

**IN THE JUDICIAL CONDUCT COMMITTEE OF
THE JUDICIAL SERVICE COMMISSION OF SOUTH AFRICA**

In the matter between:

#UNITE BEHIND

Complainant

and:

JUDGE TINTSWALO ANNAH NANA MAKHUBELE

Respondent

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#UNITE BEHIND

Complainant

and:

JUDGE TINTSWALO ANNAH NANA MAKHUBELE

Respondent

COMPLAINT AFFIDAVIT

I, the undersigned



ZUKISWA FOKAZI

do hereby affirm and say:

INTRODUCTION

1. I am an adult female and a member of the Organising Secretariat of #UniteBehind, whose offices are at 6th Floor, Vogue House, Thibault Square, Cape Town. #UniteBehind is a coalition of social justice organisations with a written constitution.

2. I am duly authorised by #UniteBehind's Organising Secretariat to make this affidavit and bring this complaint on behalf of #UniteBehind. In this regard, I attach hereto a copy of a resolution authorising me to depose to this affidavit marked 'UB1'.

3. In this affidavit I will variously use “#UniteBehind”, “we” or “us” to refer to the complainant. The respondent is Judge Tintswalo Annah Nana Makhubele, a judge of the Gauteng Division of the High Court of South Africa. Whilst at some of the time periods referred to in this affidavit the respondent had not yet been appointed a judge of the High Court, for ease of reference, I shall refer to her in her current capacity as a judge (“**Judge Makhubele**”).

4. The purpose of this affidavit is to lodge a complaint in terms of section 14(3) of the Judicial Services Commission Act 9 of 1994 (“**JSC Act**”) against Judge Makhubele. In particular, this complaint relates to conduct and actions arising from and in relation to Judge Makhubele’s concurrent status as the Chairperson of Interim Board of Control of the Passenger Rail Agency of South Africa (“**PRASA**”) and a Judge, or prospective Judge, of the High Court of South Africa.

5. The facts upon which the complaint is based are largely public knowledge and my attestation thereto is therefore based upon various sources of information including official reports and statements. I can attest to the truth thereof because I have confirmed the information through my own investigation and I believe the following information to be true and correct. In addition, I have been party to correspondence and Parliamentary hearings on this matter.

#UNITEBEHIND’S INTEREST IN ENSURING AN INDEPENDENT JUDICIARY

6. #UniteBehind is a coalition of movements and organisations which include, amongst others, the Rail Commuters Action Group, the Alternative Information and

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Development Centre, Right2Know (Western Cape), Equal Education, Social Justice Coalition, Women's Legal Centre, and Ndifuna Ukwazi.

7. #UniteBehind enjoys support from communities of faith such as the Western Cape Religious Leaders Forum, the South African Council of Churches and the Muslim Judicial Council. Organisations which form part of #UniteBehind consist of young people, anti-apartheid struggle veterans, queer people, women, workers and unemployed people, who have all come together to form a coalition fighting for a just and equal South Africa.
8. As progressive social justice movements and organisations, the members of #UniteBehind are committed to ensuring that the foundational principles of our constitutional democracy are upheld and protected. #UniteBehind has an interest in ensuring that only those who are fit and proper hold judicial office, and those who no longer meet this standard are removed from judicial office timeously.
9. Constituent members of #UniteBehind regularly rely on the courts to ensure that constitutionally guaranteed rights are realised, that the abuse of power by private actors and the state is challenged, and that the scourge of corrupt and incompetent governance is held at bay. An independent judiciary is a crucial component of this project and it is in the spirit of protecting and promoting the independence of our judiciary that #UniteBehind brings this complaint.
10. At the time of submitting this complaint, #UniteBehind has been advancing the #FixOurTrains campaign to challenge the dysfunctional train system in Cape Town. Every day hundreds of thousands of poor and working class commuters have to endure

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unreliable, overcrowded and unsafe trains. This ongoing crisis is directly connected to corruption and maladministration at PRASA, the board of which Judge Makhubele served as Chairperson from October 2017 to March 2018.

11. During the period of Judge Makhubele's tenure as Chairperson, #UniteBehind has been involved in litigation challenging unlawful resolutions of the Board, as well as the payment of monies from PRASA to companies which are linked to irregularly-awarded and possibly corrupt tenders and contracts. #UniteBehind is committed to undoing the effects of corruption at PRASA and the South African economy at large, and holding accountable those who perpetrated, enabled, or benefited from corruption.

THE STRUCTURE OF THIS COMPLAINT

12. This complaint is brought in terms of section 14 of the JSC Act. As is required by section 14(3)(b) of the JSC Act, this affidavit serves to establish (i) the nature of the complaint; and (ii) the facts upon which the complaint is based. In addition, this complaint in terms of the JSC Act must be read with the Constitution and legislation relevant to the governance of PRASA as a public entity

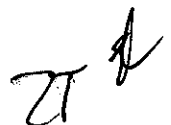
13. We proceed by first setting out the background facts which are relevant to this complaint. We thereafter proceed with our complaint in two parts:

- 13.1. **Part A** will deal with Judge Makhubele having undermined the independence of the judiciary by having served in, and received remuneration for, the position of Chairperson of PRASA (a role within the executive branch of government) after her position as a member of the



judiciary had, by presidential determination, come into effect. In this part of the complaint #UniteBehind will submit that Judge Makhubele:

- 13.1.1. Accepted and served in a position inconsistent with an independent judiciary, or that could undermine the separation of powers or the status of the judiciary;
 - 13.1.2. Wilfully and/or negligently failed to immediately sever all professional links and organise her personal and business affairs to minimise the potential of conflicts of interest;
 - 13.1.3. Breached the general prohibition against judicial officers holding an office for profit, and received the fees and/or emoluments, and /or remuneration or allowances relating to her role as Chairperson of PRASA; and
 - 13.1.4. Breached the prohibition against judicial officers seeking a special dispensation from the Executive branch of government.
- 13.2. **Part B** will deal with facts pertaining to the manner in which Judge Makhubele conducted herself as chairperson of the Interim Board of Control of PRASA. In this part of the complaint we will submit that Judge Makhubele:
- 13.2.1. Failed in her duty to act honourably and avoid the appearance of impropriety in all her activities;




- 13.2.2. Acted in a manner unbecoming of judicial office, and which is not compatible with a fit and proper person in that her actions lacked honesty and integrity, and lead to unethical conduct.

BACKGROUND FACTS

14. In March 2017, the then Minister of Transport, Ms Dipuo Peters, dissolved the Board of Control of PRASA (“**the Board**”) by removing all the Board members. The Minister’s decision was successfully challenged in court and the Board members were reinstated, but their terms of office came to an end on 31 July 2017.
15. In July 2017 the JSC issued a media statement announcing that Advocate Makhubele, as she then was, had been shortlisted as a candidate to be interviewed for judicial appointment to the Gauteng Division of the High Court.
16. On 4 October 2017, the Judicial Services Commission (JSC) formally advised¹ the President to appoint Advocate Makhubele SC as a judge in the Gauteng High Court, following her interview before that body.² This appears from a media report of the JSC’s proceedings of the day, a copy of which is attached hereto marked ‘UB2’.

¹ Section 174 (6) states that the President must appoint a judge of the High Court on the **advice** of the Judicial Services Commission. The President has discretion only in relation to the appointment of judges of the Constitutional Court. Judges of all other courts must be formally appointed by the President once the JSC has advised her or him to do so. In this sense, Advocate Makhubele’s appointment by the President became a formality.

