



EXHIBIT SS 19

**TINTSWALO ANNAH
MAKHUBELE**



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

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

In the **PRASA HEARINGS**

Rule 3.3 Notice in respect of the evidence of **ADVOCATE FRANCOIS
WEIDEMAN BOTES SC**

AFFIDAVIT

I, the undersigned,

TINTSWALO ANNAH MAKHUBELE
Identity number 6404021058084

do hereby declare under oath and state as follows;

- [1] I am a Judge of the High Court of South Africa, Gauteng Division, Pretoria, Gauteng Province.
- [2] The facts deposed to herein are within my own personal knowledge unless the context indicates otherwise or expressly stated.
- [3] On or about 26 May 2020 I received a Rule 3.3 Notice with regard to the evidence of **Advocate Francois Weideman Botes SC** (Advocate Botes SC) which I was advised the commission's legal team intended to present during its 'PRASA HEARINGS'. I was advised about my rights in relation thereto.
- [4] I spent two weeks in the urgent court during the month of June and it was difficult to find time to focus on personal matters whilst at the same

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time maintaining the required preparedness to hear matters and issue urgent judgments.

[5] I must mention that I received three other Rule 3.3 Notices on 21 February and I had raised certain objections that I believed deserved to be resolved. It is also important to note that the issues that form the subject matter of these Rule 3.3 Notices are before the Judicial Conduct Committee, which decided on 20 March 2020 to recommend to the Judicial Service Commission that a Tribunal be established to investigate the allegations. It is the same allegations. Arising from the same facts. Made by the same witnesses or complainants.

[6] I read the affidavit of Advocate Botes SC a week ago. I immediately wrote a letter to the Secretary of the Commission and advised them that I wanted to file an affidavit and also do every other thing that I am entitled to do in terms of the Rules of the Commission.

The relevant parts of letter read as follows:

1. *After considering the 'evidence' in the affidavits of the said witnesses, particularly that of Advocate Botes SC, I have decided to accept the offer to submit my own affidavit / sworn statement and to claim the other rights that I have as indicated in the Rule 3.3 Notices and any other rights as provided in the Rules of the State Capture Commission.*
2. *In this regard, I hereby tender a consultation with the Commission's legal team and forensic investigators. The purpose of consulting with the forensic investigators is to submit evidence to rebut any allegations made by Advocate Botes SC which is capable of being adjudicated on forensic evidence.*
3. *I therefore request that a determination of a date of hearing of the evidence of Advocate Botes SC (and any other witnesses) be put on hold pending finalization of the forensic investigations. I do not know what forensic investigations entails but I believe it will include analyzing the records of my electronic devices and telephone records.*
4. *I also wish to withdraw any objections made through my erstwhile legal representatives, Bokwa Attorneys and subsequent email / letters exchanged between me and the commission's secretariat and legal team during April 2020.*
5. *I therefore advise further that I am ready to provide a sworn statement / affidavit in respect of the previous Rule 3.3 Notices issued in relation to the evidence of;*

(a) Mr Mfanimpela Moses Dingiswayo,

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- (b) Ms Onica Martha Ngoye, and;
- (c) Mr Abdurrazack "Zackie" Achmat.

6. *Kindly advise the legal team and forensic investigators to get in touch with me as soon as possible.*
7. *I took this decision without the benefit of legal assistance or opinion. This is because as I understand the procedures and roles, the legal team and investigators are enjoined by the enabling legal prescripts to take statements of witnesses and implicated persons and to conduct relevant investigations arising therefrom with a view to obtaining evidence that will assist the Chairperson of the Commission to discharge his duties in a fair, impartial and objective manner.*
8. *I reserve my rights to obtain legal assistance at anytime of the proceedings should a need arise.*

[7] The Secretary confirmed receipt of my letter by email on the same day and advised me that the letter has been 'transmitted to the relevant parties for their input'

[8] This affidavit must be read with the contents of the letter (and annexures) that I have written to the Secretary today and copied the same recipients. The letter, attached hereto as **Annexure "AA"** reads as follows:

1. **YOUR FAILURE TO RESPOND TO MY LETTER DATED 23 June 2020,**
2. **OBJECTION TO THE ALLEGED SCHEDULED HEARING OF THE EVIDENCE OF ADVOCATE FRANCOIS WEIDEMAN BOTES SC; AND**
3. **APPLICATION TO TESTIFY AND TO CROSS EXAMINE ADVOCATE FRANCOIS WEIDEMAN BOTES SC**

1. *This letter will address the three headings in sequence.*
2. *I refer to my letter dated 23 June instant as well as your email confirmation on the same day at 11:05:15 that it has been received and will be 'transmitted to the relevant parties for their input'. Copies of the letter and your email are attached hereto as Annexures "A" and "B" respectively.*
3. *I have not received a formal letter from anyone, save for a telephone call from Adv. Vas Soni SC on Thursday, 25 June 2020 at about 14:23.*
- 3.1 *Adv. Soni SC advised me that he was one of the evidence leaders at the State Capture Commission and that he received a report that I had requested to consult with the legal team and the forensic investigators. The purpose of his call was to make arrangements with*

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me to consult on the Rule 3.3 Notices referred to in my letter and previous correspondence from the Secretariat. He assured me that I was still going to receive a formal letter but that in the meantime he wanted us to make arrangements for the consultation. He also indicated his unavailability until Friday, 03 July 2020 as he would be attending to the resumed hearings from Monday, 29 June.

I informed him that I was also not available in this week because I have scheduled court hearings until Friday, 03 July. We then agreed as follows;

- 3.2 That we were going to meet in the week starting on Monday, 06 July 2020. The date was going to be confirmed.
- 3.3 That in the meantime I was going to dispatch certain documents to him, particularly in relation to the complaint that I have filed against Advocate Francois Weideman Botes SC (Advocate FW Botes SC) at the Pretoria Society of Advocates. He would study the documents to enable him to formulate issues that I needed to address with regard to each witness. This arrangement was informed by the fact that my version as far as I am concerned is contained in these documents, except for one or two new issues that appear in the affidavit filed by Advocate FW Botes SC which I was going to bring a draft response to.
- 3.4 That if I had no objection, he was going to ask one of the forensic investigators to attend the consultation so that he could explain to me the process entailed in forensic investigations of devices and phone records. I have made a request for this in my letter.
- 3.5 The documents would be delivered at his chambers but the consultation was going to take place at the offices of the State capture Commission.
4. Advocate Soni called me again on Saturday, 27 June 2020 at about 11:15. He informed me that as he was checking a schedule for the hearings that are going to commence on Monday, 29 June 2020, he realized that Advocate FW Botes SC was one of the witnesses that are scheduled to testify.
This information obviously came as a shock to me because besides your failure to respond to my letter, you have also failed to give me notice of the hearing or confirm the date as indicated in your Rule 3.3 Notice. The relevant part is in paragraph 1 which reads, amongst others as follows:

"... The presentation of Adv Botes' evidence will commence on a date to be confirmed at a later stage"
- 4.1 I confirm that in the past the Commission has indeed given me notice of dates of presentation of evidence of witnesses in respect of whom it had issued Rule 3.3 Notices. I attach hereto as **Annexures "C" and "D"** respectively the notices in respect of the hearing dates in relation to Ms Onica Martha Ngoye and Mr Abdurrazack "Zackie" Achmat.
- 4.2 I made it clear in my letter dated 23 June, which you received but did not give me a courtesy of a reply that more than anything else, I

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wanted to present an affidavit in respect of the evidence of Advocate Botes SC and that I intended to make relevant applications in relation thereto.

- 4.3 I do not have to remind you about the prejudice that I will suffer because my rights are specified in your Rule 3.3 Notice and unless I waive them, you are obliged to give me the notice. Paragraph 3 of your letter states, amongst other things the following:
 "... , you are entitled to attend the hearing at which that evidence is being presented. You are entitled to be assisted by a legal representative of your choice when that evidence is presented".
5. I hereby make an application to tender my oral testimony and to cross examine Advocate FW Botes SC with regard to the issues raised in his affidavit as well as any oral testimony that he may tender.
6. In my letter I advised amongst other things that I was ready to make a sworn statement / affidavit in respect of all Rule 3.3 Notices issued and with regard to the evidence of Advocate Botes SC, I made a further request that
 "...a determination of a date of hearing of the evidence of Advocate Botes SC (and any other witnesses) be put on hold pending finalization of the forensic investigations. I do not know what forensic investigations entails but I believe it will include analyzing the records of my electronic devices and telephone records".
7. I was not aware, until I read the affidavit that he submitted to the Commission that there was dispute between me and Advocate FW Botes SC with regard to who between us initiated the settlement of the contentious Siyaya DB (in liquidation) claims. He also makes allegations about how and the reasons I was appointed to chair the Prasa Board. His statements are not substantiated, hence I believe that forensic investigations are necessary to establish the truth with regard to the evidence of the both of us. In his affidavit he says that his devices were examined by forensic investigators but he does not attach the analysis.
8. He also attached an affidavit that he gave to Professional and Ethics Committee of the Pretoria Society of Advocates (the PSA) dated 17 May 2019 in response to the complaint that I filed on 18 February 2019. My complaint was apparently dismissed as it lacks merit. I say 'apparently' because all that we received was a letter dated 22 May 2020, signed by the General Manager. The letter is attached hereto as **Annexure "E"**.
9. However, as you will see from the letters that my attorneys of record wrote to the PSA, a year went by after I filed the complaint, without any communication with me. I never saw the affidavit that he gave the Professional and Ethics Committee that he now relies on at the State Capture Commission. My attorneys of record wrote to the PSA on 07 May 2020 to request feedback on my complaint. A copy of the letter is attached hereto as **Annexure "F"**. Then on 22 May 2020 they received the letter from the General Manager as I have stated above. They wrote to them again on 10 June 2020 to demand a copy of the

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Investigation Report compiled by the Professional and Ethics Committee. A copy of that letter is attached hereto as **Annexure "G"**.

