplated in paragraph (a); and
- (ii) the period taken to dispose of the proceedings as contemplated in paragraph (a) is deemed to be active service for purposes of the Judges' Remuneration and Conditions of Employment Act, 2001.

(d) If a magistrate contemplated in paragraph (a) has subsequently not been appointed as a judge as contemplated in paragraph (c), he or she is entitled to such benefits as determined by the Minister from time to time by notice in the *Gazette*.

(e) A person contemplated in paragraph (a) who is, in the opinion of the

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are not permanently appointed magistrates.

<sup>44</sup> Compare MCA s9(6).

<sup>45</sup> Compare MCA s9(7).



Minister—

- (i) unfit to continue holding judicial office for purposes of disposing of the proceedings in question; or
- (ii) incapacitated and is not able to dispose of the proceedings in question due to such incapacity,

may be exempted by the Minister from the provisions of this subsection, after consultation with the Judge President of the Division of the High Court<sup>46</sup> having jurisdiction.<sup>47</sup>

### **Conditions of service of magistrates, except salary and vacation of office<sup>48</sup>**

**12.** Subject to the provisions of this Act, the conditions of service of a magistrate must be determined in accordance with the regulations under section 19.

### **Remuneration of magistrates<sup>49</sup>**

**13.** (1) (a) Magistrates are entitled to such salaries, allowances and benefits as may be determined by the President, from time to time, by proclamation in the *Gazette*, after taking into consideration the recommendations of the Independent Commission for the Remuneration of Public Office-bearers established under section 2 of the Independent Commission for the Remuneration of Public Office-bearers Act, 1997 (Act No. 92 of 1997).

(b) Different categories of salaries and salary scales may be determined by the President in respect of different categories of magistrates.

(c) The Commission referred to in paragraph (a) must, when investigating or considering the remuneration of magistrates, consult with—

- (i) the Minister and the Cabinet member responsible for finance;
- (ii) the Chief Justice or a person designated by the Chief Justice, acting on behalf of magistrates for the purpose of liaising with the Commission; and
- (iii) the Lower Courts Remuneration Committee referred to in subsection (4).

(2) A proclamation in terms of subsection (1)(a) or any provision thereof

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<sup>46</sup> Existing provision requires consultation with Chief Justice.

<sup>47</sup> Deleted: "(7) The Minister may delegate any of his or her powers in terms of this section to an officer in the public service."

<sup>48</sup> Similar to s11 of MA. ARMSA is not in favour of conditions of service being determined by the Executive in regulations.

<sup>49</sup> Similar to s12 of MA.

may commence with effect from a date which may not be more than one year before the date of publication thereof.

(3) (a) A copy of a proclamation issued under subsection (1)(a) must be submitted to Parliament for approval before the publication thereof.

(b) Parliament must, by resolution—

- (i) approve the proclamation, whether in whole or in part; or
- (ii) disapprove the proclamation.

(4) (a) There is a Lower Courts Remuneration Committee (in this subsection referred to as "the Committee"), consisting of—

- (i) two Regional Court Presidents, designated by the Regional Court Presidents;
- (ii) two District Court Presidents, designated by the District Court Presidents; and
- (iii) two Regional Court magistrates, designated by the Regional Court magistrates; and
- (iv) two District Court magistrates, designated by the District Court magistrates.

(b) Any member of the Committee serves as such a member for a renewable term of three years, or until recalled or replaced by those who designated him or her as a member.

(c) The Committee must interact and consult with the Chief Justice and the Independent Commission for the Remuneration of Public Office-bearers on behalf of magistrates regarding their remuneration, allowances and benefits.

(d) The Committee must elect one of its members as its chairperson, to hold such office for the period determined by the Committee.

(e) The provisions of section 8 are applicable, with the changes required by the context, in respect of the expenses of members of the Committee.

(5) The amount of any remuneration payable in terms of subsection (1), must be paid out of the National Revenue Fund as contemplated in section 213 of the Constitution.

(6) The remuneration of magistrates may not be reduced except by an Act of Parliament: Provided that a disapproval contemplated in subsection (3)(b) is, for the purposes of this subsection, not deemed to result in a reduction of such remuneration.

(7) If an officer or employee in the public service is appointed as a magistrate, the period of his or her service as a magistrate must be reckoned as part of and continuous with his or her service in the public service for the purposes of leave, pension and any other condition of service.

### Vacation of office by magistrates<sup>50</sup>

**14.** (1) A magistrate must, subject to subsection (2), retire from office on attaining the age of 65 years: Provided that if he or she attains that age after the first day of any month, he or she is deemed to attain that age on the first day of the next ensuing month.

(2) A magistrate may, before attaining the age of 65 years, notify the Commission in writing that he or she intends to continue to serve in that office for the period indicated by the magistrate in question: Provided that such a period may not be extended beyond the month in which the magistrate will attain the age of 70 years.

(3) (a) The Minister may, at the request of a magistrate, allow such magistrate to retire from office—

- (i) on account of continued ill-health; or<sup>51</sup>
- (ii) for any other reason which the Minister deems sufficient.

(b) Any request of a magistrate contemplated in paragraph (a)(ii) must be addressed to the Minister so that he or she receives it at least six calendar months before the date on which the magistrate wishes so to retire from office, unless the Minister approves a shorter period in a specific case.

