

REPUBLIC OF SOUTH AFRICA

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# JUDICIAL OFFICERS AMENDMENT BILL

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*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No 22681 of 18 September 2001) (The English text is the official text of the Bill)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 72—2001]

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## GENERAL EXPLANATORY NOTE:

[                      ]      Words in bold type in square brackets indicate omissions from existing enactments.

\_\_\_\_\_      Words underlined with a solid line indicate insertions in existing enactments.

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# BILL

To amend the Magistrates' Courts Act, 1944, so as to further regulate the appointment of magistrates; to amend the Supreme Court Act, 1959, so as to further regulate the remuneration of judges; to amend the Judges' Remuneration and Conditions of Employment Act, 1989, so as to substitute certain definitions; to bring the provisions relating to the offices of Chief Justice of South Africa and President of the Constitutional Court in line with the Constitution; to make provision for the offices of Deputy Chief Justice and Deputy President of the Supreme Court of Appeal; to further regulate the remuneration of judges and Constitutional Court judges; to further regulate the discharge of judges from active service; to make further provision in connection with the performance of service by a judge discharged from active service; to provide for the performance of service as Deputy Chief Justice or President or Deputy President of the Supreme Court of Appeal by a President or a Deputy President of the Supreme Court of Appeal or Deputy Chief Justice discharged from active service; to further regulate the vacation of office by Constitutional Court judges; to substitute obsolete expressions; to create a mechanism to deal with complaints against judges of the Constitutional Court, the Supreme Court of Appeal, the High Courts and courts of status similar to a High Court; to make the Judges' Remuneration and Conditions of Employment Act, 1989, applicable throughout the Republic and to repeal corresponding laws applicable in the former homelands; to amend the Magistrates Act, 1993, so as to further regulate the salaries of magistrates; to amend the Independent Commission for the Remuneration of Public Office-bearers Act, 1997, so as to extend the definition of "office-bearer" to include judges and magistrates and to extend the functions of the Independent Commission for the Remuneration of Public Office-bearers; to amend the Public Finance Management Act, 1999, in order to add the salaries and allowances paid to magistrates to Schedule 5 thereof; and to provide for matters incidental thereto.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 9 of Act 32 of 1944, as substituted by section 2 of Act 8 of 1967, and as amended by section 4 of Act 53 of 1970, section 8 of Act 102 of 1972, section 11 of Act 29 of 1974, section 24 of Act 94 of 1974, section 1 of Act 28 of 1981, section 2 of Act 34 of 1986, section 17 of Act 90 of 1993, section 3 of Act 104 of 1996, section 3 of Act 66 of 1998 and section 1 of Act of 62 of 2000

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1. Section 9 of the Magistrates' Courts Act, 1944, is amended by—

- (a) the substitution for paragraph (b) of subsection (1) of the following paragraph:  
 “(b) No person shall be appointed as a magistrate of a regional division unless he or she **[has satisfied all the requirements for the degree of *baccalaureus legum* of a university in the Republic or has passed the Public Service Senior Law Examination or an examination deemed by the Minister to be equivalent or superior to the said examination]** is appropriately qualified and is a fit and proper person, and the Magistrates Commission has informed the Minister that he or she is suitable for appointment as a magistrate of a regional division.”;
- (b) the substitution for subsections (3) and (4) of the following subsections: 10  
 “(3) Whenever by reason of absence or incapacity a magistrate, additional magistrate or assistant magistrate is unable to carry out the functions of his or her office or whenever such office becomes vacant, the Minister, or an officer in the Department of Justice and Constitutional Development or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may appoint any other **[competent]** appropriately qualified and fit and proper person to act in the place of the absent or incapacitated magistrate, additional magistrate or assistant magistrate, as the case may be, during such absence or incapacity or to act in the vacant office until the vacancy is filled: **[Provided that no person shall be appointed as an acting magistrate of a regional division unless he or she has satisfied all the requirements for the degree referred to in subsection (1)(b) or has passed an examination referred to in that subsection:]** Provided **[further]** that when any such vacancy has remained unfilled for a continuous period exceeding three months the fact shall be reported to the Magistrates Commission. 15 20 25
- (4) The Minister or an officer in the Department of Justice and Constitutional Development or a magistrate at the head of a regional division or a person occupying the office of chief magistrate, including an acting chief magistrate authorized thereto in writing by the Minister, may appoint temporarily any **[competent]** appropriately qualified and fit and proper person to act **[either generally or in a particular matter]** as magistrate of a regional division in addition to any magistrate or acting magistrate of that division or as additional or assistant magistrate for any district or sub-district in addition to the magistrate or any other additional or assistant magistrate.”; and 30 35
- (c) the deletion of subsection (5).