10. Pretoria Society of Advocates has failed to provide me with an opportunity to respond to the version of Advocate FW Botes SC. A complainant is entitled to consider the response of the person that he complains about. The decision maker cannot simply close a file, moreso when the version of the person accused of wrongdoing differs materially with that of the complainant.
Todate they have failed to provide us with that report. I am familiar with the processes because besides having been a member of PSA for almost two decades, I Chaired the Council of the Association, where ultimate decisions are made.
11. A further worrying fact is that in his affidavit dated 14 October 2019, Advocate FW Botes stated that the Commission's investigators approached him about the complaint that I had lodged against him. This is at the time whilst the Pretoria Bar was supposedly still considering my complaint. How the Commission's investigators came to know about this complaint is beyond my imagination. This is also before the Commission issued any Rule 3.3 Notices against me. Why they did not approach me as a complainant is also a mystery.
 - 11.1 I deserve an explanation and a copy of the record analysis.
12. I have prepared a an affidavit to respond to the issues raised in Advocate FW Botes' affidavits dated 14 October 2019 and 20 May 2020. It is attached hereto as **Annexure "H"**.
13. The affidavit was prepared in haste after I received information from Advocate Soni SC that Advocate FW Botes SC was going to testify on Wednesday, 01 June 2020.
14. I believe that the evidence leader will at least raise the issues in my affidavit if and when Advocate FW Botes testifies.
15. As indicated above, I have scheduled hearings in court this week on Monday, Wednesday and Friday (29, 30 June and 01 July 2020). I contacted Judge President Mlambo and explained the situation and the apparent ambush by the Commission. He agreed to give me time to prepare to file the affidavit in respect of the evidence of Advocate FW Botes SC. I have been granted leave of absence from 29 June to 01 July 2020.
16. I therefore request that my evidence in relation to the issues raised in the affidavits of Advocate FW Botes SC be presented soon after his oral testimony or within the recess period in the weeks that I will not be doing recess duty. I will rovide the dates.

Best Regards.

Judge TAN Makhubele.

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RESPONSE TO THE AFFIDAVITS OF ADVOCATE BOTES SC

- [9] The affidavits that I was directed to respond to appear in Paragraph 4 of the Rule 3.3 Notice which reads as follows:

"The affidavits of Adv Botes, which implicate or may implicate you are annexed hereto marked "A" (affidavit dated 14 October 2019) and "B" (affidavit dated 20 May 2020).

Affidavit dated 14 October 2019

- [10] Ad Paragraph 1 Thereof

Save to deny that the facts deposed are true and correct, the remaining allegations are noted.

- [11] Ad Paragraphs 2, 3 and 4 Thereof

I must, *ad nauseum*, express my concern with regard to the manner in which Pretoria Bar and the Commission handled my complaint against Advocate Botes SC. I do not know who (and for what purpose) informed the Commission about the complaint that I have filed against him. If the notification was lawful or in the course of the Commission's functions, it is strange why I was never consulted.

- [12] I am the complainant, but I was never consulted, or asked to present my devices for imaging process. In my complaint I attached annexures, which include screenshots of SMS, Whatsapp messages exchanged between Advocate Botes SC and me from November 2017 to March 2018. This is the relevant period. I also attached copies of emails and screenshots of messages exchanged between Advocate Botes SC and others, some of which he forwarded to me. No one has ever attempted to authenticate these messages or tell me that they are not authentic.

- [13] I have noted that Advocate Botes SC has attached an annexure "X" to his affidavit. He describes it as a copy of his response to my complaint, which he "*provided to the Professional and Ethics Committee of the Pretoria Society of Advocates*". As I have indicated in my letter that I have reproduced in paragraph 8 above, I have never had sight of this

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response. This is despite the repeated requests from my attorneys of record to the Pretoria Bar to provide feedback on their investigations. The only document that we received is a letter from the General Manager on 22 May 2020 advising me that my complaint has been dismissed.

[14] Instead of providing me with feedback on the complaint, it now becomes clear (from the affidavit of Advocate Botes) that Advocate Botes SC, with the knowledge of the Pretoria Bar, was busy consulting with the Commission's Investigators about the complaint, even before the complaint was finalized or the Commission issued any Rule 3.3 Notice to me.

[15] I do not think that it is fair to expect me to respond to allegations that I should have been given access to by the Pretoria Bar as they were investigating my complaint. My attorneys are still waiting for the investigating report and have written to Pretoria Bar on 10 June 2020 as I have indicated above. Of course, we did not know that Advocate Botes SC has already provided two affidavits to the Commission, one whilst Pretoria Bar was still investigating my complaint and the other one just two days before they dismissed the complaint.

Ad Paragraph 5 Thereof

[16] Advocate Botes stated amongst other things that he *"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...."*

He also gave details of persons that were present when digital images of his devices were made.

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- [17] The digital imaging of Advocate Botes' devices was done in September 2019. There is no explanation in his affidavit as to whether the analysis is available or not. The Commission too has a duty to give me a copy of such analysis.
- [18] In my letter of 23 June 2020 I have made a tender to subject my devices and cellphone records to a similar process. I have also requested my cellphone service provider to provide me with my call records of incoming and outgoing calls for the period between June 2017 and March 2018.
- [19] There is no response to my complaint in the affidavit of 14 October 2019. The last paragraph confirms a response, which I have not seen or provided with. I have forwarded the copies of the Rule 3.3 Notices and annexures to my attorneys because I intend to appeal the decision of Pretoria Bar as soon as they provide us with an investigation report.
- [20] I have noted one allegation in his alleged response to Pretoria Bar that I think I need to address. He says that I initiated the settlement negotiations and that I was appointed, rather 'deployed' to Prasa by Former President Zuma. This is something I have never heard of, from Advocate Botes SC or any person who has ever filed a statement on the issues that form the subject matter of the various Rule 3.3 Notices against me, be it at the State Capture Commission or the Judicial Conduct Committee.
I will address it when I respond to his affidavit dated 20 May 2020 below.
- [21] I call upon Advocate Botes and the Commission to produce the records of the analysis done on his devices. Furthermore, I call on Advocate Botes to produce proof that I called him first. I will prove my case once he has discharged the onus that is on him. Even though these proceedings are not in a court of law, the ordinary principles of evidence apply. He who alleges must prove. Then the onus will shift to



me to rebut his evidence. I cannot be called upon to respond to his bald, unsubstantiated statements. He made the allegations, he must prove it. Anyway, I will deal with it below.

Affidavit dated 20 May 2020

[22] Ad Paragraph 1 Thereof

Save to deny that the facts deposed are true and correct, the remaining allegations are noted.

Ad Paragraphs 2 and 3 Thereof

[23] As indicated throughout this affidavit, the Pretoria Bar did not bother to provide me with Advocate Botes' response to my complaint, nor did they respond to repeated requests for feedback. Instead, they decided to involve the Commission. They apparently conducted forensic investigations on the devices of Advocate Botes. In all this, they forgot to authenticate the evidence that I gave them. Now I am called upon to respond to unsubstantiated allegations arising from a response that I was never allowed to consider.

[24] Although I have not seen the response, I believe that it is in my best interest to deal with the allegations in this affidavit because they are serious.

[25] Advocate Botes has attached his response, but failed to also attach a copy of the complaint that he was responding to. I attach it hereto as **Annexure "BB"**. The document is titled "**STATEMENT IN SUPPORT OF REFERRAL FOR INVESTIGATIONS OF POSSIBLE BREACH OF PROFESSIONAL ETHICS: BOTES SC**".

For purposes of responding to the issues raised in this affidavit the only relevant annexures would be the SMS, WhatsApp and emails, which will be filed in due course.



