



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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No.2996

CONTENTS

Page

GOVERNMENT NOTICE

No. 123 Promulgation of Magistrates Act, 2003 (Act No. 3 of 2003), of the Parliament 1

Government Notice

OFFICE OF THE PRIME MINISTER

No. 123 2003

PROMULGATION OF ACT OF PARLIAMENT

The following Act which has been passed by the Parliament and signed by the President in terms of the Namibian Constitution is hereby published in terms of Article 56 of that Constitution:

No. 3 of 2003: Magistrates Act, 2003.

ACT

To provide for the establishment, objects, functions and constitution of a Magistrates Commission; to provide for the establishment of a magistracy outside the Public Service; to further regulate the appointment, qualifications, remuneration and other conditions of service of, and retirement and vacation of office by, magistrates; to provide that certain conditions of service of magistrates may be prescribed by regulation; and to provide for matters in connection therewith.

(Signed by the President on 14 June 2003)

ARRANGEMENT OF SECTIONS

PART I PRELIMINARY

Section

1. Definitions

PART II MAGISTRATES COMMISSION

2. Establishment of Magistrates Commission
3. Objects of Commission
4. Functions of Commission
5. Constitution of Commission
6. Term of office of members of Commission and filling of vacancies
7. Meetings of Commission
8. Committees of Commission
9. Remuneration and expenses of members of Commission and committees
10. Secretary and staff of Commission

PART III MAGISTRACY

11. Composition of magistracy
12. Permanent establishment of magistracy
13. Appointment of magistrates on permanent establishment
14. Qualifications for appointment as magistrate
15. Balanced structuring of magistracy
16. Powers and duties of magistrates

PART IV CONDITIONS OF SERVICE OF MAGISTRATES

17. Conditions of service of magistrates not otherwise provided for
18. Remuneration of magistrates
19. Transfer of magistrates
20. Retirement of magistrates
21. Dismissal and vacation of office of magistrates
22. Magistrates may not perform other paid work
23. Limitation of political activities of magistrates

**PART V
MISCONDUCT**

24. Definition of misconduct
25. Preliminary investigation of misconduct
26. Investigation of charge of misconduct and proceedings after investigation

**PART VI
GENERAL PROVISIONS**

27. Regulations
28. Penalty
29. Transitional provisions and saving
30. Construction of certain references
31. Amendment of Act No. 32 of 1944
32. Short title and commencement

**SCHEDULE
LAW AMENDED**

BE IT ENACTED by the Parliament of the Republic of Namibia, as follows:-

**PART I
PRELIMINARY**

Definitions

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

“affirmative action” means affirmative action within the meaning of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998);

“chairperson” means the chairperson of the Commission referred to in section 5(1)(a);

“Chief: Lower Courts” means the Chief of Lower Courts in the Ministry of Justice;

“Commission” means the Magistrates Commission established by section 2;

“committee” means a committee established by the Commission under section 8(1);

“grade” means the hierarchical levels on which posts are created;

“legal practitioner” means a person who, in terms of the Legal Practitioners Act, 1995 (Act No. 15 of 1995), has been admitted and authorized to practise as a legal practitioner or is deemed to have been so admitted and authorized;

“lower court” means any court established under section 2(1) of the Magistrates’ Courts Act pursuant to Article 83 of the Namibian Constitution;

“magistracy” means the magistracy referred to in section 11(1);

“magistrate” means a magistrate appointed under this Act;

“Magistrates’ Courts Act” means the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

“Minister” means the Minister responsible for justice;

Act No. 3, 2003

MAGISTRATES ACT, 2003

“pensions law” means the Pension Matters of Government Institutions Proclamation, 1989 (Proclamation No. AG. 56 of 1989), or any other law relating to pensions;

“permanent establishment” means the posts created for the normal and regular requirements of the magistracy;

“prescribed”, except in section 26(19), means prescribed by regulation;

“regional division”, “district division”, “district” and “subdistrict” mean respectively a regional division, district division, district and subdistrict created under section 2(1) of the Magistrates’ Courts Act;

“regulation” means a regulation made under this Act;

“remuneration”, except in sections 9(2) and 11(7)(c), means basic salary, allowance and any other similar benefit;

“salary scale” means a minimum and maximum salary limit attached to a specific grade;

“scale”, in relation to salary, includes a salary at a fixed amount;

“seat”, in relation to a lower court, means the place where the lower court is situated;

“staff member” means a staff member as defined in section 1(1) of the Public Service Act, 1995 (Act No. 13 of 1995);

“this Act” includes any regulation.

PART II MAGISTRATES COMMISSION

Establishment of Magistrates Commission

2. There is established a commission, to be known as the Magistrates Commission, with the powers and duties conferred or imposed on the Commission by or under this Act or any other law.

Objects of Commission

3. The objects of the Commission are -

- (a) to ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, magistrates take place without favour or prejudice, and that the applicable laws and administrative directives in this regard are applied uniformly and correctly;
- (b) to ensure that no influencing or victimization of magistrates takes place;
- (c) to promote the continuous judicial education of magistrates and to make recommendations to the Minister in regard thereto;
- (d) to ensure that properly qualified and competent persons are appointed as magistrates; and
- (e) to advise the Minister regarding any matter which, in the opinion of the Commission, is of interest for the independence of the magistracy and the efficiency of the administration of justice in the lower courts.