² Business Day ‘*Six recommendations for judges made by the JSC*’ 5 October 2017
<https://www.businesslive.co.za/bd/national/2017-10-05-six-recommendations-for-judges-made-by-the-jsc/>

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17. Two weeks later, on 19 October 2017, after a process of advertisement and application by prospective candidates for the position, Cabinet released an official media statement announcing Advocate Makhubele as one of four members appointed to the Interim Board of Control of PRASA, despite her imminent judicial appointment. This statement is attached hereto marked 'UB3'.
18. On the same day, 19 October 2017, the clerk to the Judge President of the High Court sent an email to Judge Makhubele and others enclosing a "directive" from the Judge President for her attention. #UniteBehind does not have knowledge of the content of the directive. This information is included in a legal opinion by ENSAfrica to Judge Makhubele dated 28 February 2018 ("the ENSAfrica opinion"), which opinion is attached hereto and marked 'UB4'.³
19. On 20 October 2017 #UniteBehind understands that Judge Makhubele sent an email to Judge President Mlambo accepting her placement to the High Court and sought to discuss the date of her appointment. The Judge President responded by email on 23 October 2017 requesting that Judge Makhubele indicate her preferred starting date by email.⁴
20. On 2 November 2017, the Presidency announced the appointment of judges to various courts, as recommended by the JSC at its October 2017 sitting. These judges included Judge Makhubele, who was appointed to the Gauteng Division of the High Court.

³ See paragraph 2.5 of the ENSAfrica Opinion. The ENSAfrica opinion was widely distributed and has become publicly available, therefore no claims of attorney's privilege or confidentiality can be made on it.

⁴ See paragraphs 2.6 and 2.7 of the ENSAfrica Opinion.



Significantly, the statement indicated that Judge Makhubele's appointment would be with effect from 1 January 2018, in an existing vacancy. This statement is attached hereto marked 'UB5'.

21. On 24 November 2017 the interim Board of PRASA, including Judge Makhubele, appeared before Parliament's Portfolio Committee on Transport ("the Portfolio Committee") to explain PRASA's failure to timeously submit its annual report and answer to allegations of systemic mismanagement, corruption and possible state capture.⁵ The Portfolio Committee is responsible for parliamentary oversight of the executive arm of government, in particular the Department of Transport and its entities, including PRASA. Importantly, a report of that meeting by the Parliamentary Monitoring Group indicates that Judge Makhubele informed the Portfolio Committee of her commencement of service as a judge. Significantly, Judge Makhubele informed the Portfolio Committee that she would "be assuming her new role on the bench on 1 January 2018". This PMG report is attached hereto marked 'UB6'.
22. On 28 November 2017 a representative of the Office of the Chief Justice emailed Judge Makhubele various forms for her to complete in order for her appointment to be "implemented on the PERSAL system". The email further stated that her appointment

⁵ For the purposes of this complaint, 'state capture' is the phenomenon of private individuals and/or entities using their close association with elected public office bearers or other politically-exposed persons to improperly benefit from business dealings with the state or other organs of state such as state-owned companies and public utilities.

cannot be finalised without the information and documentation referred to in the email.⁶

23. On 1 December 2017, Judge Makhubele chaired a Special Meeting of the PRASA Board of Control attended by only three other members. This meeting adopted a series of resolutions related to investigations ordered by the Public Protector, those resolutions became the subject of litigation by #UniteBehind and its affiliate, Equal Education, later that month This litigation is referred to in paragraph 27 below.
24. On 4 December 2017 Judge Makhubele emailed Mlambo JP indicating that *“I think it will be in the interests of the Bench if I start in April 2018”*.⁷
25. Judge President Mlambo responded to this email on 6 December 2017 confirming that, notwithstanding Judge Makhubele’s preference of a later starting date, the President had already confirmed the appointment with effect from 1 January 2018 and that Mlambo JP was waiting for the “appointment letters and certificates”.⁸
26. Despite this correspondence, on 15 December 2017 Judge Makhubele emailed the Director General of the Department of Water Affairs and Sanitation confirming her appointment to the High Court and stating that she had made arrangements to start on

⁶ See paragraph 2.10 of the ENSAfrica Opinion.

⁷ See paragraph 2.11 of the ENSAfrica Opinion.

⁸ See paragraph 2.12 of the ENSAfrica Opinion.

1 April 2018, and that she would formally resign her position as chairperson of the Water Tribunal with effect from 30 March 2018.⁹

27. The matter between #UniteBehind and Equal Education against the Minister of Transport and PRASA was launched in the Western Cape Division of the High Court on 18 December 2017 under case number 23200/2017. In our founding papers, #UniteBehind and Equal Education raised the issue of Judge Makhubele's appointment as chairperson of the PRASA Interim Board of Control after the President had been advised to appoint her as a judge as irrational and a breach of the separation of powers. An extract from the notice of motion and founding affidavit is attached hereto marked 'UB7'. The full application may be provided upon request.
28. According to the Presidency's statement of 2 November 2017, Judge Makhubele was supposed to have commenced her tenure of judicial office on 1 January 2018. However, following that date, Judge Makhubele continued to serve as Chairperson of the Interim Board of PRASA, despite the controversy and the breach of the separation of powers.
29. In light of this, #UniteBehind addressed a letter of concern to Judge-President Mlambo on 26 January 2018. In its letter, #UniteBehind expressed concerns about a member of the judiciary performing executive functions and being accountable to the Minister of Transport. This letter is attached hereto marked 'UB8'.

⁹ See paragraph 2.13 of the ENSAfrica Opinion.

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30. On 29 January 2018, #UniteBehind received a response from Judge-President Mlambo, which response is attached hereto marked 'UB9'. The letter of the Judge-President confirms that he had forwarded the letter from #UniteBehind to the Minister of Justice and Constitutional Development with a request that the President "revoke the appointment of Madam Justice Makhubele from the 01st January 2018", and to instead make her appointment effective from 1 April 2018. The Judge-President also states that Judge Makhubele had not yet taken the oath nor had she been paid a salary as a Judge. According to the letter, Justice Makhubele had also undertaken to ensure that "*by the time her appointment takes effect she will have resigned from all positions she is currently occupying*".
31. On 29 January 2018, the Registrar of Judges' Registrable Interests confirmed that after sending Judge Makhubele a reminder to complete the disclosure forms by 31 January 2018 (based on an assumed commencement date of 1 January 2018), the Registrar had since been informed that Judge Makhubele's commencement date had been moved to 1 April 2018. It is not clear who informed the Registrar of Judges' Registrable Interests of the purported decision that Judge Makhubele's commencement date had been deferred.¹⁰
32. On 4 February 2018, the Sunday Times published a front-page story reporting that Mr Lindikhaya Zide, PRASA's acting Chief Executive at the time, had controversially been involved in an illegal attempt to invest R1-billion of PRASA's assets in VBS Mutual Bank. Judge Makhubele is also brought into the controversy as chairperson of

¹⁰ See paragraph 2.14 of the ENSAfrica Opinion.

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PRASA's board. The media report indicates that she, together another PRASA acting Chief Executive, Mr Cromet Molepo, had pressurised PRASA's Chief Financial Officer, Ms Yvonne Page, to sign off on the R1-billion investment, forcing the CFO to ultimately resign. I attach hereto a copy of the front-page story in the Sunday Times marked 'UB10'.

33. On 5 February 2018, the Monday following the controversial Sunday Times story, Judge Makhubele's name appeared on the Court Roll of the Gauteng Division, Pretoria, sitting in Court 8G. A copy of the daily roll is attached hereto marked 'UB11'.
34. On 6 February 2018 the Portfolio Committee resolved to subpoena the Board of PRASA after it had yet again failed to make a scheduled appearance before the Committee on that day. Before the subpoena could be executed, however, Judge Makhubele, reportedly addressed a letter as chairperson of the PRASA Board, to the Portfolio Committee explaining the reasons why the Board had failed to appear and undertaking to appear before the committee a week later, on 13 February 2018. This standoff between the PRASA Board and the Portfolio Committee was the subject of a media statement from Parliament, which is attached hereto marked 'UB12'.
35. On 19 February 2018, the judicial governance watchdog *Judges Matter* published an article questioning Judge Makhubele's dual role as a Judge and Chairperson of a parastatal. This article is attached hereto marked 'UB13'.
36. On 21 February 2018 #UniteBehind wrote a second letter of concern about Judge Makhubele's service as Chairperson of the Interim Board of PRASA after having been


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appointed as a judge. This letter was addressed to, amongst others, the President of the Republic, the Chief Justice and the Judicial Services Commission. This letter is attached hereto marked 'UB14'.