- [24] It appears from a reading of the alleged response that Advocate Botes does not deny the factual background leading to the settlement of the claims of Siyaya. Well, I was not accusing him of anything untoward.
- [25] My complaint against him is with regard to only the contentious SMS communication between us that is alleged to be proof of corruption on my part. His response is that I did not tell him not to use it in court. That is not the issue, and if the decision of Pretoria Bar is based on this lame response, I will definitely take it on appeal. If the Smses were worth anything, he should have reproduced everything, and not the infamous one line. I will reproduce the entire communication when I deal with the general unbecoming conduct of Advocate Botes to demonstrate that he is the one who was chasing everyone to extract the settlement of the claims and then payment of the settled amount, and then blocked Prasa's legal representatives from opposing the application to interdict the Sheriff from executing on the orders of attachment. When I came in the scene he was already on it. He continued with me, and also did the bidding for payment of the settled amount. Where necessary I will refer to documents, some of which are already in the record of the Commission in this matter.
- [26] **In this affidavit Advocate Botes SC has raised two issues that require my response;**
- (a) that I initiated contact and settlement negotiations of Siyaya claims.
 - (b) I told him that I was 'deployed' by Former President Zuma to 'cleanup' at Prasa and 'sort out the mess' and that I also appointed him or offered him work to assist Prasa to consider which matters are capable of settlement.
- [27] **With regard to (a),** I deny that I initiated any contact with Advocate Botes SC. Ever since I have known him; I have never called to discuss anything about my work or practice. I do not know what kind of work he does or who briefs him and I am certain that save where the

information would have been published, he has no clue about my professional journey. I have never set my foot in his chambers, nor have we worked together in any matter. When I look at my SMS records, our last communication before 2017 November was 12 August 2016 where he was requesting a telephone number of a colleague.

[28] There is no reason for me to have called him about my appointment, be it as a Judge or Chairperson of Prasa Board.

[29] The letter from his attorney, Johan Crouse, dated 24 November 2017 bears reference. I attach it hereto as **Annexure "CC"**.

Reading this letter, and earlier SMS between us, it is clear that it is the attorneys who wanted the matter to be brought to the attention of the Interim Board. The letter was sent after I had advised Advocate Botes that I was not going to present his plea to intervene to the Board on the basis of information from him. Throughout our interactions, I always advised him to let the attorneys handle communication. I have attached screenshots of SMS communication to this effect. I will file a supplementary affidavit as soon as the cellphones records become available.

[30] On the alleged role of Former President Zuma in my appointment

It is unfortunate that a Senior Counsel, who often acts as a Judge would make such a sensational, defamatory and malicious statement without providing any context for such a conversation.

My letter of appointment bears the signature of Former Minister Joe Maswanganyi. Cabinet as far as I know approved the appointment. Should anyone wish to get information on the process followed and how I got to be appointed, I believe they had (still have) a right to make the necessary enquiries and to do whatever they want with that information. There is a (pending) application at the Western Cape High Court in which #Unite Behind challenges the appointment of a 'Judge' as a member of a state entity. The respondent is Minister of Transport. Nowhere in the papers is the name of President Zuma mentioned.

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- [31] I do not know what to 'deploy' a person means because the word is not in my vocabulary. I have never discussed anything of the sort with Advocate Botes. As indicated, he has no clue about my work, and same with me about the nature of his practice.
- [32] Most importantly, I deny that I told Advocate Botes that I was deployed by Former President Zuma to 'clean up' or 'sort the mess' at Prasa.
- [33] I have never met President Zuma, spoken to him directly or through any person, or be in any breathing space with him. Not that knowing him would be a sin, but I just wonder whether anyone in their right mind would 'deploy' someone they do not know at all. I have never been a member of the ANC or any other political party even when I was a practising advocate. My understanding is that this word 'deploy' is used when party members are appointed to positions of authority, and through party structures simply on the basis of their membership or allegiance to the party.
- [34] If Former President Zuma wanted to 'deploy' me at Prasa he would have deferred my appointment date to a date later than 01 January 2018, which is what I wanted. Instead he made it effective 01 January 2018, and I had to go through the pain of having it changed. It happened months after he left, and after I had spent two months at home without a salary.
- [35] The first and only time that I have ever seen President Zuma on close range was in September 2019 during the inauguration of Dr Nkosazana Dlamini-Zuma as the Chancellor of the University of Limpopo. I am Deputy Chairperson of the Council. The both of us and many others were in the procession.

- [36] There is nothing in our recorded interactions between me and Advocate Botes SC or any other person that points out to some higher authority that I had over Prasa beyond membership of the Board.
- [37] I spent almost two decades at the Pretoria Bar and the interactions that I have had with Advocate Botes related to governance issues. Of course we would share a light moment whenever we met because Advocate Botes is a naturally charming and outgoing person. He is loud and delightful at all times. I am certain however that he does not know anything about my life or the reasons I decided to apply for a permanent appointment in the bench. He would always tease me about when I planned to apply and my response always was that he should start. It is in the SMS communication. If he came to know about my application and appointment in 2017, it is because the information with regard to the former is circulated for comment and the results are also published. Advocate Botes SC has always been close to the processes at the Bar.

I am the opposite of Advocate Botes' personality. I keep to myself and can confirm that I only made one (1) friend at the Bar. It is also a known fact (though not acknowledged) that Advocates pass briefs or share work within their groups where there is a group system or cliques where there is none. Why would I invite Advocate Botes to do work at Prasa?

Did I have such powers?

Was there any such work?

Incidents of general unbecoming conduct on the part of Advocate Botes SC

- [38] I do not know why the Commission's investigators decided to recruit Advocate Botes as a witness who can give credible evidence to implicate me in the complaint filed by #Unite Behind, supported by Ms Martha Ngoye and Mr. Mfanimpela Dingiswayo.



- [39] The affidavit filed by Ms Ngoye, which forms the basis of the allegations against me depicts Advocate Botes and his instructing attorneys as persons with whom I had a questionable relationship and that the Siyaya claims were settled unlawfully in furtherance of this relationship. Advocate Botes is alleged to have behaved unethically before Acting Judge Holland-Muter and that he intimidated the legal representatives of Prasa.
- [40] I can only infer that the only reason Advocate Botes has been lined up as a witness to testify against me is the allegations that he made which implicate Former President Zuma in the appointment of the Interim Board, particularly me. The onus is on him to prove these allegations and if he fails, which I am certain he will, the star witness status will crumble.
- [41] One of the documents attached as an annexure to his evidence and attached to the Rule 3.3 notice is an email trail between him and attorney Madimpe Mogashoa. The emails were exchanged on 05 and 06 September 2017, before my appointment at Prasa. The language used by Advocate Botes is intimidating, disrespectful and clearly intended to coerce Mr. Mogashoa and counsel, Mr. Tsatsawane to settle the claims.

These emails, and the Interim report of the Commissioner were the first documents that he gave me to show that Prasa witnesses have conceded merits. I had invited him to meet me at Prasa because I did not want a secret meeting. Contrary to what he says, he is the one who believed that Mr. Mogashoa and others were wasting Prasa's money by insisting on proceeding to arbitration. It is recorded in these emails. By the time I came into the picture the parties had already held the Insolvency Inquiry and there were attempts to settle some of the claims.



- [42] I have attached emails in my complaint that show that Advocate Botes persistently made enquiries that should have been made by his attorneys. I had to tell him to leave communication to his attorneys. I never initiated any discussion, but he would SMS, call and generally persists with demanding what he wants. Sometimes he would send an SMS with no words, but just eyes or question marks. At some point I deleted my WhatsApp because it was too much for me. I told him that I deleted the App. At some point I refused to talk to him and referred him to the Acting Group CEO, whom he also send smses and persistent questions. He would then update me. Reading the record of emails and Smses it becomes clear who was pursuing who.
- [43] I retreated from the consequences of the settled claims as soon as I became aware that there was unhappiness about it. This was in January 2018. The Acting Group CEO tried to find out what the problem was but nothing was ever said to me or the Interim Board. In the meantime Advocate Botes sent numerous smses.
- [44] The infamous SMS exchanged occurred long after I had distanced myself from the matter. Advocate Botes was communicating with the Acting CEO. On the day in question, 07 March 2018, I was on my way to Cape Town to discuss my exit from Prasa. Advocate Botes initiated the conversation. However, in court papers his legal team does not refer to how the conversation started, only what I said, which is convenient for them.
- [45] The complete sms exchange was as follows:

*Time: 06:32: **Advocate Botes SC:** Dear Nana. I trust that you are well. Did PRASA decide to oppose the 4 applications, which 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 &*

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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.

Time : 08:22: Advocate Botes SC 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) .

Time: 10:02 Makhubele to Advocate Botes SC:

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 SC: Thank you Nana.

