MEMORANDUM BY JUDGE NB TUCHTEN IN RESPONSE TO REPLY

BY JUDGE MAKHUBELE

1 Thank you for the opportunity to respond to Judge Makhubele's reply dated 30 April 2019.

2 Nothing that the complainant said in her reply has persuaded me to depart from or modify anything I said in my answer to her complaint. I stand by what I said previously.

3 I think the complainant may have contradicted herself once again. In her affidavit in support of the complaint,[1] the complainant says:

> Although he did not make adverse findings on the allegations made by the GLS against me, ... it is clear that he believes I am guilty of the alleged wrong doings.

4 Then, in her reply to my memorandum of response, the complainant says:[2]

> The remarks that he made are actually findings of fact, for example ...

And

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1 Para 14 of the complainants affidavit of complaint

2 Para 32 and 42 of the complainant's reply to my memorandum of response

I have already indicated that the remarks that he made in the judgment are actually findings of fact. I have given the examples and I do not wish to repeat myself. He found me to have acted improperly.[3]

5 I think the applicant is correct that we once did judicial work together. I think we did urgent court work together for one week. The practice in our Division is usually for two judges to hear the urgent cases for the week. The senior judge allocates matters to the junior judge. They do not sit together. I do not recall sitting together with the complainant or the complainant appearing before me as counsel. She may have done so. I do not know what incident the complainant refers to in paragraph 35 of her reply.

6 The key arguments in the reply, as I see it, are, firstly, that I ought not to have made the remarks in question in my judgment without joining her or otherwise according her the right of reply to the allegations made against her; and, secondly, that calling attention to her alleged conduct in the way I did was not collegial. In my view, both those arguments are unfounded.

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3 My emphasis

7 On the joinder argument, it has never been our law that remarks such as those I made may only be made in relation to a party to a proceeding. *Audi alteram partem* is only necessary in the present context when findings are made against a person or an order which may adversely affect that person's rights is made. I can only repeat that I made no findings against the complainant.

8 But even if I was wrong in law, which I do not think I was, this is no ground on which the Commission may assume jurisdiction and exercise disciplinary oversight in respect of my conduct. I shall enlarge on the questions of *audi* and the independence of the judiciary below.

9 In paragraph 17 of her reply, the complainant reasons that if the purpose behind my judgment was not to precipitate a complaint against the complainant to the JSC by #Unite Behind, I would have mentioned the authority to which I intended to refer her. This is incorrect.

10 I mentioned in my memorandum of response to the complaint[4] that I told the Judge President that I was thinking of referring the allegations to another authority. The authority I had in mind, and which I named to the Judge President, was the Zondo Commission, which is

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[4] Paragraph 26

accumulating evidence of what is called state capture and is more accurately described as corruption amongst the powerful leading to wholesale looting of state resources.

11 I however decided against a formal referral. I decided to suggest a broad procedural framework in which the allegations against the complainant could be fairly investigated and the truth established. I was acutely aware that the complainant had not replied to the allegations. As I saw it, there were two imperatives: firstly that the allegations themselves should not be allowed to be swept under the carpet; and, secondly, that the complainant ought to be required to address the allegations against her in a fair procedural setting.

12 In paragraph 57 of the complainant's reply, the complainant gets to the crux of the case before me, as it related to my remarks about which she complains. She said this:

> The allegations against me in the affidavit which was filed on behalf of PRASA would constitute criminal conduct if found to be true.

13 I indeed read those allegations in the affidavit filed on behalf of Prasa to charge the complainant with serious misconduct which might even be shown to be criminal misconduct. The amount involved was over

R56 million. I believe that it is the duty of every judge before whom credible allegations of such misconduct are made to draw attention to them and to call for appropriate action to be taken.

14 That is what I did in this case; and I did so only because it was my duty as a judge to do so. It was my duty to do so because *prima facie* credible allegations of misconduct were made against the complainant on oath. I was not influenced or motivated to do so by any other person or by any of the base motives which the complainant attributes to me.

15 I do not think that judges of first instance ought to speak out otherwise than in their judgments. I do not think that it would have been proper for me privately to write letters or urge others to take action when confronted by the kind of allegations made in the case before me. I do not think, as a matter of principle, that I ought to have dealt with these serious allegations by writing privately to the Judge President or any other authority to communicate my concerns. Moreover, this case was allocated to me, as I have said,[5] by the Judge President or the Deputy Judge President. I do not think that once I had been asked to do the case, it would have been legally permissible or that justice would have been done if I passed the buck back to the Judge President. The law

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5 Para 11 of my memorandum of response to the complaint

required me to deal with the case honestly and without fear or favour and that is what I did.

16 Nor would it have been proper, in my opinion, for me to approach the complainant privately and give her advance warning of what I intended to say or might say in my judgment. I would not do such a thing in the case of a member of the public and to have done so in relation to a person alleged to have performed acts otherwise than in a judicial capacity would have amounted to acting with favour and according unequal treatment to different categories of persons. The position may be different in the case of allegations of conduct as a judge, rather than merely conduct by a judge, but I was not required to consider the latter category.

17 To summarise: I think that judges of first instance ought to speak only in their judgments; and when they do so, they should speak clearly, unequivocally and for the record.

18 That is because it is the right of every person to examine and to disagree, even disagree strongly, with what a judge has written, provided that the disagreement is expressed within appropriate bounds of civility. But I also maintain that because judges, sitting as a court, are constitutionally independent and subject only to the

Constitution and the law,[6] and have inherent constitutional power to regulate their own process,[7] no person or organ of state, however illustrious its members may be, may curb or correct such a judge in the exercise of his or her judicial functions or prescribe procedures to such a judge, excepting only courts of a higher jurisdiction. Not because I am above the law, which I am not, but because when I speak as a judge in a judgment and do so honestly and without improper motive, I do so as an independent organ of state. That is why I say that this Committee has no power to hold me to account for the expression of my honest opinions.