Functions of Commission

4. (1) The Commission must -
- (a) prepare estimates of the expenditure of the Commission and the magistracy for inclusion in the annual or additional budget of the Ministry of Justice;
 - (b) compile, after consultation with the Judges' and Magistrates' Association of Namibia, a code of conduct to be complied with by magistrates;
 - (c) receive and investigate, in the prescribed manner but subject to subsection (4), complaints from members of the public on alleged improper conduct of magistrates or alleged maladministration of justice in the lower courts;
 - (d) receive and investigate, in the prescribed manner, complaints and grievances of magistrates;
 - (e) carry out or cause to be carried out disciplinary investigations into alleged misconduct of magistrates;
 - (f) make recommendations to the Minister with regard to -
 - (i) the suitability of candidates for appointment as magistrates;
 - (ii) the minimum standard of qualification required for the purposes of section 14;
 - (iii) the conditions of service of magistrates, including their remuneration and retirement benefits;
 - (iv) the dismissal and retirement of magistrates; and
 - (v) any matter referred to in section 3(e); and
 - (g) perform any other function entrusted to the Commission by or under this Act or any other law.

(2) The Commission -

- (a) may, in the prescribed manner, promote magistrates according to their performance to higher grades;
- (b) may, subject to this Act, transfer magistrates when it is necessary in the interests of the administration of justice so to do.

(3) A committee may, subject to the directions and control of the Commission, perform any of the duties referred to in subsection (1)(a), (b) or (e).

(4) Nothing in subsection (1)(c) contained is to be construed as empowering the Commission to interfere with the judicial independence or the judicial functioning of a magistrate.

Constitution of Commission

5. (1) The Commission consists of -
- (a) a judge of the High Court of Namibia, designated by the Judge President, who is the chairperson;

- (b) the Chief: Lower Courts;
- (c) one magistrate appointed by the Minister from a list of three magistrates nominated by the Judges' and Magistrates' Association of Namibia;
- (d) one staff member of the Ministry of Justice designated by the Minister;
- (e) one suitable person designated by the Public Service Commission;
- (f) one suitable person designated by the Attorney-General; and
- (g) one teacher of law appointed by the Minister from a list of two teachers of law nominated by the Vice-Chancellor of the University of Namibia.

(2) For the purposes of subsection (1), the Minister must -

- (a) direct in writing -
 - (i) the Judge President to designate a judge of the High Court of Namibia; and
 - (ii) the Public Service Commission and the Attorney-General to each designate one suitable person,

to serve as members of the Commission from a date specified in the direction; and

- (b) invite in writing -
 - (i) the Judges' and Magistrates' Association of Namibia to nominate in writing, within the period specified in the invitation, three magistrates; and
 - (ii) the Vice-Chancellor of the University of Namibia to nominate in writing, within the period specified in the invitation, two teachers of law,

for appointment, subject to paragraphs (c) and (g), respectively, of that subsection, as members of the Commission.

(3) The Commission must elect from among its members a deputy chairperson, who must in the absence of the chairperson perform the functions entrusted to the chairperson by or under this Act.

(4) Subject to section 7(2), a vacancy in the Commission does not affect the validity of the proceedings or decisions of the Commission.

(5) The chairperson must, within 30 days after the constitution of the Commission or any change in such constitution, publish or cause to be published in the *Gazette* the names of the members of the Commission and the date or dates of commencement of their terms of office.

Term of office of members of Commission and filling of vacancies

6. (1) Except for the Chief: Lower Courts, who is an *ex officio* member of the Commission, each of the other members of the Commission holds, subject to subsection (4), office for a period of three years.

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

(3) Any designation or nomination of a member of the Commission under section 5(1) may be withdrawn by the designating or nominating authority concerned at any time after consultation with the Minister (except where the Minister is the designating authority) and the Commission if there are good reasons for doing so.

(4) A member whose designation or nomination has been withdrawn under subsection (3) ceases to hold office as from the date of such withdrawal.

(5) If a member of the Commission for any reason ceases to hold office before the expiry of his or her term of office, another person may, having regard to section 5(1), be appointed or designated in his or her place for the remainder of the term of office of that member.

Meetings of Commission

7. (1) Meetings of the Commission must be held at the times and places determined by the chairperson or, in his or her absence, by the deputy chairperson of the Commission.

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

(3) The chairperson or, in his or her absence, the deputy chairperson of the Commission must preside at the meetings of the Commission, and if both the chairperson and the deputy chairperson are absent from, or for any other reason are unable to preside at, any meeting of the Commission, the members present thereat must elect one of their number to preside at that meeting.

(4) The decision of a majority of the members of the Commission present at a meeting of the Commission constitutes a decision of the Commission, and, in the event of an equality of votes relating to any matter, the chairperson or other member presiding at the meeting has a casting vote in addition to his or her deliberative vote.

(5) The person presiding at a meeting of the Commission must regulate the proceedings and procedure thereat, and must cause minutes to be kept of the proceedings.

Committees of Commission

8. (1) The Commission may establish such committees as the Commission may consider necessary, consisting of -

- (a) one or more members of the Commission designated by the Commission; and
- (b) one or more other persons possessing special or expert knowledge of any particular matter relating to the functions of the Commission, whom the Commission may, subject to subsection (2), appoint for that purpose and for a period determined by the Commission,

to assist and advise the Commission in the performance of any of its functions requiring special or expert knowledge.

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

(3) The Commission must designate a chairperson for every committee and, if the Commission considers it necessary, a deputy chairperson.

(4) A committee must, in accordance with the terms of reference determined by the Commission and subject to the directions of the Commission, perform such functions as the Commission may assign to the committee.