- [46] In-between communicating with Botes SC, I was also in communication with the company secretary (who was AGCEO at the time the settlement negotiations commenced) about what Botes SC was asking / telling her. She 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:

"... 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.

I replied to Zide 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"

[47] Acting Group CEO, Mr. Cromet Molepo also came into the SMS exchange because he became aware that I was concerned that he did not brief me about the matter.

"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.*

[48] I replied to the AGCEO as follows:

"Morning AGCEO,

*As discussed just now, I am at the Parliamentary 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 authorized Legal Services to oppose the matter under 6 (**actually referring to no.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.

[49] AGCEO 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 which were referred to our legal and held all those meetings with LK.

[50] I forwarded a copy of one of the Notices of Intention to oppose that she had received from Advocate Botes SC to AGCEO Molepo.

He 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". ('LK' refers to Mr. Lindikaya Zide, his predecessor, and then Company Secretary)

[50] The suspension of Prasa's legal Panel was not a secret, as Judge Tuchten appears to think. 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. Documents that Prasa filed to oppose #Unite Behind's challenge to this suspension at the Western Cape High Court application clearly make this point. In the meantime, and whilst Prasa was constituting a compliant panel, the Board had issued certain directives for handling of legal matters. This was not Judge Makhubele's decision.

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 them, the Legal unit defied the Board decision and apparently continued to utilize the suspended panel. They never communicated with the Chairperson of the Board or the Board about their unwillingness to comply with the Board resolutions. In fact, they worked against the Board by communicating with outsiders and not advising as they were supposed to.

Advocate Botes' attempt to settle the SIYANGENA matter

[51] I am mentioning all this as a basis to rebut the allegation that I initiated the settlement of Siyaya claims and that I told Advocate Botes that I have been deployed to settle matters at Prasa.

[52] Sometime in January 2018, I received a letter from Advocate Botes, which he said he had been requested by attorneys acting for SIYANGENA to present to me. In this letter, I was being asked to intervene in the dispute between SIYANGENA and PRASA with a view to settle the matter.

[53] I refused to entertain the request because I was aware at the time from having read the status report provided by the Legal Unit that this was

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one of the most contentious matters which had generated a lot of publicity. Prasa was preparing to launch an application to set aside the contract. At the time the Interim Board had just received a letter from attorneys representing an interest group demanding a reassurance that Prasa was proceeding with the application.

- [54] The communication that Advocate Botes SC sent is not in my current devices but I am certain that forensic investigators will be able to retrieve it.

Referral to attorney with conflict of interest and possible interference with documents

- [55] I indicated in my complaint that Advocate Botes SC induced me to utilize the services of the same attorney that approached the Interim Board with a request to intervene in the Siyaya dispute.
- [56] At the time I was desperate because Prasa (Ms Martha Ngoye and Mr. Fani Dingiswayo) were not communicating anything with regard to the status of the application to rescind the orders of Holland –Muter AJ. All I knew was that the application was based on allegations of impropriety on my part. Advocate Botes SC became the source of my information. He offered to give me the court documents and also arranged for legal assistance.
- [57] I sent all the documents that I had on anything that I could possibly think of. This is because I did not know exactly what I was alleged to have done. I was preparing for a defence.
I then discovered that the attorney is the same one who was representing the Siyaya liquidators.
- [58] The point I am making is that Advocate Botes knew who this attorney was but he nonetheless encouraged me to utilize his services. Advocate Botes and his attorney had access to the documents and recordings that I sent as we were preparing for a consultation.

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For instance, in one meeting the Board resolved to appoint a Special Projects Officer to focus on contentious matters and to make recommendations on whether the matters are capable of being settled or whether litigation should proceed.

It cannot be a coincidence that the same theme is used to make allegations that I invited him and offered him an opportunity to provide the same services. What he was not aware of is the fact that this was not an employment opportunity for an insider, but a position to that was going to be occupied by a legal person within the organization.

Advocate Botes enjoys protection and is not made to account for his actions

- [59] I have also filed a complaint against Judge Neil Tuchten with the Judicial Conduct Committee. He heard the application to rescind the orders of Holland-Muter AJ. He agreed with Prasa that the Judge was wrong to deny Prasa legal representation. He however took a turn from what he was dealing with and launched a scathing attack on me for the issues appearing in the contentious SMS. He went as far as to question my presence at Prasa and that I should be investigated.
- [60] The relevance of the conduct of Advocate Botes SC in this complaint is that Judge Tuchten did not say anything about the conduct of Siyaya lawyers, who are mentioned by names in Prasa's affidavit. My conclusion and one of the grounds of complaint against him is that he protected the males, both white and black, and only criticized me, a black female. The matter is pending (on appeal) because the Judge who was allocated to investigate the complaint (DJP Goliath) classified it under 'non-serious complaints' and dismissed it as having no merit and 'frivolous'.
- [61] The dismissal of my complaint by Pretoria Bar under suspicious circumstances is also another indication that Advocate Botes is being protected by people who should make him to account for his unbecoming behaviour. The fact that he is capable of making up

stories is probably his biggest weapon, which he uses when confronted with the truth.

CONCLUSION

- [62] It is not clear what the evidence of Advocate Botes SC is intended to prove. I have stated many times that what I am accused of constitute a criminal offence and my co-accused is Advocate Botes SC and his instructing attorney. I was looking forward to being cited in the action to rescind the arbitration awards of Judge Brand because that is what Ms Ngoye has indicated she was going to do. I have learnt from the documents filed by Advocate Botes in these proceedings that the action / application was filed and even set down for hearing but was removed from the roll during May 2019.
- [63] The complaint lodged by #Unite Behind against was heard by the JCC on 20 March 2020. The purpose of the hearing was to consider whether it should be investigated by a Tribunal or in terms of section 17(2). Both parties were given an opportunity to file representations in this regard. #Unite Behind filed its representations very late in the evening a day before the hearing. They then withdrew an earlier submission and sent a 'corrected version'. In the 'corrected version' they made reference to the evidence that Advocate Botes was going to give against me. The version is along the lines of his evidence in the affidavits that I am replying to, namely, that I am the one who was eager to settle the claims of Siyaya DB (in liquidation). I do not know how and where they obtained his version, but it is clear that there are efforts on the part of Advocate Botes SC to extricate himself from the consequences of his actions and to lay the blame on me. Implicating Former President Zuma shows how low he is prepared to sink in the hole that he has dug for himself, hoping that my accusers will somehow throw him a lifeline.

[64] The so-called evidence of Advocate Botes SC should be subjected to intense scrutiny and interrogation.


DEPONENT

THUS DONE AND SIGNED BEFORE ME BY THE DEPONENT WHO ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT AND THAT SHE HAS NO OBJECTION IN TAKING THE PRESCRIBED OATH WHICH SHE CONSIDERS BINDING ON HER CONSCIENCE.

 72343206
CS R. Ravele
COMMISSIONER OF OATHS
PLACE: Lyttelton SAPS
DATE: 2020-06-29





REPUBLIC OF SOUTH AFRICA
HONOURABLE MADAM JUSTICE TAN MAKHUBELE
High Court of South Africa, Gauteng Division, Pretoria
PO Box 52, Pretoria, 0001
Registrar: Mr. Peter Dithipe
Office: 6.13 Tel: (012) 492 6792
Email: Amakhuvele@judiciary.org.za

23 June 2020.

MS KB SHABALALA

The Acting Secretary

Judicial Commission of Inquiry into Allegations

of State Capture, Corruption and Fraud in the Public Sector including Organs of State

Email: Secretary@commissionsc.org.za

AND TO: SHANNON VAN VUUREN

Legal Advisor: Operations & Investigative Support

Email: shannonv@commissionsc.org.za

COPY TO: JUDGE PRESIDENT DUNSTAN MLAMBO

Gauteng Division of the Hgh Court of South Africa

Email: Dmlambo@judiciary.org.za

RULE 3.3 NOTICES ISSUED TO JUDGE TAN MAKHUBELE : PRASA HEARINGS

1. I refer to your email received on 26 May 2020 in which you attached two Rule 3.3 Notices and corresponding affidavits in respect of the evidence of two further witnesses that the Commissions' legal team intends to lead. They are:

a) Advocate Francois Weideman Botes SC and;

(b) Mr Madimpe Mogashoa.

