



# **EXHIBIT SS 17**

**FRANCOIS WEIDEMAN  
BOTES**



**JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE,  
CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE**

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# **01.**

## **COMPLAINT**

**COMPLAINT RECEIVED FROM  
JUDGE MAKHUBELA  
MARKED ANNEXURE “BB”**



**PROFESSIONAL AND ETHICS COMMITTEE  
(PRETORIA SOCIETY OF ADVOCATES)**

In the matter between:

**ADVOCATE TAN MAKHUBELE SC**

(now JUDGE MAKHUBELE at Gauteng Division)

and

**ADVOCATE FW BOTES SC**

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**STATEMENT IN SUPPORT OF REFERRAL FOR INVESTIGATIONS OF  
POSSIBLE BREACH OF PROFESSIONAL ETHICS: BOTES SC**

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[1] I was a member of the Pretoria Society of Advocates (Pretoria Bar) from 1999 until I resigned on 30 November 2018 with a view to prepare for taking up a judicial appointment.

[2] My appointment as a Judge would have been with effect from 01 January 2018, however, I requested an indulgence of four (4) months to wrap up my legal practice. I would have commenced duties on 01 April 2018 but the date was amended to 01 June 2018. I took oath of office as a Judge on 08 June 2018.

[3] I served in the Interim Board of Control (BoC) of the Passenger Rail of South Africa (Prasa) for the period 20 October 2017 to 16 March 2016. Although I have not been officially advised by the Judicial Conduct Committee (JCC) of the Judicial Services Commission (JSC), I have learnt through media reports that my tenure at this entity is currently a subject of a complaint lodged with the JCC by an organization called 'Unite Behind' which contends that I should not have taken up this appointment as I was already a Judge with effect from date of being recommended as such in October 2017 and that I committed some serious wrongdoings, including

settlement of the liquidators' claims in the matter that forms the subject matter of this referral.

[4] As a member of the BoC of Prasa, I have been party to decisions that are currently being challenged in both the Western Cape and Pretoria High Courts.

[5] The application at the Western Cape High Court was filed during or about January 2018 by an organization called 'Unite Behind' (the same organization that has apparently asked the JCC to impeach me as a Judge) . It seeks to review (a) the decision of the Minister of Transport , Mr. Joe Maswanganyi to appoint an interim Board that I was chairing, and (b) the decision of the Interim Board to suspend the Prasa legal panel.

[6] I do not know if the Minister of Transport has filed any papers with regard to the first part of the application.

[7] At the time of my departure Prasa had filed answering affidavits to oppose the application to review the decision of the Board to suspend Prasa's legal panel. I do not know the status of the matter but at some point I got it through media reports that Prasa was ordered to file the audio recording of the Board meeting wherein the legal panel was suspended. I do not know if this was done. To my knowledge the audio recording and transcript thereof exists and was provided to the attorneys representing Prasa.

**SEE attachments relating to the suspension of Prasa's legal panel**, which include,

[7.1] Transcribed Resolution of the BoC of 01 December 2017.

[7.2] Memorandum from the Group Executive: Legal Risk and Compliance , Ms Martha Ngoye (Ms Ngoye) in response to the Board's resolutions. The memorandum is dated 05 December 2017 and contains a response to various issues. Only paragraph 6.2 that deals with suspension of the legal panel is relevant. The entire memorandum has already been leaked to the media and has been reported on



already. It is also an attachment in the Western Cape application. Ms Ngoye's response was based on an unsigned Board resolution (as she stated in her opening paragraph). The draft resolution was erroneously transmitted within the organization before it was checked for correctness and other errors and in the process it was also leaked to the media that was sent to her and also leaked to the media. The correct resolution was subsequently drafted and disseminated to all interested parties, including Unite Behind that had already mounted a court challenge based on leaked documents.

It is clear from this memo and subsequent communication between the Acting Group Chief Executive Officer (AGCEO) and Legal Services that the latter was not prepared to accept the resolution of the Board.

[7.3] Letter dated 12 January 2018 from Prasa (per Acting Group Chief Procurement Officer, Mr. Peter Malele) addressed to South African Civil Aviation Authority (SACAA), requesting permission to participate in its panel of legal services.

[7.4] Letter from South African Civil Aviation Authority dated 02 February 2018 granting Prasa the required permission.

[7.5] Email from AGCEO, Cromet Molepo (Molepo) to Martha Ngoye and others dated 09 March 2018, confirming suspension of Prasa Legal Panel and re-iterating the arrangement with SACAA; and also providing list of legal firms in SACAA panel.

[7.6] Emails from Ms Ngoye and Mr. Fani Dingiswayo: Manager, Legal Services (Dingiswayo), dated 09 March 2018 addressed to Molepo challenging the use of SACAA panel and the appointment of ENSafrica to assist Prasa.

[7.7] Enquiry from National Treasury on the process followed to appoint Maluleke Msimanga Inc, and the emails amongst Prasa officials in response thereto.

[8] The application before the Pretoria High Court, under case number 23484/2018 was filed by Ms Martha Ngoye, apparently with *post facto* authorization of the Minister of Transport, Dr. Blade Nzimande. In terms of the notice of motion, Prasa sought orders against the Liquidators of Siyaya DB (in

liquidation) and the Sheriff to restrain and interdict them from executing the orders granted by Honourable Acting Judge Holland-Muter (Holland-Muter AJ ) on 09 March 2018 and the writs of execution issued by the Registrar in terms of the court orders.

The application came before Honourable Judge Tuchten (Tuchten J) in the unopposed roll of 27 November 2018. He granted the relief sought, but also made some adverse comments about me on the basis of allegations made in the founding affidavit deposed on behalf of Prasa by Ms Ngoye and annexures thereof.

[8.1] This referral concerns this matter. I am alleged to have initiated the settlement and unlawfully excluded Legal Services in the negotiations. I am also alleged to have had an improper relationship with the legal team of the companies in liquidation during the settlement of the liquidators' claims, to an extent that I provided them with some confidential information that gave them an advantage against Prasa.

[8.2] Although not mentioned by name in various reports on the matter, it is common knowledge that one of the members of the legal team of the Siyaya companies in liquidation was (is) Advocate FW Botes SC (Botes SC) , against whom I am filing this referral. He argued the matter on behalf of the liquidators before Holland-Muter AJ.

[8.3] I am not a party to this litigation but from reading media reports and documents filed on behalf of Prasa in court that have since come to my possession, I am referred to as the central figure in the dispute between the parties. In fact I am considered to have breached my fiduciary duties towards Prasa.

[8.4] I am not aware if the Liquidators have filed any opposing papers, but I do have founding papers that I obtained from Botes SC



after I made a request to Prasa that was ignored. The documents are in excess of 600 pages.

If necessary, I will make the entire founding documents available by hand. However, and for purposes of this referral I will only refer to documents that are relied on to support the allegations pertaining to the suspension of Prasa's legal panel and my communication with Siyaya's legal team in this regard because that is where the gist of the matter is.

[9] The arbitration awards issued by Judge Brand were preceded by settlement of claims that the companies in liquidation had against Prasa, which were initially a subject of court action but subsequently removed for arbitration due to a clause in that regard in the service contracts between the parties. The companies were liquidated in the process. The court appointed a Commissioner to conduct an enquiry, after which he issued a provisional report.

[9.1] The Liquidators approached me, (first through Advocate Botes SC on or about the second week of November 2017, followed by a letter (towards the end of the month) to intervene in a dispute that had ensued with regard to whether there was a need to proceed to arbitration in view of the evidence at the enquiry.

I took up the matter with my colleagues at the Board and after satisfying ourselves that it fell within the delegated authority of the Acting Group Chief Executive (AGCEO), there was consensus that I should engage him and follow-up on the issues to find a solution. I subsequently wrote a memorandum to the AGCEO to confirm the discussions and our agreed planned way forward.

**See attachments hereto, being copies of documents from the liquidators and my memo to then AGCEO, Mr. Zide .**

[9.2] Botes SC brought the documents from the liquidation enquiry on or about 13 November 2018. We met at Prasa. Although he did not sit in the meeting, the then AGCEO, Zide, was present as I was in several

meetings with him and others on this day. He was aware of the purpose of Botes's visit.

After Botes SC left, we discussed the matter and he made copies of the documents.

[9.3] Therefore, the allegations that the settlement was done in secret are just malicious and intended to harm the reputations of people whose integrity has never been questioned.

[10] According to the Notice of Motion filed by Ms Ngoye, the validity of the settlement is in question and Prasa intends to have it set aside.

[11] I am not at liberty to talk much about the validity of the settlement of the claims because I doubt if the Professional and Ethics Committee would have jurisdiction on the issues.

The current Minister of Transport called a meeting after Holland-Muter's orders were issued. He then asked for reports from Ms Ngoye and me to enable him to obtain legal advice on the way forward. I am not aware if he obtained any legal advice. I was advised a week or so later that he had given instructions that the matters should be defended. The application had been filed already according to the information at my disposal.

[11.1] In the last meeting that I chaired the Interim Board resolved, amongst other things that the report that Minister Nzimande requested should come from the Board and not an individual member as it was a report of the Board's activities. A Board member, Professor Maluleke was nominated to collate information to assist the attorneys and Senior Counsel who were subsequently briefed to assist in the matter.

I attended a consultation at the Chambers of Advocate **Maleka SC** with ENSafrica attorneys, Mr. Maluleke, the former and then AGCEOs, Messrs Molepo and Zide . I do not know if they followed this through after my departure.



[12] As far as I am concerned the allegations that the settlement of the claims was done in 'secrecy' and that I 'colluded' with the legal team of the companies in liquidation are malicious, defamatory and intended to harm my good reputation and integrity.

The record (at the relevant forum should a need arise) will show that the issue was handled in a transparent manner and after consultation with the legal team and after verifying all relevant issues with all affected persons as indicated in the memorandum addressed to Zide attached above. The Board was at all times briefed about the issues.

[13] The problems that are relevant for purposes of this referral arose after conclusion of the settlement of the claims when it transpired, in early January 2019 that the Acting Chief Finance Officer, Ms Yvonne Page, was not willing to effect payment of the settlement, apparently on the instructions of the Ms Ngoye.

***Events subsequent to suspension of Prasa's legal panel***

[14] Prasa's legal panel was suspended on 01 December 2017 as it was not in compliance with the legal prescripts. It had already been declared irregular by the Auditor-General. I will provide documents that Prasa filed to oppose the Western Cape High Court application in this regard if necessary. In the meantime, and whilst Prasa was directed to constitute a compliant legal panel, the Board had issued certain directives for handling of legal matters. As indicated above, and as it can clearly be seen from the documents, the AGCEO and Supply Chain Officer, Mr. Malele had in the meantime secured permission from South African Civil Aviation Authority (SACAA) to utilize its panel. However, and for reasons known to themselves, the Legal Section defied the Board decision and apparently continued to utilize the suspended panel. They never communicated with me or the Board that they are not willing to comply with the Board resolutions. In fact, as the records show, documents from Legal Services were used by outsiders to discredit the Board. I am not aware of any advise that Legal Services has given the Board as it

faced challenges relating to its authority from Unite Behind and other organizations.

[15] The relationship between the Interim Board and Prasa's Legal Services, particularly Ngoye and Dingiswayo broke down soon after the suspension of the legal panel.

[16] The memorandum that Ngoye sent to the Board in response to the suspension of the Legal Panel and other matters was leaked to the media and at least one publication known as 'GroundUp' ran a story about its contents on 10 January 2018.

The headline read “ ***Prasa staff try to block state capture. Legal department concerned by Board decision to suspend Legal Panel***”.

The article was further captioned: “ ***Prasa's lawyers are contesting a resolution passed by the rail company's interim board***”.

[17] The memorandum from Ms Ngoye to the Interim Board was also used and attached as an annexure by Unite Behind in its application at the Western Cape High Court to challenge the Board's decision.

Since then, media reports are to the effect that the Head of Legal Services saved Prasa from the wrongdoings that were perpetrated by the Board that I was chairing. In one chance meeting I asked Ms Ngoye to issue a statement to contextualize her memorandum to the Board. She refused and arrogantly told the colleagues and me at that meeting that she stands by what she wrote.

[18] A representative of Unite Behind, one Zackie Achmat referred to Ngoye and Dingiswayo as their 'key whistleblowers'. This statement appeared in his tweet sometime during March 2018 where the discussion was about Prasa issues.

**See copy of the tweet .**

[19] To further illustrate that the relations between the two officers and the Board were tense or non-existent, we discovered that the letters addressed to the attorneys of Siyaya by Dingiswayo where he was making claims of



unlawful conduct on my part were being copied to a law firm (Equal Education Law Center) that was representing Unite Behind, the same organization that is challenging the suspension of the legal panel and also seeking my impeachment as a Judge.

[19.1] The Board resolved that the AGCEO should seek an explanation from Ms Ngoye , as the Executive Head of Legal Services (one of three units she was heading ) on this issue and other matters that were done without consultation of the Board or authority of the AGCEO. Everyone's authority was being challenged.

**See copy of the letter addressed to Ms Ngoye.**

[20] To my knowledge, Ms Ngoye and Mr. Dingiswayo never approached the Interim Board, as a collective or individual members to raise the concerns about their unhappiness with the settlement of the Siyaya claims and other allegations against me that they have now deposed to in the documents before court.

The only approach to the Board was by email on 08 March 2018, when for the first time they raised concerns about whether the Board knew about the settlement. This was after the Holland-Muter orders were issued. The settlement was in mid-December 2018.

**See the email that Mr. Fani Dingiswayo sent to Minister Blade Nzimande,** in which he attached an email to the Board members as well as an email exchange between him and Prasa's attorney of record (Bowmans) where they gossip about my alleged improper relations with Siyaya legal team.

[21] Ms Ngoye and Mr. Dingiswayo absented themselves at the meetings that Zide and I held with Prasa employees who testified at the liquidation enquiry and who were still to do so. I did not suspect any unhappiness from their side because the excuses that came through the AGCEO appeared satisfactory to me. At some point Ms Ngoye was off work because she had lost a close relative. On another occasion, where the matter was finally settled I was told that they had prior arrangements in their department as it was Christmas season.

Prasa's attorney of record, Mr. Madimpe was present on the day the settlement was made. Discussions at the last meeting are probably privileged but I will disclose at the relevant time. Nothing untoward happened as far as I know.

***Reason for the referral to the Ethics Committee of the Pretoria Society of Advocates***

[22] The reason for this referral is because I believe, as I will substantiate hereunder, that Botes SC compromised and betrayed my trust by using information obtained from me informally and probably with a motive that I was not aware of, to intimidate Prasa's attorneys of record (Bowmans in the letter written by Mathopo as well as when the matter came before Holland –Muter AJ.