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

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

(7) Section 7 applies with the necessary changes to a meeting of a committee.

Remuneration and expenses of members of Commission and committees

9. (1) A member of the Commission or a committee who is a judge or a magistrate, or who is subject to the laws governing the Public Service, may be paid such allowances for travelling and subsistence expenses incurred by him or her in the performance of his or her functions in terms of this Act as the Minister may determine with the concurrence of the Minister responsible for finance.

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

Secretary and staff of Commission

10. (1) The work incidental to the performance by the Commission of its functions must be performed by staff members of the Ministry of Justice assigned to the office of the Chief: Lower Courts by the Permanent Secretary: Justice.

(2) The Chief: Lower Courts must designate one of the staff members referred to in subsection (1) as secretary of the Commission.

PART III MAGISTRACY

Composition of magistracy

11. (1) There is a magistracy consisting of magistrates appointed permanently or temporarily in respect of lower courts under and subject to this Act.

(2) (a) One or more magistrates may be appointed in accordance with this Act for any regional division, district division, district or subdistrict.

(b) Where more than one magistrate is appointed for a regional division, district division, district or subdistrict, the Commission must designate one of their number as the head of that regional division, district division, district or subdistrict.

(3) The Commission must assign a magistrate to a specific regional division, district division, district or subdistrict to serve as magistrate of that regional division, district division, district or subdistrict.

(4) Notwithstanding subsection (3), a magistrate -

- (a) of a regional division may also be a magistrate of a district, and is for the purposes of section 16(5)(a) deemed to have been duly assigned as a magistrate to each district falling wholly or partly within the regional division of which he or she is the magistrate;
- (b) of a district division may at the same time also be a magistrate -
- (i) of another district division;
- (ii) of a district, and is for the purposes of section 16(5)(b) deemed to have been duly assigned as a magistrate to each district falling wholly or partly within the district division of which he or she is the magistrate;
- (c) of a district or subdistrict may at the same time also be a magistrate of another district or subdistrict.
- (5) (a) Every magistrate must, before commencing with his or her functions in terms of this Act for the first time, take an oath or make an affirmation, subscribed by him or her, in the form set out below:

“ I,
(full name)

do hereby swear/solemnly affirm that in my capacity as a magistrate of the Republic of Namibia I will defend and uphold the Constitution of the Republic of Namibia as the supreme law and will fearlessly administer justice to all persons without favour or prejudice and in accordance with the law of the Republic of Namibia.

(In the case of an oath)
So help me God.”

- (b) An oath or affirmation referred to in paragraph (a) must be taken or made in open court before the most senior available magistrate, who must at the foot thereof endorse a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.
- (6) Whenever by reason of absence or incapacity a magistrate is unable to perform the functions of his or her office, or whenever such office becomes vacant, the Commission may assign another magistrate to act in the place of the absent or incapacitated magistrate during such absence or incapacity or to act in the vacant office until the vacancy is filled.
- (7) (a) Notwithstanding section 13(1), the Commission may appoint temporarily any person who is qualified to be appointed as a magistrate under this Act to act, either generally or in a particular matter, as magistrate of a regional division, district division, district or subdistrict in addition to any magistrate of that regional division, district division, district or subdistrict.
- (b) A person appointed under paragraph (a) must be appointed for such period as the Commission may determine at the time of the appointment or for the duration of a particular matter.
- (c) Notwithstanding section 18(1) and (2), the Minister, in consultation with the Commission and with the concurrence of the Minister responsible for finance, may determine the remuneration and allowances, and the method

of calculation of such remuneration and allowances, payable to a person appointed under paragraph (a) who is not subject to the laws governing the Public Service.

(8) The Commission may, subject to such directions as it may issue from time to time, in writing delegate the power conferred on the Commission by subsection (6) to the Chief: Lower Courts.

Permanent establishment of magistracy

12. The Minister, in consultation with the Commission and with the concurrence of the Minister responsible for finance, must create posts for magistrates on the permanent establishment of the magistracy and determine the number, grading, regrading, designation, redesignation or conversion of posts on such establishment.

Appointment of magistrates on permanent establishment

13. (1) The Minister may, on the recommendation of the Commission but subject to subsection (2), appoint as many magistrates as there are posts on the permanent establishment of the magistracy.

(2) No person may be appointed under subsection (1) as a magistrate unless such person -

- (a) is either -
 - (i) a Namibian citizen; or
 - (ii) a permanent resident of Namibia; or
 - (iii) an employee in the Public Service;
- (b) is qualified to be so appointed in terms of section 14; and
- (c) is certified by the Commission to be in all respects suitable for appointment as a magistrate.

(3) The appointment of every magistrate must be effected on such contract of employment, not being inconsistent with this Act, as the Minister may approve on the recommendation of the Commission.

Qualifications for appointment as magistrate

14. Subject to section 29(2), a person who immediately before the date of commencement of this section did not hold a substantive appointment as magistrate is not qualified to be appointed as a magistrate under this Act unless -

- (a) such person -
 - (i) is a legal practitioner who has practised as such for at least two years; or
 - (ii) has passed in Namibia any examination in law declared by the Commission in general or in any particular case to be a qualification of a satisfactory standard of professional education for the appointment of a person as magistrate; or

- (b) such person has outside Namibia in a country which is a member of the Commonwealth passed any examination in law which is of a standard not lower than the minimum qualification required by that country for the appointment of a person as magistrate; or
- (c) such person holds a diploma or degree in law obtained in collaboration or association with the United Nations or any organ or agency thereof, and which is generally directed to the education or training of magistrates; or
- (d) such person has outside Namibia or any other country which is a member of the Commonwealth passed any examination in law which is considered by the Commission to be a qualification of a satisfactory standard of professional education for the appointment of a person as magistrate.