**Substitution of section 10 of Act 32 of 1944, as substituted by section 4 of Act 66 of 1998** 40

2. The following section is substituted for section 10 of the Magistrates’ Courts Act, 1944:

**“Qualifications for appointment of judicial officers**

**10.** Subject to the provisions of the Magistrates Act, 1993 (Act No. 90 of 1993), and of section 11, any person who is appropriately qualified and who is a fit and proper person may be appointed as a magistrate by the Minister, on the advice of the Magistrates Commission.” 45

**Repeal of section 11 of Act 59 of 1959**

3. Section 11 of the Supreme Court Act, 1959, is repealed. 50

**Amendment of section 1 of Act 88 of 1989, as amended by section 1 of Act 10 of 1994 and section 1 of Act 77 of 1997**

4. Section 1 of the Judges’ Remuneration and Conditions of Employment Act, 1989 (hereinafter referred to as the Judges’ Remuneration Act), is amended by—

- (a) the substitution in subsection (1) for the definition of “active service” of the following definition:
- “ ‘active service’ means any service as a judge in a permanent capacity, and includes—
- (a) service in an acting capacity for any continuous period immediately prior to assuming office as a judge in a permanent capacity; and
  - (b) any other continuous period of longer than 29 days of such service in an acting capacity prior to assuming office as a judge in a permanent capacity; and
  - (c) **service by a judge of the Supreme Court as a constitutional judge pursuant to an appointment as such a judge in terms of the Constitution,**
- irrespective of whether or not such service was performed prior to or after the fixed date;”;
- (b) the substitution in subsection (1) for the definition of “judge” of the following definition:
- “ ‘judge’ means any person holding the office of—
- (a) Chief Justice of South Africa or Deputy Chief Justice;
  - (b) judge of the Constitutional Court;
  - (c) President, Deputy President or judge of the Supreme Court of Appeal; or
  - (d) judge president, deputy judge president or judge of a High Court;”;

(c) the substitution in subsection (1) for the definition of “Minister” of the following definition:

“ ‘Minister’ means the Minister[of] for Justice and Constitutional Development;”;

(d) the insertion in subsection (1) after the definition of “Minister” of the following definition:

“ ‘partner’ means a partner, whether in a heterosexual or a same sex relationship, which is intended to be a lasting relationship as is the case with a marriage relationship and which relationship is, for purposes of this Act, registered as such with the Director-General: Justice and Constitutional Development in terms of the regulations made under section 12;”;

(e) the substitution in subsection (1) for the definition of “salary” of the following definition:

“ ‘salary’ means [—

    - (a) **in Chapter 2, subject to the provisions of subsection (2)—**
      - (i) the annual salary and the allowance payable to a judge [**in terms of**] as contemplated in section 2; **and**
      - (ii) **where applicable, the annual allowance payable to a constitutional judge in terms of section 10A(2); and**
    - (b) **in Chapter 3, the annual salary and the allowance payable to a constitutional judge in terms of section 10A;]**”;

(f) the deletion of subsections (2) and (3).

**Substitution of heading to Chapter 2 of Act 88 of 1989, as inserted by section 11 of Act 10 of 1994**

5. The following heading is substituted for the heading to Chapter 2 of the Judges’ Remuneration Act:

**“REMUNERATION AND CONDITIONS OF EMPLOYMENT OF JUDGES”**.

**Substitution of section 2 of Act 88 of 1989, as amended by section 8 of Act 157 of 1993 and section 2 of Act 10 of 1994**

6. The following section is substituted for section 2 of the Judges’ Remuneration Act:

**“Remuneration of judges**

2. (1) Any person who holds office as a judge, whether in an acting or permanent capacity, shall in respect thereof, in addition to the amounts

referred to in section 12 **[and an allowance at the rate of R3 500 per annum]**, be paid a monthly salary and an annual allowance at a rate determined by the President by proclamation in the *Gazette*, as contemplated in subsection (7).

(2) A proclamation in terms of subsection (1) may be issued with effect from a date which may not be earlier than one year prior to the date of the proclamation.

**[(3) (a) A copy of a proclamation issued under subsection (1) shall be submitted to Parliament within 14 days after publication thereof.**

**(b) If Parliament rejects such proclamation or any provision thereof, such proclamation or provision shall thereafter cease to be of force and effect to the extent to which it was so rejected but without prejudice to the validity of anything done in terms of such proclamation up to the date upon which it so ceased to be of force and effect, or to any right, privilege, obligation or liability acquired, accrued or incurred as at the said date under and by virtue of such proclamation.]**

(4) The allowance **[payable]** referred to in **[terms of]** subsection (1) shall not be taxable, unless Parliament expressly provides otherwise.

**[(5) If a judge who has been seconded for service as a judge of the High Court or Supreme Court of any of the former independent states of Transkei, Bophuthatswana, Venda or Ciskei holds the office of chief justice of that High Court or Supreme Court in a permanent or acting capacity, and if the amount of the salary and allowance payable to him or her in terms of subsection (1) is less than the amount of the salary and allowance payable in terms of that subsection to a judge president of a provincial division of the Supreme Court of South Africa, he or she shall, in addition to the salary and allowance payable to him or her as aforesaid, be paid an allowance equal to the difference between the amount of the salary and allowance payable to him or her as aforesaid and the amount of the salary and allowance payable as aforesaid to such a judge president.]**

(6) The amount of any salary and allowance **[payable in terms of]** contemplated in **[subsections (1) and (5)]** subsection (1) shall be paid out of revenue.

**(7) (a) Judges are entitled to such salaries, allowances or 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) The Commission referred to in paragraph (a) must, when investigating or considering the salaries, allowances or benefits of judges, take the following factors into consideration:**

- (i) The role, status, duties, functions and responsibilities of judges;
- (ii) the affordability of different levels of remuneration of public office bearers;
- (iii) current principles and levels of remuneration in society generally;
- (iv) inflationary increases; and
- (v) any other factor which, in the opinion of the Commission, is relevant.”.

