

JUDICIAL CONDUCT COMMITTEE

IN THE COMPLAINT OF:

JUDGE TINTSWALO ANNAH NANA MAKHUBELE

APPLICANT

Against

JUDGE NEIL TUCHTEN

RESPONDENT

DECISION

GOLIATH DJP

[1] The complainant, Judge Makhubele, is a Judge of the High Court, Gauteng Division. The complaint arises from a judgment handed down by Tuchten J, a Judge in the same division, in the matter of *Passenger Rail Agency of South Africa (PRASA) v Siyaya Siyaya DB Limited and Others (Siyaya)* under case no 23484/18. The complainant was not a party to the litigation. In the judgment, Tuchten J summarized allegations made under oath against the complainant as follows:

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

- 1.2 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 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.
- 1.3 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 Tuchten J, 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.
- 1.4 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 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.

- 1.5 All this, Tuchten J concluded in the judgment, gave rise to a case which the complainant ought to answer. He set out the questions which in his view arose from the allegations made against her which demanded answers. Tuchten J 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 he raised as questions which the complainant ought to answer whether this report existed, who compiled it and what it said.
- 1.6 Tuchten J observed that the complainant had not answered the allegations made against her although she had had opportunities to do so. He noted that she would have a further opportunity to do so in the course of the litigation which formed the subject of his judgment.
- 1.7 He concluded that the complainant ought not to undertake any further judicial duties until she cleared her name of the allegations against her.

[2] Judge Makhubele alleges that Tuchten J has contravened various provisions of the Code of Judicial Conduct. First, that he allowed his objectivity and independence as a judge be influenced by the views of an organisation called Unite Behind by taking into account litigation conducted by it in another forum, and that his judgment intended to give credence to claims made by this organisation against her. Second, that he wrote a speculative judgment which shows he lacked impartiality, was biased against her in circumstances where she was not a party to the proceedings, and failed to call on her to answer prior to making adverse findings against her, thereby infringing on her right to be treated fairly in trial proceedings. Third, that her right to equal protection and benefit of the law was infringed when Tuchten J singled her out for criticism, but

failed to examine the conduct of other judicial officers and legal practitioners involved in the matter. Finally, that Tuchten J, as a colleague had failed to raise matters relating to her alleged inappropriate conduct with her or the Judge President in terms of Article 16(3) of the Code.

[3] Judge Makhubele contends that the manner in which Tuchten J phrased questions manifested his contempt for her as a judge, that he believed that she was a dishonest person, a liar, and guilty of the wrongdoings as alleged. She expressed the view that she was singled out because she is a black woman. It is therefore alleged that Tuchten J discriminated against her and that the passages complained of in the judgment constituted hate speech.

[4] The complainant's papers indicate that her appointment as a Judge would have taken effect from 1 January 2018. However, she requested an indulgence of four months to wrap up her legal practice. She would have commenced duties on 1 April 2018, but the date was amended to 1 June 2018. During the indulgence period she served in the Interim Board of Control (BOC) of PRASA from 19 October 2017 until 16 March 2018.

[5] The complainant concedes that damning allegations were made against her in the founding affidavit of PRASA which was deposed to by Ms Martha Ngoye in the rescission application that served before Tuchten J. Ms Ngoye stated that she had absolute authority to deal with PRASA legal matters, and perceived the complainants involvement in such matters as interference; that she and her subordinate, Mr Dingiswayo were excluded from settlement negotiations; and that PRASA's attorney

of record, Mr Madimpe Mogashoa was instructed by the complainant not to communicate with her and Mr Dingiswayo. Furthermore, that the complainant colluded with Siyaya liquidators to reach a settlement, that she communicated confidential information to Siyaya attorneys, and that the claims were settled to advance the interests of the “*questionable relationship*” that the complainant had with the Siyaya attorneys. Ms Ngoye essentially alleged that the complainant entered into an unauthorized settlement agreement with Siyaya to the detriment of PRASA. It is evident that Tuchten J relied inter alia on the allegations contained in the founding affidavit deposed to by Ms Ngoye, in arriving at his conclusions.

