

**MEMORANDUM BY JUDGE NB TUCHTEN IN RESPONSE TO
COMPLAINT BY JUDGE MAKHUBELE**

- 1 Thank you for the opportunity to respond to the complaint made against me by Judge Makhubele by her affidavits dated 4 December 2018 (the initial affidavit) and 4 March 2019 (the supplementary affidavit).

- 2 The complaint arises from, and only from, a judgment I handed down on about 27 November 2018 in case no. 23484/18 in the Gauteng Division, *Passenger Rail Agency of South Africa v Siyaya Siyaya DB Limited and Others*. I did not mark the judgment as reportable or as of interest to other judges. At the separate requests of the Judge President and the Deputy Judge President made before I handed down the judgment, I gave them each a copy of the judgment.

- 3 The essence of the complaint in the initial affidavit is the assertion that I made criticisms of the complainant in my judgment which “border on defamation of character”, in a judgment arising from a case to which she was not a party. The complainant insinuates that my conduct is aggravated because I, a white man, wanted to injure the reputation and dignity of the complainant, who is a black woman and did not hear her before I wrote my judgment. The complainant alleges that I was influenced by the views of an organization which threatened legal action against her

4 I find the supplementary affidavit difficult to follow. As best I can make out, the further complaints made in the supplementary affidavit are that I was biased and discriminated against the complainant because she was a black woman and that the passages complained of in the judgment constituted hate speech directed at the complainant. The evidence she relies upon for this complaint is that I did not find or suggest that the conduct of the Arbitrator, the judge who made the arbitral awards orders of court or Siyaya's lawyers should be investigated. In addition, she maintains that I referred to the complainant as Judge Makhubele to emphasise the fact that she was a judge and thereby deliberately added to the humiliation I intended to cause her.

5 In the judgment, I summarised the allegations made under oath against the complainant. They were:

5.1 The complainant took up her position with PRASA after she had been appointed a judge.¹

5.2 After her appointment as the chair of the PRASA interim board, the complainant assumed a prominent role in the litigation between the Siyaya entities and PRASA for reasons which

¹ Paragraph 4 of the judgment

were not explained. These instructions culminated in an instruction to PRASA's attorney to settle the claims by paying capital and interest. This was done and the Arbitrator made awards to that effect.²

5.3 All this was done against the strong opposition of a grouping of officials within PRASA which maintained that the claims ought to be resisted. According to the deponents to affidavits before me, Judge Makhubele gave instructions that members of the GLS, the very organ created to conduct PRASA litigation, who had considerable knowledge of the Siyaya litigation, were to be excluded from any participation in the further conduct of the case. Indeed, when the second most senior member of GLS, Mr MM Dingiswayo, tried to discuss the matter with PRASA's attorney, Mr Mogashoa, on 15 December 2017, Mr Mogashoa told Mr Dingiswayo that Judge Makhubele had barred PRASA's attorneys from interacting with GLS on the case.³

5.4 The Siyaya entities brought an application to make the arbitral awards orders of court. PRASA tried to oppose that application through attorneys Bowman Gilfillan. In response, the Siyaya

² Paragraph 5 of the judgment

³ Paragraph 6 of the judgment

entities challenged the authority of Bowman Gilfillan to act under rule 7(1). It was alleged by officials of PRASA who were members of the GLS that the Siyaya entities raised this challenge on the strength of information supplied to Siyaya by the complainant herself.⁴

5.5 All this, I concluded in the judgment, gave rise to a case which the complainant ought to answer. I set out the questions which in my view arose from the allegations made against her which demanded answers.⁵ I raised a further concern regarding an alleged report which was not in the papers but was alleged to have been central to the complainant's decision to intervene in the litigation. In this context I raised as questions which the complainant ought to answer whether this report existed, who compiled it and what it said.⁶

5.6 I observed that the complainant had not answered the allegations made against her although she had had opportunities to do so. I noted that she would have a further opportunity to do so in the course of the litigation which formed the subject of my judgment. I said that if the further litigation

⁴ Paragraph 8 of the judgment

⁵ Paragraph 17 of the judgment

⁶ Paragraph 18

objectively did not offer her an appropriate forum for her side of the story to be received, another forum out to be provided to her for this purpose.⁷

5.7 I concluded that the complainant ought not to undertake any further judicial duties until she cleared her name of the allegations against her.⁸

6 I note the allegation made by the complainant⁹ that the liquidators of certain Siyaya entities did not intend to rely on the arbitration awards or the settlement agreement that preceded them.