37. On 27 February 2018, the Secretary of the JSC responded in writing to #UniteBehind indicating that Judge Makhubele had not sat as a Judge in the Gauteng Division of the High Court whilst serving as Chairperson of the Interim Board of Control of PRASA and that “[Judge Makhubele] has indicated that she will only assume her judicial duties with effect from 1 April 2018”. The JSC Secretary further indicated that the listing of Judge Makhubele as appearing on the unopposed roll in the Gauteng Division of the High Court was an error by the Registrar. Finally, the Secretary noted that Judge Makhubele had not taken the oath or affirmation and its view was that Judge Makhubele had “not commenced with her judicial functions”. The Secretary’s letter also indicated that a complaint must be brought to the Judicial Conduct Committee by way of affidavit. This letter is attached hereto marked 'UB15'.

38. I note that the Secretary’s letter did not address the effects of the President’s declaration that Judge Makhubele’s appointment came into effect on 1 January 2018, nor did the letter indicate in any way that the President had “revoked” such appointment for purposes of determining a new date.

39. On 18 March 2018, the issue of the conflict posed by Judge Makhubele serving in the position of the Chairperson of the Interim Board of PRASA after having been appointed as a judge was reported as a lead story by widely-circulated weekly newspaper, *City Press*. Several other media-houses also reported on this issue. The *City Press* article is attached hereto marked 'UB16'.

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40. In response to the media coverage, Judge Makhubele laid a complaint with the Press Ombudsman against City Press and the journalist, Mr Setumo Stone. In a decision dated 14 May 2018, the Press Ombudsman dismissed Judge Makhubele's complaint and found in favour of the newspaper and the journalist. The Press Ombudsman's decision is attached hereto marked 'UB17'.
41. On 23 March 2018, PRASA issued a media statement indicating that Judge Makhubele had resigned from the office she held as chairperson of the Board with effect from 16 March 2018. The media statement is attached marked 'UB18'.
42. #UniteBehind reliably learned that as of 22 March 2018 Judge Makhubele was, despite the statement on the 23 March 2018, still actively engaged in some of PRASA's internal affairs beyond her supposed date of resignation. Judge Makhubele had had email correspondence with members of the Board relating to ongoing litigation and which evidences an intention to meet with the Board regarding such affairs. A sample of these is attached hereto marked 'UB19'.
43. Before concluding this section, it is necessary to record that serious and damaging allegations have been made on oath regarding Judge Makhubele's direct involvement in some of PRASA's legal matters. This involvement appears as both improper and irregular. In a rescission application launched in the Gauteng Division of the High Court on 4 April 2018, Ms Martha Ngoye, then head of PRASA's legal department and presently head of PRASA Rail, alleges under oath that Judge Makhubele acted in concert with the attorneys of an external entity to cause PRASA to improperly settle arbitration proceedings for which PRASA would be liable to pay millions of rands,

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and later scuppered efforts by PRASA to prevent these “secret” settlement agreements from being made orders of court.

44. Handing down judgment in that matter on 27 November 2018, Judge Neil Tuchten raises serious concerns about Judge Makhubele’s conduct and ultimately states that she ought not to undertake any judicial duties until she answers to Ms Ngoye’s allegations. I deal with these issues in more detail below.
45. I now turn to the specific aspects of misconduct covered by this complaint.

PART A: JUDGE MAKHUBELE UNDERMINED THE INDEPENDENCE OF THE JUDICIARY AND RELATED COMPLAINTS

46. The following facts bear emphasis from the background outlined above:
- 46.1. Judge Makhubele accepted nomination to become a Judge of the High Court of South Africa prior to July 2017 and was shortlisted to be interviewed by the JSC that month.
- 46.2. On 4 October 2017, Judge Makhubele completed her interview and later that day would have become aware that the JSC would advise the President to appoint her as a Judge of the Gauteng Division of the High Court. In our view, her appointment as a judge became a constitutional certainty at this point.
- 46.3. Notwithstanding this knowledge, on 19 October 2017, Cabinet announced Judge Makhubele’s appointment as the Chairperson of the Interim Board of PRASA.

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- 46.4. On 2 November 2017, the President of South Africa announced that Judge Makhubele, by this stage serving as Chairperson of the Interim Board of PRASA, had been formally appointed as Judge with effect from 1 January 2018.
- 46.5. On 24 November 2017, Judge Makhubele informed the Portfolio Committee that she would be assuming her new role on the bench on 1 January 2018.
- 46.6. On or about 4 December 2017, Judge Makhubele sought a later starting date for her appointment. On 6 December 2017, Judge President Mlambo responded by specifically confirming that her appointment would be effective from 1 January 2018 despite her preference for a later effective date.
- 46.7. On 18 December 2017, #UniteBehind and Equal Education filed an urgent application against the Minister of Transport and PRASA which, among other things, questioned the rationality of Judge Makhubele's appointment to the PRASA Board when she had in fact been appointed as a Judge commencing duty on 1 January 2018.
- 46.8. Judge Makhubele continued serving as Chairperson of the Interim Board of PRASA apparently disregarding the Judge President's notification of 6 December 2017.
- 46.9. As at 29 January 2018, it was apparent that the Registrar of Judges' Registrable Interests and the Roll Call Registrar were proceeding on the assumption that Judge Makhubele's appointment had become effective.
- 46.10. As at 29 January 2018, the President of the Republic had not "revoked", changed or otherwise delayed the effective date for Judge Makhubele's appointment.

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- 46.11. On 5 February 2018, Judge Makhubele's name appeared on the Court Roll of the Gauteng Division, Pretoria.
- 46.12. On 23 March 2018 PRASA announced Judge Makhubele's resignation with effect from 16 March 2018.
47. In light of these facts, #UniteBehind proceeds with the following specific grounds of complaint:
- 47.1. Judge Makhubele served in a position which undermined the independence of the judiciary and breached the separation of powers.
- 47.2. Judge Makhubele failed to sever professional ties upon permanent appointment to the judiciary.
- 47.3. Judge Makhubele occupied an office for profit, where she received payment for services, which payment was not authorised in terms of the JSC Act.
- 47.4. Judge Makhubele requested a special dispensation from the Executive regarding her appointment.

Serving in a position inconsistent with judicial office and breach of separation of powers

48. Article 4 of the Code of Judicial Conduct¹¹ (“**the Judicial Code**”) enjoins judges to, amongst others, “*uphold the independence and integrity of the judiciary and the authority of the courts*”.¹²

¹¹ GNR.865 of 18 October 2012

¹² Article 4(a) of the Judicial Code of Conduct

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49. Article 14(3) of the Judicial Code states that a judge must not:

(a) accept any appointment that is inconsistent with or which is likely to be seen as inconsistent with an independent judiciary, or that could undermine the separation of powers or the status of the judiciary.

...

(b) become involved in any undertaking, business, fundraising or other activity that affects the status, independence or impartiality of the judge or is incompatible with the judicial office."

50. Interpretation Note 14(ii) further adds that:

"while judges should be available to use their judicial skill and impartiality to further the public interest, they must respect the separation of powers and the independence of the judiciary when considering a request to perform non-judicial functions for or on behalf of the State, or when performing such a function."

51. The rationale behind these requirements is clear: judges must always be and be seen to be independent, loyal and subservient only to the Constitution. Any association, conduct, or action, which may distort that perception must be avoided.