(c) If a magistrate is allowed to retire from office—

- (i) in terms of paragraph (a)(i), he or she is entitled to such pension benefits as he or she would have been entitled to under the pensions Act applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without his or her being instrumental thereto; or
- (ii) in terms of paragraph (a)(ii), he or she is entitled to the benefits under the pensions Act applicable to him or her at the time of his or her retirement.

(4) (a) Subject to subsection (5), a magistrate may resign from office by notice in writing to the Minister that he or she no longer wishes to serve in that office, and must vacate his or her office upon acceptance of such resignation.<sup>52</sup>

(b) A notice referred to in subparagraph (a) must be given at least six calendar months before the date on which the magistrate wishes to resign, unless the Minister approves a shorter period in a specific case.

(c) The Minister must consult with the Commission before the acceptance of a

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<sup>50</sup> Compare s13 of MA.

<sup>51</sup> Omitted: "(ii) in order to effect a transfer and appointment as contemplated in section 15 (1) of the Public Service Act, 1994 (Proclamation R103 of 1994);".

resignation, and may subject the acceptance to conditions determined after consultation with the Commission.

(5) When a magistrate is appointed to the office of a judge—

- (a) subsection (4)(a) and (b) is not applicable to his or her resignation from the office of magistrate; and
- (b) he or she is entitled to—
  - (i) the payment of his or her actuarial interest, as defined in the rules issued in terms of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), in the Government Employees Pension Fund as on the date of appointment as a judge; and
  - (ii) the payment of all accumulated leave as on the date of appointment as a judge.

(6) (a) A magistrate referred to subsection (5) may—

- (i) request the Government Employees Pension Fund to transfer the full actuarial interest from the said Fund to a designated preservation fund where the monies remain until he or she attains the age of 55 years, whereafter he or she can buy a monthly pension or take out an annuity with the further option to withdraw one third of the accrued amount in cash; or
- (ii) request the Government Employees Pension Fund to pay the full actuarial interest to him or her and not to transfer the monies to a preservation fund as contemplated in subparagraph (i).

(b) For purposes of this subsection "preservation fund" means a pension preservation fund or a provident preservation fund, as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962).<sup>53</sup>

### **Removal from office of magistrate<sup>54</sup>**

**15.** (1) A magistrate may not be suspended or removed from office except in accordance with subsections (2), (3) and (4).

(2) (a) The Minister, on the advice of the Commission, must<sup>55</sup>

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<sup>52</sup> Compare s11(2) of Judges' Remuneration and Conditions of Employment Act, 2001.

<sup>53</sup> Omitted: "(6) For the purpose of a transfer and appointment contemplated in section 15(1) of the Public Service Act, 1994, a magistrate is deemed to be holding an appointment in an institution as contemplated in that section. (7) The period of service as a magistrate of a magistrate transferred and appointed under section 15(1) of the Public Service Act, 1994, must be reckoned as part of and continuous with his or her service in the public service for the purposes of leave, pension and any other condition of service is retained."

<sup>54</sup> Compare applicable provisions of s13 of MA.

provisionally suspend a magistrate from office if—

- (i) the Commission, after affording the magistrate a reasonable opportunity to be heard regarding the desirability of such provisional suspension, is satisfied that reliable evidence exists indicating that an allegation against that magistrate is of such a serious nature as to make it inappropriate for the magistrate to perform the functions of judicial office while the allegation is being investigated; and
- (ii) an investigation has been instituted by the Commission into such magistrate's fitness to hold office.<sup>56</sup>

(b) The provisional suspension of a magistrate in terms of paragraph (a) lapses after 60 days from the date of the suspension, unless the Commission, within that period, commences its inquiry into the allegation in question by causing a written notice containing the allegation concerned to be served on the magistrate.

(c) An inquiry referred to in paragraph (b) must be concluded as soon as possible.<sup>57</sup>

(3) (a) If the Commission recommends that a magistrate be removed from office on account of—<sup>58</sup>

- (i) suffering from an incapacity;
- (ii) gross incompetence; or
- (iii) being guilty of gross misconduct,

the Minister must suspend that magistrate from office or, if the magistrate is, at that stage, provisionally suspended in terms of subsection (2)(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 the National

<sup>55</sup> Previously "may".

<sup>56</sup> Deleted: "(b) A report in which the provisional suspension in terms of paragraph (a) of a magistrate and the reasons therefore are made known, must be tabled in Parliament by the Minister within seven days of such suspension, if Parliament is then in session, or, if Parliament is not then in session, within seven 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 provisional suspension of the magistrate is confirmed.

(d) If Parliament passes a resolution as contemplated in paragraph (c) that the provisional suspension is not confirmed, the suspension lapses."

<sup>57</sup> Deleted: "(g) Parliament may, at any stage pending—

(i) the conclusion of an inquiry referred to in paragraph (e); or  
(ii) a resolution referred to in subsection (5)(c),  
pass a resolution setting aside the suspension of the magistrate concerned, whereupon the suspension shall lapse forthwith."

<sup>58</sup> Grounds aligned with those of judges – s177(1) of Constitution.

Assembly<sup>59</sup> by the Minister within 14 days of such suspension, if the Assembly is then in session, or, if the Assembly is not then in session, within 14 days after the commencement of its next ensuing session.

(c) The National Assembly<sup>60</sup> 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 the National Assembly as contemplated in paragraph (c), the Minister must restore the magistrate concerned to his or her office or remove him or her from office, as the case may be.