[6] It is common cause that the Siyaya entities executed on the orders which were granted by Holland-Muter AJ on 9 March 2018 and a sum of R56 029 560, 00 was seized by the Sheriff from PRASA’s bank account at their instance. On 6 April 2018 Ranchod J interdicted the paying over of these funds despite opposition from the Siyaya entities. Tuchten J was therefore seized with an application to rescind the orders of Holland-Muter AJ

[7] In his judgment Tuchten J concluded that:

“14. PRASA makes the case in papers before me that the settlements before the Arbitrator were unauthorised, that the process by which this was achieved constituted financial misconduct and that the facts pointed to a questionable relationship between roleplayers including an official or officials who are supposed to act in the best interests of PRASA and the Siyaya entities.”

“15. I find that case established for present purposes. So rescission must issue. ...”

[8] The complainant stated that she became aware of the grave allegations against her made by Ms Ngoye on 6 April 2018 in the media subsequent to the order Ranchod J. The article referred to the affidavit of Ms Ngoye where she allegedly stated that PRASA's Legal Department was wrongfully excluded from the settlement negotiations and that the complainant instructed PRASA's lawyers to settle the matter. She then sought advice on legal remedies on the defamatory allegations made by Ms Ngoye in her founding affidavit, which she is still pursuing.

[9] She obtained PRASA's founding papers from Botes SC which were emailed to her on 28 May 2018. She stated that she did not intervene in the litigation after obtaining PRASA's founding papers because she was advised by Botes SC that the Siyaya liquidators were not opposing the relief sought. She was also advised at a later stage that the liquidators were no longer relying on the arbitration awards or the settlement agreement. She was under the impression that the matter was going to be removed from the roll and referred back to arbitration. She subsequently heard about the judgment of Tuchten J. According to complainant, Tuchten J decided to write a "*speculative judgment*" on the basis of "*untested allegations*" deposed to by Ms Ngoye on behalf of PRASA. The complainant alleges that Tuchten J devoted a "*huge chunk*" of his judgment to making defamatory statements against her on matters that were not before him or at least not relevant to the issues before him, namely whether the orders issued by Holland-Muter AJ should be rescinded.

[10] She conceded in paragraph 14 of the complaint that Tuchten J did not make adverse findings on the allegations made by GLS against her, yet she contends in

paragraph 17 that he was not impartial and was biased towards making adverse findings against her and that the criticisms were unwarranted. She objects to the *“manner he phrased his questions”* and *“raised questions regarding her conduct”*, and stated that he *“knew that all of these questions were not relevant for the purpose of writing the judgment on the dispute before him”*. Plainly, the complainant is aggrieved by the judgment of Tuchten J insofar as questions were asked relating to her alleged conduct in the matter. In my view there is nothing in the judgment that suggests that Tuchten J believed the complainant is dishonest or guilty of any wrongdoing. The manner and context in which the questions were formulated was directly aligned to the misconduct attributed to the complainant in PRASA’s founding papers. I cannot discern any criticisms or adverse findings made against the complainant in the judgment of Tuchten J.

[11] An overview of the complainant’s case shows that when she became aware of Ms Ngoye’s allegations on 6 April 2018, she called PRASA Company Secretary to invoke the Directors Liability insurance *“because she really wanted to get involved in the litigation”*. She subsequently obtained legal representation and sought legal advice after being placed in possession of PRASA’s affidavit on 28 May 2018. On the papers the complainant appears to be contradicting herself as to whether she was in possession of the papers placed before Tuchten J when she filed the initial complaint on 4 December 2018. In this statement she indicated that she was not in possession of the papers that were placed before Tuchten J. In her supplementary affidavit dated 4 March 2019 she acknowledged that she received PRASA’s founding papers from Botes SC on 28 May 2018. The matter was before Tuchten J approximately six months later, on 27 November 2018.

[12] She stated that she took steps to obtain the court documents with a view to participate in the matter. She informed Minister Nzimande that the defamatory statements uttered by Ms Ngoye cannot be left unchallenged because they have adversely affected her judicial career. She labelled the allegations as “*malicious and intended to harm her reputation and integrity*”. She indicated that she intends to address the merits at the appropriate time and relevant forum if called upon to do so, or in the exercise of any legal remedies that she may have against anyone, including Judge Tuchten.