52. The importance of the independence of the judiciary and its moral authority was highlighted by the Constitutional Court in *S v Mamabolo (eTV and Business Day as amicus curiae)* 2001 (3) SA 409 (CC) (at para 16) as follows:

“In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the state.” (Emphasis added)

53. In the context of judges assuming functions in the Executive arm of government, the Constitutional Court in *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC) held (at para 46):

“[I]t is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive functions, which are not appropriate to the “central mission of the judiciary”. Were this to happen the public may well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive’s power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary,

crucial for the proper discharge of functions assigned to the judiciary by our Constitution.”

54. #UniteBehind submits that serving in the position of Chairperson of a board at a public entity of which the State is the only shareholder is a clear example of an office or association at the heart of the Executive domain. In the case of PRASA, the relevant legislation under which the company is incorporated, the Legal Succession to the South African Transport Services Act¹³ provides that the ultimate authority over the company rests with the Minister of Transport.¹⁴ Furthermore, in terms of the Public Finance Management Act¹⁵ functionaries within PRASA also account to Parliament.¹⁶ Therefore the chairperson of PRASA’s Board of Control is accountable to both the Executive and Legislative branches of government.
55. #UniteBehind submits that Judge Makhubele reasonably ought to have been aware – at least as from 4 October 2017, when she would have been informed of her imminent appointment as a judge – of the restrictions that the JSC Act and Judicial Code would place on her professional life. When Cabinet announced her appointment as PRASA Board Chair on 19 October 2017, she should have been alive to the invidious position

¹³ Act 9 of 1989

¹⁴ Additionally, in terms of PRASA’s Shareholder’s Compact with the Minister of Transport, the Board of Control must achieve certain performance targets in line with Government’s vision, and must report to the Minister on these on an annual basis.

¹⁵ Act 1 of 1999

¹⁶ Section 49(1)(a) of the Public Finance Management Act provides that the board or other controlling body of a public entity is the accounting authority for the purposes of the PFMA. Section 51(1)(f) of the PFMA sets out the general responsibilities of the accounting authority to include the submission to Parliament and the Executive of all reports, returns, notices and other information as may be required by the PFMA, including information on the operations of the entity.

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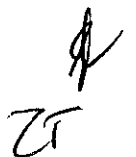
her chairing of the PRASA Board would place her in relation to her imminent judicial posting. The President's announcement of the 1 January 2018 commencement of her tenure of judicial office should have urged her to seriously consider the practical and legal effects of accepting appointments to both posts – particularly the risk of breach of the separation of powers doctrine. She did nothing.

56. As from 1 January 2018, Judge Makhubele served as both an appointed member of the judiciary and the board chairperson of a state-owned company. In the latter role, Judge Makhubele was accountable to the Minister of Transport (part of the Executive) and the Parliament's Portfolio Committee on Transport (part of the Legislature). Indeed, the Portfolio Committee resolving to summon by subpoena Judge Makhubele (as chairperson) and her fellow PRASA Board members to appear before it was a clear exercise of the legislature's coercive powers. This incident marked the first time in the history of democratic South Africa that a member of the judiciary was due to be subpoenaed to appear before Parliament.
57. #UniteBehind submits that Judge Makhubele serving as Chairperson of the Board of PRASA after having been appointed as a Judge is inconsistent with an independent judiciary and undermines the separation of powers.
58. I have already noted above that the Secretary of the JSC, in correspondence with #UniteBehind, had indicated that Judge Makhubele had not sat as a Judge in the Gauteng Division of the High Court whilst serving as Chairperson of the Interim Board of Control of PRASA; that she only intended to assume judicial duties from 1 April 2018 and thus had not commenced judicial functions; and that she had not taken the oath of office.

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59. With respect, we believe that the Secretary of the JSC was mistaken as to the legal position pertaining to Judge Makhubele.
60. The JSC Act and Judges Remuneration Act¹⁷ define “judge” as including any person holding the office of a Judge of any High Court. Section 174(6) of the Constitution provides that the President must appoint judges of all courts on the advice of the JSC.
61. The President appointed Judge Makhubele as a Judge with effect from 1 January 2018, after having been advised by the JSC in October 2017. We are advised and submit that there is no provision in law which empowers any person to amend or otherwise delay the effective date of a Judge’s appointment as determined by the President. #UniteBehind is not aware of the President having revoked or amended his determination of the appointment date of Judge Makhubele, and in any event such a revocation or amendment would not be competent in law.
62. It is clear from the facts outlined above that when Judge Makhubele initially indicated her preference for a later starting date, Judge President Mlambo informed her that the President had already made her appointment take effect from 1 January 2018. Despite this, however, Judge Makhubele did not step down from her position as Chairperson of the PRASA Board.
63. It appears that Judge Makhubele proceeded on the basis that she would not take the prescribed oath and not draw a salary in order to defer her commencement of judicial functions. There is no legal basis for such deferral by a judge of the commencement of

¹⁷ Act 47 of 2001.

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their judicial functions. Indeed, the legal opinion which Judge Makhubele requested from ENSAfrica, dated 28 February 2018, states:

“the kind of informal practical arrangement which seems to have been agreed between the Chairperson and the Judge President, that she will commence work on 1 April 2018, is not provided for or recognised in the applicable legislation.”

64. It follows that Judge Makhubele was permanently appointed as a Judge and member of the judiciary with effect from 1 January 2018. Put differently, the failure of Judge Makhubele to take the prescribed oath of office could not and did not affect her status as a member of the judiciary as from the date determined by the President. The requirements of the JSC Act as well as the Judicial Code were therefore applicable to Judge Makhubele as from 1 January 2018.
65. In addition, the failure of Judge Makhubele to timeously take the prescribed oath in order to perform her duties constitutes wilful or negligent conduct that is incompatible with or unbecoming of a person holding judicial office. If anything, it indicates an intentional effort to avoid the ethical and procedural parameters within which she would have been required to act as a Judge of the High Court.

Failure to sever professional ties upon permanent appointment to the judiciary

66. Article 12(2) of the Judicial Code provides as follows:

“A judge must, upon permanent appointment, immediately sever all professional links and recover speedily all fees and other amounts outstanding

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and organise his or her personal business affairs to minimise the potential for conflicts of interest.”

67. On 4 October 2017, Judge Makhubele would reasonably have become aware that the JSC had advised the President to appoint her as a Judge of the Gauteng Division of the High Court. When Cabinet announced, on 19 October 2017, that Judge Makhubele was appointed as chairperson of the PRASA Board, two weeks had passed since the JSC had advised the President to appoint her as a judge. At this stage, Judge Makhubele was required to have declined either the chairpersonship or the judicial appointment in order to accept the other.
68. On 2 November 2017, the President announced that Judge Makhubele had been appointed as a judge with effect from 1 January 2018. Judge Makhubele had an obligation to immediately sever all ties and wind up all affairs relating to her professional and business activity so as to minimise the potential for conflicts of interest upon her appointment coming into effect on 1 January 2018.
69. By 6 December 2017, Judge President Mlambo had made clear to Judge Makhubele that her appointment would be effective from 1 January 2018 and could not be delayed. Despite this, no efforts were made by Judge Makhubele to wind up her affairs as Chairperson of the Board of PRASA.
70. In any event, it was reasonably expected of Judge Makhubele to reconsider her position when, among other questions, the rationality of her appointment was challenged in litigation currently pending in the Western Cape Division of the High Court under case

number 23200/2017 brought by #UniteBehind and Equal Education against PRASA on 18 December 2017 (referred to in paragraph 27 above)