[23] The conduct of Advocate Botes SC in my view bothers on misrepresentation because my answers to his sms were copied into a letter that one of the attorneys in his legal team wrote to Prasa's attorneys and also intimidated them and boasted about his team's proximity to me. The attorney, Mr. Tshepo Mathopo gave Prasa an impression that he had contacted me and that I responded by sms. The responses indicated though are similar to the sms exchanges between Botes SC and me.

[24] I have known Botes SC for almost twenty (20) years and we have served in the Bar Council together for many years. I have never heard anyone question his integrity. He is hard working and has done a lot in the service of the Pretoria Bar.

I had no reason to doubt his integrity. We met at Prasa and it was always clear that we were not going to take shortcuts. Although we had an open line of communication, it was always clear between us that the official communication should be between the respective attorneys.



[24.1] After the claims were settled, and when payment did not happen as promised (in writing), and when it became clear, through rumor-mongers that Ms Ngoye and the Acting CFO were opposed to payment of the settled amount, I decided to distance myself from following up on the matter and also asked Botes SC to leave communication on the matter to the attorneys.

**See copy of the SMS that I sent to him on 13 January 2018** in this regard.

[24.2] I subsequently provided him with the contact details of the new AGCEO, Mr. Cromet Molepo (Molepo). It appears from communication that I was later copied that Molepo did engage Botes SC and made some undertakings with regard to compliance with the arbitration awards that were issued by Judge Brand.

**See the SMS I sent to Botes SC with the CEO's contact details and one from him giving me feedback about their discussion.**

### ***The judgment of Judge Tuchten***

[25] The application to rescind Holland-Muter AJ's orders in terms of which the bank accounts of Prasa were attached served before Judge Tuchten on or about 27 November 2018. No one informed me about this setdown, probably because, not being a party, no one thought I had any interest. I do not know what transpired in open court, but Tuchten J decided to devote a huge chunk of his judgment writing about what he referred to as my 'conduct'.

[25.1] I have already referred a complaint against Tuchten J to the Judicial Conduct Committee. **A copy is attached.** The judgment is already a public document and has been referred to in various radio talks and newspaper articles.

[26] The JCC has acknowledged my complaint and has undertaken to conduct investigations and revert to me. I cannot say much at this stage save to state that the issues that inform my referral to the Professional and Ethics Committee have only to do with the portions of the judgment where Tuchten J made comments about my perceived improper relationship with the legal

team of Siyaya companies. He does not say who the persons are. This issue is relevant in this referral.

[27] Paragraph 8 of Tuchten J's judgment reads as follows;

*"PRASA was represented by both an attorney and counsel when the enforcement applications came before Holland-Muter AJ. The Siyaya entities had earlier challenged BG's authority to act under rule 7(1).*

*Troublingly, it is alleged by the GLS officials that Siyaya challenged BG's authority on the strength of information supplied to them by Judge Makhubela herself and were in possession of at least one letter which ought to have enjoyed confidentiality as being a communication between attorney and client."*

[28] In Paragraph 17 of his judgment Tuchten J felt a need *"to say something about the conduct of Judge Makhubela as evidenced by these papers"*. He then raised questions that according to him demand answers. One such question that is relevant for purposes of this referral is phrased as follows;

*"Did she supply Siyaya with information which they could use against PRASA and, if so, why?"*.

[29] After speculating about what I could have done wrong at Prasa, Judge Tuchten concluded that he was of a *"firm view that Judge Makhubela ought not to undertake any judicial duties until she clears her name of the allegations against her"*. He had earlier indicated that the court forum *'will not be dispositive of the concerns in relation to Judge Makhubela'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'*.

***Alleged complaint filed by Unite Behind at the Judicial Conduct Committee against me***



[30] I have not received any official communication from the JCC of the JSC about the matter, but I learnt from enquiries made by newspapers (Ground Up' and 'City Press') that Unite Behind has filed a complaint against me and that it is seeking an order that I should be impeached as a Judge.

[30.1] According to media reports, Unite Behind has relied on amongst others the affidavit filed by Ms Ngoye in the rescission application of Holland-Muter AJ's orders and the judgment of Tuchten J as supporting documents. The documents have been posted in the internet and can be accessed by anyone.

[30.2] **'GroundUp'** and **'City Press'** articles were published on 25 and 27 January respectively. The respective journalists refer to the judgment of Tuchten J and the Unite Behind as sources of the information.

[30.3] The headline of GroundUp' article reads as follows;

*" High Court judge accused of 'impeachable conduct"*

*The article alleges, amongst other things that I was "accused of disrupting litigation procedures inside PRASA. In November 2018, the Pretoria High Court found that Makhubele had instructed PRASA's lawyers not to defend the company against legal action that resulted in R56million being seized from PRASA (the money eventually had to be returned to PRASA).*

[30.4] The headline of the City Press article reads as follows;

*" Judge Tintswalo Makhubele referred for impeachment".*

*The article alleges, amongst other things that I " drove efforts to enforce a secret settlement agreement with companies linked to corruption"*

[30.5] The City Press article was a follow-up to an earlier one that appeared in its edition of 18 March 2018 where it was alleged amongst

other things that I *“had made interventions that saw Siyaya strike a R58m settlement”*.

***The contentious SMS communication between Makhubele SC (me) and Botes SC***

[31] Firstly, I wish to state that I was not aware, until Botes SC alerted me by SMS that Prasa (read Ms Ngoye) had filed opposing documents in the application made by the Liquidators to make Judge Brand’s arbitration awards orders of court. In fact, I never had sight of the Liquidator’s applications but was advised about it informally. I did not have anything to say because at that time there were already rumors that there are allegations of wrongdoing against me in relation to the settlement of the claims.

[31.1] I had a meeting with the Company Secretary (AGCEO at the time the matter was referred and commencement of settlement ) and the Acting CFO, Ms Yvonne Page in early January 2018 where we tried to understand the reasons for the change of attitude with regard to payment of the settlement. All she told us was that she received instructions from Ms Ngoye not to pay. The basis appears to be that the matter was settled at the time when Legal Services was defending the matter, as they believed Prasa should pay zero.

[31.2] It also emerged at that meeting that the Acting CFO had consulted with all user departments about the settlement and according to her no one knew about the claims. She told us that she was following the ESKOM Parliamentary enquiry and was scared after listening to the testimony as she did not want to be in the same position as Eskom CFO. I will address the fears she expressed and our discussion at the relevant forum.

[31.3] We urged Ms Page to put everything in writing to allow a proper response from the people who were alleged to have done something wrong in relation to this matter. I do not know if she did, but nothing was brought to my attention.

[31.4] Ms Ngoye never put anything in writing or approach me, the Board as a collective or individual members about my alleged wrongdoings until as I have stated above her legal services manager sent an email to Minister Nzimande and the Board Directors, including myself after Holland-Muter's orders were issued.

[32] I received Botes SC's SMS at about 06:30 on 07 March 2018 whilst on my way to Cape Town.

[33] Our SMS exchange went as follows;

**BOTES SC:** 6:32 *Dear Nana. I trust that you are well. Did PRASA decide to oppose the 4 applications that were initiated by virtue of the Awards made by Judge Brand? Kind regards. Francois Botes.*

**MAKHUBELE:** *Morning Francois. Nothing has been brought to my attention. I am boarding a flight now to Cape Town to meet the Deputy Minister of Transport about my imminent departure. I will also meet the Minister of Justice to discuss the controversies raised by //Unite Behind (echoing the sentiments of Legal Section). They have already written to CJ, President & the JSC. My involvement in the settlement of this matter is cited amongst reasons why I should be investigated by the JSC. As you can imagine, my priority now is to get all this cleared up so I can commence my judicial duties.*

*I'll talk to you when I return.*

*Regards.*

*Nana.*

**BOTES:** at 8:22 He sent 4 screenshots of copies of "Notice to Oppose" filed by Bowman Gilfillan Inc with four different case numbers in the matters between Siyaya Consulting Engineers (PTY) LTD (in liquidation) versus Passenger Rail Agency of South Africa (PRASA) .



**MAKHUBELE:** at 10:02: Just landed in Cape Town. Those attorneys have no authority. Prasa legal panel has been suspended since 1 December 2017. We are using SACAAA panel. I know they couldn't have been appointed through that panel. Only those who had instructions already continue.

*I have just asked Zide.*

*He says decision was taken by Martha Ngoye and the current AGCEO.*

*I am about to start meetings.*

**BOTES:** Thank you Nana.

[34] In-between communicating with Botes SC, I was also in communication with the company secretary, Zide, (who was AGCEO at the relevant time ) about what Botes SC was telling me. I wanted him to verify if indeed Prasa had filed notices to oppose and that they were utilizing the services of attorneys in the suspended legal panel.

Mr. Zide's reply was as follows;

*"... We met with Group Legal yesterday and the AGCEO was advised by the Group Legal of the intention to oppose the awards and the law firm that would be briefed. The AGCEO indicated that He will brief you in detail on the issues and the reasons raised by the Legal on their stance.*

My response to Zide was as follows;

*" AGCEO hasn't told me anything. He hasn't spoken to me about many things. You and I were involved in the settlement. If it is opposed what're they saying? Affidavit in the same style as Siyangena one? Whatever happens you and I must give version. Assist Prasa or be court witnesses"*

[35] I suppose Zide discussed the matter with Mr. Molepo (current AGCEO) because shortly after our SMS exchanges, I received an SMS from Molepo which reads as follows;



*" Morning Chairperson.*

*I will appreciate an opportunity to discuss few critical issues, which will include:*

- 1. ENS legal opinion and way forward on related briefs.*
- 2. ICT penetration tests.*
- 3. National Treasury draft response;*
- 4. Werksmans*
- 5. Siyaya Arbitration Awards and related court applications.*
- 6. Hawks correspondence and related Court proceedings;*
- 7. AG's Management Letter*
- 8. Preparation for the meeting with the new Minister;*
- 9. PCOT investigations*
- 10. Other urgent matters including my personal matter.*

*Regards*

*NCM*

[36] My response to Mr. Molepo was as follows;

*" Morning AGCEO,*

*As discussed just now, I am at the Parliament office of the Ministry for an urgent meeting with the DM.*

*I will be available tomorrow to discuss he issues 1-10.*

*I must state however that it has already come to my attention that you authorized Legal Services to oppose the matter under 6 ( **I wanted to say under 5**) and furthermore, to use the services of the suspended legal panel.*

*The matter involves me directly and I would have expected a courtesy briefing before decisions were taken.*

*I will seek legal opinion on the matter after having sight of the grounds of opposition.*

*On the issue of firm that's in the suspended panel, I believe it's further evidence of disobedience of Board resolutions.*

*I will advise the Board accordingly.*

*Regards.*

Nana.

[37] Molepo responded as follows;

*" I did not authorize them and they told us that they are proceeding on their own.*

*I called the attorneys to be briefed because I only learned yesterday that we had received court papers that were referred to our legal and held all those meetings with LK.*

[38] I forwarded Molepo a copy of one of the Notices of Intention to oppose that I had received from Botes SC. Molepo replied as follows;

*" It is one of the fundamental problems we have. They even accused LK of leaving them out of the engagements regarding the settlement negotiations and even alleging that the heads of the affected divisions are not in agreement".*

[39] LK referred to in Mr. Molepo's sms is Mr. Lindikaya Zide, his predecessor, and then Company Secretary.

**See attached copies of SMS and Whatsapp messages between me and Botes SC for the period from November 2017 to May 2018**

***Proceedings before Holland-Muter***

[40] I did not know that the matter was setdown for 08 or 09 March 2018. I only became aware when I received news, firstly through media that the Sheriff had attached Prasa's bank accounts to satisfy a court order.

I only learnt about what actually happened in court after the meeting that was called by Minister Nzimande on 12 March 2018. I did not know what the meeting was all about when I went there but then learnt that it was about the attachment of the bank accounts.

***Meeting with Minister Nzimande and Board resolutions thereafter***

[41] The meeting was not good, particularly because I did not know what it was all about and because I had not had sight of Ms Ngoye's affidavit or the nature of evidence that she had to support the allegations against me.

Minister Nzimande directed that we all should file reports about what happened and that he, as Minister would consider the reports and obtain legal advice to decide on way forward, whether to rescind or appeal or whatever remedy.

[42] I briefed the Board in my last meeting on 16 March 2018 . It was resolved as indicated above, namely, that the report should come from the Board because it was a Board report on the activities of the Board, and not an individual member. We nominated Professor Maluleke to collate all the information to assist in writing the report. ENSafrica was instructed to obtain SC opinion on the issues, particularly the contention by Ms Ngoye that she has absolute authority that is not subject to the Board or the Chief Executive Officer.

[42.1] The Board had a problem with the manner in which minutes were drafted. At times certain critical issues and resolutions would be left out and the issues muddled up and riddled with errors. It is difficult to tell whether it was because of incompetence or sabotage. The minutes were riddled with errors and were not factual. At times Board discussions were often leaked as I have indicated above.

I have already referred to the Resolution that suspended the Legal Panel that was distributed and leaked to the media even before I, as the Chairperson of that meeting could check it. It had to be recalled and a correct one was drafted after listening to the audio recording, which took in excess of two months because initially they claimed that it was lost, and then it was subsequently 'found'.

[42.2] This issue was addressed almost in all meetings. The Secretariat was directed to listen to the audio of all meetings and draft minutes based on the recording.



[42.3] In the last meeting that I chaired we resolved that I should draft minutes and resolutions of 'closed meetings' and sign all verified minutes and resolutions of open Board meetings. The minutes and resolutions were subsequently emailed to me by the Secretariat after my resignation for me to do what we agreed upon in our last meeting. However, it became impossible to coordinate the Directors' inputs because the remaining members of my Board were dismissed about four weeks after I left. I do not have access to Prasa emails anymore, but these can be accessed if need be. The Secretary called me several times to remind me because the Auditor General had raised a query about lack of minutes. These tasks remain unfinished.

[43] Senior Counsel (Maleka) and the instructing attorneys requested certain documentation relating to delegation of authority, particularly to Ms Ngoye. I do not know if they were subsequently produced after my departure.

#### ***The conduct of Botes SC***

[44] Botes SC did not tell me on 07 March 2017 that he was going to use the SMS exchange between us in court, let alone that he was going to share it with his instructing attorney, who in turn, would refer to it when he write to Prasa. As far as I was concerned there was nothing contentious in the SMS because it was in the public knowledge that Prasa Legal Panel had been suspended. Furthermore, there was a pending court application to review the decision of the Board in this regard.

[45] I only expressed my shock at the decision to oppose the applications without being told under circumstances where the main defence was that I acted irregularly in the conclusion of the settlement that preceded the arbitration awards. I did not think that Botes SC, who knew that my authority was being challenged at that time would even think that I was an authority to be quoted in formal court proceedings. As indicated above, I had already told him in January 2018 that he should let the attorneys handle communication in the matter. I did not think that his SMS question was a formal enquiry or that my response was a formal response of Prasa Board.

[46] I just did not think that an Advocate would think that he has authority to make enquiries about anything.