#### **Amendment of section 3 of Act 88 of 1989, as amended by section 12 of Act 10 of 1994**

**7. Section 3 of the Judges’ Remuneration Act is amended by the substitution for subsection (2) of the following subsection:**

“(2) A judge who has been discharged from active service shall for the purposes of section 3 of the Supreme Court Act, 1959 (Act No. 59 of 1959), not be regarded as a judge of **[any division]** the Supreme Court of Appeal or any High Court.”.

**Amendment of section 4 of Act 88 of 1989, as substituted by section 3 of Act 10 of 1994**

8. Section 4 of the Judges' Remuneration Act is amended by the deletion of subsection (2).

**Substitution of section 7 of Act 88 of 1989, as amended by section 4 of Act 10 of 1994 and section 3 of Act 77 of 1997** 5

9. The following section is substituted for section 7 of the Judges' Remuneration Act:

**“Performance of service by judge discharged from active service**

7. (1) (a) A judge who has been discharged from active service—
- (i) except a judge who has been so discharged in terms of section 3(1)(b), (c) or (d), shall[, **subject to subsection (2A),**] be available to perform service until he or she attains the age of 75 years, for a period or periods which, in the aggregate, amount to three months a year; or
  - (ii) who has already attained the age of 75 years, may perform further service, if his or her services are, after consultation with the Minister, requested by the Chief Justice or President of the Supreme Court of Appeal or the judge president in whose area of jurisdiction he or she resides or of the **[division]** court to which he or she was attached when discharged from active service, or with his or her consent, any other judge president, in consultation with the Chief Justice or the said judge president, as the case may be, and that judge's mental and physical health enables him or her to perform such service. 10 15 20
- (b) A judge may voluntarily perform more than three months service a year, if his or her services are so requested.
- (c) Service as mentioned in paragraph (a)(iv), (b), (c) **[(d)]** or (e) of subsection (2) may be performed only with the consent of the judge concerned. 25
- (2) For the purposes of subsection (1) **[and subject to subsection (2A)]** “service” means—
- (a) (i) service as a judge of the **[Supreme Court of South Africa]** Supreme Court of Appeal or a High Court as contemplated in the Supreme Court Act, 1959 (Act No. 59 of 1959), in the same or a higher office held by the judge concerned on discharge from active service; 30
  - (ii) service as a judge of the constitutional Court; or 35
  - (iii) **[with the approval of the judge concerned,]** service in a lower office with the approval of the judge concerned; or
  - (iv) service as a Tribunal President of a Special Tribunal as contemplated in section 7 of the Special Investigation Units and Special Tribunals Act, 1996 (Act No. 74 of 1996); 40
  - (b) service as a **[chairman]** chairperson or a member of a commission as contemplated in the Commissions Act, 1947 (Act No. 8 of 1947);
  - (c) service as a **[chairman]** chairperson or a member of a body or institution established by or under any law;
  - [(d) service as a judge of the High Court or Supreme Court of any of the former independent states of Transkei, Bophuthatswana, Venda or Ciskei;]** 45
  - (e) any other service which the Minister may entrust to him or her.
- [(2A) A judge who performs service as a constitutional judge after he or she has been discharged from active service, shall for the purposes of this Act be deemed to perform service as contemplated in subsection (1).]** 50
- (3) A judge who performs service in terms of subsection (1) shall monthly be paid an additional salary equal to the salary which at that time is payable to the holder of the office which he or she holds for that period, or which is payable to the holder of the office which he or she held at his or her discharge from active service, whichever salary is the greater. 55

(4) The salary of a judge who contrary to subsection (1) intentionally fails or refuses to perform the minimum period of service referred to in that subsection, shall, for every full year during which he or she so fails or refuses, be reduced by two percent: Provided that such reduction shall, in the aggregate, not amount to more than 10 per cent of such salary. 5

(5) [(a)] The registrar of the **[division of the Supreme Court]** Constitutional Court, Supreme Court of Appeal or a High Court where a judge performs service in terms of subsection (1), shall notify the Director-General: Justice and Constitutional Development immediately of the commencement and duration of the service. 10

**[(b) The registrar of the Constitutional Court shall notify the Director-General: Justice immediately of the commencement and duration of service performed by a judge in terms of subsection (2A).]**

(6) The Director-General: Justice and Constitutional Development shall keep a register of all service performed by judges in terms of **[subsections]** subsection (1) **[and (2A)]**.”. 15

**Substitution of section 7A of Act 88 of 1989, as inserted by section 1 of Act 91 of 1993 and amended by section 12 of Act 10 of 1994**

**10.** The following section is substituted for section 7A of the Judges’ Remuneration Act: 20

**“Performance of service as Chief Justice [by Chief Justice] or Deputy Chief Justice or President or Deputy President of Supreme Court of Appeal by Chief Justice or Deputy Chief Justice, President or Deputy President of Supreme Court of Appeal, respectively, discharged from active service** 25

