

Amendment of Regulations for Judicial Officers in the Lower Courts regarding the leave dispensation of magistrates

The Magistrates Commission has recommended that the Minister of Justice and Correctional Services amend the Regulations for Judicial Officers in the Lower Courts by introducing new provisions regarding the leave dispensation of magistrates.

The following background information is relevant:

1. The Magistrates Act, 1993 (Act No. 90 of 1993) (the Act), makes provision for the establishment, constitution, objects and functions of a Magistrates Commission (the Commission), the appointment and remuneration of, and vacation of office by, magistrates and that certain conditions of service of magistrates may be determined by regulation. In terms of section 16(1)(b) of the Act, the Minister may, after the Commission has made a recommendation, make regulations, among others, regarding leave of absence of magistrates.

2. Comprehensive regulations, which were largely based on the public service regulations (existing at the time), were promulgated shortly after commencement of the Act. The existing regulations 38 to 38C provide for the leave of magistrates. Regulation 38 provides that the provisions of Chapter C of the Public Service Regulations and Chapter D.II of the Public Service Staff Code apply *mutatis mutandis* to magistrates. The Public Service Regulations have since been amended and in particular, the leave dispensation of public servants has been changed and has lessened the financial burden on the State relating to the payment of huge amounts for accumulated leave. This was effected, firstly, by "capping" the accumulated leave of employees and, secondly, by introducing the principle that annual leave days not taken are forfeited, making it impossible to build up vast numbers of (newly) accumulated leave which must be paid out on termination of service. Civil servants, on the other hand, benefitted from the conversion of leave from "calendar days" to "working days" which meant that weekends and public holidays falling in a leave period would not be reckoned as leave days. This is not the case with magistrates who can accumulate leave and whose number of leave days includes calendar days.

3. However, there has been growing recognition that it is neither appropriate nor desirable that the leave dispensation (and other conditions of service) of the Magistracy should mirror those of the Public Service, since the Magistracy forms part of the independent judiciary and should have a tailor-made dispensation reflecting and suited to their unique disposition as such.

4. A draft Government Notice follows below for comment. Comments must be directed to

Ms E Steyn at ensteyn@justice.gov.za or for the official's attention at Private Bag X 81, Pretoria, 0001, or to fax number 0866485369, by not later than **12 October 2018**.

**“MAGISTRATES ACT, 1993 (ACT NO. 90 OF 1993)
REGULATIONS FOR JUDICIAL OFFICERS IN THE LOWER COURTS, 1993: AMENDMENT**

SCHEDULE

Definitions

1. In this Schedule "the Regulations" means the regulations published by Government Notice No. R. 361 of 11 March 1994, as amended by Government Notices Nos. R. 644 of 1 April 1994, R. 1407 of 11 August 1994, R. 1808 of 17 October 1994, R. 1707 of 27 October 1994, R. 1791 of 17 November 1995, R. 72 of 26 January 1996, R. 331 of 1 March 1996, R. 957 of 7 June 1996, R. 1178 of 19 July 1996, R. 1242 of 2 August 1996, R. 1340 of 12 August 1996, R. 1567 of 27 September 1996, R. 1627 of 1 October 1996, R. 178 of 7 February 1997, R. 421 of 20 March 1997, R. 1081 of 8 August 1997, R. 274 of 20 February 1998, R. 997 of 7 August 1998, R. 56 of 15 January 1999, R. 1498 of 17 December 1999, R. 1339 of 26 September 2003, R. 1593 of 31 October 2003, R. 50 of 26 January 2012 and R. 933 of 7 September 2018.