Balanced structuring of magistracy

15. Whenever the Commission is required to recommend a person for appointment as magistrate, the Commission must, as far as is practicable, have due regard to affirmative action and the need for a balanced structuring of the magistracy.

Powers and duties of magistrates

16. (1) A magistrate -

(a) may hold a court, but a court -

- (i) of a regional division may only be held by a magistrate of the regional division;
- (ii) of a district division may only be held by a magistrate of the district division;

(b) has the powers and must perform the duties conferred or imposed on a magistrate by or under this Act or any other law;

(c) is subject to the administrative control of the Chief: Lower Courts.

(2) An acting magistrate has the powers and jurisdiction and must perform the duties connected with the office in which he or she is acting, for the particular case or during the time or in the circumstances for which he or she is assigned to act.

(3) A person appointed temporarily under section 11(7)(a) to act as magistrate of a regional division, district division, district or subdistrict, during the period of his or her appointment, has the powers and jurisdiction and must perform the duties connected with the office in which he or she is so acting.

(4) Notwithstanding subsection (1)(c), where more than one magistrate is appointed for a regional division, district division, district or subdistrict, every magistrate of that regional division, district division, district or subdistrict is subject to the administrative control of the magistrate designated in terms of section 11(2)(b) as the head of that regional division, district division, district or subdistrict, and the magistrate so designated must allocate the work among those magistrates.

(5) A magistrate of a regional division or district division may, in his or her capacity as -

- (a) in the case of a magistrate of a regional division, magistrate of a district in terms of section 11(4)(a);

- (b) in the case of a magistrate of a district division, magistrate of a district in terms of section 11(4)(b)(ii),

hold a court of that district for the hearing of any civil matter within the jurisdiction of such court.

(6) The Minister may, after consultation with the Commission, make regulations conferring or imposing on 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 impose administrative powers and duties of a general nature on magistrates.

PART IV CONDITIONS OF SERVICE OF MAGISTRATES

Conditions of service of magistrates not otherwise provided for

17. (1) The conditions of service of a magistrate not otherwise provided for in this Act are as prescribed.

(2) If an employee in the Public Service is appointed as a magistrate in terms of this Act, the period of his or her service while in the Public Service must be reckoned as part of and continuous with his or her service as a magistrate in terms of this Act for the purposes of leave, pension, retirement and any other condition of service.

Remuneration of magistrates

18. (1) Subject to subsection (2), any person holding the office of magistrate must be paid a monthly remuneration in accordance with -

- (a) the salary scale; and
- (b) the rate of allowances and other pecuniary benefits,

prescribed for his or her grade.

(2) The Minister, in consultation with the Commission and with the concurrence of the Minister responsible for finance, may from time to time increase the remuneration of magistrates by notice in the *Gazette*.

(3) Any remuneration payable in terms of subsection (1) must be paid from moneys appropriated by Parliament for that purpose to the Ministry of Justice.

(4) The remuneration of a magistrate may not be reduced.

(5) A magistrate is entitled to such additional service benefits as may be prescribed.

Transfer of magistrates

19. (1) The Commission may, when the interests of the administration of justice so require, transfer a magistrate from the seat of one lower court to the seat of another lower court.

(2) A magistrate who feels aggrieved by a decision of the Commission under subsection (1) to transfer him or her, may make written representations to the Commission in that regard.

(3) A transfer under subsection (1) is at the expense of the State and the magistrate so transferred is entitled to the prescribed transfer and resettlement costs.

Retirement of magistrates

20. (1) (a) Subject to subsection (2), a magistrate must retire on attaining the age of 65 years, and is so retired on the date on which he or she attains that age.
- (b) If a magistrate attains the age of 65 years after the first day of a month, he or she is deemed to have attained that age on the first day of the following month.

(2) If it is in the interests of the administration of justice to retain the services of a magistrate beyond the age of 65 years, he or she may, with his or her consent and with the approval of the Minister granted on the recommendation of the Commission, be so retained for a further period determined by the Minister but expiring not later than the last day of the month in which he or she attains the age of 70 years.

- (3) (a) Notwithstanding subsection (1)(a), a magistrate who immediately before the date of commencement of this section held office as such, may retire -
- (i) on attaining the age of 60 years; or
- (ii) with the approval of the Minister granted, subject to paragraph (d), at the request of the magistrate concerned and on the recommendation of the Commission, on attaining the age of 55 years.
- (b) A magistrate who wishes to retire under paragraph (a) -
- (i) on attaining the age of 60 years, must give written notification to the Commission of his or her wish to be so retired;
- (ii) on attaining the age of 55 years, must address a request in writing to the Commission that he or she be so retired,
- at least three calendar months before the date on which he or she attains the age of 60 years or 55 years, whichever may be applicable, unless the Commission approves a shorter period in a specific case.
- (c) On receipt of a request in terms of paragraph (b)(ii), the Commission must promptly submit the request, together with the recommendation of the Commission, to the Minister.
- (d) The Minister may not grant an approval under paragraph (a)(ii) unless the Minister is satisfied that -
- (i) sufficient reason exists for the retirement; and
- (ii) the retirement will not be to the detriment of the magistracy.
- (e) Subsection (1)(b) applies with the necessary changes to a retirement under paragraph (a).