2. After considering the 'evidence' in the affidavits of the said witnesses, particularly that of Advocate Botes SC, I have decided to accept the offer to submit my own affidavit/ sworn statement and to claim the other rights that I have as indicated in the Rule 3.3 Notices and any other rights as provided in the Rules of the State Capture Commission.
3. In this regard, I hereby tender a consultation with the Commission's legal team and forensic investigators. The purpose of consulting with the forensic investigators is to submit evidence to rebut any allegations made by Advocate Botes SC which is capable of being adjudicated on forensic evidence.
4. I therefore request that a determination of a date of hearing of the evidence of Advocate Botes SC (and any other witnesses) be put on hold pending finalization of the forensic investigations. I do not know what forensic investigations entails but I believe it will include analyzing the records of my electronic devices and telephone records.
5. I also wish to withdraw any objections made through my erstwhile legal representatives, Bokwa Attorneys and subsequent email/letters exchanged between me and the commission's secretariat and legal team during April 2020.
6. I therefore advise further that I am ready to provide a sworn statement/ affidavit in respect of the previous Rule 3.3 Notices issued in relation to the evidence of ;
 - (a) Mr Mfanimpela Moses Dingiswayo,
 - (b) Ms Onica Martha Ngoye, and;
 - (c) Mr Abdurrazack " Zackie" Achmat.
7. Kindly advise the legal team and forensic investigators to get in touch with me as soon as possible.

8. I took this decision without the benefit of legal assistance or opinion. This is because as I understand the procedures and roles, the legal team and investigators are enjoined by the enabling legal prescripts to take statements of witnesses and implicated persons and to conduct relevant investigations arising therefrom with a view to obtaining evidence that will assist the Chairperson of the Commission to discharge his duties in a fair, impartial and objective manner.

9. I reserve my rights to obtain legal assistance at anytime of the proceedings should a need arise.

Best Regards.

A handwritten signature in black ink, consisting of several overlapping loops and a central vertical stroke, positioned above the printed name.

Judge TAN Makhubele.

"B"

From: Secretary Secretary@commissionsc.org.za
Subject: RE: RULE 3.3 NOTICE // ADVOCATE FRANCOIS BOTES // JUDGE MAKHUBELE // EMAIL 4 of 4
Date: 23 Jun 2020 at 11:05:15
To: Judge- Annah Makhuvele AMakhuvele@judiciary.org.za
Cc: Andre J. Lamprecht AndreL@commissionsc.org.za, Brigitte Shabalala BrigitteS@commissionsc.org.za, Trudi T. McCracken TrudiM@commissionsc.org.za, Shannon S. Van Vuuren ShannonV@commissionsc.org.za, Boipelo B. Ratshikana BoipeloR@commissionsc.org.za

Dear Madam Judge.

Your e-mail (and attachments thereto) was received by the Commission and has been transmitted to the relevant parties for their input.

Yours sincerely.

Warren Redcliffe

From: Judge- Annah Makhuvele <AMakhuvele@judiciary.org.za>
Sent: Tuesday, 23 June 2020 09:35
To: Secretary <Secretary@commissionsc.org.za>
Cc: Mlambo JP <DMlambo@judiciary.org.za>
Subject: Re: RULE 3.3 NOTICE // ADVOCATE FRANCOIS BOTES // JUDGE MAKHUBELE // EMAIL 4 of 4

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"C"

From: Secretary Secretary@commissionsc.org.za
Subject: Ngoye/Makhubele Venue and Evidence Date
Date: 03 Mar 2020 at 12:03:56
To: Judge- Annah Makhubele AMakhubele@judiciary.org.za

Dear Honourable Judge Makhubele

We refer to the Rule 3.3 Notice previously sent to you relating to the evidence of Ms Ngoye. Ms Ngoye's evidence will commence on **13 March 2020**, or soon thereafter as her evidence may be heard. In the event of a change of date, it will be announced on the Commission's website (www.sastatecapture.org.za) and in the media.

PLEASE NOTE: The venue for the hearings of the Commission will relocate on 1 March 2020 to the Old Council Chamber of the Municipality of the City of Johannesburg situated at:

158 Civic Boulevard
Braamfontein
Johannesburg.

Kind Regards

Trudi McCracken
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: TrudiM@commissionsc.org.za
Website: www.sastatecapture.org.za



"D"

From: Secretary Secretary@commissionsc.org.za
Subject: Achmat/Makhubele/Venue and Evidence Date
Date: 03 Mar 2020 at 14:38:34
To: Judge- Annah Makhuvele AMakhuvele@judiciary.org.za

Dear Honourable Judge Makhubele

We refer to the Rule 3.3 Notice previously sent to you relating to the evidence of Mr Achmat. Mr Achmat's evidence will commence on **19 March 2020**, or soon thereafter as his evidence may be heard. In the event of a change of date, it will be announced on the Commission's website (www.sastatecapture.org.za) and in the media.

PLEASE NOTE: The venue for the hearings of the Commission will relocate on 1 March 2020 to the Old Council Chamber of the Municipality of the City of Johannesburg situated at:

158 Civic Boulevard
Braamfontein
Johannesburg.

Kind Regards,

Boipelo Ratshikana
Executive Assistant to the Secretary
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown, Johannesburg, 2193
Tel: 010 214 0651 | Mobile: 071 319 7843 | Email: boipelor@commissionsc.org.za | www.sastatecapture.org.za



"E"

From: Sindisiwe sindisiwe@bokwalaw.co.za
Subject: Fwd: Complaint against Adv FW Botes SC
Date: 22 May 2020 at 13:43:53
To: Judge- Annah Makhuvele AMakhuvele@judiciary.org.za

Good Day Judge Makhubele

The above matter and email below refers.

Kindly note that the Bar Counsel advises your complaint against Adv Botes was investigated and no merit was found in the charge.

Kindly find attached the letter from the Bar Counsel.

We trust the above finds you in order
Sindisiwe Mnokwe/ Candidate Attorney

From: Deon Gericke <ptabar@law.co.za>
Date: 22 May 2020 at 11:33:36 SAST
To: sindisiwe@bokwalaw.co.za
Subject: Complaint against Adv FW Botes SC
Reply-To: <ptabar@law.co.za>

Good day

Please see the attached letter.

Deon Gericke
General Manager
Pretoria Society of Advocates
Room 107
High Court Chambers

220 Madiba Street

PRETORIA

Tel. 012/303-7420

Cell: 082 336 8108

E-mail: ptabar@law.co.za

Pretoria Society of Advocates

Tel. : (012) 303-7400
Fax : (012) 303-7894
E-mail : ptabar@law.co.za
Docex 78

High Court Chambers
Private Bag X480
Pretoria
0001

22 May 2020

Bokwa Incorporated
210 Justice Mahomed Street
BROOKLYN
0181

sindisiwe@bokwalaw.co.za

Sirs

COMPLAINT LODGED AGAINST ADV FW BOTES SC 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 Adv Botes SC by Makhubele J and accordingly, that no further steps are to be taken.

Yours faithfully



G.J. GERICKE
GENERAL MANAGER

/yo
2020-05-22

"7"

From: sindisiwe@bokwalaw.co.za
Subject: Complaint against FW Botes SC
Date: 07 May 2020 at 13:37:54
To: tanmakhubele@me.com, Judge- Annah Makhuvele
AMakhuvele@judiciary.org.za
Cc: Nixon Simataa nixon@bokwalaw.co.za

Good Day Judge

The above matter refers.

Kindly find attached the letter we sent to the PTA bar today.

We trust the above finds you in order.

Yours Faithfully,

Sindisiwe Mnokwe | Litigation | Candidate Attorney

T : +27 12 424 2900
F : +27 12 346 5265
E : sindisiwe@bokwalaw.co.za

210 Justice Mahomed Street
Brooklyn
Pretoria
0181



Perseverance beyond passion



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pdf

letter to PTA bar.pdf

60 KB

05 May 2020

TO: DEON GERICKE

General Manager of the Pretoria High Court Chamber (Pretoria Bar Counsel)

By email: ptabar@law.co.za

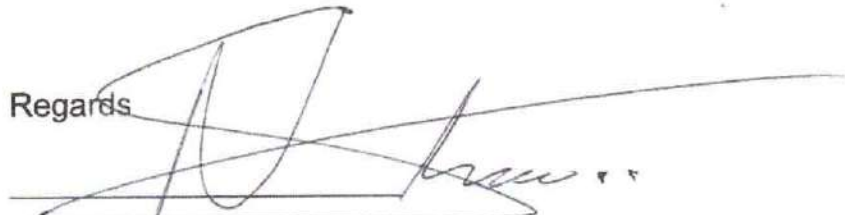
INVESTIGATIONS OF POSSIBLE BREACH OF PROFESSIONAL ETHICS: BOTES SC

1. We confirm that we act for and on behalf of Judge TAN Makhubele, our client and refer to the complaint lodged by our client against Botes SC with your Offices.
2. It is our clients instruction that a statement in support of referral investigation of possible breach of professional ethics by Botes SC was communicated to your offices.
3. It is our instruction that your offices have failed to provide our client with any feedback regarding the complaint for over a year now.
4. Your failure has resulted in our client being severely prejudiced.
5. Our client has instructed us to demand, as we hereby do, feedback on the status of her complaint against Botes SC.
6. Kindly revert to us by no later than end of business of 13 May 2020.