(4) (a) The remuneration of a magistrate is not affected during a period of suspension in terms of subsection (2)(a) or (3)(a), unless the Commission determines otherwise.

(b) If the Commission determines that the remuneration of a magistrate must be reduced or withheld in terms of paragraph (a), a report regarding that determination and the reason therefor must be tabled in the National Assembly by the Minister within seven days of such determination, if the Assembly is then in session, or, if the Assembly is not then in session, within seven days after the commencement of its next ensuing session.

(c) The National Assembly must, within 30 days after the report referred to in paragraph (b) has been tabled, or as soon thereafter as is reasonably 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.

(d) If the National Assembly passes a resolution as contemplated in paragraph (c) that the determination is set aside, that determination lapses with effect from the date when the determination was first made.

### **Powers and duties of magistrates<sup>61</sup>**

**16.** (1) A magistrate has the powers and performs the duties conferred on or assigned to him or her by or under the laws of the Republic.

(2) The Minister may, after consultation with the Commission, make

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<sup>59</sup> Previously "Parliament".

<sup>60</sup> In subclauses (2), (3) and (4), "Parliament" has been replaced by "National Assembly". This is in line with the constitutionally determined procedure in respect of judges – s177(1) of the Constitution.

regulations conferring on or assigning to magistrates administrative powers and duties which do not affect the judicial independence of magistrates, including regulations empowering the Minister, after consultation with the Commission, to confer or assign administrative powers and duties of a general nature on or to magistrates.

(3) The provisions of section 17(6) apply with the necessary changes required by the context in respect of any regulation made under subsection (2).

### **Magistrates may not perform other paid work and disclosure of registrable interests<sup>62</sup>**

**17.** (1) No magistrate may perform any paid work outside his or her duties of office.

(2)<sup>63</sup> (a) Every magistrate must disclose to the Registrar, in the prescribed form, particulars of all his or her registrable interests and those of his or her immediate family members.

(b) For purposes of this section 'immediate family member' means the spouse, civil partner or permanent life partner of a magistrate and includes dependent children of, and family members living in the same household with, that magistrate.

(3) The first disclosure in terms of subsection (2) must be within 60 days of a date fixed by the President by proclamation, and thereafter annually and in such instances as prescribed.

(4) The Registrar must open and keep a register, called the Register of Magistrates' Registrable Interests, and must—

- (i) record in the Register particulars of magistrates' registrable interests;
- (ii) amend any entries in the Register when necessary; and
- (iii) perform the other duties in connection with the Register as required in terms of this Act.

(5) The Minister must, after consultation with the Commission, make regulations regarding the content and management of the Register referred to in subsection (4)(b), which regulations must at least prescribe—

- (a) the format of the Register;

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<sup>61</sup> Similar to s14 of MA.

<sup>62</sup> Similar to s15 of MA, but the existing provision allows for the Minister to authorise other "paid work" by a magistrate, which is deleted.

<sup>63</sup> Subclauses (2) and (3) are new and are similar to section 13(3) and (4) of the Judicial Service Commission Act, 1994.

- (b) the kinds of interests of magistrates and their immediate family members that are regarded as registrable interests;
- (c) the manner and the instances in which, and the time limits within which, registrable interests must be disclosed to the Registrar;
- (d) a confidential and a public part of the Register and the interests to be recorded in those parts respectively;
- (e) a procedure providing for public access to the public part of the Register and a procedure for providing access to, and maintaining confidentiality of, the confidential part of the Register; and
- (f) the lodging of a complaint by the Registrar, in the event of failure to register any registrable interest by any magistrate, including any failure to register any such interest within a prescribed time limit, or disclosure of false or misleading information by any magistrate.

(6) Any regulations made under subsection (5) must, before publication thereof in the *Gazette*, be tabled in Parliament by the Minister, for approval and Parliament may, after obtaining and considering public comment thereon, approve the regulations or any subsequent amendment thereof—

- (a) without any changes thereto; or
- (b) with such changes thereto as may be effected by Parliament.

### **Equal benefits accruing to spouses and partners of magistrates<sup>64</sup>**

**18.** (1) If a magistrate who is not legally married is involved with not more than one person in a permanent heterosexual or same-sex life partnership—

- (a) in which the magistrate and the person concerned have undertaken reciprocal duties of support; and
- (b) which is registered with the Secretary of the Commission in accordance with the regulations made under section 19,

that person is for all purposes regarded as the lawfully wedded spouse of that magistrate.

(2) If a magistrate is married in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), and has more than one spouse in accordance with that Act, all the spouses of the magistrate are, for all purposes, regarded as the lawfully

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<sup>64</sup> Previously s15A of MA.



wedded spouses of that magistrate who must share equally in any benefit accruing to a spouse of a magistrate in terms of the law.

