

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.