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JUDICIAL CONDUCT TRIBUNAL

09 January 2025

Dear Secretary of the Judicial Service Commission

**Cc: The Chief Justice of the Republic
Justice M M L Maya**


RE: JUDICIAL TRIBUNAL – TAN MAKHUBELE

We hereby submit the report of the Judicial Conduct Tribunal concerning Judge TAN Makhubele.

The Tribunal acknowledges that the proceedings were challenged with numerous delays for various reasons. These are apparent from the lengthy record.

We hope that you find that all is in order.

We thank you.



Tribunal President

Judge President Jappie





**IN THE JUDICIAL CONDUCT TRIBUNAL OF THE JUDICIAL SERVICE
COMMISSION OF SOUTH AFRICA, HELD AT MIDRAND, GAUTENG**

REF NO: JCT/Makhubele J

DATE: 9 January 2025

In the matter between:

#UNITEBEHIND

Complainant

and

JUDGE T A N MAKHUBELE

Respondent

Coram: JUDGE PRESIDENT A N JAPPIE, JUDGE D S S MOSHIDI and MS N MADUBA-SILEVU (MEMBER)

REPORT TO THE JUDICIAL SERVICE COMMISSION

Introduction

[1] On 14 January 2019, #UniteBehind ('the complainant') lodged a complaint of judicial misconduct with the Chief Justice, as Chairperson of the Judicial Conduct Committee ('JCC'). The complaint was brought in terms of s 14(3) of the Judicial Service Commission Act 9 of 1994 ('the Act') against Judge T A N Makhubele ('the respondent').

[2] The grounds upon which such complaint may be lodged are set out in s 14(4) of the Act in the following terms:

‘(a) Incapacity giving rise to a judge’s inability to perform the functions of judicial office in accordance with prevailing standards, or gross incompetence, or gross misconduct, as envisaged in section 177 (1) (a) of the Constitution;

(b) Any wilful or grossly negligent breach of the Code of Judicial Conduct referred to in section 12, including any failure to comply with any regulation referred to in section 13 (5);

(c) Accepting, holding or performing any office of profit or receiving any fees, emoluments or remuneration or allowances in contravention of section 11;

(d) Any wilful or grossly negligent failure to comply with any remedial step, contemplated in section 17 (8), imposed in terms of this Act; and

(e) Any other wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) to (d), that is incompatible with or unbecoming the holding of judicial office, including any conduct that is prejudicial to the independence, impartiality, dignity, accessibility, efficiency or effectiveness of the courts.’

[3] The Chief Justice, on 11 March 2020, referred the complaint to the JCC in terms of s 16(a) of the Act. The respondent appeared before the JCC and made representations thereat concerning the complaint, where after the JCC referred the matter to this Tribunal.

[4] The complaint, as referred, comprises two parts, Part A and B. Part A concerns the respondent’s acceptance and service as chairperson of the interim board of control of the Passenger Rail Agency of South Africa (‘PRASA’) while simultaneously being a nominated prospective judge or judge of the High Court of South Africa. Part B relates to the respondent’s conduct during her tenure as chairperson of PRASA.

[5] The complaint alleged that the respondent undermined the independence of the judiciary, and received remuneration from PRASA; a role within the executive branch of the government. Such role at PRASA undermined the separation of powers and/or the status of the judiciary. Furthermore, the complaint alleged that the respondent intentionally and/or negligently failed to immediately sever all her professional links and failed to organise her personal and business affairs to minimise the potential of conflict of interest

[6] The following facts appear to be largely common cause. The respondent, then a senior counsel at the Pretoria Bar, applied to the Judicial Service Commission ('JSC') in July 2017 for appointment as a judge. In September 2017, upon becoming aware of a vacancy at PRASA, she expressed interest therein by submitting her curriculum vitae through her neighbour, Mr Chauke.

[7] The following sequence of events is pertinent:

- (a) On 4 October 2017, the respondent attended an interview with the JSC for appointment as a judge of the High Court, Gauteng Division;
- (b) On 5 October 2017, the JSC recommended her appointment to the President of the Republic;
- (c) On 18 October 2017, the Cabinet approved her appointment as chairperson of the Interim Board of PRASA; and
- (d) On 1 November 2017, the President appointed her as a judge of the Gauteng Division with effect from 1 January 2018.

[8] It appears from the evidence that on 20 October 2017, the respondent communicated with Mlambo JP that she would accept her appointment as a judge, and requested a discussion regarding her starting date. However, this request was not pursued until 4 December 2017. Conversely, on 24 November 2017, the respondent appeared before the Parliamentary Portfolio Committee on Transport in her capacity as PRASA Board chairperson. At this hearing, she disclosed her judicial appointment and indicated that she would assume her judicial office on 1 January 2018.