## **Regulations<sup>65</sup>**

**19.** (1) The Minister may, after consultation with the Commission, make regulations regarding the following matters in relation to magistrates:

- (a) (i) The requirements for appointment as a District Court magistrate, District Court senior magistrate and District Court President;
- (ii) the requirements for appointment as a Regional Court magistrate and Regional Court President; and
- (iii) transfer and resettlement costs;
- (b) the duties, powers, conduct, discipline, hours of attendance, leave of absence, including leave gratuity, and any other condition of service, including the occupation of official quarters;
- (c) the creation of posts on the fixed establishment, and the number, grading, regrading, designation, re-designation or conversion of posts on the fixed establishment of any District Court or Regional Court;
- (d) training, including financial assistance for such training;
- (e) the code of conduct referred to in section 4(d) to be complied with by magistrates;
- (f) the provision of official transport;
- (g) the conditions on which and the circumstances under which allowances<sup>66</sup> for overtime duty, and travel, subsistence, climatic, local and other allowances, may be paid, and the amounts thereof;<sup>67</sup>
- (h) the circumstances under which a medical examination is required for the purposes of any provision of this Act or any other law, and the form of medical reports and certificates;
- (i) the legal liability of any magistrate in respect of any act done in terms of this Act or any other law and the legal liability emanating from the use of official transport;
- (j) the circumstances under which and the conditions and manner in which a magistrate may be found to be suffering from an incapacity, to be grossly incompetent, or to be

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<sup>65</sup> Based on s16 of MA.

<sup>66</sup> Previously "remuneration".

<sup>67</sup> "and the amounts thereof" added.

- guilty of gross misconduct;
- (k) the procedure for dealing with complaints and grievances of magistrates, and the remedies that may be imposed if a magistrate is found guilty of misconduct;
  - (l) the recognition of any professional society;
  - (m) the requirements for, and the registration of, not more than one person and the deregistration of that person as a partner of a magistrate, as envisaged in section 18, with the Secretary of the Commission<sup>68</sup>; and
  - (n) in general, any matter, which is not in conflict with this Act, which is reasonably necessary for the regulation of the conditions of service of magistrates or any other matter in connection with the rights, powers, functions and duties of a magistrate.

(2) (a) Subject to paragraph (b), any regulation under this section which results in State expenditure, must be made with the concurrence of the Cabinet member responsible for finance.

(b) If any regulation under this section provides for the payment of any amount of money contemplated in subsection (1)(a)(iii) and (g), the Minister may, from time to time, after consultation with the Commission, adjust such amount by notice in the *Gazette*.<sup>69</sup>

(3) A regulation made under subsection (1)(j), and which regulates the attendance of persons at misconduct proceedings contemplated in such a regulation, may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction is liable to a fine, or to imprisonment for a period not exceeding three months.

(4) The provisions of section 17(6) apply with the necessary changes required by the context in respect of any regulation made under subsection (1).<sup>70</sup>

### **Repeal of Act 90 of 1993**

**20.** The Magistrates Act, 1993 (Act No. 90 of 1993), is hereby repealed.

### **Transitional provisions and savings**

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<sup>68</sup> Formerly "Director-General".

<sup>69</sup> New.

<sup>70</sup> New

**21.** (1) Any person who immediately before the date of commencement of section 2 was a member of the Magistrates Commission in terms of the Magistrates Act, 1993 (Act No. 90 of 1993), is deemed to have been appointed in terms of this Act, and remains in that office for a period of 12 months after the commencement of this Act.

(2) (a) Subject to the changes in designation of offices in terms of paragraph (b), any person who immediately before the date of commencement of this Act holds the office of a judicial officer of a lower court, continues to hold such office and the provisions of this Act are applicable to such person.

(b) From the date of commencement of this Act, the designation of judicial officers in the lower courts changes as follows:

- (i) "Chief Magistrate" becomes "District Court President";
- (ii) "magistrate" or "additional magistrate" become "District Court magistrate" or "District Court senior magistrate";
- (iii) "regional magistrate who is head of a regional division" becomes "Regional Court President"; and
- (iv) "regional magistrate" becomes "Regional Court magistrate".

(3) Notwithstanding the repeal of the Magistrates Act, 1993 (Act No. 90 of 1993)—

- (a) any regulation made under that Act continues in force until repealed or amended under section 19; and
- (b) any pending investigation or matter in terms of such a regulation must be dealt with and concluded as if this Act had not been passed, unless determined otherwise by any regulation made under section 19.

### **Short title and commencement**

**22.** This Act is called the Magistrates Act, 2022, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

## MEMORANDUM ON THE OBJECTS OF THE MAGISTRATES BILL, 2022

### 1. PURPOSE OF BILL

1.1 The purpose of the Magistrates Bill, 2022 (the Bill) is to provide for the establishment, constitution, objects and functions of the Magistrates Commission, to regulate the appointment, conditions of service, remuneration, retirement, suspension and removal of, magistrates; and to provide for matters in connection with Magistrates.

1.2 The main aims of the Bill are threefold. **Firstly**, it aims to replace the current Magistrates Act, 1993 (Act No. 90 of 1993) (MA) in order to ensure the autonomy of the lower courts judiciary from the Executive. **Secondly**, it aims to incorporate all the provisions relating to the appointment of judicial officers of the lower courts in the Bill itself, since some provisions are presently contained in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (MCA). **Thirdly**, it aims to bring the procedure for dealing with complaints about magistrates' conduct in line with the dispensation applicable to judges in the superior courts.

1.3 The inclusion of the appointment provisions in the Bill was supported by the Association of Regional Magistrates of Southern Africa, the Chief Magistrates Forum (CMF) and the Regional Courts Presidents Forum (RCPF). The proposed alignment of the complaints mechanism for magistrates with those of judges was also supported, notably by the CMF and RCPF. The main reason for the support seems to be the fact that such a step would affirm the status of the lower courts' judicial officers as forming part of a single judiciary, with universal norms and standards applicable to the judiciary as a whole.