**7A.** (1) A Chief Justice or Deputy Chief Justice or President or Deputy President of the Supreme Court of Appeal who has been discharged from active service, except a Chief Justice or Deputy Chief Justice or President or Deputy President of the Supreme Court of Appeal who has been discharged from active service in terms of section 3(1)(b), (c) or (d), may, at the request of the President, from the date on which he or she has been discharged from active service, perform service as Chief Justice of South Africa or Deputy Chief Justice or President or Deputy President of the Supreme Court of Appeal, as the case may be, for a period determined by the President, which shall not extend beyond the date on which such Chief Justice or Deputy Chief Justice or President or Deputy President attains the age of 75 years. 30

(2) A Chief Justice or Deputy Chief Justice or President or Deputy President of the Supreme Court of Appeal who performs service in terms of subsection (1) shall monthly be paid such remuneration as the President may determine in consultation with the Independent Commission for the Remuneration of Public Office-bearers.”. 35 40

**Substitution of section 8 of Act 88 of 1989, as amended by section 5 of Act 10 of 1994**

**11.** The following section is substituted for section 8 of the Judges’ Remuneration Act:

**“Amount payable to surviving spouse or partner of judge** 45

**8.** (1) Subject to the provisions of subsection (2) the surviving spouse or partner of a judge who on or after the fixed date was or is discharged from active service in terms of section 3 or 4 or who died or dies while performing active service, shall be paid with effect from the first day of the month immediately succeeding the month in which he or she dies an amount— 50

(a) in the case of a surviving spouse or partner of a judge who was so discharged from active service, equal to two thirds of the salary which was in terms of section 5 payable to that judge;

- (b) in the case of a surviving spouse or partner of a judge who died while performing active service as a judge, equal to two thirds of the amount to which that judge would have been entitled if he or she was discharged from active service in terms of section 3(1)(a) on the date of his or her death. 5
- (2) For the purposes of subsection (1) the amount payable to a surviving spouse or partner shall be adjusted whenever the salary applicable to the office held by the judge concerned on his or her discharge or at his or her death, is increased.
- (3) The amount payable to the surviving spouse or partner of a judge in terms of subsection (1) shall be payable with effect from the first day of the month immediately succeeding the day on which he or she died, and shall be payable until the death of such spouse or partner.”. 10

#### **Substitution of section 9 of Act 88 of 1989**

12. The following section is substituted for section 9 of the Judges’ Remuneration Act: 15

#### **“Gratuity payable to surviving spouse or partner of judge**

9. If a gratuity referred to in section 6 would have been payable to a judge who died or dies on or after the fixed date had he or she not died but, on the date of his or her death, was discharged from active service in terms of section 3 or 4, there shall— 20
- (a) if such judge is survived by a spouse or partner, be payable to such spouse or partner, in addition to any amount payable to that spouse or partner in terms of section 8; or
- (b) if such judge is not survived by a spouse or partner, be payable to the estate of such judge, 25
- a gratuity which shall be equal to the amount of the gratuity which would have been so payable to such judge had he or she not died but was, on the date of his or her death, discharged from active service as aforesaid.”.

#### **Amendment of section 10 of Act 88 of 1989, as amended by section 6 of Act 10 of 1994** 30

13. Section 10 of the Judges’ Remuneration Act is amended by the substitution for subsection (3) of the following subsection:

- “(3) The surviving spouse or partner of a judge referred to in subsection (1) shall, with effect from the first day of the month immediately succeeding the month in which he or she dies, be paid an amount equal to two thirds of the salary which was payable to that judge in terms of subsection (2)(a), which amount shall be payable until the death of such spouse or partner.”. 35

#### **Repeal of Chapter 3 of Act 88 of 1989, as inserted by section 7 of Act 10 of 1994, and amended by sections 4 and 5 of Act 77 of 1997** 40

14. Chapter 3 of the Judges’ Remuneration Act is repealed.

#### **Amendment of section 12 of Act 88 of 1989, as amended by section 71 of Act 129 of 1993, section 9 of Act 10 of 1994 and section 14 of Act 104 of 1996**

15. Section 12 of the Judges’ Remuneration Act is amended by—
- (a) the substitution for the words preceding paragraph (a) of subsection (1) of the following words: 45
- “The President may, after consultation by the Minister with the Chief Justice, the President of the [Constitutional Court] Supreme Court of Appeal and the judges president of the respective [divisions] High Courts, make regulations as to—”; and 50



- (b) the substitution for paragraph (e) of subsection (1) of the following paragraph:  
 “(e) the amounts payable to judges of the **[Appellate Division]** Supreme Court of Appeal and of the Constitutional Court in connection with their accommodation.”.

**Amendment of section 15 of Act 88 of 1989, as amended by section 10 of Act 10 of 1994** 5

**16.** Section 15 of the Judges’ Remuneration Act is amended by the substitution for subsection (1) of the following subsection:

- “(1) The provisions of this Act shall, subject to the provisions of subsection (2) and Chapter 5, apply to all judges **[who on the fixed date have in terms of section 10 of the Supreme Court Act, 1959 (Act No. 59 of 1959), been appointed as judges or who are thereafter thus appointed, and to all constitutional judges who have in terms of the Constitution been thus appointed]** of the Constitutional Court, Supreme Court of Appeal and High Courts.”.