[9] The complainant, #UniteBehind, is described as a coalition of movements comprising various non-profit organisations, including the Rail Commuters Action Group, the Alternative Information and Development Centre, Right2Know Western Cape, Equal Education, Social Justice Coalition, Women's Legal Centre and Ndifuna Ukwazi.

[10] Of particular relevance is the complainant's involvement in the #FixOurTrains Campaign, which seeks to address the dysfunctional train system in Cape Town and surrounding areas. The complainant contends that this crisis is directly connected to

corruption and maladministration at PRASA, including during the period of the respondent's chairpersonship from October 2017 to March 2018.

[11] It is not in dispute that the complaint falls to be considered within the framework of section 14 of the JSC Act, read with section 177 of the Constitution. During the proceedings before the JCT it became apparent that the provisions of the Legal Succession of the South African Transport Services Act 9 of 1989 (Transport Services Act) are also germane to the consideration of delegated authority within PRASA.

[12] On 18 February 2021, pursuant to s 22 of the Act, the Chief Justice appointed Judge F D J Brand as President of the JCT with Judge S S D Moshidi and Ms N Maduba-Silevu as members of the Tribunal and they were further advised of the terms of reference. Section 26 of the Act prescribes the objects and nature of the Tribunal's inquiry. The Tribunal is mandated to:

- (a) inquire into allegations of incapacity, gross incompetence or gross misconduct;
- (b) collect evidence;
- (c) conduct formal hearings;
- (d) make findings of fact;
- (e) determine the merits of allegations; and
- (f) submit a report containing its findings to the Judicial Service Commission.

[13] The inquiry is inquisitorial in nature, with no onus on any person to prove or disprove facts.¹ The Tribunal's determination must be made on a balance of probabilities.²

[14] On 30 August 2021, Mabuza Attorneys, who were then acting on behalf of the respondent, sent a letter to the Secretariat of the JSC and requested the recusal of Judge Brand and for the enquiry be expedited. On 22 October 2021, Judge Brand agreed to step down as President of the Tribunal and requested that the then Acting Chief Justice to appoint another retired Judge in his stead. Subsequently on 19 May

¹ S 26(2) of the Act.

² S 26(3) of the Act.

2022 and in terms s 22(1) of the Act the Chief Justice appointed retired Judge President A N Jappie as the Tribunal President of the JCT.

[15] In regard to the present enquiry the following complaint was received from Unite Behind:

5.1 Whether the respondent improperly held a dual status: as Judge of the High Court of South Africa and Chairperson of the interim Board of Control of the PRASA, and in doing so rendered herself guilty of gross misconduct as envisaged in section 177 of the Constitution; and

5.2 Whether the respondent's conduct as Chairperson of PRASA was incompatible with the office of a Judge in that:

- of all the cases that PRASA was involved in she paid immediate and special attention only to those of Siyaya;
- that she marginalised the PRASA legal unit and terminated or caused to be terminated the mandate of PRASA's attorneys and personally appointed another firm of attorneys in their stead to represent PRASA;
- that she negotiated with Siyaya's attorneys and entered into a confidential settlement agreement that is manifestly and materially prejudicial to the interests of PRASA, relying on non-existent "major concessions" on its liability to Siyaya allegedly made by PRASA employees and ex-employees at the Insolvency Inquiry; and
- frustrated PRASA attempts to resist the enforcement of the settlement;

thereby rendering herself guilty of gross misconduct as envisaged in section 177 of the Constitution.'

[16] The hearing before the Tribunal was preceded by lengthy and numerous delays. The delays included, a pre-hearing conference between the parties, which upon receipt of their minute proved not to have curtailed the issues. There were also issues concerning the respondent's requests for legal representation and the issue of payment of the respondent's legal fees. The respondent eventually agreed to be represented by Adv I V Maleka SC who in turn requested more time to prepare for the hearing. The hearing before Tribunal eventually commenced on 21 February 2023.

[17] However, of reassurance was that both in the pre-hearing correspondences, and during the hearing itself all parties expressed the view that it was in the best interests of justice that this matter be concluded as soon as possible.

[18] However, it is to be noted that the complaint was filed as far back as 14 January 2019 and therefore, it is not only old, but was also rather complex as it involved the appointment a judge of the High Court of South Africa.

Part A of the complaint

[19] The respondent through her lead counsel Adv Maleka SC, denied the allegations made in the complaint and in turn alleged that Mlambo JP had consented to her starting later than her appointed date namely 01 January 2018 and for her to commence her judicial functions only in April 2018.