When one has regard to the smses exchanged before this fateful date, it is clear I always referred his requests for 'updates' to either the company secretary or AGCEO. I never answered a question without conferring. Because I was not always kept informed by Prasa Legal Services, Botes SC at times became my source of 'updates' with regard to what was happening with the disputed payments.

[47] I was under extreme psychological pressure at the time because Unite Behind was trying to block me from assuming my judicial as they alleged I had breached the Code of Conduct of Judges by agreeing to serve in the Prasa Board.

[47.1] An online newspaper called 'GroundUp' which is aligned to Unite Behind was reporting a lot about the Board's activities and we were concerned about leaking of internal documents.

[47.2] Zackie Achmat, who was the face of Unite Behind at the time had written to Parliament, the JSC, and everyone about me.

As indicated above, it later transpired from a tweet by Zackie Achmat that he regarded both Ms Ngoye and Mr. Dingiswayo as Unite Behind's *'key whistle blowers'*.

[47.3] It was clear that Legal Services was working hand in hand with Unite Behind not only to discredit me but to ruin my professional life.

[48] Botes SC knew the pressures that I was being subjected to at the time. He knew my frustrations. He persisted to involve me in the matter. When I first answered the SMS enquiry on the fateful day it was clear that I did not want to get involved.

He persisted and forwarded the screenshots of the notices to oppose, and then I broke down and responded the way I did. I was vulnerable and someone elicited my responses that were later used against Prasa.



The response is factual in as far as suspension of the Legal panel is concerned. However, I did not mean that Prasa should not oppose the applications, only that as far as I know they should utilize SACAA panel.

[49] I only discovered what Botes has done when I read a letter after our meeting with Minister Nzimande that Botes SC forwarded to me. This was a letter from Mr. Dingiswayo, addressed to one of Botes SC's instructing attorneys, Mr. Tshepo Mathopo. The letter was dated the same day as the meeting but I later learnt that it was sent before the meeting.

**The copy is attached .**

[50] In this letter, copied to Bowman Gilfillan and Equal Education Law Centre (lawyers for Unite Behind), Dingiswayo recounted what happened in court before Holland-Muter AJ, in particular that ;

*“ 2.4 Acting Justice Holland-Muter considering and having regard to inadmissible hearsy evidence submitted by Adv Botes Sc. This is a letter that you sent to Bowman's on 08 March 2018, which letter purportedly contains SMS communication between PRASA's interim chairperson and an unnamed person. Mr. Mkiva of Bowmans sought to ascertain the identity of the person who is alleged to have had SMS communication with the acting chairperson but your Mr. K Mathopo was unwilling to disclose the identity of this person to Mr. Mkiva of Bowmans during a telephone conversation between them on 08 March 2018 after you had dispatched your letter of the same date”.*

[51] I do not have a transcript of what transpired before Holland-Muter AJ, but if the contents of Mathopo's letter are correct, it is clear from the above that Botes SC disclosed the contents of our SMS communication to Holland-Muter AJ to argue that Prasa's representatives were not authorized.

[52] In paragraph 4 of the same letter Dingiswayo further alleges that Botes SC alleged during discussions with his opponents that he was in possession of a resolution that was passed by the Prasa BoC to the effect that the matter should be settled. He was apparently challenged to produce the resolution but

came with a *“a letter which did not in any way state that the Board of Prasa had resolved and authorised settlement of the matter”*

[53] I only came across the letter written by Mr. Mathopo to Bowmans on 08 March 2018 recently after Tuchten judgment, and after perusing the founding papers filed by Prasa. **This letter is attached hereto.**

[54] Paragraph 2 of the letter reads as follows:

*“ Your purported “notices of intention to oppose” the four applications are irregular and you do not have any mandate from the Board of the Passenger Rail Agency of South Africa (PRASA) to represent it in these applications and to oppose the applications on behalf of PRASA. Adv Nana Makhubele SC is the Acting Chairperson of PRASA’s Board. After we received your purported “notices of intention to oppose” the four applications we requested Adv Nana Makubela SC to indicate whether or not the Board of PRASA has decided to oppose the four applications. Adv Nana’s response was as follows:*

[55] Mathopo then went on to quote what appears to be part of my SMS communication with Botes SC, but just a little bit that was my response, and not the question put and context.

He also quoted what appears to my SMS communication with the AGCEO in response to his request for a meeting.

[56] In Paragraph 4 of the letter Mathopo wrote the following;

*“ On a proper analysis and interpretation of the abovementioned comments from Adv Nana Makubela it is evident that you have no mandate from Passenger Rail Agency of South Africa to oppose these applications. We delivered a Rule 7 notice at your offices yesterday, but have not received the courtesy of any response or reply. The Board of the PRASA did not resolve or decide to oppose the aforementioned applications”.*



[57] I have never had any communication with Mr. Mathopo, by letter, SMS or any means with regard to the authority of Bowmans to act on behalf of Prasa. I have never met him. I do not know him. I never received any enquiry from him as indicated in paragraph 2 of his letter addressed to Bowmans.

[58] After reading Mathopo's letter referred to above, I called Botes SC to enquire about the SMS extracts that appeared like the communication exchanged between us. He apologized and could only say that he showed the instructing attorney but he doesn't know why he decided to use the content in a letter addressed to Prasa's attorneys. I do not know if Mathopo replied to Dingiswayo letter or if both he and Botes SC have filed an explanation in court.

***The allegations in the founding affidavit of Ms Martha Ngoye in the rescission application that served before Tuchten J***

[59] In her affidavit filed in support of the rescission application Ms Ngoye relies on two grounds;

**First ground**

[60] The first one is about her alleged absolute authority to deal with legal matters and what she perceives was interference on my part when I intervened in the matter. She attaches a document that she alleges gives her absolute delegated powers. She also makes allegations that she and her subordinate, the legal manager, Dingiswayo were excluded from the settlement negotiations. Furthermore, that Prasa's then attorney of record, Mr. Madimpe Mogashoa was instructed by me not to communicate with her and Dingiswayo.

[60.1] As indicated above, these issues are not relevant for purposes of this referral. My version of the events, subsequent to the approach by Botes SC and the attorneys for the liquidators, as indicated will be put forward at the relevant forum. I re-iterate that everything that I undertook to do after sending the memorandum to Zide (attached above) was followed through, to the letter.



[60.2] I also **attach hereto a copy of a report from Mr. Sonic Baltac**, one of Prasa's employees who testified at the liquidation enquiry. He alleged that Legal Services prevented him from providing information that he had gathered after his testimony to the Commissioner. I obtained a bundle of documents from Mr. Mogashoa, Prasa's then attorney of record on how they dealt with the matter from summons to liquidation enquiry. One of the documents is a letter addressed to the erstwhile owner of the companies (before liquidation), to the effect that Mr. Baltic was asked by the Commissioner to verify certain things.

[60.3] Ms Ngoye alleges in her affidavit (and Tuchten J appears to believe her ) that she does not know that there is a transcript of the insolvency enquiry proceedings. Well, this clearly exposes her negligence because Prasa was represented at the enquiry by both attorney and Counsel. Their presence, and utterings are noted in the transcripts. If they did not provide her with a copy or sought instructions it exposes many things about how the matter was handled.

[60.4] That the enquiry was not adversarial is not an excuse. The witnesses testified under oath, and nowhere did the representatives undertake to provide counter evidence to assist the Commissioner. Instead they agreed to further investigate certain issues that would advance the liquidators' claims.

The transcript exists. Copies were made available to both the Acting AGCEO and ENSafrica. I will make it available.

[60.5] Ms Ngoye has attached a document that she alleges is Prasa's Delegation of Authority dated 2016 to her Founding affidavit .

All I can say at this stage is that I have never had sight of this document before I saw it in the court papers.

The Interim Board that I chaired asked for, and was provided with a different document. I will refer to it at the relevant forum, but for present purposes. **See attached an email from the Secretariat, Ms Martha**

**Kotu, and dated 04 November 2017** wherein she forwarded certain documents to the Board members. One such document is Delegation of Authority signed by Sifiso Buthelezi.

[60.5] The issue of delegation of authority would have been addressed in the opinion that the Board sought from Advocate Maleka SC just before I left Prasa. One of the documents requested by the AGCEO from Ms Ngoye was a copy of her written delegated authority and employment contract . This is because was after her utterances that she had absolute powers, not subject to the Board or Group CEO.

[60.6] The Board that I was chairing was comprised of very highly qualified individuals with relevant skills and expertise. I was a Senior Counsel with practical legal experience. The Transport Parliamentary Portfolio Committee recognized our expertise when we made our first appearance.

My colleagues had confidence in me with regard to legal issues. I cannot imagine a situation where I would not have been obliged to intervene in the face of allegations of negligence in the manner in which legal matters were being handled. Ms Ngoye was not even aware of the status of this particular matter, hence she is still in the dark as whether there is a transcript of the liquidation enquiry or not.

[60.6] The request from the Liquidators was not the first. In fact, the Board was made aware that there were many contracts that were put on hold for no reasons. When Zide's term as Acting CEO ended he was appointed to look into these issues and to advise the Board. There were issues with the appointment, which was deferred.

All these issues are not relevant for purposes of this referral as I have indicated.



**Second ground**

[61] The second and ground of rescission that Ms Ngoye relied on to rescind the orders of Holland-Muter AJ is what she has referred to in paragraph 93.4 of her affidavit as follows:

*“ The questionable relationship between the role players including an official or officials that are supposed to act in the best interests of PRASA and the Siyaya entities as evidenced by: ”<sup>1</sup>*

This is relevant for purposes of this referral.

[62] In paragraph 94.3.3 of the founding affidavit Ms Ngoye alleges that at the hearing of the matter before Holland-Muter AJ , *“Counsel for the Siyaya entities produced a letter that he alleged was a resolution of the Interim Board authorizing the settlement, which was a letter that is subject to attorney/client privilege between PRASA and DM Inc. Dingiswayo has been advised by DM Inc. that they did not share the letter with the attorneys of Siyaya entities. This shows that there were persons who wee supposed to act on behalf of PRASA and who acted to the detriment of PRASA. A copy of the letter is already annexed hereto marked OMN16”*.

[63] Ms Ngoye also referred to the letter that Mathopo addressed to Bowmans on 08 March 2018, challenging their authority on the strength of SMS responses that he alleged were from me in response to his enquiry. The letter is already attached above. As stated, there was never an enquiry about Bowmans authority from Mathopo to me.

[64] In paragraph 98, Ms Ngoye deposed as follows;

*“ 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 the detriment of PRASA. The above text messages that is said to be from Makhubele is not only unfortunate as*

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<sup>1</sup> See founding affidavit deposed by Onicca Martha Ngoye on behalf of PRASA , paragraphs 93.1-99.

*it betrays the extent of the access that Siyaya had to Makhubele but it also shows that Makhubele shared with the Siyaya entities internal communications of PRASA. It will be recalled that she chided Group Legal Services from sharing the memorandum with DM Inc, PRASA'S former attorneys. yet she saw no irony sharing internal communication with attorneys that were suing PRASA."*

[65] In paragraph 105, Ms Ngoye deposed as follows;

*"The court made a finding that Bowmans was not properly before Court. The Court accepted the contents of Mathopo's letter dated 8 March wherein it is alleged that Makhubele advised the Siyaya entities that Bowmans did not have authority to act on behalf of PRASA. The Court proceeded to grant Siyaya the orders on an unopposed basis. The Court confirmed that the judgments were granted by default".*

***Reasons for late submission of this referral and steps taken to deal with the allegations against me***

[66] I first heard about Ms Ngoye's allegations against me when they were reported by GroundUp on 06 April 2018 after the order of Judge Ranchod.

[66.1] The headline reads as follows;

*"Court puts the brakes on R56-million payment to Siyaya. Corruption at Prasa has led to the decline of Metrorail's service. But now Prasa staff are fighting back against a dubious transaction facilitated by Prasa's board and previous CEO"*

[67] The article referred to the affidavit that was filed by Ms Ngoye where she stated, amongst other things that Prasa's Legal Department was wrongly excluded from the settlement and that I had instructed Prasa's lawyers to settle the matter.

[68] I called Prasa's company secretary and followed by an email, requesting copies of the court papers and also to find out the procedures to



invoke the Directors' Liability Insurance as I really wanted to get involved in the litigation.

**See copy of the email to Zide which I copied my former colleagues in the Interim Board.**

[69] Zide promised to give me the founding papers, but I have not heard from him to date. I did get a copy of the Insurance Policy , but the initial response from the brokers was somehow vague. I attach a copy of the response .

[70] I contacted Botes SC and enquired about the contents of Ms Ngoye's affidavit. He undertook to give me the papers, but in the meantime he forwarded a copy of Ranchod J's order, which basically postponed the matter to be properly ventilated.

[71] I did not assume judicial office in April as anticipated because a legal controversy had emerged after all the challenges by Unite Behind with regard to whether my appointment date could be changed from 1 January to 1 April 2018. I could not afford legal fees as I had no job.

[72] At this time, my only source of information on what could be the contents of the founding papers filed by Ms Ngoye was Botes SC. At some point I even smsed him to enquire if I could get pro bono representation from the Bar. He subsequently suggested an attorney, one Johan Crouse. I accepted the offer to engage him.

[73] I started sending documents to Johan Crouse in preparation for our consultation , but then as I was going through my documents, including emails, I came across one email from a Johan Crouse. When I looked at it, I realized that he appeared to be the same attorney that approached me in writing during November 2017 and requested intervention on behalf of Siyaya liquidators.

[74] In my thoughts, there was going to be issues of conflict of interest if I utilized him (Johan Crouse) to assist me with legal representation on issues arising from the same matter.

[75] I then informed Botes SC that there was a conflict of interest and that I did not think that it would be proper to utilize the services of Johan Crouse. I met him (Johan) and expressed the same sentiments. We agreed that the Senior Counsel that he had proposed to brief (Mark Leathern SC) would first advise on the question of conflict of interest.

[76] I met Mark Leathern SC. Save to state that I did not formally engage Johan Crouse, I do not know if I am at liberty to disclose the advice given, but will do so if it is permitted.

[77] I later received information from Botes SC that the Liquidators were not going to oppose Prasa's application to rescind Holland-Muter's orders and that they were no longer relying on the arbitration awards of Judge Brand (based on the settlement ) but that the matter would go back to arbitration.

[78] I then did not see a need to intervene in the court application, moreso because in my view, the party that sought reliance on my authority was no longer opposing the application, and furthermore, Prasa had not joined me as a party.

[79] I was however seeking advice on my legal remedies on the defamatory allegations made by Ms Ngoye in her founding affidavit, as well as the various news reports in social media (Twitter, Facebook) and newspapers that were made by Zackie Achmat to the effect that I was linked to '*State Capture*', and that I colluded with Siyaya liquidators to make a secret settlement to pay money to a corrupt entity.

I am still pursuing legal advice and will act as soon as possible.