**Insertion of Chapter 5 in Act 88 of 1989** 15

**17.** The following Chapter is inserted in the Judges’ Remuneration Act after section 17, the present section 18 becoming section 31:

**“CHAPTER 5**

**COMPLAINTS MECHANISM**

**Definitions** 20

**18.** For purposes of this Chapter, unless the context indicates otherwise—

- (a) “Chairperson” means the Chairperson of the Council;  
 (b) “Commission” means the Judicial Service Commission established by section 178 of the Constitution;  
 (c) “Council” means the Judicial Council established by section 19; and  
 (d) “judge” means any person holding the office of judge referred to in section 1 and includes any person holding the office of judge in a court of similar status to a High Court, as contemplated in section 166 of the Constitution.

**Establishment of Judicial Council**

**19.** A Judicial Council is established by this Act.

**Functions of Council**

**20.** The functions of the Council are to—

- (a) consider and investigate complaints as contemplated in section 180(b) of the Constitution;  
 (b) dispose of such complaints in terms of this Chapter;  
 (c) report as soon as possible to the Commission any matter which, in the opinion of the Council, is of such a nature that it may require action by the Commission in terms of section 177(1)(a) of the Constitution;  
 (d) advise judges on ethical and related issues; and  
 (e) report on its activities and make recommendations to the Commission concerning the effective administration of justice and the conduct of judges.

**Composition of Council** 45

**21.** The members of the Council are—

- (a) the Chairperson, who must be a judge designated by the Commission;  
 (b) a judge of the Constitutional Court designated by the Chief Justice;

- (c) a judge of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal; and
- (d) two judges from any High Court or a court of similar status, designated by the Chief Justice after consultation with the judges president.

#### **Term of office of members and filling of vacancies**

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**22.** (1) A member of the Council holds office for a period of three years, which period commences on the date on which the member accepts his or her designation as such a member.

(2) Any person whose term of office has expired may be re-designated as a member of the Council.

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(3) A member of the Council must vacate such office—

- (a) upon expiry of the period referred to in subsection (1);
- (b) if he or she no longer holds the office of a judge; or
- (c) upon tendering his or her resignation in writing to the Chairperson or to the Chairperson of the Commission in the case of the resignation of the Chairperson.

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(4) A vacancy on the Council does not affect the validity of the proceedings or the decisions of the Council.

(5) When a member of the Council vacates his or her office before the expiry of his or her term of office, another person must be designated to fill the vacancy for the unexpired portion of the term of office.

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#### **Meetings of Council**

**23.** (1) The Council meets at any time and place determined by the Chairperson, or in the absence of the Chairperson, by the majority of the members.

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(2) The majority of the members of the Council constitute a quorum at a meeting.

(3) If the Chairperson is absent from a meeting, the members present must elect a Chairperson for that meeting from among themselves.

(4) The proceedings of the Council take place behind closed doors, unless the Council on account of public interest decides otherwise.

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#### **Complaints about judges**

**24.** (1) A complaint about a judge may be lodged by any person in terms of subsection (2) by means of an affidavit or affirmed statement, specifying—

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- (a) the nature of the complaint; and
- (b) the facts on which the complaint is based.

(2) A complaint contemplated in subsection (1) must be lodged in respect of—

- (a) a head of a court, with the Council; and
- (b) any other judge, with the head of the court concerned.

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#### **Procedure by head of court or Chairperson**

**25.** (1) Upon receipt of a complaint lodged in terms of section 24, the head of the court concerned or the Chairperson must consider the complaint and if it—

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- (a) does not comply substantially with the provisions of section 24(1);
- (b) does not relate to the administration of justice in the court concerned;
- (c) is related to the merits of a judgment or order;
- (d) is frivolous or lacking in substance; or
- (e) is hypothetical,

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he or she must dismiss the complaint and inform the complainant in writing of the reasons for dismissal.

(2) If the complaint is not dismissed under subsection (1), the head of the court or the Chairperson—

- (a) must invite the judge concerned to respond, in writing, to the allegations or in any other manner specified; and
- (b) may conduct an investigation.
- (3) The head of the court or the Chairperson must—
  - (a) submit a copy of the results of the investigation, if any, and the response of the judge in question to the complainant; and 5
  - (b) invite the complainant to comment on the results of the investigation, if any, and on the response of the judge in question, within a specified period.
- (4) The head of the court concerned or the Chairperson must thereupon— 10
  - (a) dismiss the complaint;
  - (b) take appropriate steps for the effective administration of justice; or
  - (c) refer the complaint to the Council, and inform the complainant and the judge concerned accordingly in writing.
- (5) A complainant or a judge who is dissatisfied with any decision in terms of this section may, within one month, request the Council in writing to reconsider that decision, specifying the grounds for the request. 15
- (6) The head of a court concerned or the Chairperson may, on his or her own accord, initiate an investigation into the conduct of a judge, in which event the provisions of subsections (1) to (5) are applicable with the changes required by the context. 20