Amendment of the Arrangement of the Regulations

2. The Arrangement of the Regulations is hereby amended by the substitution for the expressions "38. Leave", "38A. Maternity leave", "38B. Adoption leave" and "38C. Family responsibility leave" of the following expressions:

- "38. Vacation leave accrued
- 38A. Vacation and sick leave provisioning
- 38B. Leave taken which affects leave provisioning
- 38C. Leave registers
- 38D. Recording of vacation and sick leave credits in the leave register
- 38E. Application for leave and granting thereof
- 38F. Compulsory vacation leave
- 38G. Leave gratuities
- 38H. Calculation of leave gratuities and payment thereof
- 38I. Vacation leave without remuneration
- 38J. Normal sick leave provisioning

- 38K. Special sick leave
- 38L. Special leave with remuneration
- 38M. Pre-natal leave
- 38N. Special leave for pregnancy and confinement
- 38O. Special leave for adoption
- 38P. Special leave for family responsibility
- 38Q. Special leave for resettlement as result of a transfer
- 38R. Exceptional special leave
- 38S. Waiver of right to unreduced salary or remuneration".

Substitution of regulations 38, 38A, 38B and 38C of the Regulations

3. Regulations 38, 38A, 38B and 38C of the Regulations are hereby substituted for the following regulations:

Vacation leave accrued

38. (1) The accumulated vacation leave of a magistrate holding office immediately before the date of the commencement of the regulations contained in this Chapter (hereafter referred to as the fixed date) shall remain to the credit of such a magistrate and be converted to capped leave in terms of subregulation (2).

(2) The vacation leave credit of a magistrate, which exists at the fixed date, consisting of calendar days, must be converted to working days by applying the following formula:

$$\frac{A \times 5}{7}$$

where –

- A: represents the magistrate's audited vacation leave credit accrued prior to the fixed date
- 5: represents the number of working days per week
- 7: represents the number of calendar days in a week.

Vacation and sick leave provisioning

38A. (1) Magistrates are entitled to 30 working days' vacation leave per calendar year, starting on 1 January each year.

(2) Magistrates' vacation leave must be taken within a three year leave cycle, as follows:

- (a) In the first year of a leave cycle, a magistrate may take all the leave that he or she is entitled to, but must take at least ten consecutive days' leave.

- (b) If a magistrate does not take all his or her leave days within the first calendar year, the remaining leave days, to a maximum of 15, are carried over to the next (second) calendar year of the cycle.
- (c) In the second year of a leave cycle, a magistrate may take all of his or her leave days, as well as the number of days carried over from the first calendar year, but must take at least ten consecutive days' leave.
- (d) If a magistrate does not take all the leave which he or she is entitled to take during the second calendar year, the remaining leave days, to a maximum of 30, are carried over to the third calendar year of the cycle.
- (e) In the third year of a leave cycle, a magistrate may take all of his or her leave days, as well as the number of days carried over from the second calendar year.
- (f) Any vacation leave not taken by the end of the third calendar year shall lapse.

(3) Except where these regulations provide otherwise, any vacation and sick leave of a magistrate must be approved by an approving functionary as contemplated in regulation 38E(4).

(4) Magistrates are entitled to 86 working days' sick leave in each tri-annual sick leave cycle, as determined in regulation 38J(1) with remuneration.

(5) A magistrate who is appointed during a leave cycle, is entitled to vacation and sick leave in accordance with these regulations, as calculated on a *pro rata*-basis in accordance with the following formulae:

(a) Vacation leave

$$\frac{30}{260.714} \times \frac{A}{1} = B$$

Where-

30 = annual accrual of working days' vacation leave

260.714 = working days per annum

A = working days of service in the calendar year in question

B = working days accrual (a part of a day is regarded as one day).

(b) Sick leave

$$\frac{86}{260.714} \times \frac{1}{3} \times \frac{A}{1} = B$$

Where-

86 = tri-annual accrual of working days sick leave

260.714 = working days per annum

3 = years in leave cycle

A = working days of service in the sick leave cycle

B = working days accrual (a part of a day is regarded as one day).

Leave taken which affects leave provisioning

38B. Leave taken without remuneration, or when a magistrate is suspended from service without remuneration, or sick leave taken without remuneration which exceeds 15 working days in the aggregate in the month in which such excess occurs, must not be regarded as service and must be negated for purposes of leave provisioning in terms of regulation 38J.