[20] Further, on 1 November 2017, the President of the Republic of South Africa informed the respondent that she was appointed as a judge of the Gauteng Division of the High Court with effect from 1 January 2018. This information was conveyed to her by Mlambo JP on the 2nd November 2017.

[21] When the respondent testified she said that it was towards the end of October 2017 when at a time she had already been informally informed by Mlambo JP that she was successful in being appointed as a judge, she accepted the position as the interim chairperson of PRASA.

[22] The first meeting of the PRASA Board was on 31 October 2017. However, on the 20 October 2017 the respondent had emailed Mlambo JP requesting an appointment with him to discuss her “starting date” of her duties as a judge. The respondent did not follow up on this request until 4 December 2017.

[23] In the interim and on the 24 November 2017, the respondent appeared at a meeting before the Parliamentary Portfolio Committee of Transport representing the Board of PRASA. At this meeting, the respondent disclosed that she had just been appointed as a judge and would be assuming her new role on the bench on 1 January 2018.

[24] According to Mlambo JP he informed the respondent on 05 October 2017, that her name will be forwarded to the President as one of the successful candidates for the appointment as a judge.

[25] On 4 December 2017, the respondent e-mailed Mlambo JP with a request that she starts on the bench from 1 April 2018. On 6 December 2017 Mlambo JP replied to the respondent's email indicating as follows:

'Thanks for your email. The delay has been your undoing unfortunately; The President has already done the appointment wef 1 January 2018. I am waiting for the appointment letters and certificate. We can meet a week after next'

[26] On the 07 December 2017 the respondent replied to Mlambo JP via e-mail indicating as follows:

'I request that you put me on hold until we finalise the discussion about my application to start later than January 2018'

[27] Mlambo JP recalled the meeting with respondent and at that meeting informed the respondent that it was too late for him to change her starting date.

[28] With regards to the first complaint Mlambo JP was called as the only witness. His evidence is corroborated by an affidavit of Ledwaba DJP. It is clear and common cause that during and after the interview of the JSC there was no mention at all by the respondent of her appointment at PRASA and/or her inability to commence her duties as a judge.

[29] Mlambo JP testified that during December 2017 he had already prepared the duty roster for the term starting January 2018 which roster included the name of the respondent.

[30] Mlambo JP further testified that all the newly appointed judges came in early January 2018 to take the oath except for the respondent. This caused Mlambo JP to arrange a meeting whereat he and Ledwaba DJP met with the respondent at the Gauteng High Court in Johannesburg. At that meeting the respondent told Mlambo JP

that she would not be starting on 01 January 2018 as set out in her certificate of appointment.

[31] According to Mlambo JP the respondent informed him that she could not commence with her duties from 1 January 2018 as she still had work at the Water Tribunal. She did not mention at all to him that she had been appointed as the Interim Chairperson of the PRASA Board.

[32] On the other hand, the evidence of the respondent on this aspect, was rather confusing. The respondent commenced with her evidence on 26 January 2024. According to the respondent she had several discussions with Mlambo JP before, during and after the JSC interviews on 4 October 2017 as to when she would commence with her duties.

[33] She further testified that Mlambo JP had agreed that she would not commence with her duties as a Judge on 1 January 2018. It is the view of this Tribunal that this conversation and agreement that the respondent claimed to have had with Mlambo JP to the effect that he knew that she would not be able to commence her duties on the 1st January 2018 is most unlikely.

[34] The evidence of the respondent in addition, on why she seemingly owed allegiance to the Water Tribunal and the manner in which she was unable to finalise her unfinished court matters in order to free and ready herself for judge's duties on 1 January 2018, was equally unconvincing, improbable and unreliable.

[35] The same criticism to her evidence as to how she became a chairperson of the Interim Board of PRASA prior to October 2017. According to the respondent she simply handed her CV to a neighbour and waited until she received congratulatory messages from various sources on her subsequent appointment as chair of PRASA. She testified that her appointment to PRASA was only for four months. This evidence of the respondent is contrary to the contents of her actual letter of her appointment by the Minister of Transport dated 19 October 2019. "page 763 of Annexure TAM19 volume 2 which reads as follows:

"It is my pleasure to inform you of your appointment as a Non-Executive Director of the Interim Board of Passenger Rail Agency of South Africa (PRASA) with immediate effect, until further notice.

I trust that your experience and expertise will benefit the Board and assist in providing strategic guidance to ensure that the entity achieves its mandate whilst ensuring that there is alignment between the entity and the Department's strategic objectives."