Dismissal and vacation of office of magistrates

21. (1) (a) The Commission may, subject to paragraph (b), suspend a magistrate from office pending an investigation under this Act into the magistrate's fitness to hold office.
- (b) The Commission may suspend a magistrate under paragraph (a) only if the Commission has reason to believe that the magistrate is -
- (i) on the ground of misconduct;
 - (ii) on account of continued ill-health; or
 - (iii) on account of incapacity to perform the duties of his or her office efficiently,
- no longer fit to hold office.
- (c) Notwithstanding section 18(4), a magistrate suspended from office under paragraph (a) is to receive, for the duration of the suspension, no salary or such salary as may be determined by the Commission.
- (d) The suspension of a magistrate under paragraph (a) may at any time be terminated by the Commission.
- (2) The Commission must, within seven days of the suspension under subsection (1)(a) of a magistrate, submit a written report on the matter to the Minister, stating the reason for the suspension.
- (3) If the Commission -
- (a) in terms of section 26(17)(ii) recommends to the Minister that a magistrate be dismissed on the ground of misconduct; or
 - (b) after an investigation, in the prescribed manner, recommends to the Minister that a magistrate be dismissed on account of -
- (i) continued ill-health; or
 - (ii) incapacity to perform the duties of his or her office efficiently,
- the Minister must dismiss the magistrate from office.
- (4) (a) A magistrate aggrieved by his or her dismissal under subsection (3) may, subject to paragraph (b), appeal against the dismissal to the High Court.
- (b) An appeal under paragraph (a) -
- (i) must be noted in writing within 30 days of the date of receipt of the notice of dismissal, and the notice of appeal must -
 - (aa) set out the full grounds of appeal; and
 - (bb) be served on every party to the matter; and
 - (ii) must be prosecuted as if it were an appeal from a judgment of a magistrate's court in a civil matter, and all rules applicable to the hearing of such an appeal apply with the necessary changes to an appeal under this subsection.

- (c) The High Court must hear an appeal under paragraph (a) and may after considering the appeal -
- (i) confirm the dismissal appealed against; or
 - (ii) set aside the dismissal appealed against; or
 - (iii) give such other order, including any order as to costs, as it may consider fit.
- (d) The Minister must reinstate the magistrate concerned in his or her office if the High Court under paragraph (c)(ii) sets aside the dismissal appealed against.
- (5) (a) The Minister may, at the written request of a magistrate and on the recommendation of the Commission, allow the magistrate to vacate his or her office -
- (i) on account of continued ill-health; or
 - (ii) for any other reason which the Minister considers sufficient.
- (b) A request by a magistrate under paragraph (a) must be addressed to the Commission at least three calendar months before the date on which the magistrate wishes so to vacate his or her office, unless the Commission approves a shorter period in a specific case.
- (c) On receipt of a request in terms of paragraph (b), the Commission must promptly submit the request, together with the recommendation of the Commission, to the Minister.
- (d) Where a magistrate -
- (i) is allowed to vacate his or her office under paragraph (a)(i), he or she is entitled to such pension benefits as he or she would have been entitled to under the pensions law applicable to him or her if his or her services had been terminated on the ground of continued ill-health occasioned without his or her being instrumental thereto; or
 - (ii) is allowed to vacate his or her office under paragraph (a)(ii), he or she is deemed -
 - (aa) to have been removed from office to promote efficiency for reasons other than his or her own unfitness or incapacity; or
 - (bb) to have been retired in accordance with section 20(3)(a)(i), if he or she has already attained the age of 55 years, or section 20(3)(a)(ii), if he or she has not yet attained that age,as the Minister may direct, and he or she is entitled to such pension benefits as he or she would have been entitled to under the pensions law applicable to him or her if he or she had been so removed from office or had been so retired, according to the direction of the Minister.
- (e) Nothing in paragraph (a) contained is to be construed as preventing a magistrate from vacating his or her office without the approval of the Minister by resigning as magistrate.

Magistrates may not perform other paid work

22. No magistrate may, without the approval of the Commission, perform any paid work outside the duties of his or her office.

Limitation of political activities of magistrates

23. (1) A magistrate may be a member of a political party, but may not -

- (a) preside at a public political meeting or draw up or publish any writing or deliver a public speech or make a public statement with the intention to promote or prejudice the interests of any political party; or
- (b) be an office-bearer of whatever designation of a political party.

(2) A magistrate may not accept a nomination as candidate for election as a member of the National Assembly, a regional council (as defined in section 1 of the Regional Councils Act, 1992 (Act No. 22 of 1992)) or a local authority (as defined in section 1 of the Local Authorities Act, 1992 (Act No. 23 of 1992)), and is, if he or she accepts such nomination, deemed to have resigned as magistrate with effect from the date on which he or she accepted the nomination.

(3) The provisions of this section, in so far as they provide for a limitation of the fundamental rights contemplated in Article 17(1) of the Namibian Constitution to participate in peaceful political activities, are enacted upon the authority conferred by the said Article.