71. Instead, she continued to serve as Board Chairperson from 1 January 2018 and it appears that when #UniteBehind wrote to Judge-President Mlambo on 26 January 2018, the Judge President was placed in a difficult position. In correspondence addressed to #UniteBehind on 29 January 2018, the Judge-President noted that he had then forwarded #UniteBehind's letter to the Minister of Justice and Constitutional Development with a request to the President that Judge Makhubele's date of appointment be deferred. To the best of my knowledge, no such revocation or deferral was granted, but even if it was such a revocation or deferral would lack lawful authority.
72. The article published by Judges Matter on 19 February 2018 (updated on 21 February 2018) quotes Judge Makhubele as having been given permission by the Judge-President to begin her judicial duties on 1 April 2018. The deferred start date was to ostensibly allow her to wind up her affairs with the Water Tribunal and other positions. As I have previously noted, a legal opinion by ENSAfrica, which the Judge herself requested as Board Chair, indicated that the "*informal practical arrangement*" between Judge Makhubele and the Judge-President that she would enjoy a deferred starting date was not empowered by any provision in law.
73. Even if Judge Makhubele laboured under the impression that she had lawfully obtained the permission that she required in order to defer her start date and therefore continue in her position as Chairperson of the Board of PRASA, the ENSAfrica opinion should

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have put paid to that impression and prompted her immediately to resign. Indeed, the ENSAfrica opinion made it abundantly clear that:

“the longer the chairperson (Judge Makhubele) remains a member of the Interim Board, without tendering her resignation and winding up her PRASA-related affairs, the greater the risk of a successful constitutional challenge based on the Minister’s failure to terminate the chairperson’s position so as to avoid a possibility of violating the separation of powers principle.”

74. In spite of the law put before her in regard to her dual positions, Judge Makhubele continued to serve as Chairperson until her apparent resignation as PRASA Board Chairperson on 16 March 2018, amidst political and institutional controversy that implicated her in wrongdoing at the public entity. (This point is addressed later in this complaint affidavit).
75. In light of all of the above, #UniteBehind submits that Judge Makhubele breached her obligation to sever all professional links after her appointment came into effect on 1 January 2018, thus contravening Article 12(2) of the Judicial Code, which in turn had the effect of undermining the independence of the judiciary. Indeed, in the judgement in the *Siyaya* matter in which Judge Makhubele’s involvement led to orders being taken against PRASA, fellow Gauteng Judge Neil Tuchten raises serious concerns about the dual roles Judge Makhubele played as a judge and also PRASA Board chairperson. This judgement is discussed in greater detail in paragraph 100 of this complaint affidavit.

Occupying an office of profit

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76. Section 11(1) of the JSC Act prohibits judicial officers in active service from holding or performing any office of profit other than being a judge. Closely connected to this, is Section 11(1)(b) which is a prohibition against receiving any income other than that prescribed in the Judges Remuneration Act, which includes a judge's salary and other amounts relating to their capacity as a judge.
77. The only exception in terms of the JSC Act are royalties relating to any legal books written or edited by the judge, and even so, such royalties may only be received with the written consent of the Minister, acting in consultation with the Chief Justice.
78. The rationale for this prohibition is clear: judges should be independent and also be seen to be independent, and any perception that a judge is paid by entities outside the judiciary has the potential of diminishing that independence.
79. Until 16 March 2018, on which date Judge Makhubele's PRASA resignation apparently took effect, she held the position of being both a judge of the High Court and also the chairperson of a state-owned public company. As such, she would legally and ordinarily be entitled to director's fees as chairperson of the Board. We have no knowledge of the amounts she has received but by comparison, for the 2015/2016 financial year, the annual remuneration of the Chairperson of PRASA was R2 090 859.¹⁸

¹⁸ Estimate based on chairperson's income for the 2015/2016 financial years as stated in PRASA Annual Report, page 120.

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80. Judge Makhubele has therefore clearly contravened section 11 of the JSC Act in that she held and/or performed an office for profit other than her judicial office without the required consent from the Minister.

Request for a special dispensation

81. Article 4(d) of the Judicial Code prohibits judges from asking for or accepting any special dispensation from the Executive. The Code explains that this provision is to protect judicial independence, and ensure that judges are only guided by their conscience, free from outside influence.
82. In his letter of 29 January 2018 to #UniteBehind (annexure 'UB9'), Mlambo JP informed #UniteBehind that he had written to the Minister of Justice and Constitutional Development to request that the President revoke Judge Makhubele's appointment and defer it to 1 April 2018.
83. Such a request made to the Minister, which would undoubtedly have been initiated at Judge Makhubele's request to the Judge-President, is in the nature of the special dispensation expressly prohibited by Article 4(d) of the Code of Judicial Conduct, as it is made to the Executive and runs the risk of compromising the independence of the judiciary. In this regard, we urge the JSC to investigate the veracity of the information provided in these letters and mete out the necessary sanction.

Conclusion on Part A

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84. The facts that have been set out in this part of the complaint establish that Judge Makhubele accepted and served in a position which breached the separation of powers and undermined the independence of the judiciary. Judge Makhubele failed to immediately sever ties to her position as Chairperson of the Interim Board upon appointment as a Judge. She further received remuneration for that position after her appointment had come into effect, and requested a special dispensation in an effort to have the effective date of her appointment revoked or delayed.
85. #UniteBehind submits that independently and cumulatively, these grounds establish that Judge Makhubele has:
- 85.1. demonstrated gross incompetence, or gross misconduct, as envisaged in section 177 (1) (a) of the Constitution;
 - 85.2. breached various provisions of the Judicial Code wilfully or grossly negligently;
 - 85.3. accepted, held and performed in an office of profit or received fees or remuneration in contravention of the JSC Act; and
 - 85.4. conducted herself in a manner that is incompatible with or unbecoming the holding of judicial office by requesting a special dispensation from the executive.
86. #UniteBehind submits that these grounds sufficiently establish the legal basis for Judge Makhubele's impeachment. I now turn to Part B of this complaint, which sets out further facts and grounds of complaint in relation to Judge Makhubele's conduct in her role as Chairperson of the Interim Board of PRASA, which demonstrated the lack of fitness to hold judicial office.



**PART B: JUDGE MAKHUBELE'S CONDUCT AS CHAIRPERSON OF THE PRASA
INTERIM BOARD DEMONSTRATES THE LACK OF FITNESS TO HOLD
JUDICIAL OFFICE**

87. In this part of the complaint, I set out concerning aspects of Judge Makhubele's conduct whilst serving as chairperson of the Interim Board of PRASA.
88. Article 5(1) of the Judicial Code requires that judges must always, and not only in the discharge of official duties, act honourably and in a manner befitting judicial office. Article 5(2) emphasises this requirement by stating that all activities of a judge must be compatible with the status of judicial office. Explanatory Note 5(ii) of the Code elaborates to state that a judge avoids impropriety or the appearance of impropriety in all the judge's activities.
89. Article 6 of the Judicial Code requires that a judge must at all times comply with the law of the land.
90. Article 12 further prohibits a judge from involvement in political controversy or from lending the cloak of prestige of judicial office to advance or benefit private interests of others.
91. On the available facts, Judge Makhubele failed to act honourably in her capacity as Chairperson of PRASA and has conducted herself in a manner that may be prejudicial to the dignity of the judiciary. Her conduct fails to satisfy her to be a fit and proper person contemplated in section 174(1) of the Constitution, and is incompatible with the holding of judicial office.

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92. We further submit that Judge Makhubele knowingly became (or reasonably ought to have foreseen that she will become) involved in political and institutional controversies at PRASA. Furthermore, she allowed her prestige as a judge to be used for private benefit by others against the best interest of that organ of state. This demonstrates that her conduct is unbecoming of a judicial officer and requires strong sanction.
93. The Code of Judicial Conduct must be read together with the Public Finance Management Act, the Prevention and Combating of Corrupt Activities Act and the Public Protector Act to gain full insight into the misconduct of Judge Makhubele.