### 2. OBJECTS OF THE BILL

2.1 The crucial innovation introduced in the Bill, as compared to the MCA, is the insertion of the Preamble, which explains the reasons and objects of the Bill. The

definitions are set out in **clause 1 of Chapter 1** of the Bill to facilitate the interpretation of the Bill.

2.1.1 Significant new definitions include “District Court” and “Regional Court”, “head of Court” and “registrable interests”. As mentioned in paragraph 1.1 above, the Bill is intended to replace the MA, which is intended to align in relevant respects with some provisions of the proposed Lower Courts Bill (the LC Bill). The LC Bill regulates the structure and functioning of the lower courts and replaces the MCA.

2.1.2 The LC Bill revises the structure of the post of magistrates and proposes the following categories of magistrates: namely, District Court magistrate, District Court senior magistrate, District Court President, Regional Court magistrate and Regional Court President.

2.1.3 The definition of “magistrate” is amended by the Bill to mean a District Court magistrate, a District Court senior magistrate or District Court President; and a Regional Court magistrate or a Regional Court President, appointed under section 10 of the Bill, and also includes an acting magistrate.

2.2 **Chapter 2** of the Bill deals with the Magistrates Commission (the Commission) and relevant provisions pertaining to the Commission. The salient features of Chapter 2, that is **clauses 2 to 9** of the Bill, can be summarised as follows:

2.2.1 **Clause 2** maintains the continued existence of the Commission, with the powers and duties conferred on or assigned to it by or under the Bill or any other law.

2.2.2 **Clause 3** is similar in most respects to section 3 of the MA, which deals with the constitution of the Commission.

2.2.2.1 A judge as chairperson of the Commission is substituted by a Judge President or Deputy Judge President of a Superior Court in sub-clause (1)(a)(i). The Deputy Minister or any other person designated by the Minister is made an alternate of the Minister in the Commission in sub-clause (1)(a)(ii) as opposed the current provision which provides for

"the Minister or his or her nominee". The President is substituted by the Minister in sub-clause (1)(a)(v), (vi) and (vi) as the designating authority of the Regional Court magistrate, one of the 2 District Court Presidents and one of the 2 District Court magistrates to the Commission.

2.2.2.2 The number of "fit and proper persons" appointed to the Commission by the President under sub-clause (1)(a)(xiii) is reduced from five to four, and the requirement to consult Cabinet in this regard is removed. When the Commission considers a matter relating to a specific Regional Court or District Court, the Head of that Court must, in terms of sub-clause (1)(a)(xiv), form part of the Commission, which is similar to the dispensation under the Judicial Service Commission.

2.2.2.3 Another provision similar to the dispensation under the Judicial Service Commission is inserted as clause 3(5) to provide that whenever the Commission considers any matter relating to a complaint about the conduct of a magistrate, it must sit without the members referred to in subsection (1)(a)(xi) and (xii).

2.2.2.4 Members referred to in subparagraphs (xi) and (xii) are: (xi) 4 persons designated by the National Assembly from amongst its members, 2 of whom must be members of the opposition parties represented in the NA, and (xii) 4 delegates of the National Council of Provinces designated by NCOP with supporting vote of at least 6 provinces.

2.2.2.5 Clause 3(6) aligns with the dispensation in the superior courts and provides that when the Commission considers any matter other than the appointment of a magistrate, it must sit without the members referred to in subsection (1)(a)(xi) and (xii).

2.2.3. **Clause 4** is similar to section 4 of the MA and provides for the objects of the Commission. The clause highlights and recognizes the status of magistrates as judicial officers and not as employees of State. The Commission is aimed mainly to have oversight over judicial officers in the lower courts in respect of various aspects relating to these judicial officers. The objects thereof are to—

- (a) ensure that the appointment, promotion, transfer or discharge of, or disciplinary steps against, magistrates, take place without favour or prejudice;
- (b) ensure that no influencing or victimization of magistrates takes place;

- (c) endeavour to promote the continuous training of magistrates and to make recommendations in regard thereto to the Minister and the South African Judicial Education Institute;
- (d) compile a code of conduct for magistrates;
- (e) advise the Minister and to make recommendations to him or her regarding the administrative matters applicable to magistrates, including proposals regarding legislation purporting to regulate the conditions of service and relevant matters regarding magistrates, separately;
- (f) carry out investigations and make recommendations to the Minister regarding the matters mentioned in section 15(2)(provisional suspension), (3)(removal from office) and (4)(reduction or withholding of remuneration during suspension);
- (g) advise the Minister or to make recommendations to him or her regarding the requirements for appointment and the appointment of magistrates; and
- (h) advise the Minister or to make recommendations to him or her or to report to the Minister for the information of Parliament regarding any matter which, in the opinion of the Commission, is of interest for—
  - (i) the independence of the dispensing of justice; and
  - (ii) the efficiency of the administration of justice, in the lower courts.

2.2.4 **Clause 5** is similar to section 5 of the MA and contains provisions regarding the meetings of the Commission. The Chairperson or, if not available, the Vice-Chairperson of the Commission determines the time and place of the meetings of the Commission. In the absence of both the Chairperson and the Vice-Chairperson, the majority of the members of the Commission determines the times and places of the meetings. The majority of members of the Commission constitutes a quorum of a meeting, and in the absence of both the Chairperson and the Vice-Chairperson from a meeting, the majority of the members present must elect one member to preside over the particular meeting.