[80] I remained under the impression that the parties (Prasa and the Liquidators) will remove the matter from the court roll and go back to arbitration.

[81] Therefore, it came as a shock to me when I was alerted to a Radio interview on 28 November 2018 about a judgment that had been issued by Tuchten J on the matter.

[82] I do not know if the liquidators have filed any papers and whether Botes SC made any submissions before Tuchten J.

I have asked the JCC to investigate the matter , particularly what transpired before Tuchten J.

[83] I contacted Botes SC immediately after I was alerted to the Radio interview and enquired, amongst other things why the matter was still in the court roll and what actually happened. Initially he told me that he was sitting in court and that the issues dealt with in the Radio interview were not canvassed in open court. The order was obtained on an unopposed basis.

He later forwarded me Tuchten J's written judgment, which he said he was shocked about.

[84] I repeated my plea to Botes SC ( which I made during March 2018, after I read the letter from Dingiswayo where it was stated that I exchanged smeses with Siyaya attorneys) that there was a need for him to make a statement by affidavit or whatever means to own up to the issues regarding the alleged SMS communication between me and Siyaya Liquidators' legal team.

[85] I spoke to Botes SC in the last week of January 2019. He was reluctant to make a statement at any forum. Instead he suggested that I should clear my name , and he was going to 'support' me. I asked how was the support going to be because since last March I have not seen any statement, instead my name is mentioned in court papers, newspapers and



social media, but the identity of the person I was communicating with by SMS is still a mystery.

[86] Botes SC suggested that he was going to ask the Liquidators to join me in the current application, where I was going to file the affidavit.

I raised my concern about the 'support' that he has been promising me. On the one hand, the Liquidators do not intend to oppose Prasa's application to rescind Judge Brand's orders, but on the other they want to keep the matter in court, simply for me to file an affidavit.

[87] I then informed Botes SC that at the time of commencement of settlement of the claims, the both of us were still members of Pretoria Bar and in any event, the Bar would have jurisdiction even if I was no longer a member.

I then informed him that I intended to refer a complaint for investigation by the Professional Ethics Committee of the Pretoria Bar.

This is when he then changed tune and agreed that indeed it was necessary for him to file a statement. He undertook to draft a statement and that we would refer the matter by consensus as he agreed that he should not have given Tshepo Mathopo our sms exchanges.

[88] I have not heard anything from Botes SC to date.

### ***The prejudice on me***

[89] I have been a subject of media reports and attempts to block my assumption of duties as a Judge. The organization that has led the offensive against me (Unite Behind) has resuscitated the matter after Tuchten J's judgment that they believe gives them some grounds to have me impeached as a Judge. Save for reference to what Unite Behind believes is a transgression of the Code of Conduct of Judges, namely, chairing the Board of Prasa, and some incoherent allegations about VBS and failure to attend a Parliamentary meeting, the main 'charge' against me is that I had some improper relations with the legal team of Siyaya liquidators. It is also alleged



that as a result thereof, I provided the legal team with some confidential and sensitive information that somehow benefited the companies in liquidation.

[90] I have read all documents that I could lay my hands on, but I cannot find any substantiation of this allegation, save wild statements that I concluded a secret settlement and colluded with the Siyaya lawyers.

Zackie Achmat has written extensively about me on this matter. He even threatened to take legal action against me.

**See the media release that he issued on 21 March 2018** where he refers to me as a Judge who is implicated in *“State Capture”*. He posted these utterings in Twitter, Facebook and newspapers.

[90.1] After Prasa was ordered to file audio recordings by the Western Cape High Court, Zackie Achmat gave a press interview and alleged that I obtained people to lie on behalf of the Prasa Board on the existence of the resolution to suspend the legal panel. He appears to think that the Board did not make such a resolution. This was not part of the court order, but just his own imagination.

I objected to the news report and the newspaper issued an apology.

**See a copy of the news article (EWN) and a subsequent apology that was issued.**

[91] The only *“evidence”* of the alleged improper relationship between me and the Siyaya legal team that has been attached in the founding affidavit deposed by Ms Ngoye is the letter of 08 March 2018 from Mathopo Attorneys to Bowmans. This is the letter where he has quoted sms allegedly from me to him or his office after he had enquired from me whether Prasa was opposing the application to make the arbitration awards of Judge Brand orders of court. No such communication occurred between me and Mathopo.

[92] In the email exchanges between Fani Dingiswayo and Mkiva (Bowmans), the latter informed the former that Mathopo called him and spoke about the discussions that I was having with the legal team of Siyaya

Liquidators. He (Mathopo) refused to reveal the identity of the person in his legal team that I was talking to.

[93] I have already indicated above that the sms responses that Mathopo alleges are from me to him are actually sms exchanges between me and Botes SC on 07 March 20018.

[94] The name of Botes SC is being concealed by Mathopo . I do not know why. The newspapers only mention my name and the identity of the person with whom I am alleged to have communicated with regard to Bowmans' alleged lack of authority is not being revealed.

[95] I do not know if Botes SC or Mathopo have filed any affidavit to address the content of the letter that the latter has sent to Bowmans.

[96] Tuchten J relied heavily if not solely on the allegations about my alleged sms correspondence with Siyaya lawyers in reaching his conclusion that I had some improper dealings that I must explain. Of course this comes from the founding affidavit of Ms Ngoye. According to media enquiries, Unite Behind has also relied on this affidavit, the judgment of Tuchten J as well as the letter dated 08 March 2018 from Mathopo In to Bowmans in its complaint to the JCC.

[97] I believe that the explanation of Botes SC (and his instructing attorney (Mathopo) about the reasons for their conduct, will restore my dignity, integrity and reputation.

### **Conclusion**

[98] I request an investigation with regard to the conduct of Botes SC;

- (a) in relation to the SMS exchange between us; why he shared it with his instructing attorney, Tshepo Mathopo, who then passed it off as

communication between me and him in his letter addressed to Bowman Gilfillan Attorneys,

(b) in relation to the alleged submissions made by Botes SC before Holland-Muter J on or about 08 March 2018 in the matter between Prasa and the Liquidators of Siyaya companies (in liquidation) wherein he relied on our SMS exchanges (converted into a letter) ; and

(c) in relation to allegations in Ms Ngoye's affidavit that when making submissions before Holland-Muter AJ, he disclosed the contents of a letter written with prejudice from Prasa's attorneys or Prasa with regard to settlement proposals.

[99] I will await your response and any request for clarity or further information.



**JUDGE TAN MAKHUBELE**



**02.**

**F BOTES**

**1ST AFFIDAVIT**

**(14 OCTOBER 2019)**

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**AFFIDAVIT**

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I, the undersigned,

**FRANCOIS WEIDEMAN BOTES**



do hereby declare under oath as follows:

1.

1.1. I am a senior advocate and member of the Pretoria Society of Advocates, practicing as such at Suite 3-25, Club Advocates' Chambers, 30 Pinaster Street, Hazelwood, Pretoria, Gauteng.

1.2. The facts hereinafter referred to fall within my personal knowledge and are both true and correct.

2.

I have been approached by Mr Clint Oellermann ("Mr Oellermann"), an investigator from the Commission of Inquiry into Allegations of State Capture ("the Commission") regarding the circumstances surrounding a complaint lodged against me, to the Professional and Ethics Committee of the Pretoria Society of Advocates, by the former Chairperson of Passenger Rail Agency of South Africa ("PRASA"), the Honourable



Madam Justice TAN Makhubele ("Judge Makhubele").

3.

The complaint in question was lodged against me on 18 February 2019 and relates to a matter between the liquidators of Siyaya DB Consulting Engineers (Pty) Ltd (in liquidation) ("Siyaya") and PRASA, during the period in which Judge Makhubele was the Chairperson of PRASA.

4.

The Professional and Ethics Committee of the Pretoria Society of Advocates requested me to submit a written response to the complaint that was lodged against me by Judge Makhubele. I attach hereto a copy of my response that was provided to the Professional and Ethics Committee of the Pretoria Society of Advocates dated 17 May 2019, marked **Annexure "X"**.

5.

I referred in paragraph 33 of my written response (which is attached hereto, marked **Annexure "X"**) to various SMS messages, WhatsApp messages and e-mails which were exchanged between Judge Makhubele and I, and between Mr Mogashoa and I, and between Messrs Mathopo and Crouse and I. All of the aforementioned messages and correspondence relate directly to the Siyaya matter. I gave consent to the Commission to allow its Digital Forensic Experts to make a digital image of my cellular telephone, containing the relevant text messages and WhatsApp messages, in

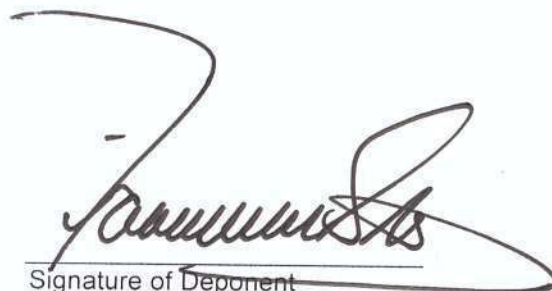


order to ensure the authenticity thereof. A digital image of my cellular device was duly made by Mr Anton van der Wout, a digital forensic expert acting on behalf of the Commission, on Monday, 9 September 2019, at my chambers. Mr Anton van der Wout furthermore made a digital image of my I-pad which contained all the relevant e-mails which were exchanged between the relevant persons and myself. Mr Oellermann was also present when the imaging process took place on Monday, 9 September 2019, at my chambers.

6.

I confirm that all the allegations and averments contained in my response to the complaint lodged by Judge Makhubela (which is attached hereto, marked **Annexure "X"**) are both true and correct.

SIGNED AT PRETORIA ON THIS 14<sup>TH</sup> DAY OF OCTOBER 2019.



Signature of Deponent  
Francois Weideman  
Botes

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge and belief both true and correct. This affidavit was signed and sworn to before me in on the 14<sup>TH</sup> day of October 2019, and that the Regulations contained in Government Notice

R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

R.

COMMISSIONER OF OATHS

R. N. HART Kruger ATTORNEYS  
54 Hesketh Street  
Moreleta Park  
0044  
EX OFFICIO  
High Court ATTORNEY

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**RESPONSE TO THE COMPLAINT LODGED BY THE  
HONOURABLE MADAM JUSTICE TAN MAKHUBELE**

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1. The Honourable Madam Justice TAN Makhubele (hereinafter referred to as "*Judge Makhubele*") lodged a complaint against me on 18 February 2019, in which she request the Professional and Ethics Committee to investigate the following:

- "(a) *In relation to the SMS exchange between us, why he (Botes SC) shared it with his instructing attorney, Tshepo Mathopo, who then passed it off as communication between me and him in his letter addressed to Bowman Gilfillan Attorneys;*
- (b) *In relation to the alleged submissions made by Botes SC before Holland-Müter J on or about 8 March 2018 in the matter between PRASA and the liquidators of Siyaya Companies (in liquidation) wherein he relied on our SMS exchanges (converted into a letter); and*
- (c) *In relation to allegations in Ms Ngoye's affidavit that when making submissions before Holland-Müter AJ, he disclosed the contents of a letter written with prejudice from PRASA's attorneys or*



*PRASA with regard to settlement proposals."*

2. The purpose of the aforementioned referral seems to be the following:

*"I believe that the explanation of Botes SC (and his instructing attorney - Mathopo) about the reasons for their conduct, will restore my dignity, integrity and reputation."*

3. The notorious letter which forms the substratum of paragraph 97 of Judge Makhubele's statement, was disseminated to Bowman Gilfillan Inc on 8 March 2018 (hereinafter referred to as *"the letter"*). I attach hereto a copy of the letter, marked **Annexure "A"**.
4. The letter was not *"from PRASA's attorneys or PRASA"* as alleged by Judge Makhubele in paragraph 98 of her statement.
5. The letter was dispatched to Bowman Gilfillan Inc by Mr Tshepo Mathopo (hereinafter referred to as *"Mr Mathopo"*). Mr Mathopo is the sole partner of Mathopo Attorneys.
6. Mr Johan Crouse (hereinafter referred to as *"Mr Crouse"*) is the managing member of Crouse Inc. Messrs Mathopo and Crouse represent the duly appointed liquidators of Siyaya DB Consulting Engineers (Pty) Ltd (in liquidation) (hereinafter referred to as *"the company"*).



7. I received instructions from Messrs Mathopo and Crouse to represent the company (as Plaintiff) in litigation that was initiated by it in the High Court of South Africa, Gauteng Division, Pretoria (hereinafter referred to as "*the Court*") during 2015 and 2016 under case no's 73933/2015, 73934/2015, 47597/2016 and 47598/2016 (hereinafter referred to collectively as "*the matters*").
8. The matters were referred to arbitration by agreement between the parties by virtue of an order that was made by the Honourable Deputy Judge President, the Honourable Mr Justice Ledwaba on 30 May 2017. The Passenger Rail Agency of South Africa (hereinafter referred to as "*PRASA*") is the Defendant in the matters. PRASA was at all relevant times represented by Mr Madimpe Mogashoa, member of Diale Mogashoa Attorneys (hereinafter referred to as "*Mr Mogashoa*"). Mr Mogashoa briefed Adv Kennedy Tsatsawane SC (hereinafter referred to as "*Adv Tsatsawane SC*") to represent PRASA in the matters. Adv Tsatsawane SC is a member of the Johannesburg Society of Advocates.
9. Judge Makhubele and I know each other since 1997. We served together on the Bar Council and her integrity, dignity, ethical values and honesty were never in doubt. We (Judge Makhubele and I) established a cordial professional relationship and I encouraged her to make herself available for permanent appointment to the Bench. I became aware of the fact that the Judicial Services Commission ("*JSC*") recommended Judge Makhubele to be appointed permanently as a Judge of the Court during October 2017, through various



reports and articles which appeared in the press.

10. Judge Makhubele makes the following allegation in paragraph 9.1 of her statement:

*"The liquidators approached me, (first through Adv Botes SC on or about the second week of November 2017), followed by a letter (towards the end of the month) to intervene in a dispute that had ensued with regard to whether there was a need to proceed to arbitration in view of the evidence at the enquiry."*

11. The aforementioned allegation is factually **incorrect** and **wrong**:

11.1 I was completely unaware of the fact that Judge Makhubele was appointed as the Chairperson of PRASA's interim board. It appears from Judge Makhubele's statement, and the annexures attached thereto, that she was appointed as such on 19 October 2017, **after** she was recommended by the JSC to be appointed as a Judge in the Court.

11.2 It therefore came as no surprise to me when I received a call from Judge Makhubele on or about the first week or the second week of November 2017. Judge Makhubele phoned me on my cellular phone and I immediately congratulated upon her "*appointment*" to the Bench of the Court. Judge Makhubele informed me (**for the first time**) during our





conversation that the President (former President Zuma) had decided to deploy her at PRASA and to appoint her as the Chairperson of PRASA's interim board. The purpose of her appointment was, according to her, to "clean up" at PRASA and to "sort out the mess". Judge Makhubele specifically directed my attention to the fact that PRASA was engaged in numerous litigious matters, some of which should have been settled or finalized or disposed of "long ago".