[36] On the credible evidence it remains that the respondent did not assume her judicial duty on 1 January 2018 as per her appointment and did not inform Mlambo JP that the reason for her failure to do so was that she had in fact accepted the appointment to the Interim PRASA Board.

[37] The evidence of what transpired after 1 January 2018, in particular, the alleged rescheduling of her commencement dates to either April 2018 and/or June 2018, remain not an issue for the determination of this matter before the Tribunal.

[38] During her evidence-in-chief, the respondent handed up documents and correspondence between her and Mlambo JP, as well as new documents not previously referred to by Mlambo JP. Most of this evidence and correspondence relate to letters written by Mlambo JP to the Minister of Justice and the obtaining of an opinion by the State Law Advisor. This evidence though interesting is not strictly necessary nor relevant to determine the issues currently before the Tribunal.

[39] Whilst giving her evidence the respondent became argumentative, for example, she interjected when the Tribunal President attempted to summarise the evidence adduced thus far.

[40] When she testified, the respondent denied a meeting with Mlambo JP and Ledwaba DJP in January 2018. On her version she places the meeting firstly, in March 2018, and later changes to February 2018. This was once again not put to Mlambo JP during his cross examination.

[41] In regards to the part A of the complaint, it is the view of this Tribunal that the principle as set out in the case law³, favours the events as explained by Mlambo JP.

[42] Based on the above as well as the entirety of the evidence placed before us we must conclude that, the denial of Mlambo JP' s evidence by the respondent as to the meeting in January 2018 and her referral to such a meeting in February and/March 2018 is not credible and cannot be true. It is our view that her version of events leading up to and including her evidence of only meeting with Mlambo JP and Ledwaba DJP in either February or March was deliberately misleading and it was unambiguously insufficient as an explanation for her conduct to cast any doubt on the credible version of Mlambo JP.

[43] Accordingly, we find on the totality of the evidence that the respondent has made herself guilty of gross misconduct as set out in s 14(4)(e) of the JSC Act 9 of 1994 as referred to herein above.

Part B of the complaint

[44] In summary this part of the complaint lodged by the complainant against the respondent is that the respondent failed to act honourably and to avoid the appearance of impropriety in all her activities as the chairperson on the Interim Board of PRASA. That is to say that she acted in a manner unbecoming of a judicial officer which is incompatible with her being a fit and proper person. Her conduct was dishonest and lacked integrity, that is to say, whilst at PRASA she acted in an unethical manner.

[45] The following are common cause in regard to Part B of the complaint:

- (a) The respondent took up the position of chairperson the Interim of the Board of PRASA towards the end of October 2017.
- (b) She remained as chairperson of the Board until she abruptly resigned in the middle of March 2018. It is common cause that during her tenure as Chairperson of the Board, the Board was not properly constituted. The Board chaired by the

³ For example, see *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* 2003 (1) SA 11 (SCA).

respondent did not formulate their own delegation of authority, but continued to operate under the authority provided for the previous Board.

(c) Relevant to the complaint it is common cause that four claims brought by the Siyaya Group of Companies (Siyaya matters) which PRASA was vigorously defending, the Board allegedly took a resolution to settle these claims. There was no record of the decision to settle these claims.

(d) The decision to settle the above said claims was conveyed by the respondent to Adv Botes SC who was on brief, instructed by Mathopo Attorneys and acting on behalf of Siyaya.

(e) There were several interactions between Adv Botes SC and the respondent including a physical visit by Adv Botes SC to the offices of the respondent at PRASA. These exchanges commenced in October 2017 until the resignation of the respondent in March 2018. The only conflict between the evidence of Adv Botes SC and the respondent is who initiated the initial contact between the two of them.

(f) Representatives of Siyaya and PRASA were present at the section 417 of the Insolvency Inquiry.

(g) The respondent provided Adv Botes SC with correspondence that assisted Siyaya in obtaining default judgment against PRASA.

[46] In this part of the inquiry the evidence leader called four witnesses. They are, Ms Martha Onica Ngoye, Mr Fani Dingiswayo, Mr Diale Mogashoa (external attorney) and Adv Francois Botes SC.

[47] The respondent testified in the advancement of her own case. It turned out that the respondent intended to call a witness not for giving evidence-in-chief but to merely to cross examine that witness. The witness which the respondent intended to call was a registrar/clerk of the court allocated to her at the North Gauteng Division to assist her in her duties during the first term in 2018. In the view of the Tribunal that would have amounted to an irregular procedure.

[48] Although the respondent challenged the evidence of Ms Ngoye, Mr Dingiswayo and Mr Mogashoa, the respondent presented no counter veiling evidence.