2.2.5 **Clause 6**, dealing with the Committees of the Commission, is similar in most material respects to section 6 of the MA, and sub-clause (1) thereof provides that the

Commission must establish an executive committee and may establish such other committees as the Commission may deem necessary. A new provision is inserted in sub-clause (1), in terms of which the Commission must establish a standing committee to deal with allegations of misconduct against magistrates. When considering a complaint relating to the conduct of the magistrate who is a member of the standing committee, the standing committee must sit without that member. The Chairperson is added as a member of the executive committee and the standing committee. It is envisaged that the establishment of a standing committee will contribute towards expediting the processing of misconduct cases. In terms of sub-clause (3), the Commission is required to designate a chairperson for every committee and, if deemed necessary, a vice-chairperson.

2.2.6 **Clause 7** is similar to section 7 of the MA, which sets out the powers and functions of the Commission.

2.2.6.1 The powers of the Commission include, *inter alia*, investigating matters that the Committee deems necessary; obtaining access to official information or documents; hearing any person or summoning any person to appear before the Commission for questioning; advising the Minister about any matter or providing him or her with a recommendation; and reporting to the Minister for the information of Parliament on any matter the Commission deems fit.

2.2.6.2 The newly inserted sub-clause (2) requires the Commission to report annually to the Minister and Parliament on matters under clause 15(2), (3) and (4) relating to the provisional suspension, removal from office or the reduction or withholding of remuneration of the magistrate who is suspended. However, other than annual reporting contemplated in sub-clause (2) the Commission is required to report, under sub-clause (1)(f), to the Minister for the information of Parliament on any matter the Commission deems fit. The latter report must be tabled in Parliament by the Minister within 14 days after it was presented to him or her, if Parliament is then in session, or, if not then in session, within 14 days after the commencement of its next ensuing session.



2.2.7 **Clause 8** is similar to section 8 of the MA, and contains provisions regarding the remuneration, travelling and subsistence expenses of the different categories of members of the Commission.

2.2.7.1 In terms of sub-clause (1) the Minister with the concurrence of the Minister of Finance determines payment of the allowances for travelling and subsistence expenses incurred by the Chairperson of the Commission or a member of a committee who is a judge or a member of the Commission designated in terms of section 3(1)(a)(xi) (NA members), (xii) (NCOP members) or (xiii) (President's appointees), which expenses were incurred in the performance of their functions in terms of the Bill.

2.2.7.2 However, the Minister determines by notice in the *Gazette* with the concurrence of the Minister of Finance payment of such remuneration, allowances for travelling and subsistence expenses incurred by a member of the Commission or a committee who is not a judge or a magistrate, or a member of the Commission designated in terms of section 3(1)(a)(xi), (xii) or (xiii), or who is not subject to the laws governing the public service, in the performance of their functions in terms of the Bill.

2.2.8 **Clause 9** lays down provisions relating to the Secretary and staff of the Commission. In terms of sub-clause (1) the work incidental to the performance by the Commission of its functions must be performed by officials appointed in terms of the laws governing the public service, but one of these officials must be appointed as the Secretary of the Commission by the Minister, in consultation with the Commission. The Secretary performs his or her functions under the control and direction of the Chairperson, performs the functions of the Registrar of registrable interests and generally performs such administrative tasks related to the work of the Commission as may be directed by the Chairperson from time to time.

2.3 **Chapter 3** deals with appointment, conditions of service, remuneration, retirement, suspension and removal of magistrate. The salient features of Chapter 3, being **clauses 10 to 18** of the Bill, can be summarised as follows:

2.3.1 **Clause 10** is based on section 10 of the MA, dealing with the appointment of magistrates, but the references to the specific posts of magistrates are new, namely: District Court magistrates, District Court senior magistrates, District Court Presidents, Regional Court magistrates and Regional Court Presidents. The Minister must, after consultation with the Commission, and in accordance with the provisions of the LC Bill, appoint appropriately qualified South African citizens who are fit and proper persons to these posts.

2.3.2 **Clause 11** deals with acting appointments.

2.3.2.1 In terms of sub-clause (1) the Minister may appoint any appropriately qualified and fit and proper person to act in the place of any magistrate who is not available, or in any vacant office of a magistrate or as a magistrate in addition to the judicial establishment of any lower court. Acting appointments must be made where the case load justifies such appointment and with due regard to the financial and resource implications.

2.3.2.2 Sub-clause (2), which follows the approach in section 175(2) of the Constitution relating to acting judges, provides that before making an acting appointment to any court, the Minister must consult with the Head of the Court in question or, if the acting appointment relates to a Head of a Court, the Minister must consult with the Judge President of the Division of the High Court having jurisdiction over that court.

2.3.2.3 Sub-clause (3) empowers a Head of Court to temporarily appoint any competent person in the place of the magistrate whenever a magistrate of the Court in question is for any reason unavailable to carry out the functions of his or her office, and to do so in consultation with the Minister or an officer in the public service designated by the Minister. Such an appointment remains valid for the duration of the unavailability of the magistrate in question, or for a period not exceeding five consecutive court days, whichever period is the shortest. However, any person so appointed may upon the expiry of the period of appointment, and if the magistrate in whose place the appointment has been made is still unavailable, be reappointed once only in the place of that magistrate.

2.3.3 **Clause 12** is similar to section 11 of the MA, which provides that the conditions of service of a magistrate must be determined in accordance with the regulations.