- 11.3 Judge Makhubele specifically informed me that she got the impression that some of the attorneys who acted on behalf of PRASA exploited PRASA and that matters were dragged out and prolonged specifically to benefit the attorneys financially. The impression that I got was that Judge Makhubele was establishing my availability to assist her in this regard, i.e. to be appointed as counsel to investigate the merits and the status of the various pending matters in which PRASA was engaged in. I asked Judge Makhubele the following question:

***"How can I assist you in this regard?"***

- 11.4 Judge Makhubele immediately directed my attention to the company. She told me that, according to her information, I appeared on behalf of the liquidators who were appointed subsequent to the liquidation of the company and that I represented the company in the matters (the four matters referred to in paragraph 7 *supra*). I immediately informed Judge



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Makhubele that PRASA was represented in the matters by Mr Mogashoa and Adv Tsatsawane SC. Judge Makhubele told me that she was aware of this. Judge Makhubele explained the following to me:

11.4.1. She did not trust the attorneys who acted on behalf of PRASA and that PRASA was "*captured*" by certain of its own employees and certain contractors; and

11.4.2. She was undermined by certain members of PRASA's legal department and she did not believe (or trust) the information that was provided to her regarding the merits or the status of the pending matters in which PRASA was involved in.

11.5 Judge Makhubele specifically asked me to provide her with the following information:

11.5.1. The status of the matters;

11.5.2. What transpired at the insolvency enquiry presided over by Mr Krige; and

11.5.3. Whether the matters were capable of being settled, or not.

11.6 I responded as follows to Judge Makhubele's concerns:



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- 11.6.1. The company initiated the matters against PRASA during 2015 and 2016. PRASA filed pleas in the matters and, insofar as I was concerned, the pleas which were filed on behalf of PRASA constitute bare denials;
- 11.6.2. An insolvency enquiry was set down for a period of 5 days, from 28 August 2017 until 1 September 2017. Mr Krige presided over the insolvency enquiry and I invited Mr Mogashoa and Adv Tsatsawane SC to be present at the insolvency enquiry and to sit in during the interrogation of witnesses. The liquidators of the company decided to subpoena employees of PRASA to appear at the insolvency enquiry and to give evidence under oath. I specifically afforded Adv Tsatsawane SC an opportunity to cross-examine each of the witnesses who were subpoenaed by the liquidators. Adv Tsatsawane SC declined my invitation to cross-examine any of the witnesses. A copy of the entire record (approximately 210 pages) is attached to Judge Makhubele's statement; and
- 11.6.3. Mr Krige prepared a report dated 15 September 2017. On a proper interpretation and analysis of Mr Krige's report it is evident that the witnesses (employees of PRASA) conceded the majority of the company's claims.





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- 11.7 Judge Makhubele requested me to provide her with documentation in support of my aforementioned comments and observations. I made an appointment to meet with Judge Makhubele at PRASA's Head Office situate at Hatfield, Pretoria at 13h00 on Tuesday, 14 November 2017. I prepared a bundle of documents consisting of 17 pages in total. I paginated the papers contained in the bundle in my own handwriting and I provided Judge Makhubele with the bundle, in accordance with my undertaking. I attach hereto a copy of the aforementioned bundle of documents (consisting of 17 pages), marked **Annexure "B"**.
- 11.8 Judge Makhubele and I did not discuss the merits of the matters during our aforementioned meeting. I was completely unaware of the fact that certain members of PRASA's executive were present in the boardroom next door to the boardroom where Judge Makhubele and I have met.
12. It is of paramount importance to emphasize the following:
- 12.1 I informed Messrs Mathopo and Crouse immediately after our initial conversation. I specifically informed Messrs Mathopo and Crouse that we should avoid a situation which may result in a serious conflict of interest or a situation which might be perceived as "*irregular*" or in conflict with our Society's Code of Conduct and Ethical Rules.
- 12.2 Messrs Mathopo and Crouse and I consequently decided that I should



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provide Judge Makhubele with the information requested by her and to co-operate with her in pursuit of the finalization of the matters. We furthermore agreed that I will keep them up to date with the correspondence or messages exchanged between Judge Makhubele and I, specifically to avoid any misunderstanding or confusion.

12.3 Judge Makhubele and I were on the same page insofar as honesty, transparency and ethical conduct are concerned. We established an open, honest and transparent relationship which is evident from the correspondence (letters, e-mails, SMS messages and WhatsApp messages) which were exchanged between us. The majority of the aforementioned correspondence are attached as annexures to Judge Makhubele's statement.

13. Judge Makhubele addressed an **important** WhatsApp message to me on 19 December 2017 at 13h44:

*"I've forwarded the letter to PRASA with instructions to enquire from Mogashoa if he received this & to forward same ASAP.*

*Our instructions were **transparent** hence I forwarded the copy to you. The intention was to have an **open discussion** with you & our attorneys but due to your unavailability we instructed him **to engage your clients**.*

*I think the correctness of the calculation of interest will be verified by PRASA finance. **The principal is acceptable and those were the***



***instructions.***

*Regards,*

*Nana."*

I attach hereto a copy of Judge Makhubele's aforementioned WhatsApp message dated 19 December 2017, marked **Annexure "C"**.

14. Attached to Judge Makhubele's aforementioned WhatsApp message (which is attached hereto, marked **Annexure "C"**), was a letter prepared by Mr Lindikaya Zide, PRASA's Group Company Secretary dated 15 December 2017, addressed to Mr Mogashoa. I attach hereto a copy of the aforementioned letter dated 15 December 2017 confirming same, marked **Annexure "D"**.
15. I provided Messrs Mathopo and Crouse with **all** the information which were provided to me by Judge Makhubele. I was extremely cautious and diligent. I am a "*creature of instruction*" and it was therefore paramount importance to appraise Messrs Mathopo and Crouse of the information which were exchanged between Judge Makhubele and I. I had no intention to hide any information from Messrs Mathopo and Crouse.
16. The matters eventually became settled, in accordance with PRASA's instructions to Mr Mogashoa, which is evident from the content of the letter attached hereto, marked **Annexure "D"**. The Honourable Retired Judge FDJ Brand (hereinafter referred to as "*Judge Brand*") was appointed by agreement between the parties





to preside in the arbitration proceedings. Mr Mogashoa and I informed Judge Brand that the matters became settled in accordance with four written tenders which were prepared by Mr Mogashoa, in accordance with the provisions of Rule 34 of the Uniform Rules of the High Court, dated 21 December 2017. We (Mr Mogashoa and I) made an appointment with Judge Brand to meet him in Pretoria, at the offices of Adams & Adams, on Wednesday, 7 February 2018. Mr Mogashoa and I prepared four draft awards which were presented to Judge Brand on Wednesday, 7 February 2018.

17. Judge Brand specifically enquired from Mr Mogashoa whether the draft awards were in line and in accordance with his client's (PRASA) instructions. Mr Mogashoa confirmed that what is provided for and contained in the four draft awards were 100% in accordance with his client's instructions. Judge Brand went ahead and made the four awards in the matters. I attach hereto copies of all four the awards dated 7 February 2018 confirming same, marked **Annexures "E", "F", "G" and "H"** respectively.
18. PRASA failed and omitted to comply with the awards which were made by Judge Brand on 7 February 2018. Messrs Mathopo and Crouse instructed me to prepare four applications, in accordance with the provisions of Section 31(1) of the Arbitration Act, No 42 of 1965. All four the aforementioned applications were delivered at Mr Mogashoa's office, by virtue of the fact that he was at all relevant times the attorney on record for PRASA. His client (PRASA) decided or elected **not** to oppose any of the aforementioned four applications. The four



applications were set-down for hearing and enrolled in the Court on Friday, 9 March 2018, as follows:

18.1 Court 2A - Coram: Holland-Müter AJ

18.1.1. Case no. 73934/2015 - No 29 on page 4

18.1.2. Case no. 47598/2016 - No 23 on page 4

18.2 Court 2B - Coram: Petersen AJ

18.2.1. Case no. 73933/2015 - No 69 on page 4

18.2.2. Case no. 47597/2016 - No 64 on page 4

19. Bowman Gilfillan Inc delivered four notices of their intention to oppose the applications on Tuesday, 6 March 2018. Mr Mogashoa was still on record on behalf of PRASA and we (Messrs Mathopo, Crouse and I) were of the opinion that Bowman Gilfillan Inc took an irregular step. Mr Mogashoa filed four notices of withdrawal as PRASA's attorney of record on 8 March 2018.

20. Mr Mathopo, in the meantime, went ahead and prepared four notices in terms of Rule 7(1) of the Uniform Rules of the High Court, in terms of which Bowman Gilfillan's authority to act on behalf of PRASA were challenged. Mr Mathopo invited Bowman Gilfillan Inc to produce a written power of attorney to him, in terms of which it is confirmed that PRASA's board has instructed Bowman Gilfillan Inc to oppose the four applications which were set-down for hearing on Friday, 9 March 2018.



21. I was surprised to learn that the four applications became opposed, specifically in the light of the facts referred to herein *supra*. I made contact with Judge Makhubele and asked her to shed some light on this issue. It was extremely important to establish whether or not PRASA's interim board has decided or resolved to oppose the aforementioned applications. Judge Makhubele voluntarily sent me an SMS, the content of which are recorded *verbatim* in Mr Mathopo's letter (specifically paragraphs 2 and 3 thereof) dated 8 March 2018, attached hereto marked **Annexure "A"**.
22. I forwarded the aforementioned messages to Mr Mathopo and we (Mr Mathopo and I) decided to dispatch the letter to Bowman Gilfillan Inc "*with prejudice of rights*". My considered view and opinion were to place the correct information on record. I had nothing to hide and it was evident from Judge Makhubele's messages that PRASA did **not** instruct Bowman Gilfillan Inc to oppose the four applications on PRASA's behalf.
23. Judge Makhubele did not ask or request me not to disclose any of her SMS messages or e-mails or WhatsApp messages to any third party or to Messrs Mathopo and Crouse. I am an officer of the Court and I will not abdicate my duty and responsibility to place the objective and correct evidence before the Court. This is exactly what I did.
24. Bowman Gilfillan Inc instructed counsel to appear on PRASA's behalf on Friday, 9 March 2018. Counsel received instructions from Bowman Gilfillan Inc to





request the Honourable Mr Acting Justice Petersen (hereinafter referred to as "*Petersen AJ*") for an indulgence. We (PRASA's counsel and I) decided that all four applications should be heard by the same Judge, so as to avoid a duplication of judgments. The decision was then taken to request Petersen AJ to remove the two applications which was set-down in his Court (Court 2B) and to uplift the Court files and to request Holland-Müter AJ to hear all four applications simultaneously. Petersen AJ agreed and we informed Holland-Müter AJ accordingly.

25. I called all four applications before Holland-Müter AJ. I specifically directed Holland-Müter AJ's attention to Mr Mathopo's letter dated 8 March 2018 (attached hereto marked **Annexure "A"**). I handed the aforementioned letter to Holland-Müter AJ and I took him through each and every paragraph thereof. I highlighted the aspects addressed by Mr Mathopo in paragraphs 2 and 3 of his letter, which contained the messages which were dispatched to me by Judge Makhubele.
26. Counsel who acted on behalf of PRASA was under enormous pressure. Holland-Müter AJ asked him whether or not he was in possession of a decision or resolution adopted by PRASA's interim board, in terms of which it is confirmed that PRASA has decided to oppose any of the four applications. Holland-Müter AJ was furthermore of the view that Bowman Gilfillan Inc had sufficient time to obtain the necessary information, which was crucial for purposes of defeating the Rule 7(1) notices which were dispatched by Mr Mathopo on 7 March 2018.



Counsel conceded that he was not in possession of any documents which supports his argument, i.e. that PRASA's interim board has decided to oppose the four applications.

27. I submitted to Holland-Müter AJ that there is no reason **not** to accept Judge Makhubele's version. I furthermore submitted to Holland-Müter AJ that Judge Makhubele confirmed in the messages (which are recorded in Mr Mathopo's letter dated 8 March 2018) that PRASA's interim board has **not** decided to oppose the four applications and that the purported decision was taken by a certain Mrs Martha Ngoye. Judge Makhubele confirmed the following:

***"Those attorneys have no authority."***

28. I was satisfied and convinced that I complied with my duty as counsel towards the Court. I provided the Court with the objective and correct facts which were entrusted to me and which were in my possession. I had no reason to doubt Judge Makhubele's word. The truth should, in my respectful view and submission, always prevail. Transparency, honesty and integrity are, in my book, **not** negotiable.
29. I am 100% convinced that I did the right thing. I took the Court into my confidence and I provided the Court with all the relevant information which I was privy to. It was never my intention to embarrass either Mr Mogashoa or Judge Makhubele.



30. Having said that, Holland-Müter AJ was satisfied that a proper case has been made out and he made orders in all four applications in accordance with the relief applied for by the company.
31. Various applications ensued subsequent to the orders (four in total) which were made by Holland-Müter AJ on Friday, 9 March 2018. Messrs Mathopo and Crouse and I advised our clients (the liquidators) not to oppose any of these applications. Neither us (Messrs Mathopo and Crouse and I) nor the liquidators (our clients) filed or delivered any affidavits or reports. Our clients (the liquidators) decided, upon our advise, **not** to oppose any of the subsequent applications. PRASA initiated an application to suspend the writs which were issued pursuant to the four orders which were made by Holland-Müter AJ on Friday, 9 March 2018. The liquidators did not oppose these applications and no opposing affidavits were filed. The Honourable Mr Justice Tuchten made an order in one of these applications on 27 November 2018, under case no. 23484/2018. This application was unopposed and Tuchten J made an order in accordance with the evidence and the information which were contained in the Applicant's (PRASA) founding affidavit.
32. PRASA furthermore decided to initiate an application in terms of which Judge Brand's awards, dated 7 February 2018, are set-aside. The liquidators have decided **not** to oppose this application. This application was set-down for hearing on 9 May 2019. Bowman Gilfillan Inc removed the application by way of notice from the roll on 12 April 2019. The fact of the matter remains that the





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application to set-aside the four awards which were made by Judge Brand on 7 February 2019 remains unopposed.

33. Numerous SMS messages, WhatsApp messages and e-mails were exchanged between Judge Makhubele and I, and between Mr Mogashoa and I, and between Messrs Mathopo and Crouse and I. I am in possession of the majority of the aforementioned correspondence. I have no objection or reservation to provide the Committee with any additional information, if required. I am furthermore prepared to appear before the Committee and to address any other issues or concerns. I undertake unconditionally and irrevocably to assist the Committee in dealing with this matter and to address the issues or concerns raised by Judge Makhubele in her statement.