Leave registers

38C. (1) The Department must keep a leave register in respect of each magistrate in which all credits and absences from duty must be recorded.

(2) All applications for leave must be filed for audit and other purposes in the office of the Department where the leave register is kept as well as on each magistrate's personal file.

Recording of vacation and sick leave credits in the leave register

38D. (1) The full complement of vacation leave credits as contemplated in regulation 38A(1) must be recorded to the credit of a magistrate at the commencement of each calendar year.

(2) Vacation leave credits must, from the date of assumption of office, be recorded to the credit of a magistrate on a *pro rata* basis as contemplated in regulation 38A(5) if a magistrate commences duty within a vacation leave cycle.

(3) Vacation leave credits must, on a *pro rata* basis as contemplated in regulation 38A(5), be reduced if a magistrate vacates his or her office during the vacation leave cycle.

(4) The full complement of sick leave credits as contemplated in regulation 38A(4) must be recorded to the credit of a magistrate at the commencement of the sick leave cycle, or on assumption of duty within a sick leave cycle and may not be reduced on a *pro rata* basis should a magistrate vacate his or her office during the sick leave cycle.

Application for leave and granting thereof

38E. (1) An application for leave must be made in writing.

(2) Sick leave may be granted if, owing to illness, a magistrate cannot perform his or her duties for a specified period.

(3) The granting of leave of any regional court president and of any chief magistrate shall be subject to approval by the Minister, as the approving functionary.

(4) Leave of any magistrate, other than a magistrate referred to in regulation 38E(3), must be approved, in the case of-

(a) a regional court magistrate, by the regional court president in question, as the approving functionary;

(b) a magistrate of a district court, by the chief magistrate concerned, as the approving functionary.

(5) Any refusal of an application for vacation leave or a withdrawal of vacation or any other or special leave already granted must be in writing, stating the reason and arrangements for the rescheduling thereof.

(6) (a) A magistrate who is aggrieved by the refusal of his or her application for vacation leave may within five working days lodge representations with the approving functionary in question, who must reconsider the application within five working days and inform the magistrate concerned in writing of his or her decision, stating the reasons therefore.

(b) If, on such reconsideration, the application is turned down, the magistrate in question may within five working days lodge representations with the Minister.

(c) If representations is lodged with the Minister in terms of subregulation (6)(b), the Minister may, after obtaining the additional information that he or she deems fit from the approving functionary and the magistrate in question, turn down or approve the application for leave.

Compulsory vacation leave

38F. All the entitled vacation leave in the vacation leave cycle must be utilized within the leave cycle, but not more than 10 unused leave days may be utilised within the first three months of the following leave cycle.

Leave gratuities

38G. (1) The cash value in respect of unused vacation leave accrued during the last year of service of a magistrate must be calculated in accordance with regulation 38H and be paid to a magistrate on vacating his or her office for any reason.

(2) A leave gratuity calculated in accordance with regulation 38H, must be paid to a magistrate in respect of capped vacation leave to his or her credit on vacation of office for any reason.

Calculation of leave gratuities and payment thereof

38H. (1) The amount of leave gratuity is calculated as follows:

$\frac{A \times B}{100}$

260.714

where –

A: represents the annual salary of the magistrate which is payable to him or her on the last day of his or her service

B: represents the number of vacation leave days that could not be taken as stipulated in regulation 33 or, represents the magistrate's capped and the accumulated leave credit during his or her last year of service, excluding a part of a day, standing to his or her credit on the last day of his or her service

260.714: represents the number of working days in a year.

(2) An adjustment of the amount of the leave gratuity paid to a magistrate must be made when an increase in salary is effected after the termination of his or her services with retrospective effect for the period between the date of such increase and the date of such termination.

(3) A magistrate may in writing request the Department to pay any leave gratuity owed to him or her upon his or her death to a beneficiary, including a trust, identified by him or her.