**PART V
MISCONDUCT****Definition of misconduct**

24. A magistrate commits misconduct if he or she -

- (a) is found guilty of -
 - (i) a criminal offence relating to the performance of the duties of his or her office; or
 - (ii) an offence for which he or she is sentenced to -
 - (aa) any term of imprisonment without the option of a fine; or
 - (bb) a term of imprisonment exceeding three months with the option of a fine;
- (b) contravenes or fails to comply with a provision of this Act;
- (c) is negligent or indolent in the performance of the duties of his or her office;
- (d) uses intoxicants or stupefying drugs excessively without a prescription of a medical practitioner resulting in his or her incapacity to perform the duties of his or her office efficiently;
- (e) uses or is under the influence of intoxicants or stupefying drugs during official hours of attendance without a prescription of a medical practitioner;

- (f) accepts or demands in respect of the performance of or failure to perform his or her duties any commission, fee or pecuniary or other award to which he or she is not entitled by virtue of his or her office;
- (g) operates or undertakes, without the approval of the Commission, any private agency or private work in regard to any matter directly or indirectly related to the performance of the functions of his or her office or any matter directly or indirectly related to the field of operations of a magistrate, or fails to declare that a member of his or her household operates or undertakes any such private agency or private work;
- (h) misappropriates or makes improper use of any property of the State;
- (i) absents himself or herself from his or her office or duty without leave or valid cause;
- (j) makes a false or incorrect statement, knowing it to be false or incorrect, with a view to obtain any privilege or advantage in relation to his or her official position or his or her duties or to the prejudice of the administration of justice;
- (k) commits any act which brings or is likely to bring the administration of justice or the magistracy into disrepute;
- (l) refuses to execute a lawful order; or
- (m) contravenes or fails to comply with the code of conduct referred to in section 4(1)(b).

Preliminary investigation of misconduct

25. (1) If the Commission has reason to believe that a magistrate has committed misconduct, the Commission must, subject to subsection (2), appoint a magistrate or other person (hereinafter called the investigating officer) to carry out a preliminary investigation and to obtain evidence in order to determine whether there are any grounds for a charge of misconduct against the magistrate.

(2) If the Commission is satisfied that there is sufficient evidence to support a charge of misconduct against a magistrate, the Commission may charge the magistrate in accordance with section 26 with misconduct without a preliminary investigation having been carried out in terms of subsection (1).

(3) After the conclusion of a preliminary investigation in terms of subsection (1), the investigating officer must recommend to the Commission whether or not the magistrate concerned should in his or her opinion be charged, and if so, what in his or her opinion the charge in question should be.

Investigation of charge of misconduct and proceedings after investigation

26. (1) The Commission must charge a magistrate in writing with misconduct if the Commission is satisfied -

- (a) that sufficient grounds for a charge of misconduct against the magistrate have been found during a preliminary investigation carried out in terms of section 25(1); or
- (b) that, notwithstanding the fact that a preliminary investigation was not carried out as contemplated in paragraph (a), there is sufficient evidence to support a charge of misconduct against the magistrate.

- (2) (a) The Commission must cause the charge to be served on the magistrate charged with misconduct, together with a statement of particulars of the alleged misconduct.
- (b) A charge referred to in paragraph (a) must -
- (i) contain or be accompanied by a direction calling upon the magistrate charged to send or deliver, within 14 days of receipt of the charge, to a person mentioned in the direction a written admission or denial of the charge and, if he or she so desires, a written explanation regarding the misconduct with which he or she is charged; and
- (ii) be served in the manner determined by the Commission.
- (3) If the magistrate charged admits the charge, he or she -
- (a) may, together with the admission, make written representations to the Commission in mitigation of punishment; and
- (b) is deemed to have been found guilty in terms of this section of misconduct as charged on the date of admitting the charge.
- (4) If the magistrate charged -
- (a) denies the charge; or
- (b) fails to comply with the direction referred to in subsection (2)(b)(i),

the Commission must, within seven days of receipt of the written denial or, in the case of a failure to comply with the direction referred to in subsection (2)(b)(i), of the lapsing of the period mentioned in that subsection, appoint a magistrate (hereinafter called the presiding officer) to preside at the investigation, and a magistrate or other person to lead evidence.

(5) The presiding officer must fix the time, not being later than 21 days of the date of his or her appointment as such, and place of the investigation and must give the magistrate charged reasonable notice in writing of such time and place.

(6) The magistrate or other person appointed in terms of subsection (4) to lead evidence may -

- (a) subpoena any person who in his or her opinion may be able to give information of material importance concerning the subject matter of the investigation, or who he or she suspects or believes has in his or her possession or custody or under his or her control any book, document or object which has any bearing on the subject matter of the investigation, to appear before the presiding officer at the time and place specified in the subpoena, to be questioned or to produce such book, document or object;
- (b) retain a book, document or object referred to in paragraph (a) for the duration of the investigation;
- (c) lead evidence and present arguments in support of the charge and cross-examine witnesses called by the magistrate charged.

(7) The law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce a book, document or object in a civil trial before a court of law, applies with the necessary changes in relation to the examination of, or the production of any book, document or object to the presiding officer by, any person called in terms of this section as a witness.

(8) If the misconduct with which a magistrate is charged amounts to an offence of which he or she was convicted by a court of law, a certified copy of the record of his or her trial and conviction by that court is, on the identification of the magistrate as the person referred to in the record, sufficient proof of the commission by him or her of that offence, unless the conviction has been set aside by a superior court.

(9) At an investigation the magistrate charged has the right -

(a) to be personally present, to be assisted or represented by a legal practitioner, to give evidence and, either personally or through a legal practitioner -

(i) to be heard;

(ii) to call witnesses;

(iii) to cross-examine any person called as a witness in support of the charge; and

(iv) to examine any book, document or object produced in evidence; and

(b) notwithstanding a denial or failure by him or her referred to in subsection (4), to admit at any time during the investigation that he or she is guilty of the charge, whereupon he or she must be found guilty by the presiding officer of misconduct as charged, and subsection (11) then applies with the necessary changes in respect of the finding.