[49] As far as the evidence of Adv Botes SC is concerned, the respondent challenged his version of events but again presented no counter veiling evidence. Further, the respondent litigated against Adv Botes SC in the High Court and also brought a complaint against him with the Society of Advocates, Pretoria. Her complaint against Adv Botes SC was that he had breached the relationship of trust between the two of them and that he had abused their friendship.

[50] Ms Ngoye is/was a Group Executive of Legal, Risk and Compliance at PRASA. She testified that when she became aware that the respondent was appointed to the chairperson of the Interim Board she was very pleased with this. She further testified that the respondent, for reasons unknown to her, excluded her from attending meetings of the Board. The same applied to Mr Dingiswayo.

[51] According to Ms Ngoye she was informed by Ms Yvonne Page, an accountant at PRASA, that PRASA was about to pay one of the Siyaya claims. She (Ms Ngoye) immediately took steps to prevent this from happening. As a consequence of this PRASA briefed Werksmans Attorneys to stop Siyaya from taking judgment against PRASA. As to what occurred before the High Court, Pretoria is to be found in the testimony of Botes SC. Eventually PRASA brought an application to set aside this judgment obtained by Siyaya.

[52] It is common cause that to date hereof Siyaya never pursued these claims against PRASA.

[53] Mr Dingiswayo is/was a General Manager responsible for Legal Services at PRASA. He testified in support of the evidence of Ngoye.

[54] The external attorney of PRASA, Mr Mogashoa, who had been handling the Siyaya matters on behalf of PRASA prior to the arrival of the respondent, likewise testified. He testified that he eventually withdrew as the attorney of PRASA and this caused the legal department at PRASA to instruct Werksmans Attorneys to represent PRASA. He corroborated the evidence of both Ngoye and Dingiswayo that the two of them were excluded from attending Board meetings. He confirmed that he was instructed by the respondent not to interact with the internal legal department of

PRASA. He further confirmed that as the external attorney that he eventually withdrew as PRASA'S attorney when PRASA sought to set aside the default judgment which Siyaya had obtained.

[55] At this stage of the enquiry, the respondent was now represented by an attorney from the offices of the State Attorney, Ms Matshepo Mobeng. It is noted that up until this stage the respondent represented herself and had no legal representation.

[56] It is pointed that the evidence-in-chief and in cross-examination of the respondent was not only confusing but rather difficult to follow. She also was inclined to introduce new evidence and matters which were irrelevant to the inquiry before the Tribunal. Not only was she dilatory, but she also referred to correspondence and exhibits/annexures previously introduced and dealt with by previous witnesses. In addition, she referred to numerous new correspondence never used before when witnesses were called by the evidence leader. As a result, this caused inordinate delays in the proceedings, resulting in unnecessary postponements.

[57] During cross-examination, the respondent did not fare any better. On the evidence before us, the version of the respondent was intrinsically problematic. It was inconsistent and amounted to a bare denial in the face of vastly credible evidence to the contrary on the crucial aspects in this matter.

[58] It remains unknown who gave the respondent the mandate to settle the Siyaya matters and to allow default judgment to be taken against PRASA. It is to be noted that there is no record of a Board meeting where the decision was taken to settle these matters.

[59] Further, it is to be noted, that on the evidence when the Minister of Transport asked the respondent for a report concerning the Siyaya matters she unexpectedly resigned and failed to give such a report. The absence of the existence of a record as to who and how the decisions were taken to settle the Siyaya matters is the basis of the contention that the settlement was done in secret by the respondent. In addition, her assistance to Adv Botes SC in obtaining default judgment against Siyaya raises a further concern.

[60] It is to be noted that once the default judgement was rescinded, no further action was taken by Siyaya in pursuit of these alleged claims. In fact, the Siyaya Group of Companies were eventually liquidated.

[61] The evidence before the Tribunal was extensive and lengthy. The arguments by Adv T Masuku SC and his junior Adv M Simelane, who came into the hearing at a late stage, and represented the respondent though interesting added nothing further to the evidence of the respondent.

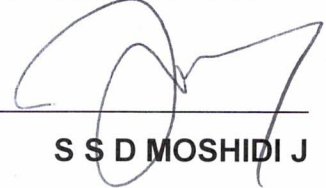
Conclusion

[62] It is the unanimous view of the Tribunal that on the totality of the credible evidence, as given before us, that the respondent's conduct as alleged in part B of the complaint constitute a breach of the provisions of section 14(4)(e) of the JSC Act 9 of 1994.



A N JAPPIE J

TRIBUNAL PRESIDENT



S S D MOSHIDI J

TRIBUNAL MEMBER



Ms N MADUBA-SILEVU

TRIBUNAL MEMBER