2.3.4 **Clause 13** is based on section 12 of the MA, which determines in sub-clause (1) that magistrates are entitled to such salaries, allowances or benefits as determined from time to time by the President by proclamation in the *Gazette*, after taking into account the recommendations of the Independent Commission for the Remuneration of Public Office-Bearers.

2.3.4.1 Sub-clause (4) provides for the establishment by the Commission of a Lower Courts Remuneration Committee, emanating from representations by the magistracy, which consists of two Regional Court Presidents, designated by the Regional Court Presidents, two District Court Presidents, designated by the District Court Presidents, two Regional Court magistrates, designated by the Regional Court magistrates, and two District Court magistrates, designated by the District Court magistrates.

2.3.4.2 Members of the Committee serve for a renewable term of three years, or until recalled or replaced by those who designated them as members. The Committee is empowered to elect one of its members as its chairperson, to hold such office for the period determined by the Committee, and the provisions of clause 8 are applicable in respect of the expenses of members of the Committee.

2.3.4.3 Sub-clause (5) provides that any remuneration payable to members of the Committee must be paid out of the National Revenue Fund as contemplated in section 213 of the Constitution. In terms of sub-clause (6) the remuneration of magistrates may not be reduced except by an Act of Parliament.

2.3.4.4 In terms of sub-clause (7) if an officer or employee in the public service is appointed as a magistrate, the period of his or her service as a magistrate must be reckoned as part of and continuous with his or her service in the public service for the purposes of leave, pension and any other condition of service.

2.3.5 **Clause 14** deals with retirement from office by magistrates, and is based largely on section 13 of the MA.

2.3.5.1 Sub-clause (1) provides that a magistrate must retire from office on attaining the age of 65 years. However, in terms of sub-clause (2) the magistrate may notify the Commission in writing before reaching that age that he or she intends to continue to serve in that office for a specified period, but such a period may not be extended beyond the month in which the magistrate in question will attain the age of 70 years.

2.3.5.2 In terms of sub-clause (3) a magistrate may request the Minister to allow him or her to retire from office on account of continued ill-health or for any other reason which the Minister deems sufficient. The request to retire must reach the Minister at least six calendar months before the date on which the magistrate wishes so to retire, unless the Minister approves a shorter period.

2.3.5.3 A magistrate who has been allowed to retire on account of continued ill-health is entitled to such pension benefits as he or she would have been entitled to under the pensions Act applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without his or her being instrumental thereto.

2.3.5.4 If a magistrate is allowed to retire for any other reason, he or she is entitled to the benefits under the pensions Act applicable to him or her at the time of his or her retirement.

2.3.5.5 Sub-clause (4) requires a magistrate to resign from office by written notice to the Minister that he or she no longer wishes to serve in that office, and six calendar months must be given before resignation, unless the Minister approves a shorter period. In terms of sub-clause (5) a magistrate who is appointed to the office of a judge does not require to give the Minister six months' notice of resignation from office of the magistrate.

2.3.6 **Clause 15** deals with suspension or removal from office of magistrate.

2.3.6.1 In terms of sub-clause (2) the Minister is required to provisionally suspend a magistrate from office if—

(a) the Commission is satisfied that reliable evidence exists indicating that an allegation against that magistrate is of such a serious nature as to make it inappropriate for the

magistrate to perform the functions of judicial office while the allegation is being investigated; and

(b) an investigation has been instituted by the Commission into such magistrate's fitness to hold office. The Minister must in this regard act on the advice of the Commission, after it has afforded the magistrate a reasonable opportunity to be heard regarding the desirability of such provisional suspension.

2.3.6.2 The provisional suspension of a magistrate lapses after 60 days from the date of the suspension, unless the Commission commences its inquiry, within that period, into the allegation in question by serving on the magistrate a written notice containing the allegation concerned. The enquiry by the Commission must be concluded as soon as possible.

2.3.6.3 Sub-clause (3) determines that if the removal of the magistrate from office is recommended by the Commission on account of—

- (a) suffering from an incapacity;
- (b) gross incompetence; or
- (c) being guilty of gross misconduct,

the Minister must suspend that magistrate from office or, if the magistrate is, at that stage, already being provisionally suspended, confirm the suspension. A report on the suspension must be tabled in the National Assembly by the Minister within 14 days of such suspension if the Assembly is then in session, or, if not then in session, within 14 days after the commencement of the next ensuing session of the Assembly. The National Assembly must, as soon as is reasonably possible, pass a resolution as to whether or not the restoration of a magistrate to his or her office is recommended, after which the Minister must restore the magistrate concerned to his or her office or remove him or her from office.

2.3.6.4 Sub-clause (4) provides that unless the Commission determines otherwise, the remuneration of a magistrate is not affected during a period of suspension. If the Commission determines to reduce or withhold the remuneration of a magistrate, the Minister must table a report regarding that, and the reason therefor in the National Assembly within seven days of such determination, if the Assembly is then in session, or,

if not then in session, within seven days after the commencement of the next ensuing session of the Assembly.

2.3.6.5 The National Assembly must, within 30 days or as soon thereafter as is reasonably 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. If the National Assembly passes a resolution that the determination is set aside, that determination lapses effective from the date when the determination was first made.