7. Our client's rights to approach the court for appropriate relief remain reserved.

8. We await your response

Regards



BOKWA INCORPORATED

PER: NIXON SIMATAA

"G"

From: sindisiwe@bokwalaw.co.za
Subject: Complaint against Advocate Botes
Date: 10 Jun 2020 at 10:38:27
To: Judge- Annah Makhuvele AMakhuvele@judiciary.org.za

Good Day Judge

The above matter refers.

Kindly find attached another letter sent to the PTA Bar Council.

We trust the above finds you in order.

Yours Faithfully,

Sindisiwe Mnokwe | Litigation | Candidate Attorney

T : +27 12 424 2900
F : +27 12 346 5265
E : sindisiwe@bokwalaw.co.za

210 Justice Mahomed Street
Brooklyn
Pretoria
0181



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04 June 2020

TO: DEON GERICKE

General Manager of the Pretoria High Court Chamber (Pretoria Bar Counsel)

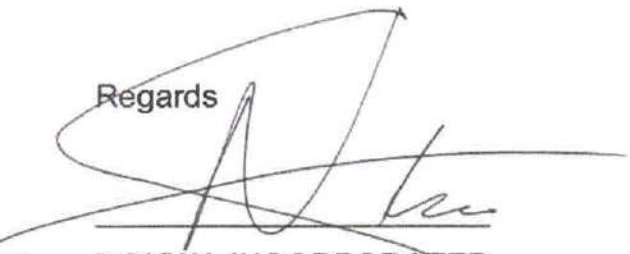
By email: ptabar@law.co.za

INVESTIGATIONS OF POSSIBLE BREACH OF PROFESSIONAL ETHICS: BOTES SC

1. We confirm that we act for and on behalf of Judge TAN Makhubele.
2. We further draw your attention to our correspondence dated the 25th of May 2020, sent by our offices, in which a request for reasons for the dismissal of our client's complaint against Advocate Botes SC, was submitted to your offices.
3. We confirm that we have to date not received the courtesy of a reply.
4. It is improbable that the Professional Ethics Committee of the Pretoria Bar Council, reached a decision on our client's complaint without being furnished with an investigation report.
5. It is our clients instruction that we hereby demand, which we hereby do, that our offices be furnished with the outcome of the investigation report, by no later than the end of business day on the 11th of June 2020.
6. Our client's rights remain reserved.

7. We await your response

Regards



BOKWA INCORPORATED

PER: NIXON SIMATAA

"H"

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

In the **PRASA HEARINGS**

Rule 3.3 Notice in respect of the evidence of ADVOCATE FRANCOIS
WEIDEMAN BOTES SC

AFFIDAVIT

I, the undersigned,

TINTSWALO ANNAH MAKHUBELE
Identity number 6404021058084

**Affidavit attached as main
affidavit to this exhibit**



"AA"

REPUBLIC OF SOUTH AFRICA
HONOURABLE MADAM JUSTICE TAN MAKHUBELE
High Court of South Africa, Gauteng Division, Pretoria
PO Box 52, Pretoria, 0001
Registrar: Mr. Peter Dithipe
Office: 6.13 Tel: (012) 492 6792
Email: Amakhuvele@judiciary.org.za

28 June 2020.

MS KB SHABALALA

The Acting Secretary

Judicial Commission of Inquiry into Allegations

of State Capture, Corruption and Fraud in the Public Sector including Organs of State

Email: Secretary@commissionsc.org.za

AND TO: SHANNON VAN VUUREN

Legal Advisor: Operations & Investigative Support

Email: shannonv@commissionsc.org.za

COPY TO: JUDGE PRESIDENT DUNSTAN MLAMBO

Gauteng Division of the Hgh Court of South Africa

Email: Dmlambo@judiciary.org.za

1. YOUR FAILURE TO RESPOND TO MY LETTER DATED 23 June 2020,
2. OBJECTION TO THE ALLEGED SCHEDULED HEARING OF THE EVIDENCE OF ADVOCATE FRANCOIS WEIDEMAN BOTES SC; AND
3. APPLICATION TO TESTIFY AND TO CROSS EXAMINE ADVOCATE FRANCOIS WEIDEMAN BOTES SC

1. This letter will address the three headings in sequence.

2. I refer to my letter dated 23 June instant as well as your email confirmation on the same day at 11:05:15 that it has been received and will be 'transmitted to the relevant parties for their input'. Copies of the letter and your email are attached hereto as Annexures **"A"** and **"B"** respectively.
3. I have not received a formal letter from anyone, save for a telephone call from Adv. Vas Soni SC on Thursday, 25 June 2020 at about 14:23.
 - 3.1 Adv. Soni SC advised me that he was one of the evidence leaders at the State Capture Commission and that he received a report that I had requested to consult with the legal team and the forensic investigators. The purpose of his call was to make arrangements with me to consult on the Rule 3.3 Notices referred to in my letter and previous correspondence from the Secretariat. He assured me that I was still going to receive a formal letter but that in the meantime he wanted us to make arrangements for the consultation. He also indicated his unavailability until Friday, 03 July 2020 as he would be attending to the resumed hearings from Monday, 29 June.

I informed him that I was also not available in this week because I have scheduled court hearings until Friday, 03 July. We then agreed as follows;
 - 3.2 That we were going to meet in the week starting on Monday, 06 July 2020. The date was going to be confirmed.
 - 3.3 That in the meantime I was going to dispatch certain documents to him, particularly in relation to the complaint that I have filed against Advocate Francois Weideman Botes SC (Advocate FW Botes SC) at the Pretoria Society of Advocates. He would study the documents to enable him to formulate issues that I needed to address with regard to each witness. This arrangement was informed by the fact that my version as far as I am concerned is contained in these documents, except for one or two new issues that appear in the affidavit filed by Advocate FW Botes SC which I was going to bring a draft response to.

- 3.4 That if I had no objection, he was going to ask one of the forensic investigators to attend the consultation so that he could explain to me the process entailed in forensic investigations of devices and phone records. I have made a request for this in my letter.
- 3.5 The documents would be delivered at his chambers but the consultation was going to take place at the offices of the State capture Commission.
4. Advocate Soni called me again on Saturday, 27 June 2020 at about 11:15. He informed me that as he was checking a schedule for the hearings that are going to commence on Monday, 29 June 2020, he realized that Advocate FW Botes SC was one of the witnesses that are scheduled to testify. This information obviously came as a shock to me because besides your failure to respond to my letter, you have also failed to give me notice of the hearing or confirm the date as indicated in your Rule 3.3 Notice. The relevant part is in paragraph 1 which reads, amongst others as follows:
- " ... The presentation of Adv Botes' evidence will commence on a date to be confirmed at a later stage"*
- 4.1 I confirm that in the past the Commission has indeed given me notice of dates of presentation of evidence of witnesses in respect of whom it had issued Rule 3.3 Notices. I attach hereto as **Annexures "C" and "D"** respectively the notices in respect of the hearing dates in relation to Ms Onica Martha Ngoye and Mr Abdurrazack "Zackie" Achmat.
- 4.2 I made it clear in my letter dated 23 June, which you received but did not give me a courtesy of a reply that more than anything else, I wanted to present an affidavit in respect of the evidence of Advocate Botes SC and that I intended to make relevant applications in relation thereto.

4.3 I do not have to remind you about the prejudice that I will suffer. My rights are specified in your Rule 3.3 Notice and unless I waive them, you are obliged to give me the notice. Paragraph 3 of your letter states, amongst other things the following:

".... , you are entitled to attend the hearing at which that evidence is being presented. You are entitled to be assisted by a legal representative of your choice when that evidence is presented ".

5. I hereby make an application to tender my oral testimony and to cross examine Advocate FW Botes SC with regard to the issues raised in his affidavit as well as any oral testimony that he may tender.
6. In my letter I advised amongst other things that I was ready to make a sworn statement / affidavit in respect of all Rule 3.3 Notices issued and with regard to the evidence of Advocate Botes SC, I made a further request that
"...a determination of a date of hearing of the evidence of Advocate Botes SC (and any other witnesses) be put on hold pending finalization of the forensic investigations. I do not know what forensic investigations entails but I believe it will include analyzing the records of my electronic devices and telephone records".
7. I was not aware, until I read the affidavit that he submitted to the Commission that there was a dispute between me and Advocate FW Botes SC with regard to who between us initiated the settlement of the contentious Siyaya DB (in liquidation) claims. He also makes allegations about how and the reasons I was appointed to chair the Prasa Board. His statements are not substantiated, hence I believe that forensic investigations are necessary to establish the truth with regard to the evidence of the both of us. In his affidavit he says that his devices were examined by forensic investigators but he does not attach the analysis.
8. He also attached an affidavit that he gave to Professional and Ethics Committee of the Pretoria Society of Advocates (the PSA) dated 17 May 2019 in response to the complaint that I filed on 18 February 2019. My

complaint was apparently dismissed as it lacks merit. I say 'apparently' because all that we received was a letter dated 22 May 2020, signed by the General Manager. The letter is attached hereto as **Annexure "E"**.