7 I did not criticise or defame the complainant. As she herself acknowledges, I made no findings against her. I have no animus against her. I do not hate her. I barely know her.

8 The suggestion that I might want to hurt the complainant because she is a black woman is unfounded. I have never been influenced either in favour of or against anyone because of their race, gender, religion,

⁷ Paragraph 20 of the judgment

⁸ Paragraph 20 of the judgment. This was the course taken, with the approval of the authorities, by a judge of my Division pursuant to an earlier complaint which served before the Committee.

⁹ Complainant's supplementary affidavit para 45

political beliefs or the like. The judicial oath which I took pursuant to art 6(1) of Schedule 2 to the Constitution, requires me to administer justice to all persons alike, without fear, favour or prejudice That is what I have always done, to the best of my ability, and that is what I did in this case. I would have written the same judgment and come to the same conclusions if the person against whom the allegations were made had been a white man or, eg, a person of any other gender or race or religion or held particular political beliefs.

9 The reason why I did not suggest that the conduct of the Arbitrator or the judge who granted the default judgment which I set aside or the lawyers for Siyaya ought to be investigated was that there were no allegations of misconduct against any of them. I did however refer critically to the reasoning of the judge who granted default judgment against PRASA. I referred to the complainant as Judge Makhubele out of respect for the office she held. She was, if I remember correctly, referred to in the papers by her surname alone. I thought it would be discourteous of me to the judiciary if I did that.

10 I was not influenced by any person or organisation or the views of any person or organisation to write my judgment as I did. The judgment is my own, entirely independent, work. At that time, all I knew about the

organisations mentioned by the complainant was what was in the papers before me.

11 I did not allocate this case to myself. I heard the case because the Judge President or the Deputy Judge President expressly asked me to do so. I am not sure whether one or both of them separately asked me to hear the case.

12 In the case that came before me, very serious, *prima facie* credible allegations of misconduct were made against the complainant under oath in the affidavits. I do not know whether she knew about the case which was before me at the time I heard that case. The complainant first said, on 4 December 2018:¹⁰

I am not in possession of the papers that were placed before Judge Tuchten. All I know is that the matter was [on] the unopposed roll.

13 Then the complainant said, on 4 March 2019:¹¹

I requested Prasa's founding papers from Advocate Botes SC ... as I was preparing to obtain legal advice on the allegations against me that I kept reading about in

¹⁰ Complainant's initial affidavit para 9

¹¹ Complainant's supplementary affidavit para 11

newspapers and social media platforms. **He emailed the affidavit and annexures in three parts on 28 May 2018.**¹²

14 The case before me was heard during November 2018. So the complainant said in the initial affidavit that she was not in possession of the papers in the case when she swore to the truth of her initial affidavit. Then, in the supplementary affidavit, the complainant said that she had, by email, received PRASA's founding papers on 28 May 2018, for the purpose of obtaining legal advice. These two statements, both made under oath, appear to contradict each other. I hope that the Committee will investigate what the complainant in fact knew about the case before me and when she knew it. I hope that the Committee will establish the reason why the complainant chose not to put her version before the court in the case before me.

15 I made no findings against the complainant. I have no opinion on whether or not the complainant is guilty of all or any of the alleged conduct to which I referred in my judgment. It certainly was not my intention to pronounce on the complainant's guilt or innocence. I do not think the judgment can be read to suggest that I believed the complainant was guilty. If the complainant were cleared of the allegations against her after due consideration, I would be relieved

12

My emphasis

because an adverse finding against the complainant would reflect poorly on the judiciary.

16 In paragraph 20 of the judgment I said that I held the firm view that the complainant should not undertake any judicial functions until she clears her name of the allegations against her. That is my honest opinion. I deliberately did not say "*unless* and until ...". That was because there is a presumption of innocence which operates in favour of the complainant. But this, I hardly need add, does not mean that the case against the complainant should not be accurately formulated or fairly investigated.