2.3.7 **Clause 16** is similar to section 14 of the MA, which provides that magistrates have the powers and duties conferred on or assigned to them by or under the laws of the Republic. However, the Minister may, after consultation with the Commission, make regulations conferring on or assigning to magistrates administrative powers and duties which do not affect the judicial independence of magistrates, including regulations empowering the Minister, after consultation with the Commission, to confer or assign administrative powers and duties of a general nature on or to magistrates.

2.3.8 **Clause 17** is based on section 15 of the MA, which provides in sub-clause (1) that magistrates may not perform other paid work without the consent of the Minister.

2.3.8.1 New provisions have been inserted to deal with the declaration of registrable interests which are similar to the provisions contained in section 13 of the Judicial Service Commission Act, 1994, in respect of judges of the superior courts.

2.3.8.2 Sub-clause (2) obliges every magistrate to disclose to the Registrar as prescribed, particulars of all his or her registrable interests and those of his or her immediate family members. 'Immediate family member' is for the purposes of clause 17 defined to mean the spouse, civil partner or permanent life partner of a magistrate and includes dependent children of, and family members living in the same household with, that magistrate. Sub-clause (3) requires the initial disclosure to be made within 60 days of a date fixed by the President by proclamation and thereafter annually and in such instances as prescribed.

2.3.8.3 The Registrar is obliged to open and keep a register which must record the particulars of magistrates' registrable interests, amend any entries in the Register when necessary and perform the other duties in connection with the Register as required in terms of the Act.

2.3.8.4 In terms of sub-clause (5) the Minister must, after consultation with the Commission, make regulations regarding the content and management of the register. Sub-clause (6) obliges the Minister to table in Parliament the said regulations, before being published in the *Gazette*, for approval and Parliament may, after obtaining and considering public comment thereon, approve the regulations or any subsequent amendment thereof.

2.3.9 **Clause 18**, dealing with equal benefits accruing to spouses and partners of magistrates is similar to section 15A of the MA. In terms of sub-clause (1) a person is regarded as the lawfully wedded spouse of a magistrate who is not legally married but is involved with not more than one person in a permanent heterosexual or same-sex life partnership in which reciprocal duties of support have been undertaken and which is registered with the Secretary. Sub-clause (2) recognizes polygamous marriages entered into under the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), in terms of which all the spouses of the magistrate are, for all purposes, regarded as the lawfully wedded spouses of that magistrate.

2.3.10 **Clause 19** provides for the making of the regulations by the Minister after consultation with the Commission regarding certain specified matters relating to magistrates.

2.3.11 **Clause 20** provides specifically for the repeal of the MA.

2.3.12 **Clause 21** deals with transitional provisions and savings.

2.3.12.1 In terms of sub-clause (1) a member of the Magistrates Commission in terms of the Magistrates Act, 1993, is deemed to have been appointed in terms of the Bill, and remains in that office for a period of 12 months after the commencement of the Bill.

2.3.12.2 Sub-clause (2)(a) provides that a person who holds the office of a judicial officer of a lower court, continues to hold such office, subject to changes in the designation of offices, and the provisions of the Bill are applicable to such person.

2.3.12.3 Sub-clause (2)(b) changes the designation of magistrates in terms of which "Chief Magistrate" becomes "District Court President", "magistrate" or "additional magistrate" become "District Court senior magistrate" or "District Court magistrate", "regional magistrate who is head of a regional division" becomes "Regional Court President" and "regional magistrate" becomes "Regional Court magistrate".

2.3.12.4 Sub-clause (3) saves the existing regulations and provides that notwithstanding the repeal of the Magistrates Act, 1993 any regulation made under that Act continues to be in force until repealed or amended under section 19, and any pending investigation or matter in terms of such a regulation must be dealt with and concluded as if the Bill had not been passed, unless determined otherwise by any regulation made under section 19.

2.3.13 **Clause 22** deals with the short title and commencement of the Bill. If enacted, the Bill will be called the Magistrates Act, 2022, and will come into operation on a date to be fixed by the President by proclamation in the *Gazette*.

### **3. DEPARTMENTS/BODIES/PERSONS CONSULTED**

3.1 The Bill was published in the *Gazette* and the public were invited to submit comments thereon.

### **4. IMPLICATIONS FOR PROVINCES**

There are no implication for provinces.

### **5. FINANCIAL IMPLICATIONS FOR STATE**

The Bill has no financial implications.



## **6. PARLIAMENTARY PROCEDURE**

6.1 The Department of Justice and Constitutional Development is of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The Constitution distinguishes between four categories of Bills as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly classified or tagged; otherwise it would be constitutionally invalid.

6.3 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 to the Constitution.

6.4 The Constitutional Court stated in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC), that the test for the tagging of Bills essentially entails that "any Bill whose provisions in substantial measure" affects the provinces must be classified to follow the section 76 procedure.

6.5 The Bill seeks to replace the current Magistrates Act, to incorporate all the provisions relating to the appointment of judicial officers of the lower courts in the Bill itself, and to bring the procedure for dealing with complaints about magistrates' conduct in line with the dispensation applicable to judges in the superior courts. Therefore the substance of the Bill is to provide for matters relating to magistrates, which is a matter not listed in Schedule 4 of the Constitution as a matter of concurrent jurisdiction between national and provincial legislatures. In the final analysis, it is the Department's view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 or Schedule 5 to the Constitution. Consequently, the Department is of the opinion that the Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

## **7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL LEADERS**

The Department is of the view that the Bill would not affect the customary law or customs of traditional communities, and therefore it is not necessary to refer the Bill to the National House of Traditional Leaders.