### **Investigative powers of Council**

- 26. (1) The Council may—**
- (a) after considering or reconsidering the complaint in terms of sections 25(4) or 25(5), as the case may be, dismiss the complaint without holding an inquiry; or 25
  - (b) order that an investigation be undertaken.
  - (2) After considering the recommendations of the investigation, it may order that an inquiry be held in accordance with subsection (3).
  - (3) The Council may also— 30
    - (a) refer any matter to a committee of not less than two members of the Council for advice;
    - (b) conduct an inquiry into a complaint received under paragraph (a) or (b) in order to determine the merits of a complaint and the manner in which the matter must be disposed of; 35
    - (c) subpoena any person to appear before it in person and to produce any book, document, statement or object relating to the matter;
    - (d) determine the procedure to be followed at an inquiry;
    - (e) appoint an independent counsel to investigate any matter, adduce evidence at the inquiry and cross-examine witnesses. 40
  - (4) (a) A complainant or a judge in respect of whom an inquiry is conducted is entitled to be present at the inquiry, to be assisted or represented by an advocate or attorney, to give evidence through a legal representative or personally to— 45
    - (i) be heard;
    - (ii) call witnesses;
    - (iii) cross-examine any witness called at the inquiry; and
    - (iv) have access to books, documents or other objects produced in evidence.
  - (b) Any other person appearing before the Council may be assisted or represented at such inquiry by an advocate or attorney. 50
  - (5) Despite any other law a person may not disclose to any other person the contents of a book, document or other object in the possession of a member of the Council or the record of any evidence given before the Council during an inquiry, unless the Chairperson determines otherwise. 55
  - (6) If the Council is of the opinion that the facts disclose the commission of an offence by the judge concerned, the Council must—
    - (a) whether or not it conducts an inquiry; or
    - (b) at any time during or after the inquiry, if an inquiry is held, notify the National Director of Public Prosecutions and the director of public prosecutions of the area concerned. 60

### **Deliberative powers of Council**

- 27.** (1) The Council may—
- (a) dismiss a complaint;
  - (b) decide that a complaint has been established and deal with it in terms of subsection (2); or
  - (c) deal with it in terms of subsection (3).
- (2) If the Council finds that the complaint has been established, it may privately or publicly—
- (a) record the finding;
  - (b) caution or reprimand the judge; or
  - (c) recommend such steps as it deems appropriate for the effective administration of justice in the court concerned.
- (3) If the Council finds that the conduct of the judge is of such a nature that, in the opinion of the Council, it may require action by the Commission in terms of section 177(1)(a) of the Constitution, it must, within 21 days, submit a report to the Commission.

### **Publication of findings of, and reports by, Council**

- 28.** (1) The disposal of any matter by the Council must be reported in writing as soon as reasonably possible to the head of the court, the judge concerned and to the complainant.
- (2) The Council may, in the manner it deems fit, make public its decision.
- (3) The Council may, at any time, submit a report to the Commission if it deems it necessary.

### **Judge not to hold any other office of profit**

- 29.** A judge may not, without the consent of the Minister, accept, hold or perform any other office of profit or receive in respect of any service any fees, emoluments or other remuneration apart from his or her salary and any amount which may be payable to him or her in his or her capacity as a judge.

### **Administrative support to Council**

- 30.** The administrative work connected with the performance of the functions of the Council must be performed by officers seconded by the Director-General: Justice and Constitutional Development for that purpose at the request of the Chairperson as and when the need arises.”.

### **Substitution of long title of Act 88 of 1989**

- 18.** The following long title is substituted for the long title of the Judges’ Remuneration Act:

#### **“ACT**

**To provide for the remuneration and conditions of employment of judges of the [Supreme Court] Constitutional Court, Supreme Court of Appeal and High Courts of South Africa; to provide for a mechanism to deal with complaints against judges of the Constitutional Court, Supreme Court of Appeal, High Courts and courts of a status similar to a High Court; and to provide for matters connected therewith.”.**

### **Substitution of words in Act 88 of 1989**

- 19.** The Judges’ Remuneration Act is amended by the substitution for the word—

- (a) “he” of the words “he or she” where it occurs in sections 3(1)(a) and (b), 5(5), 6(2), (3) and (4), 11 and 15(2) and (3);
- (b) “him” of the words “him or her” where it occurs in sections 6(1), 10(2)(a) and 15(2); and
- (c) “his” of the words “his or her” where it occurs in sections 6(1) and (5), 11 and 15(3). 5

**Application of Judges’ Remuneration and Conditions of Employment Act, 1989, and repeal of laws**

**20.** (1) The Judges’ Remuneration Act applies throughout the Republic from the date of commencement of this Act. 10

(2) The Judges’ Remuneration and Conditions of Employment Act, 1989 (Act No. 27 of 1989) (Bophuthatswana) and Decree No. 19 (Judges’ Remuneration and Conditions of Service) of 1990 (Decree No. 19 of 1990) (Transkei), are repealed.

**Amendment of section 1 of Act 90 of 1993, as amended by section 8 of Act 35 of 1996**

**21.** Section 1 of the Magistrates Act, 1993 (hereinafter referred to as the Magistrates Act), is amended by the substitution for the definition of “salary” of the following definition: 15

“ ‘salary’ means the annual salary and allowance, if any, payable to a magistrate as contemplated in section 12;”.