17 For my own part, I offered to the Judge President before I even received the text of the complaint against me, to take leave until the complaint against me was resolved. The Judge President declined my offer.

18 I formulated the questions which have aggrieved the complainant because I thought that a proper foundation ought to be laid for my conclusion that the allegations ought to be investigated through a fair process. That is my style. I think that formulating issues in the form of questions contributes towards clarity of thought.

19 The judgment reflected my honest opinions. I do not think the Committee is empowered by law to enquire into the conduct of judges who express their honest opinion in a judgment. If the Committee did so, I believe it would be infringing the separation of powers doctrine. Judges who feared that the Committee might discipline them for writing what they honestly believed would not be independent in the fullest sense of the word and might withhold their honest opinions for fear of disciplinary consequences. I believe that my approach to the allegations made against the complainant was the correct one, but if I am wrong it is for the courts to correct me, not the Committee.

20 I did not make any findings or display any animus against the complainant, any more than the Committee has made any findings or displayed animus against me by deciding, without hearing me, that the present complaint should go forward for further consideration. If I had considered making findings against the complaint, of course I would have given her an opportunity to be heard. My judgment does not contain any hate speech.

21 Misconduct on the part of the powerful is a problem in this country. That does not mean that a person in high office should be condemned on mere allegations. But where *prima facie* allegations of such misconduct are before a judge, I believe that it is that judge's

constitutional duty to identify those allegations and, where appropriate, call for them to be investigated according to law and dealt with accordingly.

- 22 There is a long standing practice in this regard where persons such as lawyers, medical professionals, engineers and accountants are said in court papers to have conducted themselves inappropriately. I do not think that judges ought to be exempted from this practice.
- 23 Since time immemorial, similarly, judges have commented in their judgments on matters of public importance. It is of the utmost importance that the conduct of judges should not only be above reproach but should be seen to be above reproach. Who should stand guard against the alleged improprieties of judges if not the judges themselves? In my opinion, where a judge is alleged to have misconducted herself, and those allegations are *prima facie* credible and made under oath in a court case, the judge hearing that case ought, in a proper case, to spell out that alleged conduct and call for an investigation into the allegations. In that way the goal of finality will be advanced. I can think of at least two instances where no such finality has thus far been reached on complaints made against judges. This has given rise to prolonged speculation, with members of the press and the public taking sides on incomplete information either for

or against the judge in question. That is a bad outcome, in my opinion. Here again, if other judges think I am wrong, it is for them to say so in their judicial capacities and not through the medium of a disciplinary enquiry.

- 24 I did not specifically consider the Code of Judicial Conduct for purposes of writing my judgment. However art 16(3) of the Code states:

A judge who reasonably believes that a colleague has been acting in a manner which is unbecoming of judicial office must raise the matter with the colleague or the head of the court concerned.

- 25 I do not think art 16(3) of the Code applies in this instance. Firstly, the complainant was not a colleague when she allegedly committed the conduct in question. Secondly, I do not think that art 16(3) is intended to cover situations where allegations are made against a judge in litigation.

- 26 Coincidentally, however, I did discuss the case briefly with the Judge President before I handed down my judgment. I told him that the allegations against the complainant concerned me and that I was thinking of referring the allegations to another authority. The Judge

President, rightly in my view, did not suggest that I should act otherwise than as I saw fit.

27 Finally, as regards art 16(3), I consider it would in the present context have been entirely inappropriate to conduct extra-curial interviews with any person for purposes of obtaining information not on the papers.

28 The outcome of the complaint is important to me, I believe that your Committee ought to clear me of contravening the Code. But in a sense the outcome of the complaint against me is of subordinate significance. In my opinion, whatever view the Committee takes of my conduct, it is of great public importance that the allegations against the complainant be investigated pursuant to a fair procedure and that a finding be made on those allegations. Anything less and we the judiciary risk losing the confidence and respect of the people we serve.



NB Tuchten
Judge of the High Court
3 April 2019