SIGNED AT PRETORIA ON THIS 17<sup>th</sup> DAY OF MAY 2019.



F W BOTES SC  
CLUB ADVOCATES' CHAMBERS  
PRETORIA



"A"



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VAT No: 404228787

Our ref: GTM/ SIYAYA/HCRT

Date: 8 March 2018

Your ref: Mr C Mkhwa/6179674

Bowman Gilfillan Inc.

11 Alice Lane

Sandton

Email: [clement.mkiva@bowmanslaw.com](mailto:clement.mkiva@bowmanslaw.com)

WITH PREJUDICE OF RIGHTS

Dear Sir,

IN RE : SIYAYA DB CONSULTING ENGINEERS (PTY) LTD (IN LIQUIDATION) /  
PASSENGER RAIL AGENCY OF SOUTH AFRICA - CASE NUMBERS 73933/2015,  
73934/2015 AND 47598/2016

IN RE: SIYAYA RAIL SOLUTIONS (PTY) LTD / PASSENGER RAIL AGENCY OF SOUTH  
AFRICA - CASE NO. 47597/2016

1. We represent the Applicants in the four applications which have been set-down for hearing in the High Court of South Africa, Gauteng Division, Pretoria on Friday, 9 March 2018. Our clients are the liquidators of Siyaya DB Consulting Engineers (Pty) Ltd (in liquidation).

Partner: Gabriel Tshopo Mathopo  
Associates: Kabelo Mathopo,

2. Your purported "notices of intention to oppose" the four applications are irregular and you do not have any mandate from the Board of the Passenger Rail Agency of South Africa (PRASA) to represent it in these applications and to oppose the applications on behalf of PRASA. Adv Nana Makubela SC is the Acting Chairperson of PRASA's Board. After we received your purported "notices of intention to oppose" the four applications we requested Adv Nana Makubela SC to indicate whether or not the Board of PRASA has decided to oppose the four applications. Adv Nana Makubela SC's response was as follows:

*"Those attorneys have no authority."*

*PRASA legal panel has been suspended since 1 December 2017. We are using SACAA panel.*

*I know they couldn't have been appointed through that panel. Only those who had instructions already continue.*

*I've just asked Mr Zide. He says decision was taken by Martha Ngoye and the current AGCEO."*

3. Adv Nana Makubela SC subsequently dispatched the following message to the Acting Group Chief Executive Officer of PRASA:

*"Morning AGCEO,*

*As discussed just now, I am at the Parliament office of the ministry for an urgent meeting with the DM.*

*I will be available tomorrow to discuss the issues 1 - 10.*

*I must state however that it has already come to my attention that you authorised legal services to oppose the matter under 6 and furthermore, to use the services of the suspended legal panel.*

*The matter involves me directly and I would have expected a courtesy briefing before decisions were taken.*

*I will seek legal opinion on the matter after have sight of the grounds of opposition.*

*On the issue of firm that's in the suspended panel, I believe it's further evidence of disobedience of board resolutions.*

*I will advise the board accordingly.*

*Regards*

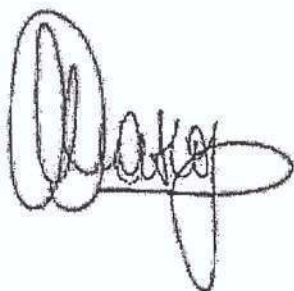
*Nana."*





4. On a proper analysis and interpretation of the aforementioned comments from Adv Nana Makubela SC it is evident that you have no mandate from the Passenger Rail Agency of South Africa to oppose these applications. We delivered a Rule 7 notice at your offices yesterday, but have not received the courtesy of any response or reply. The Board of the PRASA did not resolve or decide to oppose the aforementioned applications.
5. Retired Judge Fritz Brand made the four awards which are the subject matter of the four applications by agreement between the parties on Wednesday, 7 February 2018. PRASA has no defence in law in opposing any of the four applications.
6. We briefed senior counsel to attend to the four applications on Friday, 9 March 2018. Our clients instructions are to move all four the applications on Friday, 9 March 2018, and furthermore to disclose the content of this letter to the Presiding Judge. We have consequently instructed senior counsel to move all four the applications on Friday, 9 March 2018 and to hand a copy of this letter to the Presiding Judge.
7. Our clients have nothing to hide and our clients have conducted themselves in an honest, fair, reasonable and transparent manner. PRASA has conceded our clients' respective claims and our clients are entitled to dispose of the four applications and to finalize these matters. PRASA is, with respect, playing cat and mouse with the Court and our clients.

Yours sincerely,



**MATHOPO ATTORNEYS**

per: Mr Tshepo Mathopo

---

Partner: Gabriel Tshepo Mathopo  
Associates: Kabelo Mathopo,



"B"

**SIYAYA CONSULTING ENGINEERS (PTY) LTD****("THE COMPANY")****(IN LIQUIDATION)****MASTER'S REFERENCE T801/2017**

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**COMMISSIONERS INTERIM REPORT OF THE ENQUIRY IN TERMS OF SECTION 417 (1) AND 418 (2) OF THE COMPANIES ACT 61 OF 1973 READ WITH ITEM 9 OF SCHEDULE 5 OF THE COMPANIES ACT 71 OF 2008 ON**

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**1. APPOINTMENT**

- 1.1 The Company was wound up voluntarily in terms of a Special Resolution that was registered on the 24<sup>th</sup> of March 2017.
- 1.2 On the 25<sup>th</sup> of July 2017 the High Court of South Africa Gauteng Division, Pretoria in terms of Section 388 of the Companies Act converted the Special Resolution to a winding up by the Court.
- 1.3 In terms of the aforesaid order the court appointed me as Commissioner to hold an enquiry into the affairs of the company under sections 417 and 418 of the Companies Act, as amended.

**2. THE ENQUIRY**

- 2.1 The enquiry was held on the 28<sup>th</sup> and 31<sup>st</sup> of August 2017 at the Offices of Tshwane Trust, 1207 Cobham Road, Colbyn Pretoria.
- 2.2 The enquiry was conducted in an atmosphere of collegiality which was informed by the conduct of counsel.

2.

### 3. REPRESENTATION

- 3.1 On behalf of the Liquidators the examination of witnesses was undertaken by Adv F Botes SC, instructed by two firms of Attorneys Crouse Inc and Mathopo Inc.
- 3.2 Advocate Kennedy Tsatsawane SC instructed by Diale Mohashoe Attorneys represented the PRASA witnesses.

### 4. THE WITNESSES

Of the witnesses summoned the following gave evidence:

- 4.1 Mr S Baltic *Baltic* [Baltic]
- 4.2 Mr M Bopape
- 4.3 Mr AM Vermeulen
- 4.4 Mr V Kobiwe
- 4.5 Mr L Montana
- 4.6 Dr D Mthimkulu

### 5. BRIEF SUMMARY OF THE EVIDENCE SO FAR PRESENTED:

#### 5.1 EVIDENCE OF MR SOREN BALTIC

- 5.1.1 Mr Baltic is employed by the Passenger Rail Agency of South Africa (PRASA) as a general manager signalling and telecommunications and was responsible for level signalling and telecommunications projects within PRASA.

RE: THE TECHNICAL ASSISTANCE FOR THE SUPERVISION OF THE NATIONAL RESIGNALLING PROJECT, STAGE 1, PHASES 1 TO 5 AGREEMENT.



- 5.1.2 Mr Baltic confirmed that he was familiar with the above agreement which was entered into and concluded between PRASA and the company in liquidation on the 31st of May 2011 which was for Technical Assistance for the Supervision of the National Resignalling Project, Stage 1, Phases 1 to 5 and that the value of the contract was R54,537,600.00.
- 5.1.3 He further confirmed that he was personally involved and had personal knowledge of the way the contract was implemented and executed and that according to his knowledge the company had complied with the conditions of the contract.
- 5.1.4 Mr Baltic also said that he had no reason to believe that the company had not complied with the terms of the contract.
- 5.1.5 According to the company the amount outstanding in terms of this contract is R15,319,491.61. Mr Baltic could not confirm or deny that this figure was accurate and agreed to consult PRASA's records to confirm what was due in terms of the contract and then revert back to the liquidators and the Commission with the correct amount.
- 5.1.6 On the 8th of September 2017, I received a letter from PRASA's attorneys in which they said that their clients were investigating the matter and that they would, as soon as possible, make their findings available to the Commission.

**RE: CONSULTANCY AGREEMENT FOR "TECHNICAL ADVISOR FOR THE NEW DIGITAL RAILWAY SIGNALLING RADIO NETWORK" CONTRACT NO: HO/INFRA(T) 301/01/2013.**

- 5.1.7 Mr Baltic testified that he was familiar with the agreement.
- 5.1.8 During evidence, it appeared that the amount due in respect of agreement could not be agreed upon by the parties to the contract so the company, represented by Mr Mabunda its former CEO, and Mr Baltic agreed to meet to try and calculate the amount which is due and payable to the company and to submit their answer to the Commission and the liquidators by the 11th September 2017.

4.

- 5.1.9 On the 6th of September 2017, I received letter by e mail from PRASA's attorneys addressed to myself and the liquidators' representative Mr Boshoff, in which they confirm that their client Mr Baltic was requested to engage with Mr Mabunda to calculate the amount which was due in terms of the contract no HO/INFRA(T) 301/01/2013.
- 5.1.10 In the aforesaid letter, they say that the contract was with a company called Siyaya Rail Solutions (Pty) Ltd and not with Siyaya Consulting Engineers, the company which is the subject of the Commission of enquiry.
- 5.1.11 Accordingly, they say that it is not clear why their client has been called to testify about the affairs of Siyaya Rail Solutions (Pty) Ltd which has no links with company which is the subject of the enquiry.
- 5.1.12 In the circumstances, it would in my view be appropriate to have the contents of the aforesaid letter raised before the commission when it recommences.

## 5.2 EVIDENCE OF MR MAISHE BOPAPE

- 5.2.1 Mr Bopape is a former Senior Manager responsible for Procurement at PRASA Rail.
- 5.2.2 He explained the checks and balances within PRASA which would monitor the implementation of services required up to payment for the work when it was completed.

## RE: THE ACCELERATED INFRASTRUCTURE REFURBISHMENT PROJECT CONSULTING AGREEMENT: CONTRACT NUMBER HO/PTI(INFR)/017/06/2013

- 5.2.3 The witness has seen the contract.
- 5.2.4 He said that the contract was concluded between Siyaya with PRASA Tech and not with PRASA Rail and that only PRASA Tech would be able to confirm that the work had been done in terms of the contract.
- 5.2.5 He could not confirm that the work had been done and that PRASA Cres would be better placed to confirm or deny that the work had been done.



5.

RE: CONSULTANCY AGREEMENT FOR THE IMPLEMENTATION OF PRASARAIL  
INFRASTRUCTURE REHABILITATION PROGRAM - PHASE II: CONTRACT NUMBER  
HO/PR/INF(P)/201/04/2013

- 5.2.6 This contract was concluded between PRASA and Siyaya Consulting Engineer on the 8th of September 2014 with a contract value of R28,819,200.00 and according to Mr Bopape was signed by the authorised official at PRASA.
- 5.2.7 He said the "agreement pertaining to the asset rehabilitation programme" had been given effect to but that the End-User at PRASA would be better placed to confirm that the work had been done.
- 5.2.8 Speaking generally, Mr Bopape said that in the time that he was employed by PRASA there were no problems or issues pertaining to the company in terms of service delivery, performance, and the manner in which their work was executed.
- 5.2.9 He went on to say that some payments due to the company were not being effected by PRASA and that this could have been caused by internal issues within PRASA and not because PRASA was not happy with the work which had been done by the company.
- 5.2.10 He went on to say that as far as PRASA Rail was concerned the Asset Rehabilitation Programme which was entrusted to the company was successfully and properly and diligently attended to and executed.

RE: INTERNAL PRASA MEMORANDUM FROM DR JOSEPHAT PHULUNGULA (CHIEF  
PROCUREMENT OFFICER) TO MR TSHEPO LUCKY MONTANA (GROUP CHIEF  
EXECUTIVE OFFICER)

PROJECT DESCRIPTION: THE IMPLEMENTATION OF THE MATERIAL CODING  
PROJECT WHICH WAS INITIATED UNDER PRASA TECHNICAL FOR THE BENEFIT OF  
PRASA RAIL NATIONALLY.



6.

REQUEST TO FACILITATE THE PAYMENT OF OUTSTANDING INVOICES TO SIYAYA DB.

DATED: 2<sup>ND</sup> JUNE 2016

- 5.2.11 Mr Bopape confirmed that he drafted the above memorandum/document which was the result of a dispute between PRASA Rail and PRASA Technical which were different divisions within PRASA.
- 5.2.12 The dispute as I understood it was whether a contract was concluded or not.
- 5.2.13 The entity which benefitted from the project was PRASA Rail but the "budget and the function" was for PRASA Technical.
- 5.2.14 Mr Bopape testified to the fact that PRASA Rail was satisfied with work done and said that to the best of his knowledge the End-User was satisfied with the work that had been done.
- 5.2.15 As a consequence of the dispute he drafted the abovementioned document which was to be referred to the GCEO him to approve:
- A. *The regularisation of the appointment of Siyaya DB;*
  - B. *B That PRASA Technical concludes and signs a contract with Siyaya DB to the tune of R14,000,000.00 excluding Vat;*
  - C. *That upon the successful conclusion and signing of the contract, PRASA Technical effect payment of R14,000,000.00 owed to Siyaya DB as settlement done for work done under the material coding project.*
- 5.2.16 Mr Bopape said amount due at that point in time (the 8th of May 2015) was R14,000,000.00.
- 5.2.17 The recommendation was approved by the Group CEO Mr Montana on the 19th of June 2015 subject to "a written explanation why disciplinary action should not be instituted against managers who gave a go ahead without first obtaining approval, as required by the Group SCM Policy."

7.

5.2.18 Mr Bopape said that this basically says that "I (the CEO, Mr Lucky Montana) confirm and agree with all that has been said in this document and I support and recommend that payment be made."

5.2.19 The witness then went on to confirm that the company "without any doubt" was entitled to be paid the amount of R14,000,000.00 by PRASA.

5.2.20 When I asked the witness what "regularising" the contract meant he said it meant the "signing" of the contract.

### 5.3 THE EVIDENCE OF MR AM VERMEULEN

5.3.1 Mr Vermeulen is an engineer employed by PRASA and is responsible for Infrastructure Operational Services PRASA Rail on a national basis.

#### RE: CONSULTANCY AGREEMENT FOR THE IMPLEMENTATION OF PRASARAIL INFRASTRUCTURE REHABILITATION PROGRAM – PHASE II: CONTRACT NUMBER HO/PR/INF(P)/201/04/2013

5.3.2 Mr Vermeulen is aware of the above agreement which was concluded between PRASA Rail and the company for the rehabilitation of certain infrastructure that needed to be attended to.