(4) Any leave gratuity owed to a magistrate is payable—

(a) directly to him or her;

(b) upon his or her death to—

(i) a beneficiary or trust as contemplated in regulation 38;

(ii) if no beneficiary or trust was identified, to—

(aa) the surviving spouse or registered partner as contemplated in Part XXII of these regulations; or

(bb) the estate of the magistrate in the event of there being no surviving spouse or partner.

(5) The leave gratuity, which on termination of service, other than by death of the magistrate is payable to a magistrate, may be used as a set-off against any departmental debt for which he or she may be liable.

Vacation leave without remuneration

38I. (1) All vacation leave with remuneration standing to a magistrate's credit must first be exhausted before vacation leave without remuneration may be granted to him or her.

(2) For purposes of calculating the amount to be deducted from a magistrate's remuneration *in lieu* of vacation leave granted without remuneration, the following formula applies:

A x B

260.714

Where –

- A = the magistrate's remuneration
 B = the number of working days annual leave without remuneration
 260.714 = the number of working days per year.

Normal sick leave provisioning

38J. (1) The sick leave cycle of a magistrate commences on a fixed common date, namely on 1 January 2019, and on each third anniversary of that date.

(2) Sick leave accrues to a magistrate on the first day of a cycle and with effect from that day the full provision of the relative cycle may be granted to him or her if the other provisions of these regulations are complied with.

(3) A magistrate appointed after the commencement of a sick leave cycle may be granted the full leave provisioning of that cycle.

(4) Unused sick leave in a particular cycle shall lapse at the end of that cycle.

(5) A magistrate may be granted the maximum number of working days of sick leave with remuneration provided for in regulation 38A(4) and (5) during a three year sick leave cycle.

(6) A magistrate may on application in writing to the Minister, be granted any vacation leave which he or she may have to his or her credit, *in lieu* of sick leave with half salary: Provided that –

- (a) such application is submitted not later than one calendar month after he or she has resumed duty;
- (b) the number of days' vacation leave so granted may not exceed 260 working days in the aggregate in any sick leave cycle; and
- (c) the Minister must be satisfied that the magistrate concerned is not at that stage permanently unfit for the resumption of his or her normal duties.

(7) Notwithstanding the provisions of subregulation (6) or (7), the provisions of subregulation (6) may also be applied in respect of a magistrate's absence owing to illness after steps have been taken to remove him or her from office on the grounds of ill health.

(8) Once the vacation leave referred to in subregulation (6) or (7) has been granted to a magistrate and he or she has received remuneration in respect thereof, such leave may not be reconverted into sick leave with half salary.

(9) A magistrate, who—

- (a) has been granted the maximum number of working days of sick leave as contemplated in regulation 38A (4) and (5);
- (b) has utilised vacation leave *in lieu* of sick leave as contemplated in subregulation (6) to (8); and

(c) is not yet able to resume his or her normal duties, may apply in writing, stating the reasons and submitting a medical certificate to the Minister, for further sick leave with half salary.

(10) The Minister may grant further sick leave with half salary, not exceeding 86 working days in the aggregate in any one cycle, which grant may be made in respect of separate periods of absence and any illness if—

(a) the Minister is satisfied that the magistrate at that particular time is not permanently unfit to resume his or her normal duties; and

(b) the magistrate has no vacation leave including capped leave to his or her credit.

(11) If a magistrate has used his or her remunerated or half salaried sick leave and vacation leave provided for in these regulations, he or she may upon application in writing be granted sick leave without remuneration not exceeding one year in the aggregate in any particular cycle.

(12) A magistrate may not, other than in terms of this regulation and during a particular sick leave cycle, be granted any further leave to cover his or her absence from duty owing to illness, except on the recommendation of the Commission.

(13) If a magistrate to whom vacation leave has been granted, becomes ill after the vacation leave has commenced, that portion of the said vacation leave in respect of which he or she submits a medical certificate, may be converted into sick leave, provided the necessary sick leave is available in terms of these regulations.