**Substitution of section 10 of Act 90 of 1993** 20

**22.** The following section is substituted for section 10 of the Magistrates Act:

**“Appointment of magistrates**

**10.** The Minister shall, **[after consultation with]** on the advice of the Commission, appoint magistrates in respect of lower courts under and subject to the Magistrates’ Courts Act.”. 25

**Amendment of section 12 of Act 90 of 1993, as amended by section 4 of Act 18 of 1996, section 8 of Act 35 of 1996, section 19 of Act 104 of 1996 and section 35 of Act 47 of 1997**

**23.** Section 12 of the Magistrates Act is amended by—

- (a) the substitution for paragraph (a) of subsection (1) of the following paragraph: 30
 

“(a) Subject to the provisions of this section, any person occupying the office of magistrate, including a magistrate in an acting or temporary capacity, shall, in respect of that office, in addition to the amounts referred to in section 16, be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the **[Minister] President** by **[notice] proclamation** in the *Gazette* **[in consultation with the Commission and with the concurrence of the Minister of Finance]**, as contemplated in subsection (8). ”;
- (b) the deletion of subsections (3) and (4);
- (c) the substitution for subsection (5) of the following subsection: 40
 

“(5) The amount of any salary payable in terms of subsection (1), shall be paid **[from moneys appropriated by Parliament for that purpose]** out of the National Revenue Fund as contemplated in section 213 of the Constitution.”;
- (d) the substitution for subsection (6) of the following subsection: 45
 

“(6) The salary payable to a magistrate shall not be reduced **[except by an Act of Parliament: Provided that a disapproval contemplated in subsection (4)(b) shall, for the purposes of this subsection, not be deemed to result in a reduction of such salary]**; and
- (e) the addition after subsection (7) of the following subsection: 50
 

“(8) (a) Magistrates are entitled to such salaries, allowances or benefits as determined by the President, from time to time, by proclamation in the *Gazette*, after taking into consideration the recom-

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) The Commission referred to in paragraph (a) must, when investigating or considering the salaries, allowances or benefits of magistrates, take the following factors into consideration:

- (i) The role, status, duties, functions and responsibilities of magistrates;
- (ii) the affordability of different levels of remuneration of public office-bearers;
- (iii) current principles and levels of remuneration in society generally;
- (iv) inflationary increases; and
- (v) any other factor which, in the opinion of the said Commission, is relevant.”.

#### **Amendment of section 1 of Act 92 of 1997**

**24.** Section 1 of the Independent Commission for the Remuneration of Public Office-bearers Act, 1997, is amended by the substitution for the definition of “office-bearer” of the following definition:

“ ‘office-bearer’ means—

- (a) any member of the Cabinet, any Deputy Minister, any member of the National Assembly, any permanent delegate to the National Council of Provinces, any member of the **[Council]** National House of Traditional Leaders, any member of any provincial house of traditional leaders or any traditional leader;
- (b) any member of the Executive Council of a province, any member of any provincial legislature or any member of any Municipal Council of any category or type of municipality; and
- (c) any person holding the office of—
  - (i) judge as defined in section 1 of the Judges’ Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989); and
  - (ii) magistrate who is appointed under section 9 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), read with section 10 of the Magistrates’ Act, 1993 (Act No. 90 of 1993), and includes a magistrate in an acting or temporary capacity.”.

#### **Amendment of section 8 of Act 92 of 1997**

**25.** Section 8 of the Independent Commission for the Remuneration of Public Office-bearers Act, 1997, is amended by the substitution for subsections (3) and (4) of the following subsections:

“(3) The Commission may conduct or cause to be conducted such research or obtain such information from the Secretary to Parliament, the secretary to any provincial legislature, the secretary to the **[Council]** National House of Traditional Leaders, the secretary to any provincial house of traditional leaders, the chief executive officer of any municipality, the secretary to the Judicial Service Commission, the secretary to the Magistrates’ Commission or any **[office-bearer]** functionary or body as may be necessary for the performance of the functions of the Commission under this Act, section 219 of the Constitution or any other law.

(4) The Commission shall publish annually in the *Gazette* recommendations concerning—

- (a) the salary, allowances and benefits of any office-bearer as defined in **[paragraph]** paragraphs (a) and (c) of the definition of ‘office-bearer’ in section 1;
- (b) the upper limits of the salary, allowances or benefits of any office-bearer as defined in paragraph (b) of the definition of ‘office-bearer’ in section 1; and
- (c) the resources which are necessary to enable an office-bearer to perform the office-bearer’s functions effectively.”.

## Amendment of Schedule 5 to Act 1 of 1999

**26.** Schedule 5 to the Public Finance Management Act, 1999, is amended by the addition of the following item:

“4. Magistrates Act, 1993 (Act No. 90 of 1993) (covering salaries and allowances of magistrates in terms of section 12).”.

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## Transitional provisions

**27.** (1) The Judges’ Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989), applies to all judges who, at the commencement of this Act, had been appointed as judges of a High Court in the former Republics of Transkei, Bophuthatswana, Venda or Ciskei—

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- (a) in terms of section 174(6) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)(the Constitution); or
- (b) in terms of section 104(1) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) (the Interim Constitution), prior to its repeal by the Constitution,

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as well as to all judges who, in terms of section 241(2A) of the Interim Constitution, are deemed to have been appointed to such office in terms of Chapter 7 of the Interim Constitution.