5.3.3 He explained that there were two contracts, one for phase 1, and another for phase 2 and that the amount due in terms of the contracts was R26 million and R28 million totalling R54 million of which about R54 million was paid.

5.3.4 After he had done a reconciliation his estimate was that R1.8 million was due but that the final amount will be determined "on some interpretation that both parties will agree on.

5.3.5 It was agreed at the Commission that Mr Vermeulen and Mr Mabunda would meet to calculate what amount was due to the company by PRASA in terms of the contract.

5.3.6 On the 8th of September 2017, I received a letter by e mail from PRASA's attorneys addressed to myself and the liquidators' representative Mr Boshoff in which they



8.

confirm that their client Mr Vermeulen was requested, with the assistance of Mr Mabunda, to investigate if there were payments outstanding and due to the company.

- 5.3.7 In the letter, they say that in terms of their client's records PRASA overpaid the company by an amount of R1,191,530.00 and that they awaited the liquidator's response to their submissions.

#### 5.4 THE EVIDENCE OF MR V KOBUWE

- 5.4.1 Mr Kobuwe confirmed that he is still in the employ of PRASA and that he is the Executive Manager for Infrastructure.

**RE: THE ACCELERATED INFRASTRUCTURE REFURBISHMENT PROJECT  
CONSULTING AGREEMENT: CONTRACT NUMBER HO/PT/(INFR)/017/06/2013**

- 5.4.2 The witness confirmed that he was familiar with the agreement.

- 5.4.3 At the commission, it was agreed that Mr Kobuwe would engage with Mr Mabunda, the CEO the company, to compare his (PRASA) records with the records of the company "insofar as instruction is concerned, and where there was communication to attend to what is contained in invoices 12, 13 and 14 and to establish whether there was a lawful instruction and whether or not it was executed".

- 5.4.4 On the 6<sup>th</sup> of September 2017, I received a letter by e mail addressed to the liquidators' representative and myself from PRASA's attorneys in which they confirm that the their client Mr Kobuwe was requested, with the assistance of Mr Mabunda, to clarify whether "Siyaya Consulting Engineers (Pty) Ltd (the company) additional works and invoices in respect thereof were in line with the existing contractual terms and/or instructions as the case may be."

- 5.4.5 In the letter, they request that prior to any engagement between the parties a valid contract signed by both parties on the basis of which Siyaya Consulting Engineers (Pty) Ltd attended to additional works should be made available to their client,



9.

alternatively, that "Siyaya Consulting Engineers (Pty) Ltd should make available to Mr Kobozev express instructions, by or on behalf of PRASA, which directed that Siyaya Consulting Engineers (Pty) Ltd attends to such additional works".

- 5.4.6 The letter concludes by saying that the aforesaid requirements need to be complied with "before Mr Kobozev can start engaging you further on this matter".

## 5.5 EVIDENCE OF MR MONTANA

- 5.5.1 Mr Montana confirmed that he was the former Group Chief Executive Officer of PRASA.
- 5.5.2 Mr Montana began by giving a summary of the importance of railway infrastructure in the economy of the country and how PRASA was established.

**RE: INTERNAL PRASA MEMORANDUM FROM DR JOSEPHAT PHULUNGULA (CHIEF PROCUREMENT OFFICER) TO MR TSHEPO LUCKY MONTANA (GROUP CHIEF EXECUTIVE OFFICER)**

**PROJECT DESCRIPTION: THE IMPLEMENTATION OF THE MATERIAL CODING PROJECT WHICH WAS INITIATED UNDER PRASA TECHNICAL FOR THE BENEFIT OF PRASA RAIL NATIONALLY.**

**REQUEST TO FACILITATE THE PAYMENT OF OUTSTANDING INVOICES TO SIYAYA DB.**

**DATED: 2ND JUNE 2016**

- 5.5.3 Mr Montana was familiar with the document which he had approved.
- 5.5.4 He confirmed that the work had been done and that the company was entitled to payment. By confirming this he corroborated the evidence of Mr Bopape mentioned in paragraph 5.2 of this report.

10.

RE: DEPOT PROGRAMME: TECHNICAL DESIGNS AND TENDER FOR BRAAMFONTEIN  
AND SALT RIVER CONSULTING AGREEMENT: CONTRACT NUMBER:  
HO/PT(DM)/014/08/2013

- 5.5.5 Mr Montana signed the contract on behalf of PRASA and gave the reason for its genesis.
- 5.5.6 He confirmed that the work was done by the company in terms of the contract was done, implemented and completed to the satisfaction of the End-User.
- 5.5.7 He also confirmed that the amount due and payable in terms of the contract was R15,371,793.87.

RE: CONSULTANCY AGREEMENT FOR "TECHNICAL ADVISOR FOR THE NEW  
DIGITAL RAILWAY SIGNALLING RADIO NETWORK" CONTRACT NO: HO/INFRA(T)  
301/01/2013.

- 5.5.8 Mr Montana said that the work was done and the amount (which could not be agreed upon with Mr Baltic) was due and payable.

5.6 EVIDENCE OF DR MTHIMKULU

- 5.6.1 Dr Mthimkulu was a formerly employed by PRASA as the Executive Manager Infrastructure and Rolling Stock.

RE: PROJECT CHARTER- YEAR 1 MATERIAL MANAGEMENT AND CODING- ROLLING  
STOCK AND INFRASTRUCTURE (YEAR 1)

- 5.6.2 Dr Mthimkulu confirmed that an amount of R16,999,322.00 was allocated to this project.

RE: DATA CLEANSING PROJECT – ROLLING STOCK AND INFRASTRUCTURE

5.6.3 Dr Mthimkulu confirmed unreservedly that the amount of R17,628,118.59 is due and payable in terms of the above two contracts because the company had successfully executed the Material Management Programme and the Data Cleansing Programme.

RE: INTERNAL PRASA MEMORANDUM FROM DR JOSEPHAT PHULUNGULA (CHIEF PROCUREMENT OFFICER) TO MR TSHEPO LUCKY MONTANA (GROUP CHIEF EXECUTIVE OFFICER)

PROJECT DESCRIPTION: THE IMPLEMENTATION OF THE MATERIAL CODING PROJECT WHICH WAS INITIATED UNDER PRASA TECHNICAL FOR THE BENEFIT OF PRASA RAIL NATIONALLY.

REQUEST TO FACILITATE THE PAYMENT OF OUTSTANDING INVOICES TO SIYAYA DB.

DATED: 2ND JUNE 2016.

5.6.4 Dr Mthimkulu is familiar with this document and aligned himself with what is said in it and knows of no reason why the R14,000,000.00 should not be paid.

SIGNED AT PRETORIA ON 15<sup>TH</sup> SEPTEMBER 2017

  
NIEL KRIGE – COMMISSIONER

TO: The Registrar High Court Gauteng Division, Pretoria

TO: The Master of the High Court, Pretoria

TO: Crouse Inc – Attorneys for the Liquidators

TO: Mathopo Inc – Attorneys for the Liquidators



12.

From: Francois Botes fwbotes@law.co.za  
 Subject: Re: SIYAYA // PASSENGER RAIL AGENCY OF SOUTH AFRICA  
 Date: 06 Sep 2017 at 10:10:26  
 To: Madimpe Mogashoa Madimpe@dm-inc.co.za  
 Cc: Ncebakazi Mbebe Ncebakazi@dm-inc.co.za, Tshepo Mathopo  
 tshopo@mathopo.co.za, Mawande Seti - Baza  
 mawande@thulamolachambers.co.za, Kennedy kenglaw.co.za  
 Bcc: Justus Van Wyk justus@vanwykeditors.com, Willem Schoeman  
 willem@vanwykeditors.com, Johan Crouse  
 johan@crouseinc.co.za, hannes@tshwanetrust.co.za,  
 izak@tshwanetrust.co.za

Dear Madimpe,

Thank you for the comprehensive letter. Kennedy and I discussed this issue comprehensively on various occasions and I labored under the apprehension that Kennedy was duly instructed and mandated by you and your client to agree to a postponement. It seems that Kennedy "went on a frolic of his own".

If it is your client's instruction that the arbitration should proceed on Monday, so be it! There is nothing that I can do to persuade your client otherwise.

I will ask Commissioner Krige to expedite his report so that it can be discovered in accordance with the provisions of Rule 35. I believe that the record is in the process of being finalized. Once we are in possession of the record it will be discovered in accordance with the provisions of Rule 35. The record speaks for itself: *res ipsa loquitur*.

You were present at the insolvency enquiry and you personally witnessed the testimony of your client's employees and former employees under oath. You and Kennedy witnessed the material and fundamental concessions and admissions that were made by your client's employees and former employees.

Your client's Mr Soren Baltac conceded Siyaya's claim which forms the subject matter of case no 47597/2016 in the amount of R21 626 138. Your Mr Soren Baltac undertook, under oath, to verify and confirm the amount that is due and payable to Siyaya and to revert to Commissioner Krige within a week. Commissioner Krige excused Mr Soren Baltac and Mr Johan Edwards to afford them an opportunity to verify the correct amount that is due and payable to Siyaya. My instructions are that Mr Soren Baltac verified the amount due and payable by PRASA to Siyaya, being

13.

R19 700 000. This amount is therefore NOT in dispute and your client should pay it immediately in full and final settlement of the claim in respect of case number 47597/2015. Does your client persist in pursuing the arbitration under these circumstances ?

Your client's Mr Tony Vermeulen conceded that PRASA is liable and responsible to pay an amount "of at least between R2 milj and R3 milj" to Siyaya in respect of the claim which forms the subject matter of Siyaya's claim under case number 73934/2015. You will recall that Mr Vermeulen initially mentioned that "an amount of approximately R5 milj" is due and payable, but immediately corrected himself. His explanation in this regard was that "it is a matter of interpretation". Do you recall his testimony in this regard ?

Commissioner Krige excused Mr Vermeulen to afford him and Mr Mabunda an opportunity to meet and to verify the correct amount that is due and payable by PRASA to Siyaya. Mr Vermeulen was keen to resolve this dispute and to do his best to liaise with Mr Mabunda to settle this claim. My instructions are that this meeting will take place on Friday, 8 February 2017. We are eagerly awaiting the outcome of these discussions. Does your client persist in pursuing the arbitration against this backdrop ?

Your client's Mr Maishe Bopape conceded, under oath, that PRASA is liable and responsible to pay an amount of R8 095 950 in respect of Siyaya's claim which forms the subject matter of the claim instituted under case no 73933/2015. He furthermore confirmed that the works were executed to PRASA's satisfaction. Does your client persist in pursuing the arbitration under these circumstances ?

Mr Maishe Bopape furthermore admitted and confirmed, under oath, that PRASA is



14.

liable and responsible to pay "at least R14 000 000" to Siyaya in respect of its claim which forms the subject matter of case no 74281/2015. You were present when this was canvased with Mr Bopape. Mr Bopape was the author of the Memorandum dated 2 June 2015 : annexure POC 18. Does your client persist in pursuing the arbitration under these circumstances ?

Mr Lucky Montana confirmed and conceded, under oath, that PRASA is responsible and liable to pay an amount of R17 628 118 to Siyaya in respect of its claim instituted under case no 74281/2015. Does your client persist in pursuing the arbitration under these circumstances ?

Mr Lucky Montana furthermore confirmed and conceded, under oath, that PRASA is liable and responsible to pay an amount R15 371 739 to Siyaya in respect of its claim which forms the subject matter of case no 47598/2015. The record will reflect his testimony in this regard. Does your client persist in pursuing the arbitration under these circumstances ?

With the greatest respect : PRASA doesn't have a leg to stand on, nor does it have a valid defense in law. On its witnesses' own version, having regard to the benefit of doubt, the following amounts are, subject to verification and confirmation, due and payable to Siyaya :

73934/2015 = R3 300 000

73933/2015 = R8 000 000

74281/2015 = R14 000 000

47598/2015 = R15 000 000

47597/2015 = R19 700 000

TOTAL : R60 000 000

PJW ± R25 000 000 not part of wav. enquiry

Total : R85 000 000 - \$0



15.

In the event that your client persist with the view and attitude that Kennedy had NO mandate to agree to a postponement, then I suggest that you inform Judge Brand immediately. Kennedy and I were on the same page : we understood each other and you can accept that there was no misunderstanding between us.

Let's not play "cat-&-mouse" with each other Madimpe. On Sunday, 3 September 2017 @ 13h44, I addressed a letter, via email to everybody concerned herein, including you, Kennedy and Judge Brand, in which I confirmed the agreement reached between Kennedy and I regarding the postponement. Neither you, nor Kennedy activated the panic button and objected hereto. You wait 3 days and suggest that "I should consult with my clients regarding this and revert to you at the earliest".

What is there to revert about Madimpe ? Please allow me to suggest the following :

1. Please follow up on the progress of the verification and confirmation of the amounts referred to herein above and revert to us at the earliest; and
2. Please advise your client, in the light of the evidence that was adduced under oath during the insolvency inquiry, to submit a fair and reasonable offer or tender in respect of the claims which were referred to arbitration and revert to us at the earliest.

In the event that we are successful to settle some of the claims, we should continue with the arbitration only in respect of the remainder of the claim/s which are still in dispute. Judge Brand confirmed that he is available from 4 December to 15 December 2017 to assist the parties in this regard.

16.

I trust that we are on the same page now and that you will obtain proper and meaningful instructions from your client to dispose of all the outstanding issues in an effective and expeditious manner. We should not be seen to drag our feet and to play for time at our clients expense. We are duty bound to act in a responsible and diligent manner. We should therefore display leadership and act pro-actively in resolving these disputes !

Kind regards,



FRANCOIS WEIDEMAN BOTES SC  
HIGH COURT CHAMBERS, PRETORIA  
220 Madiba street, Pretoria, 0002 | Private Bag X480, Pretoria, 0001

Tel : (012) 303-7566  
Fax : (012) 303-7983  
Email : fwbotesc@law.co.za

On 06 Sep 2017, at 20:47, Madimpe Mogashoa <Madimpe@dm-inc.co.za> wrote:

Dear Francois

I thought it fit that we deal with this in camera with us being the parties' legal representatives.

The position as we have it is that indeed you and Kennedy discussed the various options there may be regarding these matters and as well our letter that had raised concerns regarding the plaintiff's readiness for the arbitration proceedings that are meant to commence on the 11<sup>th</sup> next week.

17.

Apart from the fact that you may have expressed similar challenges regarding the plaintiff's readiness to start with its cases, and furthermore outside of the activities that may be related to the liquidation proceedings, our client has yet to agree to the postponement of next week's proceedings if it is communicated to it, and what the terms thereof would be. In other words there is no agreement to have the proceedings postponed and that should it now be the plaintiff's position that the matters be postponed, that in that event that should be communicated to us in order that we take instructions from PRASA.

Consequently we wish that you consult with your clients regarding this and revert to us at the earliest.