9. However, as you will see from the letters that my attorneys of record wrote to the PSA, a year went by after I filed the complaint, without any communication with me. I never saw the affidavit that he gave the Professional and Ethics Committee that he now relies on at the State Capture Commission. My attorneys of record wrote to the PSA on 07 May 2020 to request feedback on my complaint. A copy of the letter is attached hereto as **Annexure "F"**. Then on 22 May 2020 they received the letter from the General Manager as I have stated above. They wrote to them again on 10 June 2020 to demand a copy of the Investigation Report compiled by the Professional and Ethics Committee. A copy of that letter is attached hereto as **Annexure "G"**.
10. Pretoria Society of Advocates has failed to provide me with an opportunity to respond to the version of Advocate FW Botes SC. A complainant is entitled to consider the response of the person that he complains about. The decision maker cannot simply close a file, moreso when the version of the person accused of wrongdoing differs materially with that of the complainant. Todate they have failed to provide us with that report. I am familiar with the processes because besides having been a member of PSA for almost two decades, I Chaired the Council of the Association, where ultimate decisions are made.
11. A further worrying fact is that in his affidavit dated 14 October 2019, Advocate FW Botes stated that the Commission's investigators approached him about the complaint that I had lodged against him. This is at the time whilst the Pretoria Bar was supposedly still considering my complaint. How the Commission's investigators came to know about this complaint is beyond my imagination. This is also before the Commission issued any Rule 3.3 Notices against me. Why they did not approach me as a complainant is also a mystery.

11.1 I deserve an explanation and a copy of the record analysis.

12. I have prepared an affidavit to respond to the issues raised in Advocate FW Botes' affidavits dated 14 October 2019 and 20 May 2020. It is attached hereto as **Annexure "H"**.
13. The affidavit was prepared in haste after I received information from Advocate Soni SC that Advocate FW Botes SC was going to testify on Wednesday, 01 June 2020.
14. I believe that the evidence leader will at least raise the issues in my affidavit if and when Advocate FW Botes testifies.
15. As indicated above, I have scheduled hearings in court this week on Monday, Wednesday and Friday (29, 30 June and 01 July 2020). I contacted Judge President Mlambo and explained the situation and the apparent ambush by the Commission. He agreed to give me time to prepare to file the affidavit in respect of the evidence of Advocate FW Botes SC. I have been granted leave of absence from 29 June to 01 July 2020.
16. I therefore request that my evidence in relation to the issues raised in the affidavits of Advocate FW Botes SC be presented soon after his oral testimony or within the recess period in the weeks that I will not be doing recess duty. I will provide the dates.

Best Regards.

Judge TAN Makhubele.

"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

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

[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: ”¹

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 were 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

¹ 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.

A handwritten signature in dark ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

JUDGE TAN MAKHUBELE

"CC"

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Your Ref:
Date: 24 NOVEMBER 2017

The Acting Chair Person of the Board of PRASA
The Honourable Madam Justice Makhubele SC
BY EMAIL: Nanam@law.co.za

OUTSTANDING ACCOUNTS / PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA) / SIYAYA CONSULTING ENGINEERS (PTY) LTD (IN LIQUIDATION)

1. We act in this matter on behalf of the duly appointed joint liquidators of the insolvent estate of SIYAYA CONSULTING ENGINEERS (PTY) LTD (IN LIQUIDATION) (The Insolvent) to whom we shall forthwith refer to as our clients.
2. We furthermore refer to the actions that were instituted against PRASA by the insolvent prior to its liquidation. In considering the status of the matter and the evaluation of the testimony obtained during the insolvency enquiry we consider it prudent to consider the following in our clients justification to creditors and the Master of the North Gauteng High Court whether or not these actions against PRASA and specifically the arbitration should proceed.
3. Prior to its liquidation the insolvent estate was the service provider to PRASA in respect of the following contracts:
 - 3.1 Material Management and Coding
 - 3.2 Infrastructure Rehabilitation Programme
 - 3.3 Survey Existing Infrastructure & Simulation Traction System

- 3.4 Salt River Depot Modernisation Programme and Administration Block
 - 3.5 Technical Assistance for the Supervision of National Re - signalling Projects
 - 3.6 Technical Advisor for Digital Railway Signalling Radio Network
-
- 4. The dispute between the insolvent and PRASA originated from internal procedures of PRASA that were not followed. The inability to amend contracts awarded to service providers, alternatively the adjustments and authorisation of actions that fell outside the scope of work as stipulated in terms of the various agreements were the sole contributing factors to the outstanding amount due to the insolvent estate.
 - 5. It is not in dispute that any of the work performed by the insolvent prior to its liquidation was done out of its own accord. Every single aspect for all the outstanding amounts was performed on instruction and at the specific instance and request of PRASA. It is furthermore not in dispute that the work performed and services rendered by the insolvent estate were not done diligently and in accordance with the specific request and instruction of PRASA.
 - 6. In consideration whether or not the liquidators of the insolvent estate should continue with the actions instituted prior to its liquidation against PRASA it became necessary for the liquidators to consider the particulars of claim of each matter as well as the specific pleas and defences raised against the claims of the insolvent by PRASA. The mechanism utilised to establish the validity of the claims and the defences raised against these claims were the section 417/418 enquiries before the Honourable Commissioner KRIGE.
 - 7. As per our previous correspondence a factor that needs to be considered is not only the effect that the non-payment of the valid claims had upon the insolvent estate, but furthermore on its service providers whom contracted in good faith with

the insolvent estate and PRASA to render the services as stated above at the specific instance and request of PRASA.

8. The refusal to remunerate the insolvent estate had the effect that the service providers as subcontractors as stipulated in the specific agreements with PRASA also did not receive any remuneration for the services rendered. It is common cause that PRASA was enriched by the services rendered and we are therefore of the opinion that the different international service providers will also have valid claims against PRASA in the event that the insolvent estate is deprived of its valid claims against PRASA. Although the subcontractors are service providers contracted by the insolvent estate prior to its liquidation, their appointment were regulated by a contract concluded with PRASA to which the different service providers were a party.
9. At this juncture we need to emphasise that during the enquiry held before the honourable Commissioner KRIGE not a single witness of PRASA denied that the insolvent estate and its subcontractors did not render any of the services. In fact, every witness in the current employ of PRASA as well as previous employees and the CEO of PRASA confirmed the indebtedness as per the different claims towards the insolvent estate.
10. We furthermore need to bring to your attention that none of the witnesses disputed the existence, validity of contracts or completeness of the work performed by the insolvent estate. Every single aspect was acknowledged and consented to under cross-examination.
11. We deem it prudent at this juncture to bring your attention to the fact that the cross examination were not done simply by an attorney specialising in these type of matters. We recommended that the examination and interrogation of the witnesses be done by Advocate FW BOTES SC, an extremely experienced senior counsel who frequently act as a Judge. We therefore find it improbable that in consideration of the evidence in any further arbitrations or the continuation of the

action as instituted that any of the evidence obtained during the insolvency enquiry by Advocate Botes SC will be deemed irrelevant alternatively not applicable to the dispute at hand. The concessions and acknowledgements by the witnesses and specifically those in the employ of PRASA confirming the indebtedness of PRASA to the insolvent estate will be at best impossible to overturn.

12. We do however need to mention that the "Technical Advisor for Digital Railway Signalling Radio Network" project does not fall within the Insolvent Estate but is due to another company, Siyaya Rail Solutions (Pty) Ltd. The indebtedness to this entity was also canvassed during the insolvency enquiry. The indebtedness was confirmed and acknowledged and is not in dispute.
13. We attach a schedule hereto that detail the relevant amounts owed by PRASA to both entities.
14. The Honourable Commissioner, after hearing the evidence, acknowledgements and concessions made before him under oath, delivered a report ordering the parties to attend to certain aspects, *inter-alia* the verification of certain amounts stated on the invoices of the insolvent estate. This verification process was to be done by Mr. Mabunda, the previous director of the insolvent estate and representatives of PRASA. Despite the order of the Commissioner, the representatives of PRASA did not provide their cooperation, despite the best endeavours of the insolvent estate to comply with the Commissioners order.
15. PRASA and its employees, including its legal representatives made all attempts to circumvent this order and in the process provided the Commissioner and the insolvent estate with irrelevant correspondence, thereby burdening the honourable Commissioner from exercising any discretion relating to the current matter. The previous director, Mr Mabunda was furthermore prevented from meeting with any employee or representative of PRASA to establish whether or not PRASA could find any discrepancies in relation to the indebtedness of the insolvent estate.