19 The complainant is aggrieved by my failure to accord her the right to be heard. But as I made no findings against the applicant, there was no need for me to hear the complainant's side of the story. The right of *audi alteram partem* is accorded to persons by courts and administrators which make decisions impacting their rights. I made no such decision. I expressed the opinion that a forum should be created in which the complainant's version would be heard. That was where I contemplated that the complainant would receive the right of *audi*.

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6 Section 165(2) of the Constitution

7 Section 173 of the Constitution

20 It is well settled that even investigative bodies are not usually required to comply with the *audi* rules when carrying out their functions. All the more so in relation to my remarks affecting the complainant, which were not even made in an investigative context but in a preliminary context. See, eg, *Simelane and Others NNO v Seven-Eleven Corporation of SA (Pty) Ltd and Another*,[8] particularly at para 16 (quoting paras 51 and 52 of the judgment of the Competition Tribunal in *Norvaitis SA (Pty) Ltd v Competition Commission and Others*[9]) and para 22.

21 But I doubt whether the complainant's grievance that she was not given *audi* can be plausibly made. I say this because of two significant concessions which the complainant has made in her reply.

22 The first concession is that she has been in possession of and aware of the contents of the affidavit filed on behalf of Prasa in which the allegations in question were made against her since she received an electronic copy of that affidavit from Adv Botes SC on 28 May 2018.[10]

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8 2003 SA 64 SCA

9 CT 22?CR/BJun 012.07.2001

10 Complainant's supplementary affidavit para 11

23 The second concession is that she accepts that the allegations in the affidavit filed on behalf of Prasa would, if true, constitute criminal conduct.[11] It is strange that the complainant did not, upon reading the allegations against her in May 2018, attempt to intervene in the proceedings to put her side of the story before the court or, at the very least, submit an affidavit giving her side of the story. For this she did not need to know when the case was going to be heard in court. I do not say that the complainant would have succeeded in an attempted intervention. But whether or not she so succeeded, by attempting to intervene she would have placed her version before any administrator or judge charged with the duty of assessing the allegations against the complainant and would have forestalled any criticism that she had left the allegations against her unanswered.[12]

24 It is equally strange that the complainant has still not sought to intervene in the case or file an affidavit explaining why she is not guilty of the misconduct attributed to her.

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11 Paragraph 57 of the complainant's reply

12 For a case in which the fact that a witness had given evidence which was inadmissible and the approach adopted by that witness in her inadmissible evidence were taken into consideration during the adjudication process, see *Le Roux and Others v Dey (Freedom of Expression Institute and Resporative Justice Centre as Amici Curiae)* 2011 3 SA 274 CC para 116.

25 I have struggled to get relevant procedural information about the complaint against me and the complaint which #Unite Behind brought before the JSC against the complainant. I had not received any of the information for which I asked until 21 May 2019 when I was told by Ms Bios of the secretariat that the text of the complaint of #Unite Behind against the complainant had apparently not been sent by the secretariat to Ponnan JA who was to chair the committee of investigation into that complaint.

26 I have been told that the complaint against the complainant by #Unite Behind was lodged in hard copy with the secretariat on 15 January 2019. I have also been told that, despite the lapse of almost four months since the complaint of #Unite Behind was lodged with the secretariat, the complainant has still to disclose what her answers are to the allegations in the affidavit filed on behalf of Prasa and in the affidavit made on behalf of #Unite Behind in support of the complaint against the complainant.

27 I learnt on 21 May 2019 that the complaint of #Unite Behind has not as yet been considered by a committee of the JSC. The following day I was told by Ms Bios that the text of the #Unite Behind complaint had finally been emailed to Ponnan JA.

28 But the complainant has seen the affidavit made in support of the complaint and was asked by a news agency to comment on the allegations made in that affidavit.[13] It appears from the complainant's memorandum of reply read with annexure TAN 11 to that document that the complainant saw the affidavit of complaint of #Unite Behind on or before 25 January 2019.

29 The complainant has brought separate proceedings against the newspaper which reported on the court proceedings in which the complainant was named, against Adv Botes SC and against me. But as far as I know, the complainant has not ever responded to the serious allegations made against her.

30 In short, the complainant has attacked the actions and the motives of those who drew attention to the allegations against the complainant. She has attacked the conduct of Adv Botes SC. She has, on no evidence at all, attributed to me the basest of motives for drawing attention to the allegations of misconduct against her. But she has never herself put up a version.

31 This does not look like the conduct of someone who wants to exercise her right of reply.

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13 The complainant says as much in para 53 of her memorandum of reply.

32 In my moral universe, it is unthinkable that a judge, faced with allegations under oath such as these, would choose to remain silent and continue performing judicial duties. Instead of answering the allegations against her, the complainant has without justification imputed base motives to me. I think she has done so to deflect attention from the serious, unanswered allegations of misconduct against her.

33 The complainant complains of damage to her reputation and to her career caused by my judgment. But all she has to do to restore her reputation and continue her career is to supply a version, forthrightly, unequivocally and for the record which demonstrates that the allegations against her, as contained in the affidavit filed on behalf of Prasa which served in the case before me and the complaint of #Unite Behind, are unfounded.

NB Tuchten
Judge of the High Court
23 May 2019