Judge Makhubele's efforts to enforce secret settlement agreements with companies linked to corruption

94. In litigation brought before the Gauteng Division of the High Court, Ms Martha Ngoye, the then head of PRASA's legal department and present acting head of PRASA Rail, filed a sworn affidavit which contains serious allegations pertaining to the conduct of Judge Makhubele as Chairperson of the Interim Board. The affidavit is filed in the matter of *PRASA v Siyaya DB (Pty) Ltd and Others*, case number 23484/2018. The matter is public record. Extracts of Ms Ngoye's affidavit are attached hereto marked 'UB20'. The full affidavit may be provided upon request.
95. The litigation has its roots in civil actions which were instituted by different entities within the Siyaya Group for the payment of monies owed in terms of contracts entered into by the Siyaya entities and PRASA. These contracts are alleged to be tainted with corruption and impropriety, and the courts have already set aside at least one of them

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on that basis.¹⁹ Importantly, PRASA had, by agreement with Siyaya, decided to take these civil actions to arbitration before Retired Justice Fritz Brand.

96. In August 2015 the Public Protector released a report titled '*Derailed*'²⁰ after an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against PRASA. As remedial action, the Public Protector ordered that PRASA and National Treasury investigate all awarded contracts to the value of R10 million and above. National Treasury found that of 216 contracts entered into by PRASA, only 13 could be said to be regular. The findings from the forensic investigations done by law firm ENSAfrica and TGR Consultants, on behalf of National Treasury, included irregularities and a failure to follow proper procurement processes in the award of several contracts to companies sharing variation of the same name '*Siyaya*', which are all owned by a Mr Makhensa Mabunda.

97. The affidavit of Ms Ngoye reveals startling details about the conduct of Judge Makhubele in relation to the Siyaya litigation. While much of the conduct related to the *Siyaya* matter occurred prior to Judge Makhubele taking judicial office, it is necessary to note the conduct which occurred in the interim period between the JSC recommending her appointment (that is, 4 October 2017) , and her taking office (on 1

¹⁹ See *Swifambo Rail Leasing (Pty) Ltd v PRASA* (1030/2017)[2018] ZASCA 167 (30 November 2018)


²⁰ Public Protector South Africa '*DERAILED: A report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA)* Report no. 3 of 2015/16 (24 August 2015)

January 2018). In particular I draw the Commission's attention to the following key facts emerging from Ms Ngoye's affidavit —

- 97.1. Three weeks after her appointment as chairperson on 19 October 2017, Judge Makhubele requested meetings with members of PRASA's Group Legal Services department, with a view to familiarising herself with the work of the department. In particular, she sought information on the ongoing investigations into corruption and other contractual irregularities, and pending litigation against PRASA.²¹
- 97.2. On 14 November 2017, Judge Makhubele requested a meeting to specifically discuss matters concerning companies referred to as the Siyaya Group. Ms Ngoye and Mr Lindekhaya Zide (PRASA's Company Secretary and Acting Group CEO at the time) attended the meeting. Ms Ngoye and Mr Zide informed Judge Makhubele that PRASA had defended these matters and there were good prospects of success.²²
- 97.3. Judge Makhubele, however, informed Ms Ngoye that an unnamed colleague of hers had given her access to a report on the insolvency inquiry of one of the Siyaya entities, which report indicated that PRASA employees had made concessions so damaging that they gave rise to PRASA's liability for

²¹ Paragraph 42 of Ms Ngoye's affidavit.

²² Paragraph 43 of Ms Ngoye's affidavit.

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payment towards Siyaya in the arbitration proceedings before Justice Brand.²³

97.4. Judge Makhubele stated that she was informed that this information was contrary to the information held by PRASA legal services executives who were intimately involved in the matters against Siyaya; and also contrary to the legal advice that they had been provided which indicated that PRASA's defences had good prospects of success at arbitration. Ms Ngoye requested that Judge Makhubele provide her with the insolvency report she referred to, however Ms Ngoye states that Judge Makhubele has to date failed provide such a report.²⁴


97.5. Judge Makhubele later requested a status report from PRASA's legal representatives at the arbitration, DM Mogashoa Inc, which must details Siyaya's claims against PRASA and the prospects of PRASA's success. DM Mogashao Inc.'s report confirmed the views PRASA's group legal services department (represented by Ms Ngoye) had expressed – that PRASA had good prospects of success.²⁵

97.6. Despite the lawyer's report, Judge Makhubele circulated an urgent memorandum on 28 November 2018 to Ms Ngoye and executives in the legal services and other technical departments within PRASA, wherein she

²³ Paragraph 44 of Ms Ngoye's affidavit.

²⁴ Paragraphs 45-47 of Ms Ngoye's affidavit.

²⁵ Paragraph 48 of Ms Ngoye's affidavit.

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indicated that she had been approached directly by Siyaya's attorneys who shared a report into the insolvency inquiry with her, which confirmed that they had made concessions which were damaging to PRASA's defences against the claims. The memorandum further requests certain additional reports from these PRASA's officials, which were ostensibly to prepare for a meeting of the Interim Board that was to be held three days later (on 1 December 2017), where a final decision on the arbitrations would be taken.²⁶

97.7. In her affidavit, Ms Ngoye states that Judge Makhubele does not explain on what basis Siyaya's attorneys approached her and why she would entertain such discussions to the exclusion of the relevant officials from group legal services. Ms Ngoye articulates the concern around this approach as follows:

"Firstly, it was odd to me that Makhubele was entertaining the advances made to her regarding these matters as it is improper for the Siyaya entities' attorneys to contact Makhubele, in her capacity as the then chairperson of PRASA's interim board, in circumstances where PRASA is represented by attorneys.

*Secondly, Makhubele's views seemed to disagree with the advice given to her by me, Dingiswayo and DM Inc in favour of the opinions of the Siyaya entities' attorneys."*²⁷

²⁶ Paragraphs 49-50 of Ms Ngoye's affidavit.

²⁷ Paragraphs 51-52 of Ms Ngoye's affidavit.

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97.8. We pause at this stage to emphasise the importance of the 1 December 2017 special meeting of PRASA's Interim Board of Control, as it is a key event in which Judge Makhubele played a significant role as chairperson. While the special meeting was purportedly to discuss "*the various investigative reports to enable the Board to consider the findings, the recommendations, the implementation...[of the]...Public Protector... Werksmans Attorneys...*"²⁸, that meeting ultimately took a decision to suspend the legal panel of attorneys through which PRASA procures external legal services; to centralise all legal work under the control Judge Makhubele as chair; and to divest the relevant officials of these matters. This decision is currently subject to judicial review proceedings brought by #UniteBehind and Equal Education under WCC case number 23200/2017 (referred to in paragraph 27 above).

97.9. #UniteBehind and Equal Education argue that the 1 December 2017 decision of the PRASA Board was unlawfully taken and had the effect of suspending the mandate of attorneys involved in complex forensic investigations and litigation to set aside unlawful contracts and recover PRASA's assets.

97.10. The key aspects under legal challenge include that:

97.10.1. The Board was not properly constituted in terms of the relevant provisions of the Legal Succession Act as several of the

²⁸ Sworn transcript of PRASA Interim Board meeting of 1 December 2017 filed in #UniteBehind and Equal Education v Minister of Transport and PRASA (case no. 23200/2017) at page 12, line 5- 13. A copy of this transcript may be provided upon request.

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statutorily-prescribed members were still outstanding appointment by the Minister of Transport; and

97.10.2. The Board's decision to suspend the legal panel of attorneys that were conducting forensic investigations into corrupt contracts as recommended by the Public Protector, and to centralise all investigations and asset-recovery litigation under Judge Makhubele were patently unlawful and prejudicial to PRASA's interests;

97.11. Evidence from the official transcript of the meeting indicate that members of the Board, including Judge Makhubele herself were alerted to the unlawfulness of the constitution of the Board.²⁹ At this meeting, Judge Makhubele directed that her fellow Board members proceed with taking decisions without being properly briefed on the subject matter of these decisions, and in violation of several statutes including the Public Finance Management Act 1 of 1999, the Prevention and Combating of Corrupt Activities Act 12 of 2004, and the Public Protector Act 23 of 1994.