We hope to hear from your team soon.

Regards

<image001.jpg>

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From: Fritz D J Brand [mailto:fritz.dj.brand@nwsh.co.za]

Sent: 05 September 2017 08:08 AM

To: Francois Botes

Cc: Ncebakazi Mbebe; Madlape Mngushwa; Mapule Bulanyo; 'Tshepo Mathopo'; 'Mawande Seti - Bazo'; 'Kennedy'; 'Justin Van Wyk'; 'Willem Nelman'; 'makhenka mabunde'

Subject: RE: SIYAYA // PASSENGER RAIL AGENCY OF SOUTH AFRICA

Thank you Mr Botes. I am looking forward to hear from the parties.

Kind regards,

Fritz Brand

From: Francois Botes [mailto:f.botes@nwsh.co.za]

Sent: Monday, 04 September 2017 19:26

To: Fritz D J Brand

Cc: Ncebakazi Mbebe; Madlape Mngushwa; Mapule Bulanyo; 'Tshepo Mathopo'; 'Mawande Seti - Bazo'; 'Kennedy';



I've forwarded the letter to Prasa with instructions to enquire from Mogashoa if he received this & to forward same ASAP . Our instructions were transparent hence I forwarded the copy to you. The intention was to have an open discussion with you & our attorneys but due to your unavailability we instructed him to engage your clients. I think the correctness of the calculation of interest will be verified by Prasa finance. The principle is acceptable and those were the instructions .

Regards,

Nana.

" C "

"D"

www.prasa.com


**prasa**

 PASSENGER RAIL AGENCY  
OF SOUTH AFRICA

 PRASA HOUSE  
1040 Burnett Street  
Hatfield  
Pretoria

 Private Bag X101  
Braamfontein, 2017  
T: +27 12 748 7000

Diale Mogashoa Attorneys  
Brookfield Office Park  
Ground Floor, South Block  
272 Bronkhorst Street  
Nieuw Muckleneuk  
Brooklyn, Pretoria

Dear Mr Mogashoa

**SIYAYA DB CONSULTING ENGINEERS (PTY) LTD (NOW IN LIQUIDATION)**

1. I confirm that you were instructed to defend the actions instituted at the Gauteng Division of the High Court Pretoria, under the case numbers indicated hereunder.
2. Furthermore I confirm the meeting held between yourself and the Chairperson of the Interim Board of Control on 15 December 2017, and that you were instructed as follows:

**A) Siyaya DB Consulting Engineers (now in liquidation)**

- 2.1 In respect of Case No. 74281/15- PRASA's instructions are that you pend both the file and the arbitration proceedings until receiving further instructions. You are also instructed to confirm with the liquidators the amount claimed by Siyaya. According to the documents attached in the particulars of claim, the matter appears to arise from an initial contract of R 5.6 million which appears to have been settled. The total amount for the project is indicated as R 14 million. In this regard, the

**Directors**

Adv. TAN Makhubele SC (Chairperson), C Molepo (Acting Group CEO)  
G Maluleke, X George, Dr. N Skoopers, MC Reddy  
Prof. J Maluleke

Company Secretary  
L. Zide



outstanding amount if any, will be the difference between the R 14 million and R 5.6 million which Siyaya conceded in a memo provided to PRASA, to have been paid and received.

- 2.2 In respect of Case No. 77333/15- You have advised the Chairperson that you did not file a plea because it was agreed between you and Siyaya legal representatives that the amount claimed under this matter was paid in April 2016.
- 2.3 In respect of Case No. 73934/15- The amount claimed is R7 098 481.66, PRASA's instructions is for settlement of this matter, as per the amount claimed.
- 2.4 In respect of Case No. 73933/15- the amount claimed is R 8 095 950.00, PRASA's instructions is for settlement of this matter, as per the amount claimed.
- 2.5 In respect of Case No. 47598/16- The amount claimed is R 15 371 739.87, PRASA's instructions is for settlement of this matter, as per the amount claimed.

**B) Siyaya Rail Solutions (PTY) LTD**

- 2.6 In respect of Case no 47597/16- the amount claimed is R 21 million. However, after investigations and verifications PRASA's instructions are that the amount that is due and payable for settlement is R19 583 778.42 (Including vat).

**C) Interest Payable**

- 2.7 It was noted that in some instances in the summons instituted, the interest claimed was to be reckoned from the date of invoice.
- 2.8 The instruction to you is that the payment of interest should be reckoned from the date of summons.





**D) Full and Final Offer**

2.9 You are instructed to tender this offer as follows:

2.9.1 Liquidators of the Siyaya DB Consulting Engineers (Now in Liquidation), in the total amount of R30 566 171.53 plus interest.

2.9.2 Attorneys representing Siyaya Rail Solutions (PTY) LTD, in the total amount of R 19 583 778.42 plus interest.

**E) Confidentiality Clause**

2.10 As discussed with the Chairperson you are to include the confidentiality Clause in the Settlement offer.

Please advise as soon as possible if this offer is acceptable.

Kind regards,

LINDIKAYA ZIDE

GROUP COMPANY SECRETARY

DATE: 15/12/2017.

"E"

**PRIVATE ARBITRATION**

**CORAM: THE HONOURABLE RETIRED JUDGE FDJ BRAND**

**CASE NO. 73933/2015**

In the matter between:

**SIYAYA DB CONSULTING ENGINEERS (PTY) LTD  
(IN LIQUIDATION)**

**PLAINTIFF**

and

**PASSENGER RAIL AGENC OF SOUTH AFRICA  
("PRASA")**

**DEFENDANT**

---

**AWARD**

---

**HAVING PERUSED** the Defendant's settlement offer dated 21 December 2017, which offer was accepted by the Plaintiff on the same day, the following award is made:-

1. The Defendant is ordered to pay the amount of R9 752 847,16 to the Plaintiff;

2. The Defendant is ordered to pay interest *a tempore morae* on the amount of R9 752 847,16 at the rate of 9% per annum, calculated from <sup>16 January</sup> ~~22 December~~ <sup>2017</sup> until date of final payment, both days inclusive, to the Plaintiff;
3. The Defendant is ordered to pay the amounts referred to and contained in paragraphs 1 and 2 *supra* into the following bank account:
- Name of account holder: Crause Inc Trust Account  
Bank: Standard Bank of South Africa Ltd  
Branch: Menlyn  
Account no. 081324839  
Ref: Siyaya (in liquidation)
4. Each party is liable to pay its own legal costs.

By order,



Retired Judge FDJ Brand  
7 February 2018



"F"

**PRIVATE ARBITRATION****CORAM: THE HONOURABLE RETIRED JUDGE FDJ BRAND****CASE NO. 73934/2015**

In the matter between:

**SIYAYA DB CONSULTING ENGINEERS (PTY) LTD  
(IN LIQUIDATION)****PLAINTIFF**

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA  
("PRASA")****DEFENDANT**

---

**AWARD**

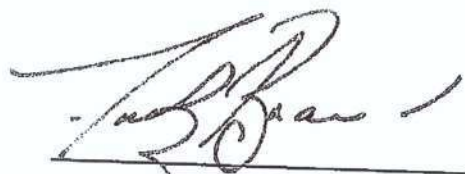
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**HAVING PERUSED** the Defendant's settlement offer dated 21 December 2017, which offer was accepted by the Plaintiff on the same day, the following award is made:-

1. The Defendant is ordered to pay the amount of R8 551 239,41 to the Plaintiff;

2. The Defendant is ordered to pay interest *a tempore morae* on the amount of R8 551 239,41 at the rate of 9% per annum, calculated from <sup>16 January</sup> ~~22 December~~ 2017 until date of final payment, both days inclusive, to the Plaintiff;
3. The Defendant is ordered to pay the amounts referred to and contained in paragraphs 1 and 2 *supra* into the following bank account:
- Name of account holder: Crause Inc Trust Account  
Bank: Standard Bank of South Africa Ltd  
Branch: Menlyn  
Account no. 081324839  
Ref: Siyaya (in liquidation)
4. Each party is liable to pay its own legal costs.

By order,



Retired Judge FDJ Brand  
7 February 2018

"S"

**PRIVATE ARBITRATION****CORAM: THE HONOURABLE RETIRED JUDGE FDJ BRAND****CASE NO. 47597/2016**

In the matter between:

**SIYAYA RAIL SOLUTIONS (PTY) LTD****PLAINTIFF**

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA  
("PRASA")****DEFENDANT**

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**AWARD**

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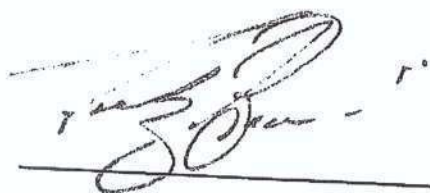
**HAVING PERUSED** the Defendant's settlement offer dated 21 December 2017, which offer was accepted by the Plaintiff on the same day, the following award is made:-

1. The Defendant is ordered to pay the amount of R22 693 575,12 to the Plaintiff;



2. The Defendant is ordered to pay interest *a tempore morae* on the amount of R22 693 575,12 at the rate of 9% per annum, calculated from 22 December 2017 until date of final payment, both days inclusive, to the Plaintiff; <sup>16 January 2018</sup>
3. The Defendant is ordered to pay the amounts referred to and contained in paragraphs 1 and 2 *supra* into the following bank account:
- Name of account holder: Crause Inc Trust Account  
Bank: Standard Bank of South Africa Ltd  
Branch: Menlyn  
Account no. 081324839  
Ref: Siyaya Rail Solutions (Pty) Ltd
4. Each party is liable to pay its own legal costs.

By order,



Retired Judge FDJ Brand  
7 February 2018

"H"

**PRIVATE ARBITRATION****CORAM: THE HONOURABLE RETIRED JUDGE FDJ BRAND****CASE NO. 47598/2016**

In the matter between:

**SIYAYA DB CONSULTING ENGINEERS (PTY) LTD  
(IN LIQUIDATION)****PLAINTIFF**

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA  
("PRASA")****DEFENDANT**

---

**AWARD**

---

**HAVING PERUSED** the Defendant's settlement offer dated 21 December 2017, which offer was accepted by the Plaintiff on the same day, the following award is made:-

1. The Defendant is ordered to pay the amount of R17 870 174,03 to the

Plaintiff;

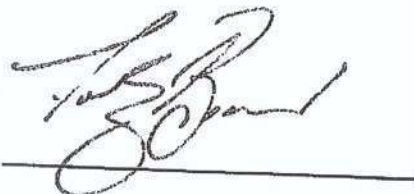
2. The Defendant is ordered to pay interest *a tempore morae* on the amount of R17 870 174,03 at the rate of 9% per annum, calculated from 22 December 2017 until date of final payment, both days inclusive, to the Plaintiff;

3. The Defendant is ordered to pay the amounts referred to and contained in paragraphs 1 and 2 *supra* into the following bank account:

Name of account holder: Crause Inc Trust Account  
Bank: Standard Bank of South Africa Ltd  
Branch: Menlyn  
Account no. 081324839  
Ref: Siyaya (in liquidation)

4. Each party is liable to pay its own legal costs.

By order,



Retired Judge FDJ Brand  
7 February 2018



**03.**  
**F BOTES**  
**2ND AFFIDAVIT**  
**(20 MAY 2020)**

---

**AFFIDAVIT**

---

I, the undersigned,

**FRANCOIS WEIDEMAN BOTES**

**Identity number 660924 5095 080**

do hereby declare under oath as follows:

1.

1.1. I am a senior advocate and a member of the Pretoria Society of Advocates since 1997 and practicing as such at Suite 3-25, Club Advocates' Chambers, 30 Pinaster Street, Hazelwood, Pretoria, Gauteng.

1.2. The facts hereinafter deposed to fall within my personal knowledge and are both true and correct.

2.

I prepared a written response to the complaint that was lodged against me by the Honourable Madam Justice TAN Makhubele (hereinafter referred to as "*Judge Makhubele*") dated 17 May 2019. The complaint was lodged by Judge Makhubele on 18 February 2019.



## 3.

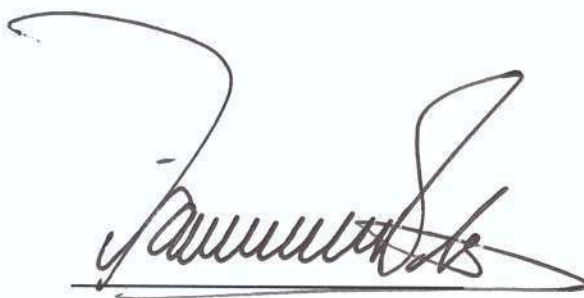
I referred in paragraph 11.2 of my written response to a telephonic conversation between Judge Makhubele and I which transpired during November 2017.

- 3.1. I, once again, confirm that Judge Makhubele initiated contact with me on my cellular telephone pursuant to her being appointed as the Chairperson of PRASA's interim board. I was totally unaware of her aforementioned appointment.
- 3.2. I furthermore confirm that Judge Makhubele informed me that she was appointed by former President Zuma as Chairperson of PRASA's interim board, the purpose of which was specifically to "*clean up*" at PRASA and to "*sort out the mess*".
- 3.3. I did not ask Judge Makhubele to elaborate on the specific reasons why former President Zuma has decided to deploy her at PRASA and to appoint her as the Chairperson of PRASA's interim board.
- 3.4. The impression that I got was that Judge Makhubele was deployed by former President Zuma to "*wrap up all the outstanding and pending litigation*", so as to clear the backlog of litigation and to do everything within her means to settle or to finalize matters which were capable of being settled or finalized, and to pursue the remaining matters, either by way of litigation, or by means of arbitration, in respect of those matters which could not be settled or resolved.

DATED AT PRETORIA ON THIS 20<sup>TH</sup> DAY OF MAY 2020.







DEPONENT

The deponent has acknowledged that the deponent knows and understands the contents of this affidavit, which was signed and sworn before me at PRETORIA on this the 20<sup>TH</sup> day of MAY 2020, the regulations contained in the Government Gazette Notice No R1258 of 21 July 1972, as amended, and Government Gazette Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

FULL NAMES: MARTINUS PHILIPPUS VAN DER MERWE

DESIGNATION: ATTORNEY

ADDRESS: FOURWAY  
COR. R513 & R515  
CULLINAN

**04.**

**LETTER STATING COMPLAINT  
OUTCOME**

## *Pretoria Society of Advocates*

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22 May 2020

Adv FW Botes SC  
Room 3-25  
THE CLUB ADVOCATES' CHAMBERS

Sir

### **COMPLAINT LODGED AGAINST YOU BY THE HONOURABLE MADAM JUSTICE TAN MAKHUBELE**

The Professional and Ethics Committee of the Pretoria Bar investigated the above complaint and resolved that there was no merit in the charges brought against you by Makhubele J and accordingly, that no further steps are to be taken.

Kind regards



**DEON GERICKE**  
**GENERAL MANAGER**

/ybr  
2020-05-22