(2) (a) Any active service or service referred to—

- (i) in section 1 of the Judges’ Remuneration and Conditions of Employment Act, 1989, of the former Republic of Bophuthatswana; or
- (ii) in section 1 of Decree No. 19 (Judges’ Remuneration and Conditions of Service) of 1990, of the former Republic of Transkei,

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performed by a judge referred to in subsection (1) prior to the commencement of this Act, is, for the purposes of the Judges’ Remuneration and Conditions of Employment Act, 1989, deemed to be active service or service as contemplated in section 1(1) of the latter Act.

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(b) For the purposes of section 1(1) of the Judges’ Remuneration and Conditions of Employment Act, 1989, “service as a judge” includes service performed by a judge of the Republic of South Africa, prior to the commencement of the Interim Constitution, who was seconded to serve as a judge of a High Court in any of the former Republics of Transkei, Bophuthatswana, Venda or Ciskei, while he or she was so seconded and so served.

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(3) The remuneration and conditions of employment applicable immediately before the commencement of this Act, in respect of any former Chief Justice of South Africa who, at the commencement of this Act, had been discharged from active service, are not affected by the amendments to the definition of “judge” in section 1 of the Judges’ Remuneration and Conditions of Employment Act, 1989, in terms of section 4(b) of this Act and continue to apply as if the said definition had not been amended.

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(4) Any period in office as a constitutional judge before the commencement of this Act is recognised for purposes of Chapter 2 of the Judges’ Remuneration and Conditions of Employment Act, 1989, as amended by this Act.

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(5) The definition of ‘salary’ contemplated in section 21 of this Act may not be construed or applied in a manner which is less favourable to magistrates than the manner in which it was construed or applied immediately before the commencement of the said section 21 of this Act.

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## Short title and commencement

**28.** This Act is called the Judicial Officers Amendment Act, 2001, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

## **MEMORANDUM ON THE OBJECTS OF THE JUDICIAL OFFICERS AMENDMENT BILL, 2001**

### **1. OBJECTS OF BILL**

The Bill contains amendments to the Magistrates' Courts Act, 1944, the Supreme Court Act, 1959, the Judges' Remuneration and Conditions of Employment Act, 1989, the Magistrates Act, 1993, and the Independent Commission for the Remuneration of Public Office-bearers Act, 1997.

The main objects of the Bill, which give rise to the amendments in question, are the following:

- (i) To bring the appointment requirements of magistrates into line with those relating to judges, as required by the Constitution, namely that magistrates must be appropriately qualified and be "fit and proper persons" to be appointed as such.
- (ii) To provide that the Independent Commission for the Remuneration of Public Office-bearers should make recommendations to the President on the salary and allowances of magistrates and judges, including Constitutional Court judges, for purposes of determining their salaries.
- (iii) To make provision for the head of the Constitutional Court to become the Chief Justice of South Africa and for the head of the Supreme Court of Appeal to become President of the Supreme Court of Appeal, in line with proposed Constitutional amendments.
- (iv) To make provision for the offices of Deputy Chief Justice and Deputy President of the Supreme Court of Appeal in the Judges' Remuneration and Conditions of Employment Act, 1989, which are reflected in the Constitution.
- (v) To put Constitutional Court judges on the same footing as their colleagues in the Supreme Court of Appeal and the High Courts in respect of tenure of office and "retirement" benefits.
- (vi) To provide that benefits currently received by spouses of deceased judges can also be received by partners of judges in permanent heterosexual or same sex relationships.
- (vii) To establish a mechanism to deal with complaints against judges as contemplated in section 180(b) of the Constitution.
- (viii) To make the Judges' Remuneration and Conditions of Employment Act, 1989, applicable throughout South Africa and to repeal the corresponding legislation in the former homelands.
- (ix) To delete or amend possible unconstitutional or obsolete provisions of the above Acts which are being amended to give effect to paragraphs (i) to (viii) above.

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

The Bill was made available to the following role-players for comments:  
 The Acting Chief Justice and the President of the Constitutional Court;  
 The Judge President of the Labour Appeal Court and Labour Court;  
 The President of the Land Claims Court;  
 The Judges President of the High Courts;  
 The Magistrates Commission;  
 The Judicial Officers' Association of South Africa (JOASA);  
 The Management Committee for the Lower Courts;  
 The Association of Regional Magistrates of South Africa (ARMSA);  
 The Office of the Presidency;  
 The Department of Provincial and Local Government; and  
 The National Treasury.

### **3. IMPLICATIONS FOR PROVINCES**

None.



#### **4. FINANCIAL IMPLICATIONS FOR STATE**

Although it is extremely difficult to quantify the financial implications of the Bill, it is thought that the following provisions of the Bill could have financial implications for the State.

- (i) The provisions which extend the benefits received by surviving spouses to partners of judges. (The additional funds for this purpose are expected to be minimal and can be accommodated in the existing budget.)
- (ii) The provisions which establish a complaints mechanism. It is thought that an amount of R2 million will suffice for the mechanism to carry out its mandate and to staff a support component. (When preparing its input for the Medium Term Expenditure Framework, the Department indicated its need in this regard.)
- (iii) The provisions which provide that temporary and acting magistrates should receive the same salaries and allowances as their permanent colleagues, even if they are Public Servants. (The amount required to give effect to this has already been approved and accommodated in the Department's budget.)

#### **5. PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill must be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.