97.12. On 9 February 2018, #UniteBehind addressed a letter to Judge Makhubele (attached hereto as **UB21**) setting out our understanding of the Siyaya

²⁹ Sworn transcript of PRASA Interim Board meeting of 1 December 2017 file in #UniteBehind and Equal Education v Minister of Transport and PRASA (case no. 23200/2017) at page 12, line 5- 13. A copy of this transcript may be provided upon request.

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contracts dispute and the secret negotiations she had entered, and we requested:

...an unequivocal written undertaking from you [Judge Makhubele] that PRASA will not make any payments to Siyaya in respect of the claims made by the S-Group in these summonses [for R56 million] or in relation to any litigation or arbitration proceedings between PRASA and entities within the S-Group unless there is a final, binding and executable decision from a court of law on the merits of these claims against PRASA.

- 97.13. Ms Ngoye's affidavit then explains how PRASA's group legal services department were thereafter excluded from the matter, and Judge Makhubele directly instructed MD Mogashoa Inc to settle the arbitration matters (without the knowledge of PRASA's own group legal services department). As Ms Ngoye explains:

"I and Dingiswayo were then excluded from the handling of the matter. Dingiswayo found out on 9 March 2018 that on 15 December 2017 Makhubele had met with Mr Madimpe Mogashoa of DM Inc. wherein DM Inc. was instructed to settle this matter. These instructions were later recorded in a letter from Zide to Mogashoa...This letter was provided to Dingiswayo and Bowmans at court by the Siyaya entities' legal team. It still

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remains a mystery how they received a privileged document from PRASA to its attorneys."³⁰

97.14. Ms Ngoye further states that in or around March 2018, Mr Dingiswayo was surprised to learn that the settled arbitration awards were due to be made orders of court on an unopposed basis.³¹ When PRASA's legal services department instructed attorneys Bowman Gilfillan to oppose the confirmation of these settlements as orders of court, Siyaya's attorneys disputed Bowman Gilfillan's legal authority to oppose those proceedings. Siyaya's attorneys had in their possession direct instructions (in the form of text messages) from Judge Makhubele indicating that Bowman Gilfillan did not have authority to act as they were not lawfully appointed because the legal panel was suspended.³² The instructions from Judge Makhubele are contained in a letter from Mathopo Attorneys on behalf of Siyaya. This letter is attached hereto as 'UB22'.

97.15. It is worth noting Ms Ngoye's observations about the improper manner in which Judge Makhubele engaged the matter:

"The stance taken by Makhubele in the above text messages is, at least, curious or in the extreme, inappropriate to me. The text messages allegedly sent by her served to protect the interests of the Siyaya entities and were to

³⁰ Paragraph 65 of Ms Ngoye's affidavit.

³¹ Paragraph 86 of Ms Ngoye's affidavit.


³² Paragraph 96 of Ms Ngoye's affidavit.

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the detriment of PRASA. The above text message that is said to be from Makhubele is not only unfortunate as it betrays the extent of the access that Siyaya has to Makhubele but it also shows that Makhubele shared with the Siyaya entities internal communications of PRASA.”³³

98. On the strength of the instructions held by Mathopo Attorneys from Judge Makhubele, Acting Judge Holland-Mutter granted default judgement against PRASA and confirmed all four arbitration awards as orders of court. As a result, PRASA was liable for payment of amounts upwards of R56 million.
99. Following the granting of the *Siyaya* orders, the sheriff was immediately instructed to attach funds in PRASA’s bank accounts and pay them over to Siyaya to satisfy the judgement debt. However, before the sheriff could do so, PRASA filed an urgent application (under Gauteng Division case number 23484/2018) in April 2018 to interdict the sheriff from transferring the funds to Siyaya but also to rescind Holland-Mutter AJ’s order confirming the arbitration awards by default. The interdictory relief was granted by Ranchod J (April 2018), while Tuchten J rescinded and set aside the default judgment confirming the arbitration awards in a written judgment (dated 27 November 2018).
100. The haste with which Judge Makhubele acted to settle Siyaya’s claims, the manner with which she excluded PRASA’s legal department and assumed responsibility for all decisions relating to this matter in a manner that is potentially unlawful, and the extent of her direct engagement with Siyaya’s attorneys create a reasonable impression

³³ Paragraph 98 of Ms Ngoye’s affidavit.

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of impropriety on her behalf. Her actions certainly fall short of the standards expected of a fit and proper person with the integrity suitable for appointment to and occupation of judicial office in terms of section 174 (1) of the Constitution.

101. While Tuchten J made no definite findings of fact in his judgment, he made the following remarks (the full judgment is attached marked 'UB23'):

[17] I am sorry that I must say something about the conduct of Judge Makhubele as evidenced by these papers. There are questions which demand answers: Did she disclose in her application for judicial appointment that she was considering taking up appointment as PRASA chair which would prevent her from performing the duties of a judge until she gave up her position at PRASA? Why did she accept the appointment to chair PRASA when she had already been appointed a judge? Why did she intervene at all in the litigation with Siyaya? Did she sideline the GLS [group legal services] from participation in the litigation and the settlement and, if so, why? Did she supply Siyaya with information which they could use against PRAA and, if so, why? In general, did she act with propriety in relation to the Siyaya litigation?

[18] This brings me to a further concern. According to the memorandum written in her name which is before me,³⁴ Judge Makhubele mentioned at an early stage of her intervention in Siyaya litigation that she was in possession of a report arising from an insolvency enquiry into the affairs of one of the Siyaya entities.

³⁴ This is the memorandum dated 28 November 2018 sent to PRASA executives referred to above and attached to Ms Ngoye's affidavit – it is attached hereto as part of UB20.

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It seems to me that the contents of the alleged report were, according to her, central to her decision to intervene in the Siyaya litigation. In PRASA's founding affidavit in the rescission application, PRASA asserts that the GLS officials have never been furnished with such a report, despite their requests. They say that none of the evidence adduced at the insolvency inquiry impacted upon PRASA's case in the Siyaya litigation. Does such a report exist. If it does, who compiled it and what does it say?

[19] At no stage of the proceedings has Judge Makhubele made an affidavit or otherwise communicated her version in response to the allegations of the GLS officials in the rescission application. She has had at least two opportunities to do so: when the urgent application was adjudicated and in response to the present application. The alleged insolvency enquiry report was never put before the court.

[20] Judge Makhubele will have a further opportunity to present her side of the story the applications for enforcement are argued. Of course it does not necessarily follow that a decision on the enforcement applications one or the other will be dispositive of the concerns in relation to Judge Makhubele's conduct. If, objectively, the adjudication of the enforcement applications is not an appropriate forum for her side of the story to be received and considered, another forum ought to be provided to her for this purpose. But I must express my firm view that Judge Makhubele ought not to undertake any judicial duties until she clears her name of the allegations against her.


[Emphasis added]

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102. We submit that in light of all the above, Judge Makhubele's conduct is unbecoming of someone holding judicial office. Her conduct constitutes an egregious violation of Article 12 of the Code of Judicial Conduct that obliges a judge to avoid using her office or status to benefit the private interests of others.
103. Tuchten J's pointed questions evidence the reasonable perception of impropriety which no judicial official should be under. Furthermore, Tuchten J's question on whether Judge Makhubele informed the JSC of her imminent appointment as PRASA Board Chair speak to her integrity as a fit and proper person worthy to hold high judicial office. Most distressingly, Tuchten J's firm view that Judge Makhubele ought not to undertake any judicial duties is as clear an indication as any that Judge Makhubele's conduct requires serious investigation, adjudication and the harshest sanction of impeachment as it constitutes a grave institutional risk to the judiciary.