(14) A magistrate who has completed at least ten years continuous service may during the remainder of his or her service, if the sick leave provisioning in terms of these regulations is insufficient, be granted an additional non-recurrent 86 working days sick leave with remuneration and when granting such additional sick leave the other provisions of these regulations apply *mutatis mutandis*.

(15) Any unused portion of the additional working days sick leave as contemplated in subregulation (14) is carried forward to the following cycle or cycles.

(16) Additional working days sick leave granted in terms of subregulation (14) must be recorded as such in the leave register.

Special sick leave

38K. (1) A magistrate who is absent from duty owing to an injury sustained in an accident or owing to a disease contracted in the course of and as a result of his or her duties, must be granted special sick leave with remuneration for the period, to a maximum of 130 consecutive working days, that he or she is incapable to perform his or her normal duties.

(2) The Minister must, after the period referred to in subregulation (1) has lapsed and the magistrate is still unable to resume his or her duties, cause an investigation to be conducted—

- (a) to determine the capacity of the magistrate to resume his or her duties within a further period of not more than 130 consecutive working days; or
- (b) in terms of Part VI of these Regulations.

(3) The Minister may grant additional special sick leave with remuneration or half salary or without any remuneration for a further maximum period of six calendar months if, after an investigation in terms of subregulation (2)(a), a magistrate will be able to resume his or her duties within such further period.

(4) Special sick leave in terms of this regulation may be granted notwithstanding the fact that the accident is attributable to the negligent conduct of the magistrate.

Special leave with remuneration

38L. Special leave with remuneration including any period actually and necessarily occupied in travelling for the purpose for which the leave is granted, may be granted to a magistrate—

- (a) for pre-natal examinations and tests, pregnancy and confinement as regulated in regulations 38M to 38N;
- (b) for adoption as regulated in regulation 38O;
- (c) for family responsibility as regulated in regulation 38P;
- (d) for resettlement on transfer as regulated in regulation 38Q; or
- (e) when, in the case of a disabled magistrate, he or she must attend any training course related to his or her disability, or go for maintenance work for equipment used by him or her.

Pre-Natal Leave

38M. A pregnant magistrate shall be entitled to 8 working days pre-natal leave, per pregnancy, allowing the magistrate to attend medical examinations by a medical practitioner or midwife, and tests related to the pregnancy.

Special leave for pregnancy and confinement

38N. (1) Special leave with remuneration may be granted for purposes of pregnancy and confinement to a magistrate regardless of marital status.

(2) A magistrate may, per confinement, be granted a maximum of four consecutive calendar months' maternity leave with remuneration, commencing at any time from four weeks

before the expected date of birth, or on a prior date from which the attending medical practitioner certifies that it is necessary for the magistrate's health or that of the unborn child.

(3) No magistrate may commence with normal official duties for at least four weeks after the birth of her child, unless the attending practitioner certifies that she is fit to do so.

(4) The maternity leave may be utilised before and after the confinement but must in all cases be uninterrupted and continuous with the confinement.

(5) Notwithstanding subregulation (4) maternity leave may only be interrupted, if—

- (a) a magistrate so chooses if the child is born prematurely and is hospitalised during the maternity leave;
- (b) a magistrate so chooses if the child becomes ill and is hospitalised for a period longer than a month during the maternity leave; or
- (c) the magistrate falls ill during the maternity leave:

Provided that if the magistrate chooses to interrupt her maternity leave, or falls ill, she may for the period of interruption utilise her annual leave or unpaid leave, in the event of the magistrate not having enough annual leave available, or, in the event of illness, utilise her sick leave.

(6) A magistrate who has interrupted her maternity leave as contemplated in subregulation (5), and fails to return to work after the four weeks as contemplated in subregulation (3) have expired, must cover that period with annual leave, or unpaid leave in the event of the magistrate not having enough annual leave available.

(7) A magistrate may apply for an extension of maternity leave by the granting of—

- (a) annual leave;
- (b) unpaid leave for a period not exceeding six calendar months in the event of the magistrate not having enough annual leave available; or
- (c) sick leave as a result of a medical complication.