(10) At an investigation the presiding officer may, at the commencement of the proceedings or at any time thereafter, require from the magistrate charged a full explanation of his or her defence on the charge and question him or her in clarification about that.

(11) At the conclusion of the investigation, the presiding officer must make a finding on the charge and inform the magistrate charged whether he or she is guilty or not guilty of misconduct as charged and, in the case of a finding of guilty, afford that magistrate an opportunity to -

(a) state any mitigating factors;

(b) comment in writing on the matter.

(12) The presiding officer must, within seven days after the conclusion of the investigation, forward to the Commission -

(a) the record of the proceedings at the investigation, including any documentary evidence adduced thereat; and

(b) a written statement of his or her finding and his or her reasons therefor,

and, in the case of a finding of guilty, the presiding officer must also -

(i) submit to the Commission the written comments referred to in subsection (11)(b), if any;

(ii) inform the Commission in writing of any aggravating or mitigating factors; and

(iii) make a written recommendation to the Commission as to whether the magistrate found guilty of misconduct should be -

- (aa) cautioned or reprimanded; or
- (bb) dismissed or called upon to resign as magistrate.

(13) The Commission must, at the written request of the magistrate charged made within seven days of the date on which he or she was informed of the finding of the presiding officer, furnish that magistrate with a copy of the record, statement, reasons and recommendation referred to in subsection (12).

(14) A magistrate found guilty of misconduct who feels aggrieved by the finding of the presiding officer may, within 14 days of receipt of a copy of the record, statement, reasons and recommendation in terms of subsection (13), make written representations to the Commission, and must, when so making representations, also transmit a copy thereof to the presiding officer.

(15) On receipt of a copy of the representations in terms of subsection (14), the presiding officer must promptly furnish the Commission with his or her comments thereon.

(16) If the Commission, having regard to all the circumstances, is satisfied that a magistrate found guilty of misconduct, or who has admitted guilt in terms of subsection (3), is in fact guilty of misconduct but that the misconduct in question is not of such a nature as to detrimentally affect that magistrate's fitness to hold office, the Commission must caution or reprimand that magistrate and allow him or her to continue in office.

(17) If, after consideration of -

- (a) the record of the proceedings at the investigation (including the finding and recommendation of the presiding officer) and all comments and representations made in terms of subsection (11)(b), (14) or (15), if any, as well as all aggravating or mitigating factors; or
- (b) where applicable, any representations made under subsection (3)(a),

the Commission is satisfied that a magistrate found guilty of misconduct, or who has admitted guilt in terms of subsection (3), is in fact guilty of misconduct and that by reason of the nature of the misconduct in question that magistrate is no longer fit to hold office, the Commission must -

- (i) notify that magistrate in writing of its decision and afford him or her an opportunity to resign as magistrate within 14 days of receipt of the notice; and
- (ii) if that magistrate refuses or fails to resign within the period mentioned in paragraph (i), make a written recommendation to the Minister that the magistrate be dismissed from office in terms of section 21(3)(a) and submit, together with the recommendation, such record, comments, representations and other relevant documents to the Minister.

(18) A person subpoenaed to attend an investigation instituted in terms of this section as a witness or to produce a book, document or object is entitled to allowances as if he or she were a witness in criminal proceedings.

(19) A subpoena must be issued in the form prescribed by the Commission and must be served in the manner determined by the Commission.

(20) An investigation in terms of this section must take place in private.

(21) Any statement obtained during a preliminary investigation carried out in terms of section 25(1) which is not disputed by the magistrate charged may be admitted in evidence at the investigation instituted in terms of subsection (4).

(22) A magistrate who, while a charge of misconduct is being investigated against him or her or while the investigation is not yet completed, resigns as magistrate or assumes duty in other employment, is deemed to have been dismissed on account of misconduct with effect from the date on which he or she resigned or assumed duty in other employment.

PART VI GENERAL PROVISIONS

Regulations

27. (1) The Minister may, after the Commission has made a recommendation, make regulations regarding the following matters in relation to magistrates:

- (a) The appointment, promotion and transfer;
- (b) the recognition of appropriate qualifications and experience for the purposes of appointment and the determination of basic salary;
- (c) the procedure and manner of and criteria for evaluation and the conditions or requirements for the purposes of promotion;
- (d) salary scales and rates of allowances and other pecuniary benefits;
- (e) transfer and resettlement costs;
- (f) the powers, duties, conduct, discipline, hours of attendance, leave of absence, including leave gratuity, and pension, including contributions to a pension fund, and any other condition of service and benefits, including the occupation of official residential quarters;
- (g) the training of magistrates, including financial assistance for such training;
- (h) the provision of official transport;
- (i) the conditions on which and the circumstances under which remuneration for overtime duty, and travel, subsistence and other allowances, may be paid;
- (j) the legal liability of a magistrate in respect of anything done or omitted under this Act or any other law and the legal liability emanating from the use of official transport;
- (k) the procedure at misconduct proceedings and the attendance of persons at such proceedings;
- (l) the circumstances under which and the conditions and manner in which a magistrate may be found to be suffering from continued ill-health or of incapacity to perform the duties of his or her office efficiently;
- (m) the procedure for dealing with complaints from members of the public on alleged improper conduct of magistrates or alleged maladministration of justice in the lower courts;
- (n) the procedure for dealing with complaints and grievances of magistrates, and the manner in which and time when or period wherein and person to whom documents in connection with requests and communications of those magistrates must be submitted;