Allegations relating to PRASA investment in VBS Bank

104. On 4 February 2018, the Sunday Times published a front-page story reporting that Judge Makhubele had controversially been involved in an arrangement to invest R1-billion of PRASA's assets in Venda Building Society Mutual Bank ('VBS Mutual Bank'). The article has previously been attached as 'UB10'.
105. The Sunday Times report alleges that in December 2017 Judge Makhubele, working together with PRASA's then Group Chief Executive Officer (GCEO), Mr Cromet Molepo, and the then Company Secretary, Mr Lindekhaya Zide, had pressurised the Chief Financial Officer (CFO), Ms Yvonne Page, to approve the R1 billion investment in VBS Mutual Bank. The report further states that Ms Page resigned in protest against

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the decision. Significantly, the report notes that Judge Makhubele denied the allegations.

106. I pause to mention that subsequent to those events, the South African Reserve Bank (SARB) placed VBS Mutual Bank under administration and commissioned legal and financial forensic investigations into the affairs of the bank. In a report titled 'The Great Bank Heist', the forensic investigators confirm that officials of VBS Mutual Bank had advanced discussions with officials from PRASA on the R1-billion investment that would have been illegally made to VBS Mutual Bank. The report states that Judge Makhubele had been copied in correspondence between the VBS Bank and PRASA officials.³⁵
107. Needless to say, the VBS Bank scandal has set off significant political controversy, tainted with institutional corruption and allegations of state capture at organs of state such as PRASA. By allowing herself to be drawn into this scandal Judge Makhubele violated Article 12(1)(b) of the Code of Judicial Conduct by failing to exercise due care to avoid political controversy. Furthermore, in her dual role as Chairperson of PRASA's Board and a judge, she has drawn her judicial office into the public arena in ways that risk diminishing the status, dignity and esteem of the judiciary.
108. #UniteBehind submits that these allegations establish a most visible example of improper conduct on the part of Judge Makhubele in her position as Chairperson of the Board of PRASA. I submit that such real or perceived improper conduct is

³⁵ See: Adv T Motau SC and Werksmans Attorneys *'The Great Bank Heist – Investigator's report to the Prudential Authority'* (October 2018) at 52.

unbecoming of a person holding judicial office and fundamentally undermines the integrity of the judiciary in terms of section 14(4)(e) of the JSC Act. We further more submit that this is a sufficient ground for the JSC to sanction Judge Makhubele.

Failure to appear before the Portfolio Committee

109. On 6 February 2018, the PRASA Board chaired by Judge Makhubele failed to make a scheduled appearance before the Transport Portfolio Committee in Parliament. As a result of the failure to attend the Portfolio Committee meeting, the Committee resolved to issue a subpoena against members of the board including Judge Makhubele.
110. Judge Makhubele then addressed a letter to the Portfolio Committee explaining the reasons why the Board had failed to appear and provided an undertaking to appear before the committee a week later, on 13 February 2018.
111. The failure to attend the Portfolio Committee meeting was the subject of a statement from Parliament, which has previously been attached hereto marked [UB12].
112. The failure to appear before the Portfolio Committee was widely reported in the media. The lack of due consideration and regard afforded to the Legislature evidences a concerning failure by Judge Makhubele to have carried out her functions as Chairperson of PRASA diligently and in line with the principle of accountability. Most concerning however, is the evidence of a pattern of behaviour which tends to draw negative attention to her. While this may not be an impeachable ground, it does require stern action from the JSC.

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113. Furthermore, as we have previously noted, the fact that a committee of the legislature resolved to subpoena a Judge (after her date of appointment had become effective) served to undermine the independence of the judiciary and the separation of powers principle.

Involvement at PRASA after resignation

114. Judge Makhubele reportedly resigned as Chairperson of the Interim Board of PRASA with effect from 16 March 2018. Despite this, email correspondence to other directors of the Board dated 22 March 2018 indicate that Judge Makhubele was still actively involved in PRASA's internal affairs beyond her supposed date of resignation. This email correspondence is attached hereto marked 'UB19'.
115. This is yet another example of her failure to sever links with interests outside judicial office but also a lack of probity and commitment to honesty and integrity.

Conclusion on Part B

116. The conduct independently and cumulatively set out in the facts above leads to the inescapable impression of Judge Makhubele as a person lacking the judgement, restraint, integrity and honour to hold judicial office.
117. The evidence indicates that Judge Makhubele conducted herself either wilfully or negligently in a manner that is completely incompatible with and unbecoming of a holder of judicial office. Furthermore, and particularly in relation to matters pertaining to VBS Bank and Siyaya Companies, it appears that there is a compelling and


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reasonable apprehension of gross incompetence, a lack of integrity or gross misconduct on the part of Judge Makhubele.

118. It is both embarrassing and disreputable that judges in the Gauteng and Western Cape Divisions have had to (and will continue) to deal with matters concerning Judge Makhubele's conduct – this creates both an internal and external risk to the institution of the judiciary. Significantly, the grave concerns and pointed questions raised by Tuchten J provide more than sufficient ground for the JSC to act and to act urgently to address them. #UniteBehind submits that the JSC has little choice but to recommend the harshest sanction of impeachment for Judge Makhubele's conduct.

CONCLUSION OF COMPLAINT

119. This complaint provides sufficient facts to illustrate several breaches to the JSC Act and the Code of Judicial Conduct by Judge Makhubele.
120. Part A of the complaint has highlighted several breaches of the JSC Act and Judicial Code stemming from Judge Makhubele's dual role as Chairperson of the Board of PRASA and as a Judge. In particular, I submit that Judge Makhubele demonstrated gross incompetence and/or gross misconduct for —
- 120.1. accepting and serving in a position inconsistent with an independent judiciary, or that could undermine the separation of powers or the status of the judiciary;

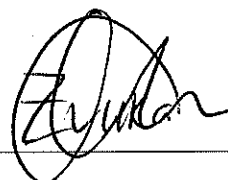
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- 120.2. wilfully and/or negligently failing to immediately sever all professional links and organise her personal business affairs to minimise the potential of conflicts of interest;
 - 120.3. breaching the general prohibition against judicial officers holding an office of profit, and received the fees and/or emoluments, and /or remuneration or allowances relating to her role as Chairperson of PRASA; and
 - 120.4. breaching the prohibition against judicial officers seeking a special dispensation.
121. Part B of the complaint has described several seriously concerning aspects of Judge Makhubele's conduct whilst serving as Chairperson of PRASA. Amongst others, such conduct includes being involved in or being seen to be involved in enforcing unlawful agreements at PRASA, associating improperly with companies linked to corrupt activities, improperly excluding PRASA's legal department from decisions; and entering into "secret" settlement agreements on behalf of PRASA. I submit that Judge Makhubele's conduct demonstrates gross incompetence and/or gross misconduct particularly in that Judge Makhubele —
- 121.1. failed to act honourably and avoid the appearance of impropriety in all her activities;
 - 121.2. acted in a manner that violated the law in her extra-judicial work at PRASA;

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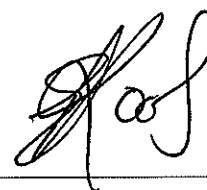
- 121.3. failed to avoid political controversies;
- 121.4. used, or created the perception that she used, her judicial office to promote the private interests of corrupt individuals and entities; and
- 121.5. acted in a manner that is unbecoming the holding of judicial office, and which is not compatible with a fit and proper person with honesty and integrity; committed to ethical conduct.

122. #UniteBehind respectfully submits that the facts and grounds set out in either or both Part A and Part B of this complaint provide a sufficient and substantial basis for the Judicial Conduct Committee to find that Judge Makhubele has engaged herself in impeachable conduct. Therefore #UniteBehind requests that this affidavit be accepted as a formal complaint in terms of section 14 of the JSC Act.



ZUKISWA FOKAZI

I hereby certify that the deponent has acknowledged that they know and understand the contents of this affidavit, which was signed and sworn to before me at ... CAPE TOWN ... on this the ... ^{13th} ... day of **DECEMBER 2018** the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



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