16. It was therefore impossible the report to the Commissioner in terms of his order. We are of the opinion that the obstructiveness by PRASA in this regard constitutes an offence in terms of the Companies Act 61 of 1973 due to the fact that there was wilfully non-compliance with the order of the Commissioner.
17. At the conclusion of the enquiry it was agreed between the senior counsels representing the insolvent estate, advocate FW Botes SC and the senior counsel representing PRASA that the different actions and the arbitration will not proceed due to the acknowledgements and concessions made. The assurance were provided that PRASA, taken into account the acknowledgements and concessions during the enquiry, will settle its indebtedness to the insolvent estate. In this regard the continuation of any arbitration will therefore constitute a confirmation of the acknowledgements and indebtedness already made during the insolvency enquiry by the employees and representatives of PRASA.
18. Despite the above undertakings and agreement reached between the respective senior counsels, the legal representatives of PRASA informed us after the enquiry that the arbitration is to proceed. We find this conduct with all due respect unethical in reneging on agreements made between respected counsels on behalf of the two litigating parties.
19. We are of the opinion that this conduct it is not only *mala fide* but a delaying tactic in the finalisation of the matter based on hidden agendas and ulterior motives. In this regard we will disclose to the arbitrator alternatively the Honourable Court, should be the matter proceed, the fact that PRASA and its legal representatives do not deem themselves bound to agreements made by the senior counsel on its behalf. This conduct constitutes nothing more than a deliberate and unethical delaying tactic to circumvent the inevitable.
20. Subsequent to the correspondence received that the arbitration is to proceed, we were unable to make any progress in securing arbitration dates. We confirm that despite arrangements made with the arbitrator, a retired Supreme Court of Appeal

Judge, PRASA and its legal representatives made every attempt to postpone and delay the matter. This conduct is indicative of the intention to frustrate the insolvent estate and delay the matter indefinitely at all cost.

21. Adv. FW Botes SC made the attorneys of PRASA aware of the fact that they do not act in the best interest of their client with their deliberate delaying of the arbitration process, despite the fact that the indebtedness towards the insolvent estate was already conceded and confirmed during the insolvency enquiry. This correspondence remains uncontested and the facts stated therein not in dispute.
22. Despite all reasonable attempts to avoid continued litigation in the matter, PRASA seems to be under the misinformed perception that, despite the acknowledgements and concessions made during the insolvency enquiry, it still as a valid case to argue. This is with all due respect devoid of all truth as is evident from the testimony under oath obtained during the enquiry.
23. In consideration of the above and taking into account the conduct of PRASA and their legal representatives subsequent to the insolvency enquiry, it is our opinion that PRASA endeavours not to comply with its legal obligations by the utilisation and abuse of legal mechanisms and in the process attempt to avoid liability to its creditors.
24. This conduct of PRASA and its legal representatives is not only detrimental to the insolvent estate but also to the subcontractors utilised in providing world-class services to PRASA. As the beneficiary of these services that were rendered in terms of contracts and at the specific instance and request of PRASA, and now denying any liability in terms of the services and products received, despite the acknowledgements and concessions, amounts to nothing more than theft. The question is whether or not the business model of PRASA and their alleged profitability it is not based on criminal conduct.

25. It is common cause that the testimony provided during the insolvency enquiry was under oath by each witness who testified on behalf of PRASA. In the event that this testimony, on the version of PRASA and their legal representatives are changed to a different version, it will constitute perjury. This raises the question that which contractor in future will be amenable to conclude any agreements with PRASA when not even their version under oath can be believed.
26. We have been informed that PRASA has appointed an Interim Board during October 2017.
27. We therefore deemed it prudent that the current matter must be brought to the attention of the interim board for a proper consideration of the facts. In the event that the interim board condone the conduct of PRASA and its legal representatives we request a clear and unequivocal confirmation thereof.
28. The facts of the matter are well documented and the testimony and acknowledgements relating to the indebtedness (which is not in dispute) are under oath. We therefore propose that serious consideration is given to the amicable settlement of this matter.
29. Regard being had to the aforementioned, we respectfully submit that sanity should prevail and we rely on your intervention to bring an end to this senseless and fruitless litigation that is pursued and persisted with to the detriment of public funds.
30. Our client's respective claims were conceded by PRASA and are therefore common cause. It will be foolish and senseless to continue with the arbitration. We, as officers of the High Court, are duty bound to advise our clients and to prevent an occurrence that might be perceived by others as "self enrichment". There is no *vinculum juris* between the parties by virtue of the fact that PRASA's witnesses have conceded that the amounts we our client claim are due and payable.

31. We confirm the availability of Adv FW Botes SC and writer to consult with the interim board should it be required. We reiterate that we are of the opinion that senseless litigation is not in the best interest of any of the parties.
32. We trust that the aforementioned clarify the status of the pending disputes and we therefore await your response as a matter of urgency.

Yours Faithfully

Per J Crouse

CROUSE INCORPORATED

(Electronically transmitted therefore unsigned)

SIYAYA CONSULTING ENGINEERS

	Case number	Amount Claimed
Material Management and Coding	2015/74281	17 628 119,33
Infrastructure Rehabilitation Programme	2015/73934	7 098 481,65
Survey Existing Infrastructure & Simulation Traction System	2015/73933	7 396 013,00
Salt River Depot Modernisation Programme and Salt River Depot Administration Block	2015/47598	15 371 739,86
Technical Assistance for the Supervision of National Resignalling Projects		15 319 491,61
		<u>62 813 845,45</u>

SIYAYA RAIL AND INFRASTRUCTURE ADVISORS

		Capital
Technical Advisor for Digital Railway Signalling Radio Network	2016/47597	19 700 000,00
		<u>19 700 000,00</u>

TOTAL PAYABLE

<u>82 513 845,45</u>



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 Brooklyn
 Pretoria 0181

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SIYAYA CONSULTING ENGINEERS (PTY) LTD

PER EMAIL: MAKHNSA@ME.COM

**CC: IZAK@TSHWANETRUST.CO.ZA
 KRIGEN@KRIGECONSULT.CO.ZA**

OUR REF: MR. MOGASHOA
 YOUR REF: SEC 417 INQUIRY

ATTENTION: MR MABUNDA

Dear Sir,

08 September 2017

RE:	SIYAYA CONSULTING ENGINEERS (PTY) LTD (IN LIQUIDATION) INQUIRY
CASE NUMBERS:	77333/2015
SUBJECT MATTER:	TECHNICAL ASSISTANCE FOR THE SUPERVISION OF THE NATIONAL RESIGNALLING PROJECT, STAGE 1, PHASE 1 - 5
PARTIES:	SIYAYA DB CONSULTING ENGINEERS (PTY) LTD // PRASA

1. We act on the instructions of Passenger Rail Agency of South Africa (PRASA), and also refer to the Commission's proceedings of the 28th of August 2017 to which Mr. Sorin Baltac was served with a subpoena to attend to testify as a witness.
2. Mr. Baltac, in respect of whom we also act, attended at the Commission on the aforesaid date and was requested to investigate if there were payments outstanding and due to Siyaya in respect of the Gauteng 1 Resignalling Project, and that if so what such outstanding amounts are.
3. We confirm that our clients are still investigating this matter and will, as soon as possible, make available to you the findings of such investigations.
4. We trust that the above is in good order.

Directors: Msdimphe Mogashoa, Donald Diale
 Senior Associates: Ntando Makuyana, Busisiwe Mqungwana, Yagashen Pillay, Mari Wilbrock, Thuthi Mmamadi
 Molebogeng Masake, Kobus de Beer, Calvin Solane, Geraldine Burger, Kenneth Mkhawo
 Associates: Mphahlele Sekegetha, Precious Mubodzi, Itumeleng Papo
 Nondumiso Dlamini, Muthoni Manyangane, Tshilwani Ntshisaulu
 Finance Manager: Karen Greyling, Office Manager: Ndlovu Thobethe

Co. Reg: 2013/029832/21
 VAT Reg: 4540280487

Yours faithfully



DIALE MOGASHOA ATTORNEYS

Per: *Modimpe Mogashoa*

Direct Tel: 012 433 7145

Direct Fax: 086 614 0125

Email: madimpe@dm-inc.co.za

DIALE MOGASHOA ATTORNEYS



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08 September 2017

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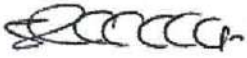
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 Molebogeng Maakoe, Kobus de Beer, Calvin Salana, Geraldine Burger, Keneilwe Makwela
Associates: Mohlatlego Sekgotha, Precious Mulaudzi, Itumeleng Papo
 Nondumiso Dlamini, Mufhati Munyangane, Tshifhiwa Netshisaulu
Finance Manager: Karen Greyling **Office Manager:** Nelisiwe Thabethe

DIALE MOGASHOA ATTORNEYS

Yours faithfully



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Per: *Madimpe Mogashoa*

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