- (o) the recognition of a professional society or body representing the interests of magistrates;
- (p) the membership or conditions of membership of a particular medical aid scheme or medical aid society, and the manner in and the conditions on which membership fees and other moneys which are payable or owing by or in respect of magistrates or their dependants to a medical aid scheme or medical aid society, may be recovered from the salaries of magistrates and paid to such medical aid scheme or medical aid society;
- (q) the contributions to and the rights, privileges and obligations of magistrates or their dependants with regard to a medical aid scheme or medical aid society;
- (r) the circumstances under which a medical examination must be required for the purposes of this Act or any other law, and the form of medical reports and certificates;
- (s) any matter which is required or permitted to be prescribed under this Act; and
- (t) in general, any matter which is not in conflict with this Act and which is reasonably necessary for the effective functioning of the Commission or the regulation of the conditions of service of magistrates or any matter in connection with the rights, powers, duties and functions of a magistrate.

(2) Any regulation under this section that results in State expenditure must be made with the concurrence of the Minister responsible for finance.

(3) No regulation made under subsection (1) may contain any provision that affects or is likely to affect the service benefits of any magistrate, as they existed immediately before the date of commencement of this section, to his or her detriment.

(4) A regulation made under subsection (1)(k), and which regulates the attendance of persons at misconduct proceedings contemplated in such a regulation, may provide that a person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and liable on conviction to a fine not exceeding N\$1 000 or to imprisonment for a period not exceeding three months.

Penalty

28. A person who wilfully obstructs or interferes with the Commission or a committee in the performance of its functions in terms of this Act or any other law is guilty of an offence and liable on conviction to a fine not exceeding N\$1 000 or to imprisonment for a period not exceeding three months.

Transitional provisions and saving

29. (1) All posts created for magistrates on the permanent establishment of the Ministry of Justice and which existed immediately before the date of commencement of section 12 are, as from the said date, deemed to be posts created in terms of that section for magistrates on the permanent establishment of the magistracy.

(2) Any person who immediately before the date of commencement of section 13 held the office of magistrate is, as from the said date, deemed to have been duly appointed as a magistrate under that section, and the provisions of this Act apply to such person.

(3) The remuneration paid to a magistrate immediately before the date of commencement of section 18 is, until the date on which the first regulation contemplated in subsection (1) of that section commences, deemed to have been prescribed pursuant to that subsection.

(4) The conditions of service applicable to a person referred to in subsection (2) immediately before the date of commencement of section 17, may not be affected to his or her detriment, and no such condition of service is, after the said date, to be construed or applied in a manner which is less favourable to the person concerned than the manner in which it was construed or applied immediately before that date.

(5) Subject to this Act -

- (a) any law regarding any condition of service; or
- (b) any measure regarding powers, duties and functions; or
- (c) any arrangement regarding any administrative function,

which applied to a magistrate immediately before the date of commencement of any regulation relating to such matter, remains in force until the date on which that regulation commences.

(6) Notwithstanding the Pension Matters of Government Institutions Proclamation, 1989 (Proclamation No. AG. 56 of 1989) -

- (a) any person referred to in subsection (2) remains a member of the Government Institutions Pension Fund referred to in section 2(b) of the said Proclamation;
- (b) any person appointed as a magistrate after the commencement of section 13 who is a member of the fund mentioned in paragraph (a), remains such a member; and
- (c) any person appointed permanently as a magistrate after the commencement of section 13 who is not a member of the fund mentioned in paragraph (a), becomes a member of that fund as from the date of appointment and must contribute thereto,

until other provision is made by regulation under section 27(1)(f).

Construction of certain references

30. Any reference in any other law to -

- (a) a chief magistrate, magistrate, additional magistrate, assistant magistrate, civil magistrate or criminal magistrate, is to be construed as a reference to a magistrate appointed under this Act;
- (b) a regional magistrate, is to be construed as a reference to a magistrate appointed under this Act to the court of a regional division.

Amendment of Act No. 32 of 1944

31. The Magistrates' Courts Act, 1944 (Act No. 32 of 1944), is amended to the extent indicated in the third column of the Schedule.

Short title and commencement

32. (1) This Act is called the Magistrates Act, 2003, and comes into operation on a date to be fixed by the Minister by notice in the *Gazette*.

Act No. 3, 2003

MAGISTRATES ACT, 2003

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

SCHEDULE
(Section 31)

LAW AMENDED

No. and year of law	Short title	Extent of amendment
Act No. 32 of 1944	Magistrates' Courts Act, 1944	<p>1. The amendment of section 1 -</p> <p>(a) by the substitution for the definition of "judicial officer" of the following definition:</p> <p style="padding-left: 40px;">"judicial officer' means a magistrate appointed under the Magistrates Act, 2003;"; and</p> <p>(b) by the deletion of the definition of "magistrate".</p> <p>2. The substitution for section 8 of the following section:</p> <p style="padding-left: 20px;">"Before whom courts to be held</p> <p style="padding-left: 40px;">8. Every court held under this Act shall be presided over by a judicial officer."</p> <p>3. The repeal of sections 9, 9bis, 10, 11 and 12.</p> <p>4. The amendment of section 66 by the deletion in paragraph (b) of subsection (2) of the words "or an additional or assistant magistrate".</p>