(8) (a) Sick leave may be granted due to absence from duty as a result of miscarriage, stillbirth or termination of pregnancy on medical grounds before the third trimester of pregnancy and before a period of maternity leave commences.

(b) If the miscarriage, stillbirth or termination of pregnancy on medical grounds occurs during the third trimester of pregnancy or after the period of maternity leave has commenced, the magistrate will be eligible for six consecutive weeks' maternity leave that will commence after the miscarriage, stillbirth or termination of pregnancy on medical grounds, whereafter sick leave as a result of a medical complication may be granted.

(c) If the miscarriage, stillbirth or termination of pregnancy on medical grounds occurs after the period of maternity leave has commenced, the period prior to the miscarriage, stillbirth or termination of pregnancy on medical grounds must be regarded as maternity leave.

Special leave for adoption

38O. (1) A magistrate who legally adopts a child that is not older than 24 months on the date of adoption, qualifies for adoption leave to a maximum of 45 working days commencing from the date that the adopted child takes up residence with the adoptive parent.

(2) Adoption leave may be extended upon application by a magistrate by the granting of—

- (a) annual leave; or
- (b) unpaid leave for a period not longer than six calendar months, in the event of the magistrate not having enough annual leave available.

(3) If the spouse or registered partner of a magistrate as contemplated in subregulation (1) is also a magistrate, that spouse or partner is entitled to the family responsibility leave as contemplated in regulation 38P(1).

Special leave for family responsibility

38P. (1) A magistrate may be granted not more than five working days family responsibility leave per year leave cycle for utilization if—

- (a) the magistrate's spouse or registered partner gives birth;
- (b) the magistrate's spouse or registered partner adopts a child that is not older than 24 months on the date of adoption; or
- (c) the magistrate's child, including an adopted child, spouse or registered partner, is sick.

(2) A magistrate may be granted not more than five working days family responsibility leave per year for utilization if the magistrate's child, including an adopted child, grandchild, spouse or registered partner, parent, adoptive parent, sibling, grandparent or parent-in-law dies.

(3) A magistrate who has utilized all his or her family responsibility leave may, subject to the approval of the Minister or a person designated by him or her, apply to use—

- (a) available annual leave; or
- (b) unpaid leave for a period not longer than six calendar months, in the event of the magistrate not having enough annual leave available.

Special leave for resettlement as result of a transfer

38Q. (1) Two consecutive working days special leave with remuneration may be granted to a magistrate who is transferred to new headquarters to bring a single prior visit to such new headquarters.

(2) Two working days special leave with remuneration for the purpose of resettlement may be granted to a magistrate who is transferred.

Exceptional special leave

38R. If in exceptional circumstances the Minister is satisfied that leave for which no provision has been made in these regulations should be granted in a specific case, the Minister may, on the recommendation of the approving functionary concerned, grant such leave on the conditions it deems necessary, whether it be leave with remuneration or leave with reduced or no remuneration.

Waiver of right to unreduced salary or remuneration

38S. A magistrate shall only be granted leave with half salary or without remuneration, upon waiving in writing his or her right to unreduced remuneration as contemplated in section 12(6) of the Act.”.

Substitution of regulation 39 of the Regulations

4. The following regulation is hereby substituted for regulation 39 of the Regulations:

"Discounting of leave

39. (1) A magistrate may, after 20 years' uninterrupted service in the office of magistrate, discount a maximum of 10 days of his or her available vacation leave.

(2) A magistrate may, after 30 years' uninterrupted service in the office of magistrate, discount 20 days of his or her available vacation leave, or 10% of his or her available vacation leave, whichever is the most.

(3) For purposes of subregulations (1) and (2), 'uninterrupted service in the office of magistrate' includes service in the Public Service immediately before appointment as a magistrate.”.

Commencement

5. These Regulations come into operation on the date of publication thereof.”.