[13] The complainant was a highly qualified senior counsel with vast practical legal experience before her appointment as a Judge. She was aware of the grave allegations made against her which questioned her integrity in her capacity as Senior Counsel, Chair of PRASA, as well as a Judge whose appointment was imminent. She was in a position to intervene in the case or file an affidavit to counter the allegations against her for some time before Tuchten J handed down judgment on 27 November 2018. The complainant’s reasoning as to why she elected not to intervene in the court application cannot be sustained. The fact that the matter was no longer opposed and no further reliance was placed on the settlement and the arbitral awards did not diminish the extent of the serious uncontested allegations against her. She stated unequivocally that she intended to take action to vindicate her good name and reputation but failed to do so.

[14] Complainant’s assertion that the judgment “*left me under the mercy of Unite Behind, the media and malicious individuals in the social media space*” is unfounded. It is evident that the papers before Tuchten J included documents relating to legal

action instituted by Unite Behind challenging the execution of enforcement orders and the power of the interim board of PRASA to institute, defend or settle legal proceedings or claims against one of the Siyaya entities. It is common cause that Ms Ngoye raised the same issues in her founding papers. The complainant herself concedes that the judgment is based on the allegations contained in the affidavit of Ms Ngoye. There is accordingly no merit in the averment that Tuchten J intended to give credence to claims made by this organisation against her.

[15] Tuchten J indicated that the reason why he did not suggest that the conduct of the Arbitrator or Judge who granted default judgment which was set aside or the lawyers for Siyaya ought to be investigated was that there were no allegations of misconduct against any of them. He did however refer critically to the reasoning of the Judge who granted default judgment against PRASA. I find this explanation to be reasonable and logical. It cannot reasonably be concluded that the complainant was singled out and the complainant's assertion in this regard is unfounded.

[16] The complainant concedes that Tuchten J did not make adverse findings on the allegations made against her by the GLS. The complainant concedes that the remarks he made were findings of fact. The complainant concedes that the allegations against her in the affidavit which was filed on behalf of PRASA would constitute criminal conduct if found to be true. It is the duty of every Judge before whom credible allegations of such misconduct are made to draw attention to them and call for appropriate action to be taken. Tuchten J saw it fit to say "*something about the conduct of Judge Makhubele as evidenced in these papers.*" (my emphasis) Tuchten J cannot be faulted for merely performing his duty diligently as a Judge when he raised concerns and asked probing questions in the face of *prima facie* credible allegations


of improper and questionable conduct. It is important for Judges to raise relevant issues and ask hard questions when required. A failure by the presiding Judge to raise these concerns may create the impression that the matter is being swept under the carpet, which could bring the judiciary into disrepute. The conduct of Judges must be above reproach.

[17] Currently the allegations against the complainant remains uncontested. The complainant is not barred from following an appropriate judicial process to state her case and vindicate her reputation. All she has to do to restore her reputation is to take the necessary action which will demonstrate that the allegations of misconduct as contained in the affidavit filed on behalf of PRASA is unfounded.

[18] The fact that the matter was unopposed before Tuchten J did not absolve him from meticulously ventilating the issues, or scrutinizing certain serious allegations of misconduct as reflected in the founding papers. In my view Tuchten J, in the performance of his duties, evaluated the case judiciously, purely based on the facts before him. There is nothing irregular in the manner he approached the matter and raised questions which needed clarification. It is my considered view that the questions raised and the comments complained of in the judgment were germane to the judicial proceedings before Tuchten J. I am satisfied that there is no merit in the complainant's allegations that Tuchten J had acted in violation of the Code of Judicial Conduct. I am accordingly of the view that the complaint lacks substance and falls to be dismissed.

Order

[19] The complaint is dismissed in terms of section 15(2)(c) and (d) of the Judicial Service Commission Act 9 of 1994 as it solely relates to the merits of a judgment or an order of court and is lacking in substance.



DEPUTY JUDGE PRESIDENT GOLIATH